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Compelled Speech and Doctrinal Fluidity

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Even within the messy and complicated confines of First Amendment jurisprudence, compelled speech doctrine stands out in its complexity and conceptual murkiness—a state of affairs that has only been exacerbated by the Supreme Court's decisions in NIFLA v. Becerra *and* Janus v. American Federation of State, County, and Municipal Employees*. This Essay observes that as the Court's compelled speech jurisprudence has grown increasingly complex, it has also manifested a troubling degree of fluidity, where the doctrinal framework has grown so incoherent, imprecise, and unstable that it can be readily shaped by courts to plausibly justify a wide range of disparate results. After examining some recent examples of this doctrinal fluidity and identifying its origins, the Essay observes that a true fix to this problem—the development of a fully coherent and stable compelled speech doctrine—is highly unlikely to emerge under the current state of affairs, given the intractable nature of the sources of this fluidity and the Court's case-by-case, winner-take-all culture of constitutional adjudication.*

This Essay therefore argues for a shift in the Supreme Court's approach to compelled speech doctrine—one that eschews formal complexity in favor of more open-ended, analytically transparent approaches. This proposal is, in essence, a second-best solution. If it is unrealistic to expect that an elegant, fully unified, and consistent doctrinal framework will emerge anytime soon, the Court should, at the very least, avoid obscuring its decisions behind complex and malleable formal doctrines and instead analyze cases in a manner that lays bare the fundamental intuitions and value judgments actually driving its decisions. A useful point of comparison might be to common law courts' approach to negligence doctrine—an approach that is anchored in a simple, open-ended analysis that forces courts to bring to the fore the fundamental values underlying the doctrine. Such an approach would at least allow courts—and society at large—to discuss and debate these fundamental values openly rather than through a nebulous doctrinal façade that may ultimately serve merely to obscure the contested judgments and intuitions actually driving the results.

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INTRODUCTION

First Amendment doctrine is famously messy and complicated—a tangled web of blurry doctrinal distinctions, inconsistently enforced rules, and open-ended tests. Even against this backdrop, however, the Supreme Court's compelled speech doctrine stands out in its complexity and conceptual murkiness. In an article published soon after the Court's most recent compelled speech decisions in *National Institute of Family and Life Advocates (NIFLA) v. Becerra* and *Janus v. American Federation of State, County, and Municipal Employees*, Eugene Volokh spent forty pages painstakingly laying out and explaining a broad array of rules and exceptions that, in his view, best capture the doctrine.[1] Yet even this incredibly meticulous treatment of the doctrine was bookended by a series of disclaimers. At the outset, Volokh observed that "the doctrine contains major uncertainties" and that "its details are hard to pin down."[2] He then concluded the article on an even blunter note, observing that when it comes to compelled speech, one "must cope with a sneaking feeling that there is no such thing as first principles, just one damned case after another."[3]

It therefore seems an appropriate moment to step back and evaluate the current state of the doctrine. There is, of course, extensive academic literature as to whether the Court's various compelled speech decisions have gotten things substantively

1. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355 (2018).
2. *Id.* at 356–57.
3. *Id.* at 394.

right.[4] But this Essay addresses a different question: whether the *manner* in which the Court has constructed—and continues to construct—compelled speech doctrine is capable of producing the sort of predictability, constraint, and stability that are the hallmarks of a sound doctrinal framework. It focuses specifically on the substantial complexity that has developed within the doctrine since its relatively simple beginnings nearly eighty years ago. While complexity can serve to bring greater constraint, stability, and accuracy to the doctrine, it can also produce a state of doctrinal fluidity, where the doctrinal framework becomes so destabilized, incoherent, and opaque that it can be readily shaped by courts to plausibly justify a wide range of disparate results. And the Court's recent decisions suggest that the complexity within the Court's compelled speech jurisprudence increasingly falls into the latter category.

Part I of this Essay broadly examines the issue of doctrinal complexity and evaluates the present complexity of compelled speech doctrine. It observes that as the Court's compelled speech jurisprudence has grown increasingly complex, it has also manifested a troubling degree of fluidity—that is, it has become so incoherent, imprecise, and unstable that it affords courts significant flexibility to adopt, discard, stretch, or contract rules at their pleasure. Part II examines the sources of this doctrinal fluidity, tracing it primarily to two fundamental characteristics of modern First Amendment jurisprudence: the lack of a singular and coherent theoretical underpinning for protecting speech, and the rapid expansion of First Amendment coverage to an increasingly wide and eclectic variety of communicative contexts.

Part III makes some observations as to what can be done to combat the problems associated with doctrinal fluidity within compelled speech doctrine. It observes that any true fix to the problem is highly unlikely, given the intractable nature of the sources of this fluidity and the Court's case-by-case, winner-take-all culture of constitutional adjudication. Thus, if a fully coherent and stable compelled speech doctrine is unlikely to emerge, perhaps the best we can hope for is a Court that approaches cases in a manner that is analytically transparent—one that lays bare the fundamental intuitions and value judgments upon which it is actually basing its decisions in individual cases rather than obscuring them behind complex and malleable doctrines. I therefore suggest that the Court's approach to compelled speech doctrine should emulate common law courts' approach to negligence doctrine—an approach that is marked by more direct and open-ended analyses that bring to the fore the fundamental value judgments underlying the doctrine. Part IV concludes.

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4. *See, e.g.*, Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731 (2020); William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018); Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195 (2005).

I. DOCTRINAL COMPLEXITY AND FLUIDITY IN COMPELLED SPEECH JURISPRUDENCE

A. The Complexity of Modern Compelled Speech Doctrine

Compelled speech doctrine originated in the 1943 case of *West Virginia Board of Education v. Barnette*.[5] *Barnette* involved a constitutional challenge to a West Virginia law requiring schoolchildren to salute the flag and recite the Pledge of Allegiance.[6] In deeming the law unconstitutional, the Court famously observed, "If there is any fixed star in our constitutional constellation, it is that no 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."[7]

From these relatively straightforward beginnings, compelled speech jurisprudence has sprawled into a doctrine of great breadth and complexity, extending well beyond the context of direct ideological speech compulsions. Over the following eight decades, the doctrine has grappled with a wide variety of government compulsions, such as mandatory factual disclosures in commercial advertising,[8] compelled subsidies of commercial speech,[9] compelled hosting of another's speech on one's property,[10] and compelled incorporation of others' speech into one's own speech.[11] In each of these contexts, the Court has developed distinct sets of doctrinal standards, many of which are replete with their own set of complex rules, subrules, and exceptions.[12]

Exhaustively documenting the complexity of current compelled speech doctrine is well beyond the scope of this Essay; as noted above, Eugene Volokh's recent attempt to summarize and explain the doctrine ran to forty pages. But the following is just a sampling of the doctrinal distinctions the Court has developed within the compelled speech context:

- Whether a mandatory monetary assessment is used to subsidize the speech of a private party or a government speaker[13]
- Whether the government's compulsion also works to restrict the speaker's own speech[14]
- Whether the government's compulsion works to misattribute the compelled speech to the unwilling speaker[15]

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5. 319 U.S. 624 (1943).
6. *Id.* at 626–27.
7. *Id.* at 642.
8. *See, e.g.*, Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985).
9. *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405 (2001).
10. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).
11. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).
12. *See generally* Volokh, *supra* note 1.
13. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005).
14. *See* Volokh, *supra* note 1, at 359–65 (describing this subset of cases and contrasting their treatment to that of "pure speech compulsions" that do not restrict speech).
15. *See, e.g.*, *PruneYard*, 447 U.S. 74; Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1299–1300 (2014) (discussing the significance of misattribution as an

- Whether the compulsion is purely factual as opposed to one based on opinion[16]
- Whether the compulsion involves ideological speech, commercial advertising, or professional speech[17]
- Whether a mandated factual disclosure is "uncontroversial"[18]
- Whether the compulsion involves actual communication, or the provision of money to subsidize speech, or the provision of one's property to host speech[19]

And as Volokh observed, despite the current complexity of the doctrine, there continue to be numerous doctrinal details and uncertainties that the Court has yet to resolve.[20]

B. The Benefits and Dangers of Complexity Within First Amendment Doctrine

What is the source of this steadily increasing complexity within compelled speech doctrine? To a certain extent, this trend merely tracks the general development of First Amendment jurisprudence as a whole.[21] Commenting back in 1982 on the Supreme Court's then-recent decision in *New York v. Ferber*,[22] Frederick Schauer observed:

> The rules relating to child pornography now take their place alongside the equally distinct rules relating to obscenity, defamation, advocacy of illegal conduct, invasion of privacy, fighting words, symbolic speech, and offensive speech. Moreover, each of these areas contains its own corpus of subrules, principles, categories, qualifications, and exceptions. There are also special principles for particular contexts, such as government employment, the public forum, and electronic broadcasting,

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infringement of speaker autonomy).

16. *See, e.g.*, Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985); Corbin, *supra* note 15, at 1286–89.

17. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 717 (1977) (ideological speech); *Zauderer*, 471 U.S. at 651 (commercial advertising); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (professional speech). *But see* Nat'l Inst. of Fam. & Life Advocs. (*NIFLA*) v. Becerra, 138 S. Ct. 2361, 2375 (2018) (suggesting that professional speech is not "a unique category that is exempt from ordinary First Amendment principles," but declining to foreclose that possibility completely).

18. *See NIFLA*, 138 S. Ct. at 2372; *Zauderer*, 471 U.S. at 651; Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881 (2022).

19. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (communication); United States v. United Foods, Inc., 533 U.S. 405 (2001) (subsidizing speech); *PruneYard*, 447 U.S. 74 (hosting speech on one's property).

20. *See* Volokh, *supra* note 1, at 357 (outlining some of the "major uncertainties" within the doctrine, such as whether "requiring people to create speech . . . constitute[s] impermissible speech compulsion").

21. *See, e.g.*, Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991) ("The doctrinal web surrounding the free speech clause of the first amendment is one of the most complicated and confusing in constitutional law.").

22. 458 U.S. 747 (1982).

> and in addition we have the pervasive tools of First Amendment analysis, such as chilling effect, prior restraint, vagueness, overbreadth, and the least restrictive alternative. . . . When we take all of this together it becomes clear that the First Amendment is becoming increasingly intricate, which has prompted one scholar to observe pejoratively that First Amendment doctrine is beginning to resemble the Internal Revenue Code.[23]

First Amendment doctrine has, of course, grown only more complex over the decades following Schauer's observation.

There is a fundamental reason as to why First Amendment doctrine has developed with this degree of complexity. The text of the Free Speech Clause itself—"Congress shall make no law . . . abridging the freedom of speech"[24]—is incredibly sparse, yet it also suggests a significant scope and breadth of protection.[25] Furthermore, the historical background surrounding its drafting offers little in the way of interpretive guidance.[26] This textually sparse but broad mandate—combined with the near-infinite variety of factual scenarios potentially triggering First Amendment protection—means that the edifice of First Amendment doctrine must ultimately be designed and constructed by courts, brick by brick, through common law-style development.[27]

And as Schauer has observed, we have now had a century's worth of experience[28] with all sorts of different First Amendment problems—experience that has allowed us to discern patterns in disparate cases that enable us to craft legal rules and categories governing discrete recurring circumstances. As a result, the "codification" of the First Amendment, as Schauer calls it, makes eminent sense.[29] There is little reason to adhere to simple but vague First Amendment doctrines when experience allows us to construct a more complex set of rules tailored for specific situations.[30]

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23. Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 308–09 (1982) (footnotes omitted).

24. U.S. CONST. amend. I.

25. *See* Schauer, *supra* note 23, at 309.

26. *See* GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, THE FIRST AMENDMENT 6–7 (2d ed. 2003); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 26–27 (2011) (observing, after undertaking a detailed historical survey, that "the evidence regarding the original meaning of the Speech and Press Clauses is anything but easy to sort out" and that "[i]n the face of such deeply conflicting evidence, most scholars of the First Amendment have despaired of producing any coherent originalist account of the Speech and Press Clauses"); *see also id.* at 29 ("[T]he difficulties in identifying the original meaning of the First Amendment are a function of the reality that the meaning of free speech and a free press was something of a moving target in the eighteenth and nineteenth centuries.").

27. *See* Schauer, *supra* note 23, at 309–10.

28. The modern era of First Amendment jurisprudence began with the Espionage Act cases in the early twentieth century. *See, e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 1 (1997); STONE ET AL., *supra* note 26, at 8 (observing that the Supreme Court never directly considered the Free Speech Clause prior to the Espionage Act of 1917).

29. Schauer, *supra* note 23, at 309.

30. *Id.* at 310 (observing that "[t]he more we have seen, the less likely we are to be surprised, and open-ended flexibility becomes progressively less important").

We have voluminous rules and subrules governing areas such as public forums, obscenity, and defamation because we have, over time, developed sufficient familiarity with these particular aspects of First Amendment jurisprudence to construct bespoke doctrines. And if we end up with an intricate and complex doctrinal framework, that is to a significant extent merely a reflection of the intricacy and complexity of the broad mandate set forth by the First Amendment. The development of doctrinal complexity is therefore largely inevitable in First Amendment doctrine as a whole and compelled speech doctrine specifically.

There is a distinction, however, between healthy complexity and unhealthy complexity, and this is to be evaluated based on the general characteristics of effective doctrinal frameworks. Broadly speaking, the hallmarks of sound doctrine are precision, predictability, internal coherence, stability, and accuracy.[31] In the First Amendment context, a sound doctrinal framework will effectively constrain and channel courts' analyses in a manner that is both consistent with the underlying purposes of the constitutional provision and internally coherent. And it must exhibit a sufficient degree of stability such that it can be consistently and predictably relied upon by courts, legislators, or any other actors seeking to conform their actions to constitutional strictures.[32] Finally, a sound doctrinal framework will generally serve to illuminate rather than obscure the theoretical commitments underlying the extension of special constitutional protection to speech.[33]

The development of more complex and intricate First Amendment doctrines can certainly work to advance these goals, as it allows for more nuance and precision in constraining and channeling courts' analyses.[34] To be sure, a more complex doctrine requires a greater investment from courts and regulators to understand and apply it, and there is a point at which complexity may become so extreme as to be practically inadministrable and counterproductive.[35] But as long as courts and regulators are capable of applying them, complex doctrinal frameworks can enhance the clarity, predictability, and accuracy that are the hallmarks of effective doctrine. And when these frameworks are well constructed, they can do so in a manner that illuminates the first principles supporting the doctrinal framework below the surface.

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31. *See id.* at 311 (observing that "First Amendment doctrine serves the normative function of guiding future action").

32. In this context, stability is a relative term. As noted above, First Amendment doctrine necessarily evolves through common law-style development; if it were to remain completely static, it would lose its capacity to adapt to the novel speech problems that constantly emerge as a result of technological, cultural, and social change. *See* David S. Han, *Constitutional Rights and Technological Change*, 54 U.C. DAVIS L. REV. 71, 120–21 (2020). And if the doctrine does not evolve with these changes, it risks becoming obsolete, in that it will either yield nonsensical results or devolve into meaningless window dressing. *See id.* at 105–13.

33. *See* David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 372–79 (2015).

34. *See* Schauer, *supra* note 23, at 316 ("Making First Amendment doctrine more precise makes it easier both to decide cases and to predict the outcome of First Amendment litigation.").

35. *See id.* at 316 (observing that "[d]octrines can become so complex that they go beyond the interpretive and comprehensive abilities of those who must apply them").

Take, for example, the law of defamation. The Court's first foray into the area was in *New York Times v. Sullivan*, a 1964 case where the Court held that public official plaintiffs must prove actual malice in order to prevail on a defamation claim regarding their official duties.[36] *Sullivan* represented the starting point for what would become a highly intricate doctrinal framework governing defamation claims—a framework that the Court built out, piece by piece, over the following decades. Over time, it crafted distinct standards for cases involving private figure plaintiffs and statements regarding issues of private concern.[37] It also delineated and clarified a wide range of discrete issues within the defamation framework, such as standards of review,[38] the distinction between facts and opinions,[39] the distinction between public and private figures,[40] allocation of the burden of proof,[41] and so forth.

Defamation doctrine exhibits the sort of positive complexity that ultimately helps to better effectuate the vaguely defined mandate of the First Amendment. It is the natural outgrowth of the common law-style development of First Amendment jurisprudence—a reflection of the many facets of defamation doctrine that revealed themselves over time, on a case-by-case basis. Although scholars might disagree as to the particularities of the doctrine, it is sufficiently coherent, as it was constructed from the outset on a singular and robust theoretical foundation: the promotion of democratic self-governance.[42] It has also proven to be relatively stable—the basic doctrinal framework has remained largely unchanged over the span of decades, with the Supreme Court and lower court judges consistently working within its confines. To the extent that there is imprecision in the doctrine—for example, distinguishing public figures from private figures or determining whether a statement is on a matter of public concern—it is the sort of imprecision that is largely unavoidable given the nature of the doctrine. And finally, the complexities in the doctrine broadly serve to highlight, rather than obscure, the sorts of value judgments underlying the doctrine. Most notably, the greater constitutional protection afforded in cases involving public figures and matters of public concern is a direct reflection of the doctrine's theoretical roots in a democratic self-governance theory of the First Amendment, as democratic self-governance is most strongly implicated in these contexts.[43]

But doctrinal complexity can also work to opposite ends, producing a condition of doctrinal fluidity. Doctrinally fluid frameworks are incoherent, imprecise, and

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36. 376 U.S. 254 (1964).

37. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (private figure plaintiffs); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (issues of private concern).

38. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984).

39. *See* Milkovich v. Lorain J. Co., 497 U.S. 1 (1990).

40. *See Gertz*, 418 U.S. at 342–45.

41. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–77 (1986).

42. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

43. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 318 (1988); Connick v. Myers, 461 U.S. 138, 145 (1983).

unstable; as such, they breed doctrinal gaps, inconsistencies, and ambiguities that provide courts with the flexibility to adopt, discard, stretch, or contract rules at their pleasure. And as Randy Kozel has observed, "[a] doctrine that is ill-defined or excessively weak will lead not to constraint and predictability but to cynicism that the law is being applied in good faith."[44]

Under these circumstances, the doctrinal framework ceases to accomplish its intended function. It fails to constrain courts' decision-making to a meaningful degree, it undermines courts' and legislatures' ability to consistently and predictably rely upon it, and its openness and imprecision translates to little assurance of accuracy (however one might define that term in a given dispute). The doctrine instead becomes a shifting morass of ill-fitting rules and subrules—one that is easily susceptible to cherry-picking or manipulation depending on the Court's preferred result. And when this sort of doctrinal fluidity exists, the complexity of the doctrine often works to obscure rather than illuminate: doctrinal analyses may take on the semblance of a ritual dance preceding a preordained result rather than a focused and tailored inquiry premised on the theoretical and intuitional judgments actually underlying courts' decisions.[45]

A clear example of this sort of unhealthy complexity is the Court's adoption of the secondary effects doctrine in cases evaluating zoning restrictions on sexually oriented businesses.[46] In *City of Renton v. Playtime Theatres*, the Court dealt with a zoning restriction that prohibited any "adult motion picture theater" from being located in close proximity to residential housing, parks, churches, or schools[47]—an ordinance clearly content-based on its face. Nevertheless, rather than apply the doctrine in a straightforward manner by applying strict scrutiny, the Court deemed the ordinance to be content-neutral (and thus subject only to intermediate scrutiny), since the regulation "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community," with goals such as preventing crime, preserving property values, and protecting retail trade.[48]

The secondary effects doctrine has been subject to withering criticism. Geoffrey Stone, for example, called *Renton* "a disturbing, incoherent, and unsettling precedent" that "threatens to undermine the very foundation of the content-based/content-neutral distinction," since—contrary to firmly established case law—

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44. Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 117 (2015).

45. My argument here therefore reflects the sort of skepticism of formal legal analysis associated with the legal realism movement, although to a more limited degree. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) (describing jurisprudence as "a special branch of the science of transcendental nonsense," as "legal concepts . . . do not have a verifiable existence except to the eyes of faith").

46. The following discussion draws from my previous work. *See* Han, *supra* note 33, at 409–10.

47. 475 U.S. 41, 44 (1986) (stating that the ordinance prohibited such theaters "from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school").

48. *Id.* at 47–54.

it allowed the government to escape strict scrutiny of content-based speech restrictions by simply defending the restrictions with justifications unrelated to communicative impact.[49] Indeed, nearly all speech that the government seeks to regulate carries harmful secondary consequences; it's often because of these consequences that the government seeks to regulate the speech in the first place.[50] And a number of Justices have explicitly recognized the sleight-of-hand nature of the doctrine; Justice Kennedy, for example, called the content-neutral characterization of these sorts of zoning ordinances "something of a fiction," observing that such ordinances "are content based, and we should call them so."[51]

The secondary effects doctrine thus increased the degree of doctrinal fluidity within First Amendment doctrine. It introduced a doctrinal distinction that flew in the face of previously established principles, thus undermining the coherence and stability of the doctrine. And it did so in a way that obscured rather than illuminated the fundamental reasons behind the Court's decision. Broadly speaking, the *Renton* Court likely adopted the doctrine in order to evade applying the onerous strict scrutiny standard in a context where it seemed anomalous to do so. But the Court's most likely reason for doing so—a broad intuition that sexually explicit speech of this sort is simply less valuable than, say, ideological speech[52]—had nothing to do with the formal doctrinal justification for its result. Rather, in instituting the incoherent secondary effects doctrine, it obscured the actual bases for its decision. And in doing so, it imported into First Amendment jurisprudence a highly troublesome doctrine, whose broad potential to cause substantial disruption has been blunted only by the Court's self-restraint in subsequent cases.[53]

C. Doctrinal Fluidity in Compelled Speech Doctrine

What, then, should we make of the growing complexity of compelled speech doctrine? Is this a sign of healthy development toward an increasingly precise, constrained, and accurate doctrinal framework? Or is it driving the doctrine toward greater fluidity, where doctrinal analysis threatens to serve more as justificatory ritual dance than as a true source of constraint and analytical clarity?

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49. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115–17 (1987).

50. *See* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 307 (2009) ("Almost all speech with harmful direct effects also has negative downstream consequences that are predictable. Indeed, it is typically because of the downstream social consequences that government officials often wish to regulate dangerous speech.").

51. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in judgment).

52. *See* Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 95 (1988) ("Although the Court never explicitly affirms the view that sexually explicit expression is a generally less valuable form of speech . . . , no other explanation of *Renton* is plausible.").

53. *See* Fee, *supra* note 50, at 304–05 ("The Court has never upheld a content-discriminatory regulation on the basis of the secondary effects doctrine that did not concern sexually explicit speech.").

There is no singular answer to this question. Like in other areas of First Amendment jurisprudence, the steadily increasing complexity of compelled speech doctrine is, to a significant extent, the inevitable result of the broadened complexity of the problems that it has come to encompass. As discussed above, the doctrine has, over the past eighty years, extended well beyond the confines of *Barnette*; questions regarding the constitutionality of, for example, mandated disclosures in commercial advertising or compelled subsidies of private parties' speech are far afield of direct compulsions of ideological speech. So it is both natural and preferable that the Court develop more precisely tailored doctrines to account for these sorts of distinctly recurring fact patterns.

Yet as the Court's compelled speech jurisprudence has grown increasingly complex, it has also manifested a troubling degree of malleability, instability, and incoherence, particularly in its recent decisions.

1. Factual Disclosures by Medical Professionals

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[54] the Court upheld a Pennsylvania law that required physicians or qualified nonphysicians to make certain disclosures before they could perform an abortion. Among other things, they were required to "inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."[55] In upholding this requirement, the joint opinion characterized it as burdening speech incidentally through the regulation of professional conduct.[56] The opinion observed that the requirement fit within the long established tort duty of doctors to obtain informed consent to perform medical procedures, and as such, it should be regarded as "part of the practice of medicine, subject to reasonable licensing and regulation by the State."[57]

Nearly four decades later, in its 2018 decision in *NIFLA v. Becerra*, the Court confronted a constitutional challenge to two California laws, one of which required "licensed covered facilities" with the "primary purpose" of "providing family planning or pregnancy related services" to disseminate a government-drafted notice onsite.[58] This "licensed notice" stated: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at . . . ."[59] The licensed notice was challenged by a number of crisis pregnancy centers, which were described by the Court as "pro-life (largely Christian

54. 505 U.S. 833 (1992).
55. *Id.* at 881 (plurality opinion).
56. *Id.* at 884.
57. *Id.* at 882–84.
58. NIFLA v. Becerra, 138 S. Ct. 2361, 2368–69 (2018).
59. *Id.* at 2369.

belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center."[60]

Despite the close parallels between the mandatory disclosure in *Casey* and the licensed notice in *NIFLA*, the Court distinguished them. Justice Thomas, writing for the Court, emphasized that unlike in *Casey*—in which the disclosures were given in conjunction with a specific medical procedure (abortion)—the licensed notice was "not tied to a procedure at all."[61] As such, it could not fall into the broad rubric of informed consent to a medical procedure, as no medical procedure may ever be sought, offered, or performed with respect to the facility's clients.[62]

But as Justice Breyer observed in his dissent, this distinction is not particularly persuasive, as the content and context of the mandated disclosures in *Casey* and *NIFLA* are virtually identical. The disclosures in *NIFLA* cover clinics in which patients meet with "medical personnel engaging in activities that directly affect a woman's health"—personnel who are "licensed, certified or registered to provide pregnancy-related medical services."[63] Carrying a child to term—which involves extensive prenatal care—and giving birth involve medical procedures, just like abortion.[64] Thus, just as information about the possibility of adoption and childbirth helps women make informed decisions as to having an abortion, information about the possibility of abortion helps them make informed decisions about carrying a child to term and giving birth. Indeed, as Enrique Armijo has observed, a pregnant woman might have a viable tort claim for lack of informed consent under California law based on a medical professional's failure to discuss the option of abortion during pregnancy counseling, particularly if risk factors are present.[65]

Furthermore, it seems plausible—if not likely—that this fairly hair-splitting distinction did not, in actuality, carry much weight with respect to the actual underlying basis for the Court's decision in the case. Rather—as articulated directly by the four-Justice concurrence[66] and more indirectly in Justice Thomas's opinion[67]—the result seemed driven primarily by the Court's sense that California was engaging in impermissible viewpoint-based discrimination, requiring "primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions."[68] But the Court's analysis ultimately resulted in an additional doctrinal

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60. *Id.* at 2368.

61. *Id.* at 2373.

62. *Id.*

63. *Id.* at 2385 (Breyer, J., dissenting).

64. *Id.* at 2386.

65. Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1414–15 (2020). Furthermore, as Justice Breyer observed, it is not at all clear that informed consent principles apply solely to discrete medical procedures. *See* 138 S. Ct. at 2386 (discussing warning labels on prescription drugs and required disclosures at breast cancer screening clinics unrelated to the actual screening procedure).

66. *See* 138 S. Ct. at 2378–79 (Kennedy, J., concurring).

67. *See id.* at 2375–76 (observing that most clinics "are excluded from the licensed notice requirement without explanation" and noting that "[s]uch underclusiveness raises serious doubts as to whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint").

68. *Id.* at 2379 (Kennedy, J., concurring).

distinction that might either be marshaled again or shrunk to irrelevance in the future, depending on what result the Court wants to reach.

2. Compelled Factual Disclosures in Commercial Advertising

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Court upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs.[69] In doing so, the Court observed that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [the speaker's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[70] It therefore emphasized that "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech."[71] Although the Court did "recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," it ultimately instituted a highly deferential standard for such mandatory disclosures, requiring only that such disclosures "are reasonably related to the State's interest in preventing deception of consumers."[72]

In *NIFLA*, the Court analyzed the application of *Zauderer* to a California statute requiring "unlicensed covered facilities" to provide a notice on site and in all advertising materials stating, "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."[73] In doing so, however, the Court muddied *Zauderer*'s highly deferential standard—one articulated with the standard language of rational basis review—by transforming it into a far more searching inquiry. It characterized California's justification for the requirement as "purely hypothetical,"[74] despite the obvious connection between preventing deception and informing customers of the licensing status of unlicensed covered facilities, which "collect health information, perform obstetric ultrasounds or sonograms, diagnose pregnancy, and provide counseling about pregnancy options or other prenatal care."[75] Furthermore, it readily construed California's decision to extend the notice requirement specifically to facilities providing pregnancy-related services as suspect, rather than deferring to California's stated goal to ensure that "pregnant women in California know when they are getting medical care from licensed professionals."[76]

The Court's analysis therefore appeared to ratchet up what had long been framed as a highly deferential standard—and treated as such in lower courts[77]—into one

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69. 471 U.S. 626, 650–53 (1985).
70. *Id.* at 651 (citation omitted).
71. *Id.*
72. *Id.*
73. NIFLA. v. Becerra, 138 S. Ct. 2361, 2369–70, 2377–78 (2018).
74. *Id.* at 2377.
75. *Id.* at 2390 (Breyer, J., dissenting).
76. *Id.* at 2370.
77. *See, e.g.*, N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 132 (2d Cir. 2009) (holding that "rules 'mandating that commercial actors disclose commercial

more akin to intermediate scrutiny.[78] And this sort of abrupt shift destabilizes the doctrine, as it opens up the possibility, in future cases, of the Court selecting between two versions of *Zauderer*: the highly deferential, forgiving standard initially articulated, or the more stringent, intermediate scrutiny-style standard applied in *NIFLA*. Thus, rather than constrain the Court's analysis, the untethered *Zauderer* standard might simply serve as a convenient doctrinal justification for whatever result the Court may want to reach in future cases.

3. Assessment of Agency Fees from Non-Union Public Employees

In *Abood v. Detroit Board of Education*, the Court evaluated the constitutionality of a Michigan law permitting "agency shop" agreements between local government employers and unions in which non-union public employees are required to pay fees to the union as a condition of employment.[79] Emphasizing the significant government interest in promoting labor peace—specifically, avoiding the conflict and disruption inherent in dealing with multiple employee unions—and counteracting the problem of "free rider" employees partaking in the benefits of union representation without paying their fair share,[80] the Court upheld the assessments insofar as they were "used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment."[81]

Over forty years later, in *Janus v. American Federation of State, County, and Municipal Employees*, the Court, in an opinion by Justice Alito, overruled *Abood*, holding that the mandatory collection of these agency fees from non-union public employees "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."[82] After criticizing *Abood* on substantive grounds, the Court ran through the traditional factors governing whether the Court should overrule a past decision. In relevant part, it argued that *Abood* was unworkable because its "line between chargeable and unchargeable union expenditures has proved to be impossible to draw with

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information' are subject to the rational basis test"); Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 554 (6th Cir. 2012) ("If a commercial-speech disclosure requirement fits within the framework of *Zauderer* and its progeny, then we apply a rational-basis standard."); Andra Lim, Note, *Limiting* NIFLA, 72 STAN. L. REV. 127, 136 (2020) (observing that "[t]hroughout much of *Zauderer*'s lifespan, courts generally applied the test deferentially").

78. *See* Lim, *supra* note 77, at 141 (observing that the Court "applied *Zauderer* critically rather than deferentially, as though it were an intermediate scrutiny test, not a rational basis test").

79. 431 U.S. 209, 211 (1977).

80. *Id.* at 220–22.

81. *Id.* at 225–26. The Court, however, held that to the extent the union spent funds "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative," such expenditures must be financed "from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235–36.

82. 138 S. Ct. 2448, 2460 (2018).

precision."[83] It also argued that although unions and government employers had relied upon the availability of agency fee arrangements, such reliance did not carry "decisive weight," emphasizing that "public-sector unions have been on notice for years regarding [the] Court's misgivings about *Abood*."[84] In raising this argument, the Court relied heavily on its decisions in *Knox v. Service Employees International Union*[85] and *Harris v. Quinn*[86]—cases dating from 2012 and 2014, respectively.

In dissent, Justice Kagan heavily criticized what she deemed to be a major subversion of stare decisis principles. She observed that numerous Supreme Court cases had, over the past four decades, cited *Abood* favorably and relied upon its reasoning.[87] She also criticized the Court's heavy reliance on *Knox* and *Harris* in its stare decisis analysis, observing that the Court was effectively bootstrapping—setting the table for overruling *Abood* by "throw[ing] some gratuitous criticisms into a couple of opinions and a few years later point[ing] to them as 'special justifications.'"[88] Furthermore, she noted that any sort of line-drawing difficulties involved in distinguishing between a union's collective-bargaining activities and political activities are par for the course within constitutional law doctrine, observing that while there may of course be disagreement on a case-by-case basis, no broad division existed within the circuit courts as to the contours and application of the analysis.[89] Finally, she highlighted the extensive reliance on *Abood* evinced by state employers and unions, noting that over twenty states had enacted agency fee provisions and "thousands of current contracts covering millions of workers provide for agency fees."[90] She therefore concluded that the Court had "trivialize[d] *stare decisis*" by "overthrow[ing] a decision entrenched in this Nation's law—and in its economic life—for 40 years."[91]

However one might feel about the merits of the substantive arguments on both sides, it is difficult to dispute much of Justice Kagan's scathing critique of the Court's stare decisis analysis. *Abood* was a forty-year-old decision that had long been heavily relied upon by state employers and unions. It didn't appear to be particularly unworkable—or, more precisely, it didn't appear to be any less workable than countless other aspects of First Amendment doctrine, which is replete with blurry lines and fuzzy distinctions.

And Justice Kagan's characterization of the majority's approach as "bootstrapping" seems apt given the circumstances. *Knox* and *Harris*—the two decisions that "began the assault on *Abood*"[92]—had been decided only six and four years prior to *Janus*, respectively; the Court's opinions in both cases were written by

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83. *Id.* at 2481.
84. *Id.* at 2484–86.
85. 567 U.S. 298 (2012).
86. 573 U.S. 616 (2014); *see Janus*, 138 S. Ct. at 2484–85.
87. *See Janus*, 138 S. Ct. at 2497–98 (Kagan, J., dissenting).
88. *Id.* at 2498.
89. *Id.* at 2498–99; *see also id.* at 2499 ("If the kind of hand-wringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U.S. Reports.").
90. *Id.* at 2499.
91. *Id.* at 2501.
92. *Id.* at 2498.

Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas; and both strongly indicated that *Abood* should be overruled. Indeed, it was expected by many that the same majority would formally overrule *Abood* in the 2016 case of *Friedrichs v. California Teachers Association*,[93] but Justice Scalia's untimely death would instead lead to a summary affirmance by an equally divided Court.[94] Given the subsequent appointments of Justices Gorsuch and Kavanaugh, and given the close connection between Justices' votes in this context and their broad ideological proclivities, the result in *Janus* was largely preordained by a simple count of the votes, with the table being set for overruling a stable forty-year-old precedent merely six years earlier by a portion of the Court that had quite openly targeted *Abood* from the outset.

All of this, of course, only serves to magnify the instability of the doctrinal framework. Stare decisis serves as a foundation for doctrinal stability, and as Randy Kozel has observed, a weak system of stare decisis is "little better than none at all," because rather than breed "confidence that judges are acting as part of a unified judiciary, appeals to stare decisis will breed suspicion of rhetorical cover in service of individual agendas."[95]

The *Janus* Court's overruling of *Abood* in the manner that it did ultimately highlights an aspect of the Court's present culture that is a significant driver of doctrinal fluidity—a broad understanding that in the end, five votes are what ultimately matters, and achieving "correctness" in a given case should be prioritized despite the effects such a decision might have on the broad coherence, stability, or precision of the doctrine.[96] Indeed, the *Janus* Court criticized the idea that government employers and unions would rely on *Abood*—a squarely established, unabandoned holding of the Court—stating instead that they should have seen the writing on the wall after *Knox* and *Harris*.[97] Such a posture only serves to reinforce a broad perception of the doctrinal framework as problematically fluid and malleable—one that is marshaled more as post-hoc justification of a desired result

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93. *See, e.g.*, Adam Liptak, *Supreme Court Seems Poised to Deal Unions a Major Setback*, N.Y. TIMES (Jan. 11, 2016), https://www.nytimes.com/2016/01/12/us/politics/at-supreme-court-public-unions-face-possible-major-setback.html [https://perma.cc/4S6P-A278] (observing that "the court's conservative majority seemed ready to say that forcing public workers to support unions they have declined to join violates the First Amendment").

94. Friedrichs v. Cal. Tchrs. Ass'n, 136 S. Ct. 1083 (2016) (mem.).

95. *See* Kozel, *supra* note 44, at 117.

96. *See, e.g.*, Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 131 ("As long as there are available in the decisional toolbox of the Justices multiple ways of rationalizing the avoidance of a seemingly applicable previous decision, the existence of that decision seldom stands as a significant barrier to what seems now to the Court or to individual Justices as the better decision to make, precedent aside, for the case before them."); Charles Fried, *Not Conservative*, HARV. L. REV. BLOG (July 3, 2018), https://blog.harvardlawreview.org/not-conservative/ [https://perma.cc/S25L-7NY5] (observing that the Roberts Court "has undermined or overturned precedents that embodied longstanding and difficult compromise settlements of sharply opposed interests and principles").

97. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2484–85 (2018); *see also id.* at 2500–01 (Kagan, J., dissenting) (criticizing the Court's position as a "radically wrong understanding of how *stare decisis* operates").

rather than as a means of constraining and channeling courts' analyses in an appropriate and predictable manner.

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To be clear, the purpose of my discussion here is not to argue whether the Court's decisions in any of these cases were substantively correct. Rather, it is to highlight a complex doctrinal framework that, in light of the Court's recent decisions, increasingly exhibits a worrying degree of instability, malleability, and obscurity.

II. THE SOURCES OF INSTABILITY WITHIN COMPELLED SPEECH DOCTRINE

What is the ultimate source of this malleability and instability within compelled speech doctrine? As noted above, some of this may be attributed to the culture of Supreme Court decision-making; steady, predictable, and coherent doctrine will necessarily be more difficult to build to the extent that the Court institutionally prioritizes "correctness" on a case-by-case basis over doctrinal stability and integrity. But the openness and fluidity of compelled speech doctrine are also rooted in two fundamental characteristics of modern First Amendment jurisprudence: the lack of a singular and coherent theoretical underpinning for the protection of speech, and the rapid expansion of First Amendment coverage to a wide and eclectic variety of communicative contexts. I will walk through each of these in turn.

A. The Lack of a Singular Theoretical Basis for Protecting Speech[98]

At the theoretical core of the Free Speech Clause is the basic idea that speech is entitled to greater protection from government regulation than non-speech conduct.[99] If this were not the case, of course, then the provision would be meaningless. Thus, First Amendment doctrine fundamentally rests on the broad theoretical rationales as to why speech is entitled to this special degree of protection; it is these rationales that ultimately drive determinations regarding the breadth and degree of First Amendment protection. As noted above, however, neither the sparse text of the Free Speech Clause nor the historical background surrounding its drafting provide much useful guidance in elucidating these background rationales. Thus, at least as a practical matter, First Amendment doctrine is largely driven by courts' underlying intuitions as to what exactly makes speech valuable, and these intuitions are the product of the particular theory or theories of speech protection adopted by the courts.[100]

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98. Portions of my discussion in this section draw from my previous work. *See* David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 72–74 (2017).

99. *See, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 8 (1982) ("When there is a Free Speech Principle, a limitation of speech requires a stronger justification, or establishes a higher threshold, for limitations of speech than for limitations of other forms of conduct. This is so even if the consequences of the speech are as great as the consequences of other forms of conduct.").

100. *See* Han, *supra* note 33, at 364–67; Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 251 (1982) (observing that speech value

Although many theoretical bases for granting special constitutional protection to speech have been proposed, four particular rationales have dominated both the academic and judicial discourse. The first is the idea that unfettered speech has special value as a means of uncovering truth,[101] an idea famously encapsulated by Justice Holmes's statement that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[102] The second is the idea that unfettered speech is necessary for democratic self-governance; if the citizens in a democracy are the ultimate sovereigns, they must have the freedom to openly debate and discuss matters of public concern to govern themselves effectively.[103] The third is the idea that freedom of speech is an essential aspect of individual autonomy and personhood, and thus represents a good in itself, since "[o]ur ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons."[104] And a final theoretical rationale for protecting speech is to check government abuse in managing public discourse.[105] That is, the reason to protect speech might have less to do with the value produced by such speech and more to do with the significant harm potentially caused by government intervention in the marketplace of ideas.[106]

The Court, however, has not settled on any single rationale as the definitive theoretical basis for protecting speech. Rather, it has adopted a patchwork approach, recognizing these and other theoretical rationales in different contexts.[107] This has

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judgments "will vary with the substantive values one believes underlie the amendment").

101. *See* JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

102. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

103. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22–27 (1948); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497–98 (2011).

104. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992); *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213–15 (1972).

105. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that "First Amendment law . . . has as its primary, though unstated, object the discovery of improper governmental motives"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 529 (1977).

106. *See* Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 782 (1986) (describing "negative" theories of free speech that "stress[ ] the harmful consequences of regulating speech rather than its intrinsic value").

107. *See* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1252 (1983) (observing that "the Court has been unwilling to confine the first amendment to a single value or even to a few values"). *But see* Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1042–44 (arguing that the three traditional rationales are in fact components of a broader theory conceptualizing the First Amendment "as an essential component of a nation whose primary purpose is the protection of individual rights for the common good").

produced a First Amendment doctrine that is often theoretically muddled,[108] in which different speech values may overlap and conflict in particular contexts. Take, for example, the issue of hate speech. On the one hand, extending constitutional protection to hate speech might be said to protect individual autonomy, in the sense of promoting both the speaker's right to self-expression and listeners' right to hear all ideas;[109] on the other hand, it may also degrade the ability of others to partake freely in democratic self-governance.[110] Similarly, direct government regulation of the marketplace of ideas—such as the regulation of fake news or the imposition of right-of-reply laws—might be a highly effective means of creating a healthier and more robust public discourse, yet such regulation would also be antithetical to the highly anti-paternalist conception of the First Amendment as a check on government abuse.[111]

This broad theoretical instability is magnified in the context of compelled speech doctrine due to the special importance of autonomy-based theories of speech protection within the doctrine. In the more typical speech restriction context, autonomy-based theories tend to be overshadowed by more robust instrumental considerations, such as the pursuit of truth or democratic self-governance.[112] As Richard Fallon has observed, "autonomy-based arguments seem unlikely to possess clear and uniquely determining power in very many [First Amendment] contexts," since "the influence of autonomy would occur mostly in the background, not the foreground, and a number of competing values are likely to be in play."[113]

With respect to compelled speech, however, autonomy-based rationales take on special prominence. Unlike most speech restriction contexts, certain compelled speech contexts—like pure, stand-alone speech compulsions that do not otherwise

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108. *See* Ashutosh Bhagwat, *When Speech is Not "Speech"*, 78 OHIO ST. L.J. 839, 842 (2017) ("The truth is that for the past century, courts muddled through difficult free speech issues because they had no theoretical basis for resolving such foundational questions, and because they could do so without creating unacceptable social harms.").

109. *See, e.g.*, Fried, *supra* note 104, at 249–50.

110. *See, e.g.*, Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 287–88 (1995) (arguing that hate speech "discourages [people] from participating in the deliberative activities of society"); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 471–72 (arguing that "racist speech decreases the total amount of speech that reaches the market" because it silences those affected by it).

111. *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2370 (2000) ("In contexts ranging from restrictions on pornography and hate speech to 'right-of-reply' statutes applicable to newspapers, contemporary advocates of the Meiklejohnian position have sharply and continuously complained of the tendency of courts to extend constitutional protection to individual rights even when the exercise of such rights 'distorts' public discussion by perpetuating imbalances of social and economic power.").

112. *See* Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 21 (2020) (observing that "with regard to most of the conventional doctrinal rules, instrumental values dominate, and dignitary values are simply of secondary importance").

113. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 905 (1994).

interfere with speakers' ability to say what they want[114]—do not strongly implicate any of the instrumental rationales for protecting speech.[115] Rather, they primarily conflict with the broadly held intuition that forcing individuals to speak (or support speech) against their will represents a special effrontery to human dignity and autonomy that extends beyond merely preventing them from speaking. As Vikram Amar and Alan Brownstein noted, "Even when there is no misattribution, . . . there is something uniquely personal about speech that renders coerced communication an intrusion into personal autonomy."[116] Thus, whereas instrumental rationales tend to dominate in traditional First Amendment doctrine, "[t]his ordering is inverted when it comes to compelled speech."[117]

But unlike narrower, instrumental theories of speech protection—like the promotion of democratic self-governance—autonomy-based rationales are notoriously open-ended,[118] simply because "[a]rguably all human conduct, beyond speech, can be characterized as playing an important role in each person's project of self-[realization]."[119] This reflects the general critique leveled by Robert Bork and others against autonomy-based theories: because one can characterize all human conduct, not just speech, as advancing individual autonomy, such an interest cannot justify protecting speech to a degree greater than any other conduct.[120]

The prominence of autonomy-based rationales in compelled speech doctrine therefore presents special problems in crafting a stable doctrinal framework. The crux of many compelled speech cases is simply that people ought not be forced to speak or support speech in an inauthentic manner.[121] But we are, of course, required by the government to say things we may prefer not to say all the time: we must report our income on our tax returns; doctors are required to obtain informed consent from patients before medical procedures; companies are required to make regulatory disclosures in a wide variety of contexts. Autonomy-based theories generally fail to provide a stable basis for extending greater protection to speech as opposed to non-

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114. *See, e.g.*, Wooley v. Maynard, 430 U.S. 701 (1977) (deeming the required display of the "Live Free or Die" state motto on a New Hampshire driver's license plate unconstitutional); Volokh, *supra* note 1, at 368–70 (describing this subset of cases).

115. *See* Amar & Brownstein, *supra* note 112, at 21–22; Volokh, *supra* note 1, at 368.

116. Amar & Brownstein, *supra* note 112, at 22.

117. *Id.* at 21.

118. *See, e.g.*, Fallon, *supra* note 113, at 905 ("[A]utonomy-based arguments seem unlikely to possess clear and uniquely determining power in very many contexts.").

119. David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 98 n.145 (2012).

120. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (rejecting the argument that speech deserves special protection because of its ability to promote self-development, since other activities can also achieve this objective); Post, *supra* note 103, at 479–80 (finding autonomy-based rationales unpersuasive because "the value of autonomy extends not merely to the speech of persons but also to the actions of persons"). *But see* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 598–601 (1982) (arguing that Bork's view of the First Amendment is vulnerable to a similar critique and challenging "Bork's assumption that any principled first amendment theory must rely solely on values that are *uniquely* protected by speech").

121. *See* Amar & Brownstein, *supra* note 112, at 22.

speech conduct, let alone a stable basis for distinguishing between permissible and impermissible speech compulsions.

Autonomy-based rationales in the compelled speech context are further muddied by the question of whose autonomy is at stake in a given circumstance—is it that of the speaker or that of the listener?[122] Take, for example, the issue of compelled disclosures in professional settings, like those imposed in *Casey* and *NIFLA*. On the one hand, a speaker-based view of autonomy would hold that the speaker cannot be forced to say something that she does not want to say, which would be an effrontery to her basic human dignity. On the other hand, a listener-based view of autonomy would hold that listeners are entitled to truthful, factual information that is necessary for them to make their own decisions. To withhold such information would be to blunt listeners' capacity for self-realization—to limit their capacity "to deliberate, to reach conclusions about [their] good, and to act on those conclusions," which is "the foundation of our status as free and rational persons."[123]

The muddiness of compelled speech doctrine can therefore be traced, to a significant extent, to both the unstable theoretical foundations of First Amendment doctrine in general and to compelled speech doctrine's strong reliance on autonomy-based rationales for speech protection. The lack of any strong theoretical tether underlying the Court's decisions in individual cases translates to a broad fluidity in the doctrinal options available to the Court in any given case. Broad assertions of speaker autonomy can reliably be marshalled to strike down a wide variety of government compulsions with little limit. On the other hand, broad assertions of listener autonomy, broad assertions of the government's general regulatory power, or narrow constructions of the speech-conduct distinction can reliably point the Court toward upholding a variety of government compulsions. This lack of a firm theoretical foundation thus establishes the conditions for the doctrinal incoherence, uncertainty, and instability within the doctrine, as this theoretical openness does little to constrain the Court from pushing the doctrine in whatever direction it pleases.

B. The Rapid Expansion of First Amendment Coverage

A second feature of modern First Amendment jurisprudence that has contributed to this doctrinal fluidity is the rapid expansion of the First Amendment's coverage over the past few decades.[124] As many have observed, the story of modern First Amendment doctrine is a story of steady and rapid expansion.[125] As Lillian BeVier has noted, "[b]efore the Court's extension of First Amendment protection to commercial speech in 1976, the overwhelming majority of First Amendment cases

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122. *See* Corbin, *supra* note 15, at 1298–1308 (distinguishing the speaker's autonomy to "ensur[e] that the individual rather than the government controls what she says and what she thinks" from listeners' autonomy, which is premised on the idea "that the government should not be deciding what information audiences can or cannot access").

123. *See* Fried, *supra* note 104, at 233.

124. Portions of this section draw from my previous work. *See* Han, *supra* note 98, at 92–94.

125. *See, e.g.*, Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613 (2015).

involved attempts to regulate speech that was in one way or another speech about government."[126] The first cases of the modern First Amendment era dealt with textbook examples of political dissent,[127] and many of the doctrinal cornerstones of First Amendment jurisprudence—most notably, the bedrock rule that all content-based speech restrictions are subject to strict scrutiny—can be traced back to a handful of seminal cases dealing with political or otherwise ideological speech in some form.[128]

In the intervening years, however, the coverage of the First Amendment has expanded rapidly, far beyond the narrow confines of ideological speech within which the foundations of First Amendment doctrine were developed. Beyond the Court's most notable expansion of First Amendment protection to commercial speech,[129] it has extended protection to a wide variety of other speech or speech-related activities, such as false statements of fact,[130] violent video games,[131] sexually explicit speech,[132] and the distribution of consumer data.[133] And lower courts have extended First Amendment protection to, for example, search engine results,[134] computer code,[135] scientific and technical details,[136] professional speech,[137] and factual instructions for illegal or dangerous activities.[138]

Many of these forms of expression are far afield from core ideological speech. And the fundamental questions as to whether each of these forms of expression ought to be covered by the First Amendment—and, if so, the degree to which protection

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126. Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1287 (2005) (citation omitted).

127. *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927); Abrams v. United States, 250 U.S. 616 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

128. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972); Brandenburg v. Ohio, 395 U.S. 444 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); BeVier, *supra* note 126, at 1287–88 (observing that prior to 1976, the "overwhelming majority of First Amendment cases" dealt with government regulations that "generally concerned either speech specifically about candidates or officials, speech about issues on the public agenda, or speech generally criticizing our form of government and advocating its overthrow").

129. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

130. United States v. Alvarez, 567 U.S. 709, 715 (2012) (plurality opinion).

131. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).

132. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (observing that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment").

133. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

134. *See, e.g.*, Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

135. *See, e.g.*, Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.").

136. *See* Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 19–25 (2012) (describing the treatment of such speech amongst courts, with some treating it as fully protected).

137. *See, e.g.*, Moore-King v. Cnty. of Chesterfield, 708 F.3d 560 (4th Cir. 2013).

138. *See* Bhagwat, *supra* note 136, at 15–19 (highlighting the "inconsistency and contradictions" in courts' treatments of these cases).

should extend—are premised on theoretical considerations that are distinct from those governing core ideological expression or other areas of First Amendment coverage. The underlying theoretical rationales for protecting, say, search engine results differ from the traditional rationales for protecting core ideological expression, or the rationales for protecting professional speech, autobiographical lies, or computer code.

This rapid expansion of First Amendment coverage can therefore be viewed as a natural outgrowth of the theoretical instability at the root of First Amendment doctrine. Without a singular, narrow theoretical basis for protecting speech—one that can meaningfully both circumscribe and guide the contours of First Amendment doctrine as they are developed—the Court is free to expand First Amendment coverage well beyond the traditional confines of ideological speech into varied communicative contexts that bear little resemblance to, say, speeches at rallies, picketing, or political leafletting.

This rapid expansion has worked to destabilize First Amendment doctrine in two different but connected ways. First, it has put significant pressure on what is perhaps the single murkiest aspect of First Amendment jurisprudence: when regulated activities constitute speech subject to special First Amendment treatment or non-speech conduct that falls outside of the First Amendment's boundaries. Second, the extension of the First Amendment's coverage to a broad and eclectic variety of speech contexts has produced significant tension with the traditional First Amendment doctrinal framework—one that was formulated with a much narrower First Amendment in mind.

1. The Unsettled Nature of the Speech-Conduct Distinction

As noted above, the Free Speech Clause, at its root, represents a constitutionally enshrined intuition that speech has special value—beyond that of other types of conduct—such that it is entitled to a special degree of protection against government regulation. Thus, the First Amendment requires that even when speech causes the same (or greater) degree of social harm as non-speech conduct, it is nevertheless entitled to more stringent protection, such as higher thresholds for proffered government justifications and precision in regulatory design.[139] As such, the question as to what falls within the coverage of the First Amendment—that is, what constitutes "speech" (or "freedom of speech") for First Amendment purposes—lies at the very core of First Amendment jurisprudence.

It is therefore peculiar, to say the least, that the speech-conduct distinction remains one of the least doctrinally developed areas of First Amendment jurisprudence. The Court's sole attempt to construct a doctrinal standard to distinguish protected speech from non-protected conduct came in *Spence v. Washington*.[140] In *Spence*, a college student was convicted for "improper use" of the American flag when he affixed a peace symbol on a flag and hung the flag upside down from the window of his apartment.[141] In deeming the student's actions speech protected under the First

139. *See* SCHAUER, *supra* note 99, at 8.
140. 418 U.S. 405 (1974) (per curiam).
141. *Id.* at 406–07.

Amendment, the Court noted that "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[142] The Court would later clarify in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* that "a narrow, succinctly articulable message is not a condition of constitutional protection," as under this condition such protection "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."[143]

As many have noted, the *Spence* test simply does not work as a meaningful basis for distinguishing protected speech from unprotected conduct.[144] If, as the Court has suggested, the sole requirements of the test are that the conduct must be "intended to be communicative" and that it "would reasonably be understood by the viewer to be communicative,"[145] then it is far too broad, as there are countless examples of communicative conduct meeting these criteria that clearly do not trigger First Amendment scrutiny, such as political assassination, targeted vandalism, securities transactions, or aeronautical navigation charts.[146]

Apart from the wholly lacking *Spence* test, the Court has done little to clarify the speech-conduct distinction. And this is likely because—despite the apparently straightforward, binary nature of the inquiry—the distinction is too complex a matter to reduce easily to doctrine. As Geoffrey Stone has observed, First Amendment doctrine tends to be developed backwards, where intuited results drive doctrine rather than vice-versa.[147] And the various intuitional factors underlying the speech-conduct distinction are far more multifaceted and complex than they may initially appear. These factors include the inherent characteristics of the activity in question, the social context of the activity, and the government's motive in instituting the relevant regulation.

The most apparently self-evident factor in determining the coverage of the First Amendment is the fundamental nature of the activity in question. Indeed, given the straightforward text of the provision, one might presume that distinguishing protected speech from non-speech conduct merely requires evaluating certain inherent characteristics of the activity that, in the abstract, render it "speech" covered by the First Amendment or unprotected conduct. The *Spence* test represents such an

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142. *Id.* at 410–11; *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984) ("[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.").

143. 515 U.S. 557, 569 (1995).

144. *See, e.g.*, Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250–60 (1995).

145. *Clark*, 468 U.S. at 294.

146. *See* Post, *supra* note 144, at 1254 ("Navigation charts for airplanes . . . are clearly media in which speakers successfully communicate particularized messages. And yet when inaccurate charts cause accidents, courts do not conceptualize suits against the charts' authors as raising First Amendment questions.").

147. Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 276 (2009) ("[W]e built First Amendment doctrine backwards—not from theory to doctrine to results, but from intuited results to doctrine, with only passing attention to theory.").

attempt to define speech as an abstract, freestanding concept based solely on these sorts of fundamental characteristics.

But the shortcomings of attempts to define speech solely in this manner are readily apparent. As Robert Post has observed, it is simply incorrect that "speech can be a generic object of constitutional protection," because under our eclectic First Amendment jurisprudence, there cannot be a singular, abstract definition of "speech."[148] And the "speech" referred to in the text of the First Amendment certainly does not mean "speech" in the dictionary sense. As Frederick Schauer has noted, contractual agreements and price fixing schemes are accomplished by "speech" in the generic sense, but no court would find that large swaths of contract law and antitrust law fall within the ambit of First Amendment coverage.[149] Thus, "speech"—or perhaps more accurately, "the freedom of speech"—cannot refer solely to some freestanding conception of speech as such. It must refer to a particular subset of communicative activity that corresponds to the underlying theoretical reasons as to why speech is entitled to special constitutional protection.[150]

Because there is no generic notion of "speech" with generic constitutional value, First Amendment coverage questions must also take the particular social context into consideration. As Post stated, "the basic unit of First Amendment analysis" is not speech as such, but rather "the constitutional values allocated to the discrete forms of social practice that speech makes possible."[151] Furthermore, independent from inherent characteristics of the activity in question and the social context surrounding it, the government's motive in regulating the activity plays a significant role in determining whether the First Amendment is implicated,[152] as the Court has recognized in its expressive conduct jurisprudence.[153] Indeed, in *Heffernan v. City of Paterson*, the Court held that the First Amendment can be implicated even when the purported speaker never actually "spoke," provided that the government's motives and actions produced a constitutionally meaningful harm.[154]

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148. Post, *supra* note 144, at 1271–72.

149. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1777–84 (2004).

150. *See* Post, *supra* note 144, at 1255 ("First Amendment analysis is relevant only when the values served by the First Amendment are implicated. These values do not attach to abstract acts of communication as such, but rather to the social contexts that envelop and give constitutional significance to acts of communication.").

151. *Id.* at 1273–74. As Post observes, a urinal cannot be deemed "speech" protected by the First Amendment in and of itself, but a urinal presented by Marcel Duchamp as a sculpture submitted to an art exhibition is transformed into protected speech. The surrounding social context imbues the particular communicative medium with constitutional meaning. *See id.* at 1253–54.

152. *See id.* at 1255–56 ("[O]ur First Amendment jurisprudence is concerned not merely with *what* is regulated, but also with *why* the state seeks to impose regulations.").

153. Within the Court's expressive conduct jurisprudence, the degree of First Amendment protection rests on whether the governmental interest behind the regulation "is unrelated to the suppression of free expression." United States v. O'Brien, 391 U.S. 367, 377 (1968). As the Court in *Texas v. Johnson* stated, while "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it cannot "proscribe particular conduct *because* it has expressive elements." 491 U.S. 397, 406 (1989).

154. 136 S. Ct. 1412, 1418 (2016) (observing that, in a case where a public employee was

The destabilizing effect of the undeveloped speech-conduct distinction—when combined with the rapid expansion of First Amendment coverage—is readily apparent. With no meaningful doctrinal or theoretical boundaries to govern the coverage analysis, litigants and courts are free to constantly push the boundaries of the First Amendment outwards. As Schauer has observed, recent cases have evinced "an accelerating attempt to widen the scope of First Amendment coverage to include actions and events traditionally thought to be far removed from any plausible conception of the purposes of a principle of free speech"[155]—a trend perhaps driven by the unique magnetism and attractiveness of First Amendment arguments in a broad range of legal disputes.[156] Thus, for example, the First Amendment has been invoked by companies arguing against mandated disclosures to the SEC, by tattoo parlors seeking to be shielded from health regulations, and by therapists seeking to escape state regulation of scientifically unproven therapeutic methods.[157] In the absence of any meaningful standards for evaluating questions of First Amendment coverage—and given the potentially all-encompassing scope of the term "speech"—there is little to constrain courts from expanding the doctrine into nearly all aspects of government regulation save their own self-restraint.

This effect is further magnified in compelled speech doctrine, simply from the fact that in the modern regulatory state, we are constantly required to do things that we may not want to do—and, of course, speech (in the dictionary sense) is an essential component of nearly every aspect of social and commercial activity. Thus, without any constraining principles or clear doctrinal tests to apply, there are no clear reasons—apart from courts' self-restraint—why compelled speech doctrine cannot, under a broad conception of autonomy, extend First Amendment coverage to, for example, run-of-the-mill professional malpractice cases, or drug labeling requirements, or large swaths of securities laws.

2. The Tension Created by Traditional First Amendment Doctrine

In addition to putting increased pressure on the speech-conduct distinction, the expansion of First Amendment coverage produces a significant disconnect with traditional First Amendment doctrine.[158] Traditional First Amendment doctrine was not designed with a First Amendment of this broad scope, complexity, and variety in mind. Rather—apart from the Court's distinct treatment of commercial speech—the Court's First Amendment jurisprudence is best characterized as, in effect, an ideological speech First Amendment: one formulated and calibrated based upon the theoretical justifications for, and the perceived value of, unfettered political speech,

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demoted because of the government's mistaken factual belief that he was engaging in political activity, "the government's reason for [the demotion] is what counts," and "the employee is entitled to challenge that unlawful action under the First Amendment" whether or not he actually engaged in such activity).

155. Schauer, *supra* note 125, at 1616–17.

156. *See id.* at 1633.

157. *Id.* at 1614.

158. I have written about this issue in greater detail in my previous work, upon which portions of this section draw. *See* Han, *supra* note 33, at 400–14; Han, *supra* note 98, at 95–108.

or religious speech, or other speech on social issues. And because the foundations of First Amendment doctrine were largely established in the 1960s and 1970s—before the explosive expansion of the First Amendment beyond the confines of ideological speech—the doctrine broadly presumes a First Amendment that is unitary and universal rather than eclectic and piecemeal. This posture is encapsulated in the singular cornerstone rule of First Amendment jurisprudence: that all content-based restrictions on speech (save a few narrow exceptions) are subject to strict scrutiny.[159]

This fundamental disconnect between a legacy doctrine calibrated to ideological speech and the highly expansive and eclectic First Amendment of today has produced a significant degree of tension within the doctrine, which has undermined the coherence and integrity of the broad doctrinal framework. To an increasing degree, the traditional doctrine simply doesn't fit with the novel speech contexts that courts are confronting—that is to say, the established doctrine often produces results that conflict with our intuitional judgments as to what seems fair or sensible or correct in a given case. And as I've written about elsewhere, when this occurs, courts have evinced a willingness to surreptitiously evade the formal doctrinal framework through various forms of doctrinal distortion and evasion—distortions that serve to add further complexity and instability to the doctrine.[160]

This tension has produced two diametrically opposed analytical modes within the Court's decisions. One analytical mode—which I will call the traditional mode—adheres to the traditional view of First Amendment protection. It construes First Amendment doctrine as largely unitary and universal in nature, and it assumes stringent protection of all speech falling within the First Amendment's coverage as a matter of course, with only very narrow exceptions.[161] It regards discretionary balancing approaches to speech problems with great suspicion, deeming them antithetical to First Amendment principles.[162] It therefore favors bright-line rules

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159. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

160. *See* Han, *supra* note 98, at 95–108; Han, *supra* note 33, at 395–413. Thus, for example, the Court introduced the universally criticized "secondary effects" doctrine purely as a means of evading an intuitively dissonant application of strict scrutiny to zoning restrictions on sexually oriented businesses. *See supra* note 52 and accompanying text (discussing the *Renton* case). And more recently, the Court watered down the strict scrutiny standard in order to uphold a Florida Bar rule that prohibited candidates in judicial elections from personally soliciting campaign funds. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015); Han, *supra* note 33, at 402 (describing how the *Williams-Yulee* Court watered down its application of strict scrutiny to something more akin to an intermediate scrutiny-style balancing test).

161. *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790–93 (2011) (emphasizing the narrowness of any categorical exceptions to the general principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

162. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 470 (2010) (describing as "startling and dangerous" the suggestion that First Amendment coverage should rest on a categorical

over open-ended standards, and it regards the judicial creation of additional doctrinal categories with suspicion.[163] This analytical mode is reflected in many of the Court's most recent First Amendment cases, such as *United States v. Stevens*,[164] *United States v. Alvarez*,[165] *Sorrell v. IMS Health Inc.*,[166] and *Reed v. Town of Gilbert, Arizona*.[167]

The opposing analytical mode—which I will call the eclectic mode—regards modern First Amendment doctrine as nuanced and segmented. It recognizes the breadth and variety of problems presented under a more expansive view of the First Amendment, and is therefore more amenable to openly balancing conflicting speech values and harms anew when novel problems arise.[168] As such, it is far more amenable to creating new doctrinal categories, and although it may share some of the traditional mode's suspicion of judicial discretion as applied in speech cases, it broadly regards such discretion as largely inevitable and often preferable to ill-fitting legacy rules.[169] This analytical mode is reflected in cases like *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[170] *New York v. Ferber*,[171] *Pickering v. Board of Education*,[172] and *Tinker v. Des Moines Independent Community School District*,[173] all of which represent efforts by the Court to segment and categorize discrete subsets of speech for distinct treatment.

To be sure, this tension has generally arisen in the more typical First Amendment context of speech restrictions, and as Amar and Brownstein have noted, many of the core components of traditional First Amendment doctrine do not apply cleanly to the very different context of compelled speech.[174] But Justice Thomas's opinion in *NIFLA* signals a move within the Court to increasingly tie compelled speech doctrine to the traditional doctrine governing speech restrictions, thus importing into the compelled speech context all of the destabilizing effects outlined above.

Indeed, Justice Thomas's opinion and Justice Breyer's dissenting opinion read as paradigmatic examples of the two disparate analytical modes described above.

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balancing of speech value and harms).

163. *See, e.g.*, *Brown*, 564 U.S. at 792 (stating that new categorical exceptions to the general rule against content-based restrictions will not be recognized absent "persuasive evidence that [the restriction] is part of a long (if heretofore unrecognized) tradition of proscription").

164. 559 U.S. at 460.

165. 567 U.S. 709 (2012).

166. 564 U.S. 552 (2011).

167. 576 U.S. 155 (2015).

168. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (observing that the Court "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression").

169. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 753–64 (1982) (articulating in detail the Court's reasons for carving out child pornography as a distinct category of low-value speech).

170. 425 U.S. 748 (1976).

171. 458 U.S. at 747.

172. 391 U.S. 563 (1968).

173. 393 U.S. 503, 514 (1969).

174. *See* Amar & Brownstein, *supra* note 112, at 8–10 (discussing how foundational aspects of speech restriction doctrine, such as forum doctrine and the establishment of a hierarchy of speech based on value, do not fit comfortably within compelled speech doctrine).

Justice Thomas started his opinion with the cornerstone rule that all content-based restrictions on speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[175] By anchoring his analysis in this manner, he immediately signals his adherence to the traditional analytical mode—treating this case similarly to a case dealing with a speech restriction—and under this mode, the standard analytical path is clear. Speech, writ large, is generally to be treated as a single category,[176] and as a categorical matter, any content-based restriction on speech is subject to strict scrutiny (which nearly inevitably means that it will be struck down). Thus, because the licensed notice was content based, it must be struck down, barring exceptional circumstances.[177]

Although Justice Thomas's actual analysis was more nuanced than this, this framing of the issue—and the rhetoric used throughout his analysis—makes clear that the outcome is effectively a *fait accompli*. Justice Thomas spent a significant portion of the opinion rebutting the argument that the licensed notice ought to constitute professional speech subject to a less onerous standard of review, emphasizing the Court's broad "reluctan[ce] to 'exempt a category of speech from the normal prohibition on content-based restrictions.'"[178] He framed the professional speech argument as an argument for an anomaly to standard practice—an "exempt[ion] from ordinary First Amendment principles."[179] And he all but concluded that professional speech does not constitute a separate category of speech subject to special doctrinal treatment, although he ultimately stopped short of definitively foreclosing the possibility of such a category.[180]

Justice Breyer's dissent, on the other hand, represented a paradigmatic example of the eclectic mode of analysis. He started his analysis by immediately reframing the case in direct opposition to Justice Thomas's traditional framing. Rather than premising his analysis on the categorical rule that all content-based restrictions on speech are presumptively unconstitutional, he observed that "much, perhaps most, human behavior takes place through speech and . . . much, perhaps most, law regulates that speech in terms of its content."[181] Thus, in his view, the majority's broad approach "threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation."[182] Framed in this manner, Justice

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175. NIFLA v. Becerra, 138 S. Ct. 2361, 2371 (2018) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

176. *See id.* at 2372 ("This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'" (quoting Denver Area Ed. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 804 (1996))).

177. *See id.* at 2371 ("The licensed notice is a content-based regulation of speech."); *id.* at 2372 ("This Court's precedents do not permit governments to impose content-based restrictions on speech without 'persuasive evidence of a long (if heretofore unrecognized) tradition' to that effect." (quoting United States v. Alvarez, 567 U.S. 709, 722 (2012))).

178. *Id.* at 2372 (quoting *Alvarez*, 567 U.S. at 722).

179. *Id.* at 2375.

180. *See id.* (stating that the licensed notice would fail even under an intermediate scrutiny standard).

181. *Id.* at 2380 (Breyer, J., dissenting).

182. *Id.* at 2380–83.

Breyer emphasized the need for identifying and recognizing categorical differences within the realm of content-based speech regulations: mandatory disclosures regarding purely factual matters such as the licensed notice are fundamentally different than requiring a student to salute the flag, as they are more akin to unproblematic economic and social legislation.[183]

It therefore appears that to an increasing extent, the doctrinal instability that has built up within the context of speech restrictions is being absorbed into compelled speech doctrine as well. And this instability suggests that—just as in the speech restriction context—the Court has the capacity to fluidly oscillate between each mode of analysis on a case-by-case basis, as it can plausibly connect its analysis to two distinct but divergent lines of cases depending on the desired result. Nearly every state-mandated speech compulsion can, of course, be regarded as content-based in nature. If the Court is inclined to strike it down, it merely need adhere to the traditional mode of analysis anchored by the broad rule against content-based restrictions, with all of its preset rhetorical flourishes. On the other hand, if it is inclined to uphold it, it merely need to tie it to the many cases recognizing the complexity of First Amendment doctrine and identifying and creating new speech categories. This further compromises the doctrinal framework's capacity to meaningfully constrain courts' decision-making.

III. SOME THOUGHTS ON WHAT CAN BE DONE

So what can be done to counteract this doctrinal fluidity within compelled speech doctrine? The most direct solution might be for the Court to fully embrace a singular, robust theoretical basis for speech protection, which would cure many of the maladies of the present doctrine at the root. The candidate theory most often proposed for this role is the promotion of democratic self-governance or public discourse. Versions of this argument have long been made within the academic literature[184] and continue to be made up to the present day.[185]

If First Amendment doctrine is tethered to this narrower and more stable theoretical footing, many of the potentially incoherent and inconsistent features of compelled speech doctrine fade away. A compelled speech doctrine premised solely on democratic self-governance would mean a far stricter focus on ideological speech—that is, speech on issues of public concern such as politics, religion, culture, and so forth. If applied in a sufficiently narrow manner, this might mean that the Court would simply get out of the business of imposing First Amendment scrutiny on matters outside of this realm; the First Amendment may have little or nothing to say regarding, for example, mandatory factual disclosures in commercial advertising or the provision of professional services.[186] Rooting the doctrine upon a singular,

183. *See id.*

184. *See, e.g.*, MEIKLEJOHN, *supra* note 103; Bork, *supra* note 120.

185. *See, e.g.*, Bhagwat, *supra* note 108, at 843; James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 491 (2011).

186. This might depend on both the context and content of the required disclosures. *See* Corbin, *supra* note 15, at 1301–04 (distinguishing between compelled factual disclosures meant to inform and those meant to persuade).

definitive theoretical footing would afford the Court a more stable basis upon which to craft a more robust speech-conduct distinction, and it would limit the coverage of the First Amendment to a more manageable and coherent scope—one more amenable to broad, unitary rules that apply across the board.

This solution, however, is utterly unrealistic, primarily because it runs squarely against the prevailing popular and judicial conception of First Amendment coverage as it stands today—and as noted above, First Amendment doctrine is an area where intuition tends to lead to doctrine rather than vice versa.[187] Many would likely bristle at the suggestion that, for example, regulations of artistic speech or ideological speech compulsions (at least when they are not attributable to the speaker)[188] fall completely outside of First Amendment coverage. And although some scholars have argued for an expansive version of the democratic self-governance rationale that would include a wider array of speech within First Amendment coverage, this sort of expansion threatens to undermine the whole purpose of adopting a singular and robust First Amendment theory, as it impairs the theory's capacity to meaningfully constrain the First Amendment's coverage in a coherent manner.[189]

Indeed, given that the Court's recent tendency has been to *expand* the scope of the First Amendment to an ever-wider range of eclectic communicative contexts, it is implausible that a contraction of the doctrine to a more manageable and theoretically coherent scope is on the horizon. For better or worse, we have embraced a vision of the First Amendment that is expansive, messy, and theoretically diverse. Our First Amendment doesn't care only about democratic self-governance—it also cares about speaker and listener autonomy, the pursuit of truth, and the dangers of state paternalism in public discourse. As Post has observed, "our social life is simply too diverse and rich to be compressed into any such single pattern" such as "truth-

187. *See supra* note 147 and accompanying text.

188. *See* Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 WM. & MARY BILL. RTS. J. 287, 308 (2019) (observing that "an instrumental, democracy-enhancing explanation for *pure* compelled-speech claims simply makes no sense"); Volokh, *supra* note 1, at 368 (observing that pure speech compulsions generally do not implicate any of the instrumental rationales for protecting speech).

189. Many versions of the argument argue for the inclusion of, for example, artistic expression to the extent that it aids the populace in public deliberation and self-governance. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263 ("I believe, as a teacher, that the people do need novels and dramas and paintings and poems, because they will be called upon to vote."). Such arguments, however, stretch the democratic self-governance theory so thinly as to undermine that theory's capacity to meaningfully constrain the breadth of the First Amendment's coverage. If categories of speech far afield of ideological speech can nevertheless be regarded as protected because it contributes to a person's capacity to participate in self-governance, then the self-governance theory starts to resemble an autonomy-based theory, with all of the maddening open-endedness and line-drawing problems inherent to such theories. *See, e.g.*, Bork, *supra* note 120, at 26–27 (discussing the difficulties of drawing such lines and proposing that First Amendment protection extend only to "the outer limits of political speech"); Eugene Volokh, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 567–68 (2011) (arguing that the "public discourse" limitation is "unsound" given "the difficulty of defining the category").

seeking" or "democracy," and "[i]t would be neither plausible nor desirable to make it so."[190]

If we can't revamp the unstable theoretical foundations of the doctrine, then perhaps we can hope for a change in the Court's present culture to one more suited to developing stronger, more holistically consistent doctrinal frameworks. Much of the instability of the present doctrine can be attributed to the Court's general readiness to reverse, modify, or significantly expand or contract preexisting doctrines whenever five votes can be mustered for the desired result. This is, of course, not the recipe for a coherent and stable doctrinal framework. A robust doctrinal framework cannot be constructed by focusing solely on each case as it comes—it must be designed holistically, with care as to how any doctrinal adjustments fit with both preexisting doctrine and other related areas of the doctrine.

So perhaps if the Court were to adopt this more holistic posture—that is, to place relatively more weight on doctrinal consistency, predictability, and stability as opposed to its intuitions of rightness or wrongness in individual cases—it would have a far greater capacity to craft a more coherent and less fluid doctrinal framework.[191] If we are being optimistic, perhaps a Court adopting this sort of highly deliberative posture might even, over time, develop a robust system of lexical priority to the various conflicting theories upon which First Amendment doctrine is built, thus bringing some meaningful order to a scattershot doctrine.[192]

This solution, however, is similarly unrealistic. There are no indications that the case-by-case, "five votes make right" culture of the Court will change anytime soon, as indicated by cases like *Janus*.[193] And to be fair to the Court, constructing broad, comprehensive doctrinal frameworks that are highly complex yet internally coherent and stable may not be a task for which judges are institutionally well equipped. Supreme Court Justices are not (or, for some, are no longer) law professors; their job is to resolve cases, not to theorize entire bodies of doctrine. They often lack the luxuries of both time and specialization to do so—they are constantly confronted with cases covering a broad range of substantive areas that must be resolved in a

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190. Post, *supra* note 144, at 1272.

191. This is not to say, of course, that the doctrine must remain static; a doctrine that cannot adapt to changing circumstances risks becoming obsolete, such that it either yields increasingly nonsensical results or devolves into meaningless window dressing. *See* Han, *supra* note 98, at 113. It is only to say that one of the great virtues of common law-style development—which is the most apt description for what the Court does in First Amendment analysis—is its incremental and deliberate nature, one that consistently prioritizes doctrinal coherence and consistency even as it steers the doctrine in different directions.

192. Robert Post has observed that "theories of the First Amendment can be arranged according to a 'lexical priority,'" such that "[w]hen theories conflict with each other, courts must decide the order in which theories should take precedence." Post, *supra* note 111, at 2373. As Post notes, this approach would allow for some degree of order and coherence amidst conflicting theoretical regimes. *Id.*

193. *See* Schauer, *supra* note 96, at 141 ("I suspect . . . that for some time to come, as it has been for some time in the past, *stare decisis* will serve almost entirely as a rhetorical weapon against opponents of what the wielder of the weapon believes to be the right result, questions of *stare decisis* aside. *Stare decisis* will continue not to constrain, and accusations of failure to adhere to *stare decisis* will continue to be part of the rhetorical arsenal of those who agree with a past decision and lament its overturning.").

limited span of time, leaving them with limited capacity to theorize far beyond the immediate doctrinal precincts of the present case. So what we are often left with is a series of discrete decisions from which we must struggle to draw coherence, and it is difficult to imagine some sort of massive cultural shift that would radically alter the present reality.

So perhaps the theoretical morass underlying the doctrine and the Court's constant doctrinal oscillations enabled by a case-focused judicial culture suggest that we ought not hold out much hope that the Court will ever construct a fully coherent, stable, and elegant compelled speech doctrine. Perhaps the scope of the modern First Amendment is so sprawling and messy—and the Court's case-by-case, winner-take-all mentality so intractable—that doctrinal fluidity should be understood as the norm rather than the exception.

This is not to say that the entirety of the doctrine is doomed to incoherence, malleability, and unpredictability. There is likely little dispute, for example, that a pure ideological speech compulsion like that in *Barnette* is unconstitutional or that the typical disclosures required under informed consent principles prior to medical procedures are constitutional. But given the unstable theoretical foundations of the doctrine and the Court's approach to deciding cases, this sort of doctrinal stability likely persists simply because the Court, legislatures, and society at large have consistently, over time, come to share the same broad intuitions and value judgments with respect to these particular First Amendment problems. It is likely this broadly shared consensus—rather than any robust system or culture of doctrinal constraint—that drives coherence and stability within First Amendment jurisprudence.

It therefore may be inevitable that highly contested areas of First Amendment jurisprudence represent merely ideological and philosophical battlegrounds in which the doctrine, by itself, holds little actual persuasive or justificatory force. Rather, the surface complexity of the doctrine cloaks its problematic fluidity—its capacity to shift, adjust, expand, or contract to accommodate a wide range of divergent results. Thus, there may ultimately be very little to prevent a majority of the Court from rapidly and radically transforming the coverage and protection of the First Amendment as it pleases, apart from its own self-restraint. And this represents a special concern within compelled speech doctrine, particularly amidst the longstanding debate over the specter of First Amendment Lochnerism—the use of an expansive First Amendment as an engine for effecting a broad deregulatory agenda.[194] Mandatory disclosures of all kinds are deeply entrenched within the structure of the modern regulatory state,[195] yet the murky theoretical and doctrinal framework of the First Amendment can ultimately do little to constrain a willing Court from radically upending this structure.

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194. This issue has long been discussed by academic commentators, but the discussion has greatly intensified in recent years. *See, e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 381–93 (1997); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2586 (2008); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (2016); Armijo, *supra* note 65; Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241 (2020).

195. *See, e.g.*, NIFLA v. Becerra, 138 S. Ct. 2361, 2380–81 (2018) (Breyer, J., dissenting) (describing the wide range of disclosure laws).

So perhaps the sobering conclusion is that there is not much that can realistically be done to fix the problem of doctrinal fluidity in compelled speech doctrine. If that's the case, then perhaps the next best thing that we can hope for is a Court that approaches cases in an analytically transparent manner—a manner that lays bare the fundamental intuitions and value judgments upon which it is actually basing its decisions rather than obscuring them behind complex and malleable doctrines. Such an approach would, at the very least, allow courts—and society at large—to discuss and debate these fundamental questions openly[196] rather than through a doctrinal façade that may serve more as post-hoc justification rather than as a means of actually constraining and channeling the Court's decision-making.

To frame this in different terms, perhaps the Court should approach First Amendment doctrine in the same manner that common law courts approach negligence doctrine. As discussed above, this would be consistent with the essential nature of First Amendment doctrine; given the sparsity of the text and history of the Free Speech Clause and its apparently broad mandate, First Amendment doctrine—like negligence doctrine—has been built brick by brick, through common law-style development. And crafting First Amendment doctrine poses the same fundamental challenges as crafting negligence doctrine: both are undergirded by murky theoretical foundations,[197] and both represent an attempt to impose some order and coherence upon a near-infinite range of possible factual circumstances potentially covered by the doctrine.

Negligence determinations reached by common law courts broadly and openly reflect the values and intuitions of the particular community in determining

196. As Robert Post has observed, "constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture." Robert C. Post, *Foreword; Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

197. Like in the First Amendment context, there is a long-running and perpetually unsettled debate regarding the theoretical foundations of tort law. *See, e.g.*, Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802–11 (1997) (describing this conflict amongst tort theorists). Some have argued that the imposition of tort law is premised on corrective justice principles—the "simple and elegant" idea that "when one person has been wrongfully injured by another, the injurer must make the injured party whole." Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695 (2003). *See generally* JULES L. COLEMAN, RISKS AND WRONGS (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Some have argued that tort law should be premised on a concept of civil recourse—"the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them." Zipursky, *supra*, at 699. And some have argued for an instrumental vision of tort law—that is, conceptualizing it as a means of incentivizing actors to behave in socially optimal ways. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

appropriate standards of care,[198] crafting the dimensions of causation,[199] and so forth. Given that the entire doctrine is centered around a singular, open-ended standard—how a reasonable person would act under the circumstances[200]—cases tend to be analyzed and decided in a direct, pragmatic, and unvarnished manner, with conflicting conceptions of fundamental values and social norms coming to the fore.[201] One might characterize the common law of negligence as an open-ended, continuous conversation between courts of different eras and cultural contexts regarding the abstract notion of a standard of care that necessarily shifts, expands, and contracts in different contexts.[202]

On the face of things, it may seem incredibly unwise to approach First Amendment doctrine in the same manner. After all, one of the consistent themes within First Amendment jurisprudence is a deep skepticism of courts integrating their own value judgments in delineating the boundaries of speech protection. Chief Justice Roberts, for example, characterized such approaches as "startling and dangerous," given the risk that courts' exercise of discretion would jeopardize the principle of content neutrality at the heart of First Amendment doctrine.[203] As a result, there is a heightened tendency for the Court, in First Amendment cases, to frame things in as "law-like" a manner as possible—to craft its analyses like lawyers craft briefs, where dispassionate application of the doctrine inevitably leads to the stated conclusion.[204] It may therefore seem inappropriate for the Court to openly

198. *See, e.g.*, Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1325 (2017) ("Tort has historically served as a means of determining community norms, encouraging observance of those norms to enhance private cooperation, and stigmatizing those who deviate.").

199. *See, e.g.*, Snyder v. LTG Lufttechnische GmbH, 955 S.W.2d 252, 256 n.6 (Tenn. 1997) ("Proximate or legal cause is a policy decision made by the legislature or the courts to deny liability for otherwise actionable conduct based on considerations of logic, common sense, policy, precedent, and 'our more or less inadequately expressed ideas of what justice demands or of what is administratively possible and convenient.'").

200. *See* Vaughan v. Menlove (1837) 132 Eng. Rep. 490, 493 (C.P.) ("[W]e ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.").

201. *See* Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1548 (2010) (observing that the common law "can at once acknowledge the incommensurability of the various values involved and strive to accommodate them institutionally," accomplishing this over a span of "centuries . . . through a process of practical reasoning").

202. *See, e.g.*, JOHN G. FLEMING, THE AMERICAN TORT PROCESS 116 (1988) (observing that the law of negligence "seeks to permit the infusion of community values and their adjustment over place and time").

203. United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. . . . Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.").

204. *See* Han, *supra* note 98, at 95–105 (describing the Court's tendency in First Amendment cases to distort doctrine in order to craft formally plausible justifications in cases where application of the existing doctrine would otherwise yield a dissonant result).

debate underlying values and theories in the same manner as common law courts deciding negligence cases.

Yet the present instability of First Amendment doctrine—rooted in its lack of a stable theoretical foundation and the prioritization of case-by-case rightness over doctrinal coherence—means that these sorts of conflicting value judgments and intuitions are often the actual driving force behind the Court's decisions. Thus, if there is to be any hope of theoretical and doctrinal coherence emerging from the current morass, it will likely be accomplished only through the establishment of broad cultural consensus—between courts, legislatures, and society at large—regarding fundamental speech values and how they interact with government prerogatives.[205] Such consensus, if it is achievable, will more likely arise within the sort of open dialogue that is spurred by forthright and transparent acknowledgement, rather than obfuscation, of the underlying intuitional and value-based differences driving the Court's varying decisions[206]—the sort of frank, foundational discussion that is *de rigueur* in the negligence context. And even if it is unrealistic to expect that this sort of consensus will ever be achievable, such an approach would at least bring these sorts of conflicting fundamental judgments to the fore, rather than obscure them behind a doctrinal façade.

Engendering this sort of analytical transparency rests on both doctrinal and non-doctrinal factors. Certain doctrinal frameworks are, by nature, more conducive to encouraging this sort of open dialogue regarding first principles. Here, the broad design of negligence doctrine is instructive. As noted above, negligence doctrine is centered around a simple, open-ended standard: how a reasonable person would act under the circumstances.[207] The indeterminacy and open-endedness of this standard necessarily requires courts to delve directly into the sorts of broad value judgments and intuitions that drive their analyses. And while, in the course of its common-law development, negligence doctrine has also incorporated varying degrees of complexity to effect greater precision with respect to specific problems,[208] it has nevertheless consistently retained its focus on this singular standard.

Certain aspects of First Amendment doctrine might therefore benefit from an incremental move towards what one might call "de-codification": eschewing complex, rule-like approaches in favor of simpler, open-ended approaches. Although, as noted above, complexity can strengthen doctrine by introducing greater precision and constraint, it can also serve to distance courts' analyses from the

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205. As Post has observed, "constitutional law could not plausibly proceed without incorporating the values and beliefs of nonjudicial actors"; thus, "constitutional law will be as dynamic and as contested as the cultural values and beliefs that inevitably form part of the substance of constitutional law." Post, *supra* note 196, at 10.

206. *See* Han, *supra* note 33, at 372–79 (observing that the value of analytical transparency "track[s] the traditional First Amendment principle that open deliberation is both the best means of arriving at truth and an essential requirement for making reasoned collective decisions").

207. *See supra* note 200 and accompanying text.

208. For example, distinct duty standards apply to those acting in an emergency situation, to landowners or occupiers of land, to those with physical disabilities, to professionals, to children, and so on. *See* 1 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS §§ 118–131, at 280–309 (2d ed. 2001).

underlying intuitional, theoretical, and value-based judgments driving the doctrine.[209] And when the doctrine becomes so fluid and unstable as to fail in its ability to constrain, its capacity to obscure rather than illuminate the fundamental drivers of the analysis comes with little benefit other than an appearance of law-like constraint. Thus, to the extent that many of the Court's decisions actually come down to conflicting fundamental judgments—judgments as why speech should be protected, or the appropriate weight to be given to government interests, or the particular limits of autonomy-based considerations—it should move towards simpler, more standard-like doctrinal approaches that push courts to articulate these judgments in a deeper and more open manner.[210]

The exact manner by which the complexity of the current doctrinal framework might realistically be pared down is beyond the scope of this Article. But one target for this sort of incremental de-codification might be the increasingly unstable body of doctrine surrounding content-based speech restrictions.

As discussed above, the longstanding First Amendment rule is that all content-based restrictions on speech are subject to strict scrutiny (and thus near-automatic invalidation), save a few narrow exceptions. This highly speech-protective rule has increasingly proved to be a poor fit for the modern First Amendment, given the broad expansion of the First Amendment's coverage to a wide variety of speech beyond core ideological speech.[211] The Court has therefore developed an increasingly intricate set of rules to cope with this growing disconnect—rules that have often been poorly theorized, murky, and inconsistent. For example, the Court has instituted hollow doctrinal distinctions like the secondary effects doctrine;[212] it has occasionally applied the nebulous "exacting scrutiny" standard of review, the meaning of which is opaque and inconsistent;[213] and it has applied established standards of review with varying stringency in different cases, for obscure reasons or no reason at all.[214] Such complexity has done little to meaningfully constrain the

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209. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court, 1991 Term – Foreword: Justices of Rules and Standards*, 106 HARV. L. REV. 22, 67 (1992) ("[S]tandards make visible and accountable the inevitable weighing process that rules obscure.").

210. *See* Han, *supra* note 33, at 371–79.

211. *See supra* notes 124–38 and accompanying text.

212. *See supra* notes 47–53 and accompanying text.

213. At times, the Court has appeared to use this phrase as a synonym for strict scrutiny. *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 197 (2014) (plurality opinion) ("Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest."). At other times, however, the term seems to denote a standard of review more stringent than intermediate scrutiny but less stringent than strict scrutiny. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mut. Emps., Council 31, 138 S. Ct. 2448, 2465 (2018); Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010) (citations omitted) (stating that "exacting scrutiny" requires "a 'substantial relation' between the [regulation] and a 'sufficiently important' governmental interest"). As I've previously observed, it's difficult to see how courts could meaningfully distinguish intermediate scrutiny from "exacting" (but not strict) scrutiny. David S. Han, *Categorizing Lies*, 89 U. COLO. L. REV. 613, 635 n.103 (2018).

214. *See* Han, *supra* note 33, at 402–04 (describing the Court's application of a clearly watered-down version of strict scrutiny in *Williams-Yulee v. Florida Bar* and *Burson v. Freeman*).

Court's decision-making, and it has worked more to confuse and obfuscate rather than illuminate the values and judgments underlying the Court's decisions.[215]

Greater analytical transparency might therefore be achieved by an incremental move away from the traditional approach—and the doctrines that have developed around it—towards more open-ended balancing approaches. In doctrinal terms, this might mean a far more expansive adoption of intermediate scrutiny. Under intermediate scrutiny, the outcome is not effectively preordained by the initial designation of the standard of review, which has been the source of so much messiness within traditional First Amendment doctrine. Rather, intermediate scrutiny "establishes a level playing field upon which conflicting state and private interests do battle."[216] It "forces courts to openly confront and grapple with foundational questions and assumptions regarding the value of the rights at stake and the government's regulatory interests, as it leaves courts with little doctrine to hide behind."[217]

Thus, for example, the Court might designate intermediate scrutiny, rather than strict scrutiny, as the broad default standard of review for First Amendment problems, subject to categorical exceptions where either strict scrutiny or a highly deferential standard of review might apply.[218] Under this approach, the open-ended intermediate scrutiny standard—which requires the Court to forthrightly balance individual speech interests and state regulatory interests without a thumb on the scale—would represent the core rule governing a wide range of First Amendment problems, akin to the reasonable person standard in negligence law. This approach would spur courts to anchor their analyses upon the value judgments and intuitions actually driving First Amendment doctrine, producing forthright, transparent debate.

Analytical transparency does not rest solely on the underlying doctrinal framework. It also rests on how deeply courts choose to conduct their analyses. Regardless of the doctrinal framework, courts may choose to analyze issues in a shallow manner, based on a surface application of formal doctrine rather than a deeper examination of the values and theories underlying the doctrine. Take, for example, the *NIFLA* Court's analysis of the licensed notice. In distinguishing the licensed notice from the mandated disclosure upheld in *Casey*, the Court merely highlighted a single factual difference between the two cases: in *Casey*, the mandated disclosure accompanied a discrete medical procedure (abortion), whereas in *NIFLA*, the licensed notice was "not tied to a [medical] procedure at all."[219] It gave little explanation as to why this distinction was so vital; it provided no grounding of its analysis to the underlying values surrounding the First Amendment or the government's regulatory prerogatives; and it provided no meaningful framework as to how courts are to distinguish protected speech from unprotected conduct.[220] This

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215. *See id.* at 414.

216. Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2808 (2005).

217. Han, *supra* note 33, at 400.

218. *See* Han, *supra* note 98 (proposing and discussing such an approach in detail).

219. NIFLA v. Becerra, 138 S. Ct. 2361, 2373–74 (2018).

220. *See id.* at 2373 (stating only that "the line between speech and conduct" is "difficult" to draw but "long familiar to the bar").

sort of shallow approach fails to advance any meaningful debate upon which some degree of doctrinal stability might be established.

By contrast, the Court's opinion in *Janus* delved into the fundamental values, judgments, and intuitions at the heart of the dispute. It anchored its analysis in a detailed discussion of the First Amendment values implicated by the imposition of agency fees, arguing why these values demand a reexamination of *Abood*.[221] The Court also delved into the underlying purpose and scope of the *Pickering* test in rejecting the dissent's application of that test to the case at hand; among other things, the Court articulated in detail why the speech in question constituted the sort of speech on matters of public concern that lies at the heart of First Amendment protection.[222] This direct articulation of the values and intuitions driving the Court's judgment allows for the sort of open and robust dialogue that lays bare the fundamental differences between both sides[223]—one that may spur an ongoing deliberative process within which, over time, consensus might start to develop.

Thus, in the absence of any realistic solution to the problem of doctrinal fluidity in compelled speech doctrine (and First Amendment doctrine in general), perhaps the next best thing would be for the Court to embrace more open and transparent approaches to difficult First Amendment problems, as a matter of both doctrinal design and analytical depth. Whether such a shift can realistically be expected is a separate question that is difficult to answer in the abstract. At the very least, however, a broad preference for such approaches to First Amendment problems is already represented amongst some members of the Court,[224] such that an incremental shift in this direction may be plausible as the Court's membership and judicial philosophies continue to evolve.

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221. *See* Janus v. Am. Fed'n of State, Cnty., & Mut. Emps., Council 31, 138 S. Ct. 2448, 2463–69 (2018)

222. *Id.* at 2472–78.

223. *See id.* at 2491–97 (Kagan, J., dissenting) (challenging the value judgments and assumptions underlying the majority's treatment of *Pickering*).

224. Justice Breyer has long advocated for pragmatic, open-ended, proportionality-based approaches to difficult First Amendment problems, premised on the general question of whether a regulation "works speech-related harm that is out of proportion to its justifications." United States v. Alvarez, 567 U.S. 709, 730–31 (2012) (rejecting a "strict categorical analysis" and endorsing a more open-ended, proportionality-based approach) (Breyer, J. concurring); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting). And in his analyses, he has consistently sought to articulate and wrestle with the conflicting values, judgments, and principles underlying First Amendment problems rather than simply rely on the rote application of preexisting rules. *See NIFLA*, 138 S. Ct. at 2361, 2381–83 (Breyer, J., dissenting); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 176–79 (2015) (Breyer, J., concurring in the judgment). Justice Kagan has evinced a similar penchant for open, pragmatic reasoning in the First Amendment context. For example, in *Reed v. Town of Gilbert*, she challenged the majority's rigid application of the rule against content-based speech restrictions in a case dealing with a municipality's sign ordinance. In doing so, she first elucidated the theoretical rationales underlying the rule, then argued that "[w]e can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function." *Reed*, 576 U.S. at 183 (Kagan, J., concurring in the judgment).

IV. CONCLUSION

The instability and doctrinal fluidity within compelled speech doctrine is merely a microcosm of the present state of First Amendment doctrine as a whole. The First Amendment of today is a far cry from the relatively narrow, ideological speech-focused First Amendment around which the cornerstone doctrines of First Amendment jurisprudence were originally constructed. Today's First Amendment is messy, bloated, and unwieldy, encompassing a morass of different doctrines governing a wide variety of disparate communicative and regulatory contexts. It has expanded to cover broad swaths of speech extending far beyond the traditional ideological speech context. It covers a wide range of regulatory contexts beyond direct speech restrictions, such as mandatory regulatory disclosures,[225] compelled subsidies of speech,[226] and regulations of expressive associations.[227] And it attempts to ground all of this complexity on an assortment of often conflicting theoretical rationales for protecting speech—an unstable foundation that does little to unify and guide the doctrine in any meaningful way.

This profusion of messiness and fluidity within First Amendment jurisprudence is ultimately a natural outgrowth of the expansive First Amendment that we have chosen to adopt. It is far easier to craft a coherent and stable doctrinal framework—one that is predictable, consistent, and effectively channels and constrains courts' decision-making—with respect to a narrower First Amendment, such as one concerned solely with direct government restrictions on ideological speech. And it is similarly easier to build a doctrinal framework around a robust, singular theory of speech protection—one that can provide meaningful guidance in doctrinal development—rather than the theoretically diverse First Amendment of today. The complexity, fluidity, and inconsistency in our First Amendment doctrine is simply the price that we pay for our vision of a powerful, eclectic, and far-reaching First Amendment. Thus, if we wish to adhere to this expansive vision of the First Amendment, we may need to temper any hopes for an elegant, fully unified, coherent, and stable doctrinal framework. And in the absence of this sort of robust framework, encouraging pragmatic and transparent doctrinal development through open deliberation and debate—which highlights rather than obscures the contested value judgments and intuitions actually driving the results—is perhaps the best that we can do.

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225. *See, e.g.*, *NIFLA*, 138 S. Ct. 2361.
226. *See, e.g.*, *Janus*, 138 S. Ct. 2448.
227. *See, e.g.*, Boy Scouts of America v. Dale, 530 U.S. 640 (2000).