Brooklyn Law Review

Volume 87
Issue 1 *SYMPOSIUM: THE ROBERTS COURT AND FREE SPEECH*

Article 6

12-30-2021

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"*The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.*"[1]

"*We deal here with the law of billboards.*"[2]

INTRODUCTION

Ten years ago, I wrote a short essay for another First Amendment symposium.[3] That essay considered three then-recently decided cases—*Citizens United v. FEC*,[4] *Holder v. Humanitarian Law Project*,[5] and *United States v. Stevens*[6]—that reflected the tension in the early Roberts Court between rigid doctrinal rules and more context-specific standards in First Amendment doctrine. This tension has been a longstanding one in First Amendment law, as in other areas of constitutional law and in law more generally.

That tension has not abated. Even though the Court, now in the middle of the chief justice's second decade of leadership, has firmly embraced rigid rules in the free speech context, that embrace has triggered a responsive echo questioning its coherence and advisability. In recent years, the Court has reaffirmed that free speech cases are governed by a tiered

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1 Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

2 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (White, J., plurality opinion) (stated immediately after quoting Justice Jackson's concurrence in *Kovacs*).

3 William D. Araiza, Citizens United*,* Stevens*, and* Humanitarian Law Project*: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821 (2011).

4 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

5 Holder v. Humanitarian L. Project, 561 U.S. 1 (2010).

6 United States v. Stevens, 559 U.S. 460 (2010).

scrutiny approach,[7] most notably, by insisting on a broad test for content discrimination[8] and, in turn, embracing strict scrutiny for nearly all laws denominated as content based.[9] While scholars and judges have long debated the merits of a rigid content-neutrality rule,[10] the issue merits renewed discussion in light of the Court's suggestion that its newly-broadened content-neutrality rule applies in full force to speech compulsions as well as speech restrictions.[11]

But the Court's embrace of categorical rules goes beyond the content-neutrality rule to include holdings that determine whether particular speech enjoys First Amendment protection at all. In addition to the now decade-old endorsement of a rigid historical test for identifying unprotected categories of speech (a development I discussed in my 2011 essay),[12] a more recent case involving government speech joins earlier cases concerning the speech of government employees in reflecting a similar impulse toward categorical rules governing the scope of the First

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[7] Indeed, in 2021, the Court solidified this approach by explicitly discussing and applying an approach that appears to be less stringent than strict scrutiny but nevertheless more stringent than First Amendment intermediate scrutiny. *See generally* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 [hereinafter Bhagwat, *The Test*] (identifying a variety of First Amendment tests as reflecting intermediate scrutiny). In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), the Court explained and applied what it called "exacting scrutiny" in a way suggesting that the standard occupied the space between intermediate and strict scrutiny. *See* discussion *infra* note 113.

[8] *See* Reed v. Town of Gilbert, 576 U.S. 155, 165–69 (2015) (holding that a law is content based if either it is justified on the basis of content or it facially classifies based on content, regardless of whether the law threatens to disfavor certain ideas).

[9] *See*, *e.g.*, Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) (applying strict scrutiny to a state judicial ethics canon restricting judges' and judicial candidates' solicitation of contributions). The qualifier "nearly" is necessary because the Court, at least for now, has continued to apply less-than-strict scrutiny to content-based laws that are subject to special First Amendment rules. *See*, *e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (observing that the law in question regulated commercial speech based on content but nevertheless concluding that it was unnecessary to apply strict scrutiny because the law failed review even under the Court's more deferential test for commercial speech regulation).

[10] *See, e.g.*, Hon. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1304–08 (1993) (expressing skepticism about a rigid content-neutrality rule); *Reed*, 576 U.S. at 167–68 (explaining why even innocently-motivated content discrimination justifies strict scrutiny); Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n, 518 U.S. 727, 774 (1996) (Souter, J., concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (examining the merits of rigid standards); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991) (same).

[11] See discussion of *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), in Section II.A.2.

[12] *See* United States v. Stevens, 559 U.S. 460, 470–72 (2010); Araiza, *supra* note 3, at 828–30 (discussing *Stevens*).

Amendment's protections.[13] Again, though, these moves have prompted responsive echoes urging a different approach.

This article issues a caution about these more rigid First Amendment doctrines. It argues that rigid applications of both the content-neutrality rule and the precursor categorizations that feed into that rule encourage results-driven analyses hidden beneath the ostensible inquiries the Court performs. The result is analysis that purports to be driven by those doctrinal imperatives but which in fact likely reflects more factual or contextual considerations. The fact that the Court's analyses hide those considerations, however, renders these approaches problematic by generating purportedly rigid, acontextual analyses that mask their true context sensitivity. In hiding those real driving forces, such approaches deflect whatever legitimate criticism might be directed at the considerations that actually influenced the Court.

It is relatively easy to level these attacks. Claims that the Court is using doctrine to hide its real agenda are nothing new. In the First Amendment context, the harder question for critics of these rigid approaches is what should take their place. A typical response, offered by my 2011 First Amendment essay[14] and by many other scholars, is to suggest reliance on more foundational standards grounding First Amendment law: what in another more generally-focused essay I have referred to as "the law beyond the rules"[15] and what another scholar has described as "the direct application of [a rule's] background principle or policy to a fact situation."[16] Offering a full-blown defense of any such alternative approach is beyond the scope of this article, although it does offer a possible solution.[17] Instead, this article, as a contribution to a symposium centered on two scholars' painstaking work in cataloguing the Roberts Court's free speech jurisprudence to date, seeks primarily to identify the continuing lack of resolution of the tension my 2011 essay identified. It also seeks to counter any free

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[13] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219–20 (2015) (categorizing speech on a state's specialty license plates as government speech rather than private speech); Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (categorizing speech made by a government employee as part of his job duties as falling outside the First Amendment's protection); *see also* Lane v. Franks, 573 U.S. 228, 238–42 (2015) (holding that the First Amendment protected a government employee's court testimony even though he learned the information about which he testified as part of his government job). *But see id.* at 247 (Thomas, J., concurring) (reserving the question of whether government employees whose job duties include testifying enjoy similar First Amendment protection for their testimony).

[14] *See* Araiza, *supra* note 3.

[15] William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L.A. L. REV. 889, 889 (2011).

[16] Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

[17] *See infra* Part III.

speech triumphalism that observers might be tempted to express about the Roberts Court. For those aspiring to a truly meaningful free speech right, the hard work remains to be done.

Part I of this article briefly surveys the landscape of the Roberts Court's free speech jurisprudence. Part II considers cases where the Court has manipulated or flirted with manipulating its doctrinal rules. It first considers cases from 2010 and 2015 where the Court upheld content-based speech restrictions despite ostensibly applying strict or some other form of heightened scrutiny. It then considers a 2018 case where the Court flirted with applying strict scrutiny to all content-based speech compulsions except for those it seemingly arbitrarily exempted. It concludes by considering another 2015 case where the Court used a multi-factor, context-specific standard but did so in the service of reaching a binary yes–no decision about whether the speech in question was governmental. That latter decision was outcome determinative, thus making its rigidity all the more ironic in light of how the Court reached its conclusion. Part III considers the lessons these cases should teach to those for whom these rigid rules leave much to be desired. It tentatively suggests that courts embrace more holistic balancing tests that explicitly weigh the particular values and risks that a case implicates. To be sure, such tests would raise their own legitimate concerns about outcome-based decision-making. But those tests' explicit recognition of those values and risks may make them superior to, or at least a valuable complement to, the more rigid rules the Roberts Court has embraced.

The epigrams at the start of this article reflect the context sensitivity that stands at its normative core. Justice White's pithy statement in *Metromedia, Inc. v. City of San Diego*—"We deal here with the law of billboards"—nicely encapsulates that sensitivity. The title of this article updates that statement to account for a more recent case—*Walker v. Texas Division, Sons of Confederate Veterans, Inc.*—where, as this article explains, the Court both points toward a context-specific analysis in deciding the government speech question at stake but does so in service of reaching a rigid yes–no answer to that question. Perhaps instead of a "government speech" doctrine, we should, as Justice White implied, develop judicial doctrine governing the law of license plates.[18] And many more doctrines like it.

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[18] *Cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500–01 (1981) (White, J., plurality opinion) ("This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression. . . . These cases support the cogency of Justice Jackson's remark in *Kovacs v. Cooper*, 336 U. S. 77, 97 (1949): Each method of communicating ideas is 'a law unto itself' and that law must

I. THE ROBERTS COURT AND FREE SPEECH

The Roberts Court is often described as strongly pro-free speech.[19] Several high-profile cases support that characterization. The Court has ruled in favor of offensive funeral picketers,[20] corporations wishing to speak on political issues,[21] non-union member employees in unionized public-sector workplaces who wish not to pay agency fees to unions,[22] so-called sidewalk counselors challenging state-mandated buffer zones around abortion clinics,[23] and anti-abortion "crisis pregnancy centers" that refused to post state notices advertising the availability of state-provided low-cost abortions.[24] In doing so, it has often used soaring free speech rhetoric.[25] That rhetoric is buttressed by the Court's methodologies—in particular, its insistence that most (and, it seems, an increasing portion of)[26] content-based speech regulations be subject to strict scrutiny, its broad definition of

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reflect the 'differing natures, values, abuses and dangers' of each method. We deal here with the law of billboards." (footnote omitted)).

[19] *See, e.g.*, Ronald J. Krotoszynski, Jr., *The First Amendment as a Procrustean Bed? On How and Why Bright Line First Amendment Tests Can Stifle the Scope and Vibrancy of Democratic Deliberation*, 2020 U. CHI. LEGAL F. 145, 148 ("[T]he standard narrative holds that the First Amendment's scope of application has never been broader."). Indeed, Chief Justice Roberts has described himself as the Court's "most aggressive defender of the First Amendment." Tony Mauro, *Roberts Declares Himself First Amendment's 'Most Aggressive Defender' at SCOTUS*, LAW.COM (Feb. 13, 2019, 1:56 PM), https://www.law.com/nationallawjournal/2019/02/13/roberts-declares-himself-first-amendments-most-aggressive-defender-at-scotus/?slreturn=20190303163203 [https://perma.cc/V96R-FW73]; *see also* Ronald K.L. Collins & David L. Hudson, Jr., *The Roberts Court—Its First Amendment Free Expression Jurisprudence: 2005-2021*, 87 BROOK. L. REV. 5, 21 (2021) (noting that when Chief Justice Roberts was in the majority, as he was in 95 percent of First Amendment cases, he assigned the opinion to himself approximately 29 percent of the time).

[20] *See* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011).

[21] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 468–72 (2010).

[22] *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).

[23] *See* McCullen v. Coakley, 573 U.S. 464, 496–97 (2014); *id.* at 511 (Alito, J., concurring in judgment).

[24] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2368, 2375–78 (2018).

[25] *See*, *e.g.*, *Snyder*, 562 U.S. at 460–61 ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *Citizens United*, 558 U.S. at 339 ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." (citation omitted)).

[26] *See NIFLA*, 138 S. Ct. at 2366, 2371–72 (suggesting that strict scrutiny is appropriate for content-based compulsions of speech, despite the fact that most speech compulsions are content based); Sorrell v. IMS Health Inc., 564 U.S. 552, 566–71 (2011) (suggesting that content-based commercial speech regulations should receive strict scrutiny).

the content discrimination that triggers that scrutiny,[27] and its explicit rejection of what it called "ad hoc balancing" in determining whether a category of speech falls outside the First Amendment's protection.[28]

The Court's rhetorical commitment to free speech, its adoption of doctrinal tests seemingly implementing that commitment, and its application of those tests in high-profile cases all suggest a Court that does indeed care about free speech. Perhaps proving the point, scholars and dissenting justices have criticized the Court for, in their view, "weaponizing" the First Amendment as a tool for business interests.[29] One does not critique "weaponization" of a constitutional provision that is moribund.

Nevertheless, other voices have questioned this characterization. For example, Dean Erwin Chemerinsky has insisted that the Roberts Court is "not a free speech Court at all."[30] Among others, Dean Chemerinsky cited cases involving persons in employment and custodial relationships with the government, speech that implicates national security concerns, and speech that the government can adopt as its own and thereby avoid First Amendment scrutiny entirely.[31] Those cases, in which the Court ruled against the free speech claim, led Dean Chemerinsky to charge that "when the government is functioning as an authoritarian institution, freedom of speech always loses."[32]

This article does not directly enter the debate about the extent to which the Roberts Court is, in fact, a free speech-friendly Court. At one level, taking a position on that question requires a commentator to stake out a value choice about his own favored conception of free speech—to oversimplify, a choice between a libertarian conception in which "free speech" consists of the

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[27] *See* Reed v. Town of Gilbert, 576 U.S. 155, 163–71 (2015) (defining content discrimination to include facial content distinctions and not just laws that are motivated by a desire to discriminate based on content).

[28] *See* United States v. Stevens, 559 U.S. 460, 470 (2010) (characterizing such balancing as "startling and dangerous"); United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) (same, citing *Stevens*); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011) (same, citing *Stevens*).

[29] *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (Kagan, J., dissenting); Kate Andrias, Janus*'s Two Faces*, 2018 SUP. CT. REV. 21, 21 ("*Janus* represents an unequivocal transition to what Justice Kagan termed a 'weaponized' view of the First Amendment among the Court's majority . . . .").

[30] Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 724 (2011); *see also* Transcript, *The Roberts Court and Free Speech Symposium*, 87 BROOK. L. REV. 289, 343 (2021) [hereinafter Transcript, *The Roberts Court Symposium*].

[31] *See* Chemerinsky, *supra* note 30, at 725; Transcript, *The Roberts Court Symposium*, *supra* note 30, at 343.

[32] Chemerinsky, *supra* note 30, at 725.

absence of government restrictions on one's ability to speak,[33] and a more facilitative conception in which "free speech" consists of a system in which government takes affirmative steps to create the conditions under which all citizens have a reasonable opportunity to make their voices heard[34] and, indeed, an opportunity to hear a variety of voices.[35]

But even assuming the correctness of the currently ascendant libertarian conception of free speech, assessing the Roberts Court's true adherence to free speech values raises thorny methodological issues. Straightforward metrics for deciding such questions are helpful, but ultimately inconclusive. Perhaps the most obvious metric—simple case counts—does not provide a reliable answer to this question, given different cases' impacts on both speakers and speech rights. For example, *Citizens United* was just one case: how can one measure its impact on corporations' speech rights without an intensive, empirical, and in some ways counterfactual examination of its impact on the volume of corporate political speech?[36] Other cases, such as *Reed v. Town of Gilbert*, seemingly impact just a few speakers affected by the Court's invalidation of one town's speech restrictive ordinance; nevertheless, the impact of *Reed*'s broader definition of content discrimination has resonated across many different contexts.[37]

Relaxing the assumption in favor of such a libertarian conception of free speech raises the further difficulty of calculating the extent to which the Roberts Court's free speech jurisprudence *impairs* some persons' speech rights. Campaign finance cases illustrate this potential particularly strikingly. In

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[33] *See, e.g.*, Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 83 (2016) (citing the "the libertarian and anticensorship themes which have become a hallmark of Roberts Court First Amendment jurisprudence").

[34] *See, e.g.*, CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 109 (2003) (discussing the obligation of government to "promot[e] a well-functioning system of free speech"); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2139–40 (2018) ("[T]he answer to the ills that beset contemporary free speech law is not less constitutional protection for speech but a different kind of constitutional protection: one that reduces, rather than reinforces, the inequalities in expressive opportunity that are a consequence of the highly, and increasingly, unequal distribution of economic and political power in the United States.").

[35] *See, e.g.*, Red Lion Broad. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 390, 396 (1969) (upholding an FCC rule requiring broadcasters to give equal time to opposing viewpoints when covering public issues in order to ensure that the listening public is exposed to a wide range of viewpoints).

[36] For one attempt at such an analysis, see Richard Hasen, *The Decade of* Citizens United, SLATE (Dec. 19, 2019), https://slate.com/news-and-politics/2019/12/citizens-united-devastating-impact-american-politics.html (last visited Dec. 30, 2021).

[37] *See, e.g.*, Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1982 (2016) (discussing *Reed*'s possible impact across a variety of contexts, including commercial speech, restrictions on panhandling, and sign ordinances).

Citizens United itself, the Court's vindication of corporate speech rights arguably diminishes the speech of citizens whose speech is now (potentially) drowned out in the tsunami of corporate political speech the case (might have) unleashed.[38] Even more directly, in *Davis v. FEC*, the Court struck down a law that allowed candidates to collect and spend *more* money for campaign speech if their opponents self-financed over a particular threshold.[39] Thus, in vindicating the self-financed candidate's right not to be (relatively) burdened by his own speech activities, the Court directly squelched the speech of other candidates and their supporters. Yet the case goes in the books as a win for the free speech plaintiff. For these reasons, counting cases, while certainly useful in the construction of a database for study like the one Ronald Collins and David Hudson constructed for this symposium,[40] does not fully and satisfactorily answer the question of whether the Court is fundamentally free speech friendly.

Another approach to assessing the Roberts Court's free speech record may take the form of considering the messages the Court sends via its rhetoric and accompanying doctrinal tests. While the First Amendment has long been a favored location for lofty judicial rhetoric,[41] as noted earlier,[42] the Roberts Court has, at the very least, indulged in its share of that rhetoric—and maybe more than its share. While Justice Kennedy was perhaps particularly susceptible to rhetorical flights when writing First Amendment opinions,[43] Chief Justice Roberts has been no slouch

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[38] *See, e.g.*, Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE J.L. & POL'Y 217, 222–24 (2016) (discussing this possibility); *see also* GREGORY MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT 235–53 (2017) (arguing that the Roberts Court has favored corporate and government speakers at the expense of relatively powerless ones).

[39] Davis v. Fed. Election Comm'n, 554 U.S. 724, 736, 740–44 (2008).

[40] *See generally* Collins & Hudson, *supra* note 19 (accumulating the free speech decisions of the Roberts Court).

[41] *See, e.g.*, ARTHUR D. HELLMAN ET AL., FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION vii (4th ed., Carolina Acad. Press 2018) ("No other area of law [beyond the First Amendment] has so often inspired the Justices of the Supreme Court to write opinions marked by eloquence and passion.").

[42] *See supra* note 25 and accompanying text.

[43] *See, e.g.*, Nat'l Inst. Of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) ("The California Legislature included in its official history [of the law *NIFLA* struck down] the congratulatory statement that the Act was part of California's legacy of 'forward thinking.' But it is not forward thinking to force individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.' It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a

when it comes to wrapping himself in the First Amendment's flag.[44] Still, rhetorical flourishes are even harder than bare case outcomes to assess for their impact on free speech rights. Even more importantly, such flourishes may emphasize a particular understanding of free speech that may be very different from one a commentator or observer finds attractive.[45]

Perhaps, then, one should refer instead to the doctrinal tests that accompany those case results and that rhetoric. At the very least, the limited number of tests governing free speech cases provides a more manageable data set by which to judge the Roberts Court's record. On this score, an initial investigation again suggests the truth of the assertion that the Roberts Court is indeed speech protective (but, to repeat, only if one adopts a particular vision of free speech).[46] First, the Court has reaffirmed the centrality of the content-neutrality rule requiring strict judicial scrutiny for laws that discriminate based on content.[47] This reaffirmation was not a given: Justices Kagan and Breyer often argue, as did Justice Stevens, that the content-neutrality rule is ultimately merely a useful heuristic—what Breyer has called a "rule of thumb"[48]—that should not take on outsized importance in First Amendment cases.[49] But the Roberts Court has reaffirmed that rule, even in the face of these calls for a more holistic approach to free speech that ultimately seeks to determine whether the government is trying to suppress the expression of ideas.[50]

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message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties." (second and third alterations in original) (citations omitted)).

[44] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

[45] *See supra* text accompanying notes 33–35.

[46] *See supra* text accompanying notes 33–35.

[47] *See, e.g.*, Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346–47 (2020) (Kavanaugh, J., joined by Roberts, C.J., Alito & Thomas, J.J., plurality opinion) (concluding that a restriction on robocalls, when combined with an exception for calls seeking to collect on debts owed to the federal government, was content based and thus required strict scrutiny); *id.* at 2363–64 (Gorsuch, J., concurring in judgment in part and dissenting in part) (agreeing that the law was content based and failed strict scrutiny).

[48] *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 176 (2015) (Breyer, J., concurring in judgment).

[49] *Id.* at 181–83 (Kagan, J., concurring in judgment) (arguing that content-based rules should trigger strict scrutiny only when they implicate underlying concerns about government attempts to interfere with the free exchange of ideas); *see also* Stevens, *supra* note 10, at 1304–08 (Justice Stevens expressing skepticism about a rigid content-neutrality rule).

[50] Of course, just because a doctrinal rule favors free speech does not necessarily make it desirable. Many scholars, and several justices, have decried the so-called *Lochner*ization of the First Amendment, in which the Court's embrace of a strongly pro-free speech approach comes at the expense of the government's ability to regulate everyday social

Indeed, the Roberts Court has not only reaffirmed the content-neutrality rule, but has moved to widen its domain.[51] In 2015, the Court adopted a broader definition of the content discrimination that triggers strict scrutiny, despite protests that the Court's expanded rule did little to further its underlying concern with preventing government from suppressing the expression of disfavored ideas.[52] In 2018, it walked up to the very precipice of applying that rule in compelled speech cases, in the face of Justice Breyer's objection that doing so would doom most speech compulsions, since most of them compel particular content.[53] Just as strikingly, the Court in 2011 suggested, without actually deciding, that restrictions on commercial speech normally subject to the presumably more deferential *Central Hudson* test should receive strict scrutiny when they classify based on content.[54] This suggestion again elicited the objection that applying the content-neutrality rule to commercial speech restrictions essentially swallowed the relevant overall commercial speech test.[55] The dissenters in that 2011 case raised this objection based on their observation that, as with speech compulsions, most commercial speech restrictions identify the particular speech—that is, the particular advertising—to which the restrictions apply.[56]

But the Roberts Court has done more than reaffirm and extend the domain of previously existing rules like the content-neutrality rule. It has also made new doctrine, in a speech-

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and economic life. *See, e.g.*, Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 177–79; Sorrell v. IMS Health Inc., 564 U.S. 552, 590–92 (2011) (Breyer, J., dissenting).

[51] *See* William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 BYU L. REV. 875, 876–88 (2020).

[52] *See Reed*, 576 U.S. at 163–64 (concluding that a law was content based not only if it was justified based on the content of the regulated speech but also if the law facially classified on the basis of that content); *id.* at 181–83 (Kagan, J., concurring in judgment) (expressing disagreement with that broader definition).

[53] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (identifying the speech compulsion at issue as content based); *id.* at 2371–75 (rejecting the lower court's conclusion that the speech's status as professional speech justified according the law something less than strict scrutiny); *id.* at 2375 (holding that it was unnecessary to decide whether professional speech in fact warranted an exception from "ordinary First Amendment principles" because the law failed intermediate scrutiny). *But see id.* at 2380 (Breyer, J., dissenting) ("Virtually every disclosure law could be considered content based, for virtually every disclosure law requires individuals to speak a particular message." (internal quotation marks omitted)); *id.* at 2381 (citing an example of a city ordinance requiring landlords to disclose the procedures for garbage disposal to tenants).

[54] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 571–72 (2011) (cautioning that content-based laws are presumptively unconstitutional, concluding that the law in question was content based, but declining to apply strict scrutiny because the ordinary commercial speech test was sufficient to invalidate the law). For a description of the test normally applicable to commercial speech regulations, see *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980); and *IMS Health*, 564 U.S. at 572.

[55] *See IMS Health*, 564 U.S. at 587–88 (Breyer, J., dissenting).

[56] *See id.* at 589–90.

protective direction. Most notably, the Court has firmly established that the canonical list of unprotected speech categories laid out in *Chaplinsky v. New Hampshire*[57] reflect determinations about their historical lack of First Amendment protection, rather than an explicit judicial weighing of the value of a given category of speech against the social harms it generates. In three cases decided in three consecutive terms, the Court firmly enshrined this historical methodology.[58]

It is fair to consider that move a speech-protective one. A more ad hoc judicial balancing process always threatens to weigh unpopular and unpleasant speech—for example, lies about military honors,[59] violent video games,[60] and animal cruelty depictions,[61] to recount the subjects of those three cases—against both undeniable societal interests tied to speech suppression and the political clamor for regulation that likely impelled enactment of the law in question. In other words, ad hoc balancing presents an attractive vehicle for finding speech unprotected.[62] A historical approach, perhaps, could resist contemporary clamors for speech restrictions, even if it may not reflect an accurate accounting of the genesis of the *Chaplinsky* categories.[63]

To be sure, other Roberts Court doctrinal innovations, such as its development of rules regarding government speech and the speech rights of government employees, cut in the other direction.[64] Nevertheless, at first glance, the Court's doctrinal choices seem to paint a picture of a Court that is fundamentally speech protective (again, at least if one adopts a particular vision

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[57] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (footnote omitted)).

[58] *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791–92 (2011); United States v. Stevens, 559 U.S. 460, 470 (2010).

[59] *See generally Alvarez*, 567 U.S. 709 (holding that a federal law prohibiting lying about receiving military decorations or medals was unconstitutional).

[60] *See generally Ent. Merchs.*, 564 U.S. 786 (invalidating a state law that barred the sale or rental of violent video games to minors).

[61] *See generally Stevens*, 559 U.S. 460 (striking down a federal statute that prohibited the commercial creation, sale, or possession of animal cruelty depictions).

[62] *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 485 (1985). *Cf.* Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n, 518 U.S. 727, 774 (1996) (Souter, J., concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.").

[63] *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2177 (2015) (casting doubt on the historical foundations of the *Chaplinsky* categories).

[64] *See* Chemerinsky, *supra* note 30, at 725–27 (discussing government employees' speech); *id.* at 730–32 (discussing the government speech doctrine).

of free speech).[65] But the question requires more analysis. If those doctrines allow for results-based manipulation, then their speech-protective promise also allows the Court to hide its real analysis in free speech cases. That latter potential is particularly concerning if those doctrines enable the Court to uphold popular but problematic speech restrictions as simple applications of generally speech-protective rules. In other words, speech-protective rules might allow at least some speech restrictions to be upheld without the sort of explicit balancing that attends more holistic tests. In turn, the lack of such transparency makes possible results-oriented decisions that hide their true motivations. This article considers that troubling possibility.

II. THE ROBERTS COURT'S DOCTRINAL MANIPULATIONS

On occasion, the Roberts Court has manipulated free speech doctrine in ways that obscure what appear to be the likely rationales underlying its decisions. The first subsection of this part considers two examples of the Court upholding content-based speech restrictions in ways that suggest deviations from its traditional rule subjecting such restrictions to strict scrutiny.[66] The second subsection considers the Court's flirtation, in a 2018 case, with a rule that would subject most content-based speech compulsions to strict scrutiny.[67] While that case added disclaimers and limitations to any such rule it might announce in a future case, the rhetoric it employed—and the rhetoric it chose not to employ—suggests that it may be laying the groundwork for creating a new compelled-speech doctrine that leaves room for similar manipulations. Finally, the third subsection considers a 2015 case that found the speech in question to be government speech.[68] While that case used a holistic, multifactor analysis to decide that the speech was governmental rather than private, its very acceptance of a rigid binary between government and private speech again leaves open room for outcome-based manipulation.

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[65] *See supra* text accompanying note 46.

[66] See *infra* Section II.A.1 for discussion of *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), and *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015).

[67] See *infra* Section II.A.2 for discussion of *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

[68] See *infra* Section II.B for discussion of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015).

A. The Manipulation of Strict Scrutiny

Scholars of equal protection law often accuse the Court of deviating from its ostensible three-tiered scrutiny structure.[69] The argument is a familiar one. Rational basis review can take the form of a toothless, tautological review in which the effect of the challenged law furnishes its own justification,[70] or the well-known (and sometimes judicially recognized)[71] "rational basis with bite."[72] Intermediate scrutiny has been applied in a way that locates it in a truly intermediate position in the three-tiered structure,[73] but also in a way that appears to require a near-perfect fit between the law and the asserted justification—something normally associated with strict scrutiny.[74] For its part, strict scrutiny can impose fit and justification requirements that render it exceptionally difficult to satisfy,[75] but has also been applied in ways that accord significant deference to the government's judgments.[76]

Similar manipulations mark the Roberts Court's use of strict scrutiny in its free speech jurisprudence.

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[69] *See, e.g.*, Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 529 (2014) (noting the difficulty of classifying the standard of review the Court has used in gay rights cases); *see also* United States v. Virginia, 518 U.S. 515, 574 (1996) (Scalia, J., dissenting) (arguing that the majority in an important sex equality equal protection clause case had muddied the applicable standard by which courts judge sex classifications).

[70] *See, e.g.*, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 186–87 (1980) (Brennan, J., dissenting) (accusing the majority of applying rational basis review in this way). *Fritz* involved amendments to a federal railroad worker retirement scheme that disadvantaged particular groups of workers. *Id.* at 168–74 (majority opinion). On at least one reading, the Court found a legitimate interest to which the law was rationally related in the actual classifications the law drew. *Id.* at 176–78. As Justice Brennan noted in his dissent, this approach created a tautology, in which the very classifications the law drew provided a potential justification underlying those classifications—a situation in which, as Justice Brennan noted, the law would always not just be rationally related to that hypothesized justification but would always fit perfectly. *Id.* at 186–87 (Brennan, J., dissenting).

[71] *See* Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring in judgment) ("When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

[72] *See, e.g.*, Raphael Holoszyc-Pimentel, Note, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015) (analyzing the Court's "rational-basis-with-bite cases" through the 2014 term).

[73] *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 509–10 (1976) (applying relatively deferential review to a legitimacy classification); Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing *Lucas* as applying intermediate scrutiny).

[74] *See, e.g.*, *Virginia*, 518 U.S. at 542–46 (1996); *id.* at 573 (Scalia, J., dissenting) (arguing that the majority's analysis meant that the presence of one woman willing and able to undertake education at Virginia Military Institute meant that the school's exclusion of women applicants failed intermediate scrutiny).

[75] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507–08 (1989) (applying stringent requirements on a city seeking to adopt a race-based contracting set-aside).

[76] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (deferring to a public university's judgment that racial diversity was necessary to its educational mission).

1. Applying the Content-Neutrality Rule

Consider first the content-neutrality rule. The familiar structure of scrutiny levels for particular types of speech restrictions—relatively deferential scrutiny for content-neutral laws, strict scrutiny for content-based laws, and nearly fatal scrutiny for viewpoint-based laws[77]—features a similar variability as its equal protection cousin.[78] A preliminary problem with this structure is the Court's unwillingness to be held to it in difficult cases. For example, in *Holder v. Humanitarian Law Project*, the Court, speaking through Chief Justice Roberts, explicitly concluded that what it called "intermediate scrutiny" of the challenged speech restriction was insufficiently stringent in light of the law's content discrimination.[79] Nevertheless, even though it stated that "more demanding" scrutiny was required,[80] the Court refrained from calling that scrutiny "strict" (not even mentioning that term)[81] despite observing that the law was content based. One is reminded of Justice Scalia's complaint in *United States v. Virginia*, the seminal 1996 sex equality equal protection case, that the majority's statement and application of what it called intermediate scrutiny amounted to a game of "Supreme Court peek-a-boo."[82]

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[77] *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) ("[A]ny restriction based on the content of the speech must satisfy strict scrutiny . . . and restrictions based on viewpoint are prohibited."); Bhagwat, *The Test*, *supra* note 7, at 784 (discussing the evolution of tiers of scrutiny in free speech law); Maura Douglas, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CON. L. 727, 729 (2018) (noting the particularly stringent "strict scrutiny" applied to laws that discriminate based on viewpoint).

[78] See generally Bhagwat, *The Test*, *supra* note 7, for one scholar's identification of a variety of different First Amendment doctrinal tests that have been lumped under the category of "intermediate scrutiny." The tests include one—the test for so-called secondary effects—that the Supreme Court has phrased in deferential terms, *see* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), and other tests, such as the one for commercial speech, that the Court has applied significantly more stringently, *see, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (applying the *Central Hudson* test to state restriction on tobacco ads and sales). This article does not consider the variability in those tests, although it does refer to the lumping of those tests as the same sort of problem this article explores in other contexts. *See infra* Part III and notes 228–229 and accompanying text.

[79] *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 26–27 (2010).

[80] *See id.* at 28 (quoting approvingly an earlier case stating that "we must [apply] a more demanding standard" (alteration in original) (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989))).

[81] *But see Humanitarian L.*, 561 U.S. at 45 (Breyer, J., dissenting) (using that term).

[82] United States v. Virginia, 518 U.S. 515, 574 (1996) (Scalia, J., dissenting).

The likely reason for the *Humanitarian Law* Court's failure to call what it was doing "strict scrutiny"[83] emerges when one reads the rest of the majority opinion and finds in it a heavy dose of deference to the political branches.[84] To be sure, such deference may have been appropriate. *Humanitarian Law* concerned the constitutionality of a statute that prohibited persons from providing "material support" to designated terrorist organizations.[85] The need for that prohibition turned heavily on Congress's and the president's knowledge of foreign affairs and the national security risks such support posed.[86] The Court clearly understood the need to defer to the political branches' understanding of such national security and foreign policy questions.[87] One can thus understand Chief Justice Roberts's desire to refrain from calling what he was doing "strict scrutiny," given that term's requirement that the government convincingly demonstrate that the law served the highest public needs.[88]

Nevertheless, the chief justice's explanation of the standard he was applying creates significant confusion. By explicitly rejecting as inadequate what he called "intermediate scrutiny,"[89] he was left with the choice of either applying strict scrutiny or embracing a standard somewhere between intermediate and strict scrutiny. As explained above,[90] he never explicitly made that choice. To be sure, he cited an earlier case, *Texas v. Johnson*,[91] for the proposition that, when a law is not properly analyzed under the

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[83] *But see infra* note 95 and accompanying text (citing post-*Humanitarian Law* opinions that did refer to that case as applying strict scrutiny).

[84] *See Humanitarian L.*, 561 U.S. at 33–36. To be sure, the Court's discussion of its deference to presidential and congressional national security judgments came after the Court reached a similar conclusion on its own. *See id.* at 29–33. However, much of that earlier analysis relied on an affidavit submitted by the government. *See id.*; *see also* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 855 (2011) (Breyer, J., dissenting) (describing the majority in *Humanitarian Law* as "deferring, while applying strict scrutiny, to the Government's national security judgments").

[85] *Humanitarian L.*, 561 U.S. at 8 (quoting the statute).

[86] *See id.* at 33–36 (according deference to the political branches' estimations of the foreign affairs issues implicated by the regulated conduct).

[87] *See supra* note 84.

[88] *See, e.g.*, *Ent. Merchs.*, 564 U.S. at 799 ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless [the state] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."); *id.* at 804 (describing the "compelling government interest" requirement as demanding a "high degree of necessity"); *id.* at 799–804 (rejecting the state's evidence in support of the challenged content-based regulation of violent video games and concluding, based on that rejection, that the law was both overinclusive and underinclusive and thus failed the "narrowly drawn" requirement).

[89] *Humanitarian L.*, 561 U.S. at 27–28.

[90] *See supra* notes 79–81 and accompanying text.

[91] Texas v. Johnson, 491 U.S. 397 (1989).

intermediate scrutiny of *United States v. O'Brien*,[92] something "more demanding" is required.[93] But even that statement cloaks the actual scrutiny the Court exercised in *Humanitarian Law*: in *Johnson*, the Court concluded that the "more demanding" review equated to "the most exacting scrutiny."[94] Yet Chief Justice Roberts never cited that latter phrase or *Johnson*'s use of it.[95] Adding to the confusion, after *Humanitarian Law*, majority opinions (including one he wrote) and individual justices have referred to the scrutiny applied in that case as "strict."[96] The elusive and constantly-shifting standards present here remind one of the shell game Times Square barkers used to play to separate tourists from their money.[97]

Five years after *Humanitarian Law*, the Court, in a much more straightforward but still troubling exhibition of doctrinal inconsistency, upheld a speech restriction after explicitly applying strict scrutiny. In *Williams-Yulee v. Florida Bar*, the Court upheld a Florida judicial ethics canon prohibiting judges and candidates for

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[92] United States v. O'Brien, 391 U.S. 367 (1968).

[93] *Humanitarian L.*, 561 U.S. at 28 (quoting *Johnson*, 491 U.S. at 403).

[94] *See Johnson*, 491 U.S. at 412.

[95] *See Humanitarian L.*, 561 U.S. at 28 (citing the page in *Johnson* where the Court merely stated that finding that *O'Brien* did not apply thereby required "more demanding" review).

[96] McCullen v. Coakley, 573 U.S. 464, 478 (2014) (Roberts, C.J., majority opinion); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2374 (2018) (Thomas, J., majority opinion); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 847–48 (Breyer, J., dissenting); *see also* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (Roberts, C.J., majority opinion) (describing *Humanitarian Law* as a case that required the government to show that the challenged law was "narrowly tailored to serve a compelling government interest"—the elements of strict scrutiny).

[97] To be sure, the "most exacting scrutiny" standard from *Johnson* probably does equate to strict scrutiny, since what seems to be its more deferential neighbor, "exacting scrutiny," appears to occupy the space between intermediate and strict scrutiny. See *infra* note 111 for discussion of how the Court discussed "exacting scrutiny" in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). Thus, if "exacting scrutiny" incorporates intermediate scrutiny's "substantial relation" test but also requires narrow tailoring, then presumably "*the most* exacting scrutiny" standard requires something more, which one would think can only be full-on strict scrutiny (unless that latter standard creates yet another way station between intermediate and strict scrutiny). This conclusion is buttressed by the fact that *Johnson* announced "the most exacting" scrutiny standard immediately after observing that the challenged speech restriction was content based. *See Johnson*, 491 U.S. at 412. As a matter of transitive logic, if *Humanitarian Law* really did adopt the *Johnson* standard and *Johnson*'s "most exacting scrutiny" standard really does equal strict scrutiny, then *Humanitarian Law* really did apply strict scrutiny. Nevertheless, the chief justice never uttered the term "strict scrutiny" in *Humanitarian Law*, even though he was perfectly willing to do so in his opinion in *McCullen*, 573 U.S. at 478, and to state the components of strict scrutiny in *Williams-Yulee*, 575 U.S. at 444, in both cases citing *Humanitarian Law* as precedent. When pondering the reason for this obliqueness, one inevitably suspects that it has to do with the fact that *Humanitarian Law* reflected significant deference to the government in contravention of the basic principles of strict scrutiny. *See Humanitarian L.*, 561 U.S. at 48, 55, 62 (Breyer, J., dissenting) (faulting the government for lack of, respectively, "detail," "specific facts," and "specific evidence" supporting its justification for the challenged speech restriction).

judicial office from personally requesting campaign donations.[98] As a content-based law limiting what judges and judicial candidates could say, eight justices agreed that the law merited strict scrutiny.[99] Four of those justices found that scrutiny to be satisfied.[100] After concluding that Florida had a compelling interest in ensuring the perceived integrity of the judicial system, Chief Justice Roberts, now speaking for a five-justice majority, rejected arguments that the canon was underinclusive because it allowed speech by the campaign and also by a candidate if her speech did not request campaign contributions.[101] The Court acknowledged that such underinclusiveness[102] could suggest concerns about the government's true motive or the law's effectiveness in accomplishing the stated end.[103] However, it concluded that the canon "aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary."[104] It also rejected overinclusiveness arguments, concluding that the canon allowed many ways for judges and judicial candidates to seek contributions and imposed no limits at all on speech unrelated to campaign finance.[105]

Dissenting, Justice Scalia had none of this. He accused the majority of employing a definition of judicial integrity that shifted as it confronted different arguments about the conduct judicial candidates might engage in.[106] Demonstrating the proof burdens strict scrutiny sometimes imposes on the government, he also questioned the empirical basis for the Court's conclusion that

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[98] *Williams-Yulee*, 575 U.S. at 444.

[99] *See id.* at 444 (Roberts, C.J., joined by Breyer, Sotomayor, & Kagan, JJ., plurality opinion); *id.* at 462–63 (Scalia, J., joined by Thomas, J., dissenting); *id.* at 478 (Kennedy, J., dissenting); *id.* at 479 (Alito, J., dissenting).

[100] Justice Ginsburg concurred in the decision upholding the canon, but did not join the part of Chief Justice Roberts's opinion calling for strict scrutiny. Instead, she adhered to her previously expressed view that judicial campaign speech was legitimately subject to more intrusive government restrictions. *See id.* at 457–58 (Ginsburg, J., concurring in part and concurring in judgment).

[101] *See id.* at 448–52 (majority opinion). Beyond more general speech, the canon also allowed a candidate to write thank-you notes for contributions, which of course required the candidate to be aware of who had contributed to her campaign. *See id.* at 440.

[102] In the First Amendment context, underinclusiveness refers to a law's failure to regulate all the speech that causes the harm the government cites as the reason for the challenged law. *See, e.g.*, *id.* at 448–49 (discussing the reasons an underinclusive law may be problematic from a First Amendment perspective). By contrast, an overinclusive law is one that that regulates more speech than necessary to resolve the problem the government cites as the reason for the challenged law. A law can sometimes be deemed to be both underinclusive and overinclusive. *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 801–04 (2011) (finding both of these flaws in the same law); *see also infra* notes 107–108 and accompanying text (citing Justice Scalia's arguments that the ethics canon upheld in *Williams-Yulee* was both underinclusive and overinclusive).

[103] *Williams-Yulee*, 575 U.S. at 448–49.

[104] *Id.* at 449.

[105] *Id.* at 452–55.

[106] *See id.* at 465 (Scalia, J., dissenting).

limiting such personal solicitations would improve the public's confidence in the judiciary.[107] He further questioned the fit between the canon and the state's goals (however defined). In particular, he noted the breadth of its prohibition on solicitations (including, for example, even the candidate's parents and, at the other extreme, publicly addressed fundraising appeals)[108] and, at the same time, its underinclusiveness (by prohibiting appeals for campaign contributions but allowing appeals for personal gifts or loans).[109]

At the end of his dissent, Justice Scalia identified what he thought was the underlying motivation for what he perceived as the Court's inappropriately deferential scrutiny. Recalling the Court's then-recent set of cases protecting troubling speech even in the face of legitimately-grounded government interests—cases protecting "depictions of animal torture, sale of violent video games to children, and lies about having won military medals"[110]—he accused the Court of making an exception to free speech doctrine for judicial campaign speech simply because of its hostility to the practice of electing judges.[111]

Humanitarian Law and *Williams-Yulee* are only two cases. In other cases, the Roberts Court has applied a version of strict scrutiny that truly demands a compelling interest and a narrow fit, striking down laws because of their failure to satisfy those requirements.[112] Still, the relative deference of both the "more demanding than intermediate scrutiny" applied in *Humanitarian Law* and the explicitly identified strict scrutiny applied in *Williams-Yulee* demands an explanation. After all, the entire point of any scrutiny standard is to accord equivalent treatment to factually dissimilar cases that nevertheless trigger the same level of judicial review.[113]

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[107] *See id.* at 466–67; *see also Ent. Merchs.*, 564 U.S. at 799–804 (imposing similarly rigorous proof requirements on the government as part of an application of strict scrutiny).

[108] *See Williams-Yulee*, 575 U.S. at 467–68 (Scalia, J., dissenting).

[109] *See id.* at 469–73.

[110] *Id.* at 473.

[111] *See id.*

[112] *See, e.g.*, *Ent. Merchs.*, 564 U.S. 786, 799–805 (2011) (state law banning the sale or rental of violent video games to minors); Ariz. Free Enter. Club's Freedom PAC v. Bennett, 564 U.S. 721, 727–28, 748–55 (2011) (state law granting additional monies to publicly funded candidates who were outspent by privately financed candidates).

[113] In 2021, the Court appeared to formally establish a level of scrutiny somewhere between intermediate and strict, applicable to restrictions on associational rights. In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), the Court struck down a California law requiring charities to disclose to the government their largest contributors. A five-justice majority, speaking yet again through Chief Justice Roberts, applied what it called "exacting scrutiny," which it described as requiring "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 2384 (quoting Doe v. Reed, 561 U.S. 186, 196 (2010)). A majority explicitly rejected the plaintiffs' argument that such scrutiny required the state to promote its goals by means least restrictive of the First Amendment

A candid answer to the question about *Humanitarian Law*'s and *Williams-Yulee*'s deviation from normal strict scrutiny review would likely cite those cases' factual contexts: respectively, national security and the special demands of judicial integrity.[114] It is a fair answer. After all, the Court has often insisted that "context matters" when evaluating the constitutionality of racial classifications under equal protection's strict scrutiny standard.[115] There is no reason context should not similarly matter in First Amendment scrutiny. Nevertheless, trust in scrutiny standards requires that the idiosyncrasies of particular factual contexts influence outcomes only via the sincere application of those standards. In other words, if a content-based law is held to satisfy strict scrutiny, it should be because, even in light of its context, the law truly was narrowly tailored to satisfy a compelling government interest and not because the Court thought the law

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interests at stake, but it did require that the law be narrowly tailored, thus suggesting the place of "exacting scrutiny" as a level of scrutiny between intermediate and strict. *See id.* at 2383.

Americans for Prosperity raises as many questions as it answers. First, while the Court rejected a least-restrictive-means requirement, the majority later wrote that the state "must . . . demonstrate its need for . . . production [of the required information] in light of any less intrusive alternatives." *Id.* at 2386. This statement at least suggests some residual ambiguity in the Court's explanation of what "exacting" scrutiny requires and how it relates to strict scrutiny. Second, and relatedly, the Court left unaddressed the question of how "exacting scrutiny" relates to what in other cases it called "the most exacting scrutiny," a scrutiny level that has generally been understood to approach or be the equivalent of strict scrutiny. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) ("Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum*, [the challenged law] must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983))); United States v. Alvarez, 567 U.S. 709, 724 (2012) (plurality opinion) ("In assessing content-based restrictions on protected speech, the Court . . . has applied the 'most exacting scrutiny.'" (quoting Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 642 (1994))); *see also Alvarez*, 567 U.S. at 724 (plurality opinion) (referring, in the sentence immediately following the one quoted in the last citation, to mere "exacting scrutiny"). See also *supra* discussion in note 97 for a discussion of what "the most exacting scrutiny" entails.

Finally, despite *Americans for Prosperity*'s firm foundation in the First Amendment right of association, rather than right to free speech, the Court has previously applied "exacting scrutiny" in cases that appeared to rest on a combination of speech and associational rights claims. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2464–65 (2018). This fact raises questions about whether and to what degree the standard established in *Americans for Prosperity* will apply to pure free speech cases that have used similar verbiage. Together, these questions suggest that *Americans for Prosperity* does not greatly clarify free speech law.

[114] *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872, 889 (2009) (holding that due process required a judge to recuse himself when sitting on a case involving someone who contributed significant money to his campaign).

[115] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

should be upheld for some other reason.[116] On this score, the "context matters" explanation for cases such as *Humanitarian Law* and *Williams-Yulee* fails: not only were the results in those cases different than in normal applications of strict scrutiny (i.e., the challenged laws were upheld), but, more importantly, the style of the scrutiny also differed (i.e., it featured significantly more deference to the government).[117]

Thus, something truly different seemed to influence decisions such as *Humanitarian Law* and *Williams-Yulee*. The particular contexts of those cases appear to have triggered not only unusual results, given the rules they were presumably applying, but also applications of strict scrutiny that were themselves unusual in their deference and leniency. That latter conclusion calls into question any claim that the Roberts Court has consistently adhered to a strict scrutiny "rule," upholding

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[116] This distinction finds an echo in Lewis Kaplow's explanation of the difference between rules and standards. In 1992, Kaplow wrote:

> Arguments about and definitions of rules and standards commonly emphasize the distinction between whether the law is given content *ex ante* or *ex post*. For example, a rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator. (A rule might prohibit "driving in excess of 55 miles per hour on expressways.") A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator. (A standard might prohibit "driving at an excessive speed on expressways.").

Lewis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992) (footnotes omitted). Analogously, a rule requiring that a content-based speech restriction be narrowly tailored to serve a compelling government interest leaves, at least ostensibly, "only factual issues for the adjudicator"—namely, is the law in fact narrowly tailored to serve a compelling government interest? *Id.* at 560. By contrast, a decision by a court to defer to government's judgments about those issues reflects a standard-like specification of the underlying law (here, that deference to the government is allowed) as well as the determination of factual issues. To be sure, deference determinations are not exactly "specification[s] of what conduct is permissible." *Id.* But nor are they fact-specific applications of a preexisting rule. If anything, such determinations constitute part of the legal backdrop framing the adjudicator's resolution of the factual issues.

[117] Indeed, in *Williams-Yulee*, Chief Justice Roberts implicitly established the test for whether what he did for the majority in that case constituted application of a "rule" of content neutrality or whether he did something more standard-like. He wrote: "The Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee's First Amendment challenge. We have emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. But those cases do arise." Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) (quoting Burson v. Freeman, 504 U. S. 191, 211 (1992) (plurality opinion)). This statement suggests that the rule—that a content-based law requires the government to "demonstrate[ ] that a speech restriction is narrowly tailored to serve a compelling interest"—is fixed, with the only question being the factual one of the law's conformance to it. *Id.* This article suggests that the Court's application of that rule sometimes reflects a different understanding of the burden the government faces in defending content-based speech restrictions, with the result that it essentially constituted application of a standard rather than a rule.

some statutes simply because, once in a great while, a statute will actually be narrowly tailored to further a compelling government interest. Instead, the Court appears to be applying different levels of scrutiny while claiming to apply one level completely consistently and just happening to reach different results.[118]

2. Extending the Content-Neutrality Rule

One might wonder whether such deception would also overtake any attempt by the justices to extend the content-neutrality rule to compelled speech. Since its seminal decision in *West Virginia State Board of Education v. Barnette*, the Court has insisted that government compulsion of private speech is at least as constitutionally problematic as its restriction of speech.[119] Over the last generation, the Court has applied that principle not just to compelled speech, but to laws that compel private parties to subsidize the speech of other parties.[120] Even more recently, the Court has flirted with importing the content-neutrality rule into the realm of speech compulsions.

Barnette is generally understood to be the foundation of the Court's compelled speech jurisprudence.[121] In *Barnette*, the Court struck down a school authority's requirement, imposed very soon after the nation's entry into World War II, that students regularly salute the American flag and recite the Pledge of Allegiance.[122] Writing for the Court, Justice Jackson explained that the strong rule against restricting "the expression of opinion," firmly established by the time the case

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[118] By comparison, one might recall a dormant commerce clause case, *Maine v. Taylor*, 477 U.S. 131 (1986), where the Court seemed to have concluded that the state discrimination against interstate commerce was in fact the only tool it had to promote its legitimate government interest.

[119] *Barnette*, 319 U.S. at 633 ("It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.").

[120] *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) (striking down state statutory provision that compelled nonmembers of an employee union to subsidize the union's political activities), *overruled on other grounds by* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); United States v. United Foods, 533 U.S. 405, 411, 413 (2001) (invalidating federal program that compelled fresh mushroom handlers to subsidize mushroom advertisements).

[121] *See, e.g.*, Abner S. Greene, Barnette *and* Masterpiece Cakeshop*: Some Unanswered Questions*, 13 FIU L. REV. 667, 667 (2019) ("Barnette is rightly seen as the foundation of the Supreme Court's compelled speech doctrine.").

[122] *See Barnette*, 319 U.S. at 626 (stating this history). In striking down that authority's decision, the Court overruled its three-year old opinion in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), which had upheld such compelled pledges.

was decided, applied with perhaps even greater force to government attempts to compel speech.[123] Using language that has since become canonical, he wrote: "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."[124]

Three decades later, the Court applied *Barnette* in *Wooley v. Maynard*.[125] *Wooley* involved a challenge to the State of New Hampshire's requirement that owners of passenger automobiles display a state license plate that proclaimed the state's motto, "Live Free or Die."[126] Conceding that the compelled flag salute in *Barnette* "involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate," the Court nevertheless concluded that "the difference is essentially one of degree."[127] Quoting *Barnette*, the *Wooley* Court concluded that the compelled display of the state's preferred message on license plates "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[128]

In recent years, the Court has applied both compelled speech and compelled association principles to ratchet up its scrutiny of compelled subsidization of other persons' speech, strengthening a principle that dates back to at least a case decided at nearly the same moment as *Wooley*.[129] In 2018, it struck down a state law requiring non-union member public-sector employees in a closed union shop to contribute so-called "agency fees" to defray the union's collective bargaining expenditures. In that case, *Janus v. AFSCME, Council 31*,[130] the Court applied earlier precedents holding that such fees triggered

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[123] *See Barnette*, 319 U.S. at 633 ("It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.").

[124] *Id.* at 642.

[125] Wooley v. Maynard, 430 U.S. 705 (1977).

[126] *Id.* at 706–07.

[127] *Id.* at 715.

[128] *Id.* (quoting *Barnette*, 319 U.S. at 642).

[129] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225–26, 235–36 (1977) (upholding a state law requiring non-union members in a public sector union closed-shop workplace to subsidize the union's collective bargaining activities, but striking down nonmembers' compelled subsidizations of the union's political speech). *Abood* was decided on May 23, 1977, *see id.* at 209, while *Wooley* was decided on April 20, 1977, *see Wooley*, 430 U.S. at 705.

[130] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

"exacting" scrutiny, even though those fees were limited to defraying the union's collective bargaining activities, rather than its more explicitly political speech.[131] The Court in *Janus* expressly declined to apply the strict scrutiny that the plaintiff called for, concluding that the union fee scheme failed even the less stringent "exacting" scrutiny that had been established by earlier caselaw.[132] Despite opting for the lesser scrutiny standard, the *Janus* Court's review was markedly more skeptical than that applied in earlier cases, which largely accepted Congress's determination that the union closed shop was an essential part of harmonious industrial relations.[133]

In another 2018 case, the Court turned its attention to the proper standard for judging compelled speech itself. In that case, *NIFLA v. Becerra*,[134] the Court stepped right up to the line of declaring that content-based speech compulsions generally trigger strict scrutiny. In *NIFLA*, the Court struck down a California law that required so-called pregnancy crisis centers (run by persons opposed to abortion) to post information about the availability of low-cost abortions the state offered.[135] Reading that law as a government compulsion of such centers' speech, the Court began its First Amendment analysis by noting that it was "a content-based regulation of speech."[136] It then rejected the appellate court's refusal to apply strict scrutiny, which the lower court had justified based on its conclusion that the speech in question was professional speech that was thereby more amenable to regulation.[137] However, after seemingly setting the stage for an application of strict scrutiny, the Court declined to do so, since, in its view, the law failed even intermediate scrutiny.[138]

NIFLA's resemblance to *Janus* is clear. Indeed, *NIFLA* sent an even stronger message about the application of the content-neutrality rule in compelled speech or subsidy situations. *Janus* merely acknowledged the plaintiff's argument

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[131] *See id.* at 2460–61, 2465.

[132] *See id.* at 2465. See also *supra* note 113 for discussion of a 2021 case that potentially sheds more light on "exacting scrutiny."

[133] *See Abood*, 431 U.S. at 222 ("[T]he judgment clearly made in [*Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956)] and [International Association of Machinists v. Street, 367 U.S. 740 (1961)] is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.").

[134] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

[135] The Court also struck down a requirement that unlicensed facilities post a notice to that effect. *See id.* at 2376–78.

[136] *Id.* at 2371.

[137] *Id.* at 2371–75.

[138] The Court also explained its refusal to apply strict scrutiny on the ground that some thus-far unknown justification might exist for exempting professional speech from the standard content-neutrality rule. *See id.* at 2375.

for strict scrutiny before concluding it was unnecessary to reach that issue. By contrast, before it similarly declined to apply strict scrutiny, *NIFLA* laid out the building blocks for doing so when it described the law as content-based and critiqued the lower court's reasons for refusing to apply strict scrutiny.

Despite its last-minute retreat from the precipice, *NIFLA*'s classification of the California law as content-based and its critique of the lower court's refusal to apply strict scrutiny send an unmistakable message about the Court's underlying views toward most speech compulsions. As Justice Breyer observed in his *NIFLA* dissent, most speech compulsions are content based.[139] To be sure, not all of them are: for instance, when a 1970s-era California law required shopping mall owners to open their property to persons who wished to speak (for example, by soliciting petition signatures), the Court distinguished *Wooley* on the ground that the California law did not specify the content (much less the viewpoint) of the speech it compelled.[140] Nevertheless, as Justice Breyer noted in his *NIFLA* dissent, most run-of-the-mill disclosure laws—like a requirement that landlords inform their tenants of garbage disposal procedures—would count as content based under the Court's modern approach to identifying content discrimination.[141] In turn, under the Court's analysis in *NIFLA*, a content-based speech compulsion would normally trigger strict scrutiny.

Such a move would constitute a significant change in the law. Neither of the Court's two foundational compelled speech cases—*Barnette* and *Wooley*—rested on a rigid application of the content-neutrality rule. *Barnette*, of course, was decided decades before the formal announcement of the content-neutrality rule in *Police Department of the City of Chicago v. Mosley*,[142] but *Wooley*

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[139] *See id.* at 2380 (Breyer, J., dissenting) ("Virtually every disclosure law could be considered content based, for virtually every disclosure law requires individuals to speak a particular message." (internal quotation marks omitted)).

[140] *See* Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 79, 87 (1980) ("[N]o specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message."). In part on that ground, the Court distinguished *Wooley*. *See id.* at 85–87.

[141] *See NIFLA*, 138 S. Ct. at 2380–81 (Breyer, J., dissenting) (citing Reed v. Town of Gilbert, 576 U.S. 155, 175–78 (2015) (Breyer, J., concurring in judgment)). In *Reed*, the Court held that any facial discrimination on the basis of content renders a law content based for First Amendment purposes, regardless of whether the government had a censorial motive. *Reed*, 576 U.S. at 165–68. *Reed*'s broad definition of content neutrality is also problematic. *See* Araiza, *supra* note 51, at 881–86. This article does not directly engage *Reed*, although *Reed*'s rigid approach to the content discrimination question is certainly consistent with the phenomena this article discusses.

[142] Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). *But see* William E. Lee, *Modernizing*

was decided five years after *Mosley* and thus could have drawn on *Mosley* as a precedent. Nevertheless, *Wooley* instead stressed the New Hampshire license plate law's requirement that the individual affirm an ideological position with which he disagreed.[143] That focus placed *Wooley* squarely in the tradition of *Barnette*'s concern about viewpoint neutrality in the context of compulsions of ideological statements, illustrated by *Wooley*'s heavy reliance on *Barnette*.[144] The foundational case on the constitutionality of compelled non-union member subsidization of a union's activities in a public-sector workplace, decided contemporaneously with *Wooley*,[145] also followed in that tradition.[146] That case, *Abood v. Detroit Board of Education*,[147] held that cases such as *Barnette* "prohibit the [government] from requiring any of the [non-union members] to contribute to the support of an ideological cause he may oppose as a condition of holding a [government] job."[148] Later

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the Law of Open-Air Speech: The Hughes Court and the Birth of Content-Neutral Balancing, 13 WM. & MARY BILL RTS. J. 1219, 1237 (2005) (finding precursors of the content-neutrality principle in the 1930s).

[143] *See* Wooley v. Maynard, 430 U.S. 705, 715 (1997) ("Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943))); *Wooley*, 430 U.S. at 715 (describing the difference between the compulsions in *Barnette* and *Wooley* as one "essentially . . . of degree"); *see also Barnette*, 319 U.S. at 642 ("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."). To be sure, the Court in *Wooley*, after identifying "the Maynards' interests" in terms reflecting *Barnette*'s concern with compelling ideological statements, went on to inquire "whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates." *Wooley*, 430 U.S. at 715–16. Even more specifically, it then observed that even a "legitimate and substantial" government interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* Despite these invocations of tests that imply the modern content-neutrality rule, it remains the case that such invocations were triggered, not by the New Hampshire law's simple content discrimination, but instead the law's compulsion of an ideological statement.

[144] *See Wooley*, 430 U.S. at 714–15; *see also* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 105 (1996) (noting *Barnette*'s focus on viewpoint neutrality).

[145] That foundational case, *Abood v. Detroit Board of Education*, was decided on May 23, 1977, while *Wooley* was decided a little over a month earlier on April 20, 1977.

[146] To be sure, that case, *Abood*, was overruled in 2018.

[147] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 210 (1977), *overruled by* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

[148] *Abood*, 431 U.S. at 235; *see also* Genevieve Lakier, *Not Such a Fixed Star After All:* West Virginia State Board of Education v. Barnette*, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 745 (2019) ("For the first three decades after it was handed down, . . . [w]hen the Court cited *Barnette*, it invariably did so as support for the proposition that the government could not require its citizens to 'contribute to the support of an[y] ideological cause [they] may oppose' or to attest to beliefs they did not hold." (second and third alterations in original) (quoting *Abood*, 431 U.S. at 235)).

compelled subsidy cases similarly rested on whether it was ideological speech that was being forcibly subsidized.[149]

What would be the impact of a decision to subject to strict scrutiny all content-based speech compulsions and subsidizations, even if they did not compel an ideological stance? Certainly, one result would be that courts could no longer account for the difference between government compulsion of an ideological view and compulsion of a nonideological one, or even a view with which the compelled speaker or funder did not particularly disagree.[150] Such a rigid standard would thus abandon the Court's earlier preoccupation with compulsions of ideological beliefs. That preoccupation was deeply grounded: as Justice Jackson made clear in *Barnette*, compelling a person to utter something they did not believe was, if anything, more problematic than prohibiting him from speaking.[151] The compulsion of ideological statements stands at the core of that harm.[152] Pre-*NIFLA* decisions' emphasis on that core free speech right stands in at least some tension with any judicial doctrine that imposes the same test to any speech compulsion, no matter its circumstances—the rule the Court strongly hinted at in *NIFLA*.

To be sure, the Court in *NIFLA* acknowledged precedent—*Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*—allowing the compulsion of statements that presented "purely factual and uncontroversial information about the terms under which . . . services will be available."[153] In addition, at the end

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[149] *See* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469–70 (1997) (distinguishing *Abood* and other compelled subsidy cases on the same ground); Keller v. State Bar of Cal., 496 U.S. 1, 13–14, 17 (1990) (describing *Abood* as holding that "a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining" and distinguishing state bar expression germane to the association's regulation of the practice of law from expression reflecting ideological viewpoints).

[150] *See Wileman*, 521 U.S. at 471 (noting that "[w]ith trivial exceptions . . . none of the generic advertising [challenged in that case] conveys any message with which respondents disagree").

[151] *See supra* note 119 and accompanying text; *see also* Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 191 (2002) (describing as "the heart of *Barnette*" the principle "prohibiting government interference with individual thought, conscience, or belief through a requirement that one adopt, present, or support any message or idea that she does not wish to adopt, present, or support").

[152] *See, e.g.*, B. Jessie Hill, *The Deliberative-Privacy Principle: Abortion, Free Speech, and Religious Freedom*, 28 WM. & MARY BILL OF RTS. J. 407, 411 (2019) ("Despite the expansiveness of the First Amendment right to free speech, it is possible to identify at least one truly core aspect of that right: the right to be free from compelled ideological speech, exemplified in cases such as *West Virginia State Board of Education v. Barnette*." (footnote omitted)).

[153] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2372, 2366 (2018) (quoting Zauderer v. Off. of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)). However, the Court distinguished *Zauderer* on the ground that the California law required posting of information about services that the clinics did *not* provide (abortion) and because abortion was "anything but an 'uncontroversial' topic." *NIFLA*, 138 S. Ct. at 2372. Such a narrow reading of *Zauderer*—in particular, a reading that limits it to compulsions of statements about services the compelled speaker itself provides—continues to protect persons

of its analysis of the abortion-availability speech compulsion,[154] the Court also tacked on, without citation to precedent, a seemingly offhand statement that it did not "question the legality of health and safety warnings long considered permissible."[155] *NIFLA*'s acknowledgement of the legitimacy of such speech compulsions suggests that the Court will continue to exempt at least some speech compulsions from strict scrutiny.

Still, these carve-outs from the Court's presumptive strict scrutiny rule raise questions about their manipulability. First, the *NIFLA* Court read *Zauderer* quite narrowly. For example, it observed that *Zauderer* compelled speech about services the speaker itself provided.[156] It found that feature to be absent in *NIFLA* because, even though the pregnancy crisis centers offered family planning and prenatal services, they did not provide the abortions that were the subject of the state's compelled message.[157]

Leave aside the question whether the *NIFLA* Court's narrow interpretation of *Zauderer* is consistent with *Zauderer*'s own analysis, which appeared to focus not on whether the compelled speech related to services the compelled speaker itself offered, but rather whether the compelled speech was ideological in nature.[158] Instead, assume that *NIFLA* correctly read *Zauderer*.[159] Depending

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against speech compulsions that do not require ideological affirmations. Indeed, Justice Breyer's dissent in *NIFLA* insisted that *Zauderer* itself recognized that its carve-out allowing uncontroversial compelled disclosures extended to disclosures that did not implicate ideological statements. *See id.* at 2387 (Breyer, J., dissenting) ("Where a State's requirement to speak 'purely factual and uncontroversial information' does not attempt 'to "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,"' it does not warrant heightened scrutiny." (quoting *Zauderer*, 471 U.S. at 651 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)))).

[154] *NIFLA* also struck down another mandated posting, which this article does not address.

[155] *NIFLA*, 138 S. Ct. at 2376.

[156] *Zauderer* dealt with, among other things, a requirement that lawyers advertising contingent fee arrangements disclose that clients might still be liable for some costs even if the lawsuit was unsuccessful. *See Zauderer*, 471 U.S. at 633.

[157] *See NIFLA*, 138 S. Ct. at 2372.

[158] That question is a real one. *Zauderer*, after citing the canonical compelled speech cases such as *Barnette* and *Wooley*, concluded that the lawyer advertising compelled statements were of a different order:

> [T]he interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to "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." [*Barnette*,] 319 U.S. at 642. The State has attempted only to prescribe what shall be orthodox in commercial advertising.

Zauderer, 471 U.S. at 651 (quoting *Barnette*, 319 U.S. at 642); *see also NIFLA*, 138 S. Ct. at 2387 (Breyer, J., dissenting) (disagreeing with the majority's reading of *Zauderer*).

[159] *But see supra* note 153 (citing Justice Breyer's disagreement with how the *NIFLA* majority read *Zauderer*).

on how broadly or narrowly future cases understand what speech relates to the compelled speaker's own services, *NIFLA* could mark a real limitation on *Zauderer*'s deferential review of "uncontroversial" speech compulsions related to the services the speaker itself offered. *NIFLA*'s own application of *Zauderer*—that is, its conclusion that *Zauderer* did not apply because the pregnancy crisis centers did not offer abortions, even though they offered other services related to childbirth—raises doubts about the predictability of *Zauderer*'s carve-out. For example, could a state require cell phone stores to post notices that the state makes low-cost landlines available to poor households if those stores do not sell landline services? Could it require bars or casinos to post notices offering, respectively, low-cost alcoholism or gambling addiction treatment? Justice Breyer offered several other examples of disclosures that may not come within the majority's reading of what *Zauderer* allows government to require.[160] *NIFLA* leaves such questions undecided and unclear.

Second, the majority's "general disclaimer"[161] about "health and safety warnings long considered permissible"[162] creates similar uncertainty about its meaning. A Ninth Circuit en banc panel has already grappled with this uncertainty, with one judge reading the Court's disclaimer similarly to the *Chaplinsky* categories of unprotected speech—that is, as allowing only compelled health and safety warnings whose lineage trace back to 1791.[163] That understanding might seem implausible: as the appellate majority noted, Justice Thomas's disclaimer came in response to Justice Breyer's dissent, which identified health and safety disclosures addressing modern technologies.[164] On the other hand, the very generality of *NIFLA*'s disclaimer calls out for principled elaboration. The appellate judge in question—in some ways, quite logically—provided that principled reasoning, slotting the disclaimer into the Court's existing methodology governing unprotected speech more generally: that is, the historical approach the Court has read into the *Chaplinsky* exclusions.[165]

The Ninth Circuit's division on this question exemplifies Justice Breyer's concern that unreasoned carve-outs from a general

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[160] *See NIFLA*, 138 S. Ct. at 2380–81 (Breyer, J., dissenting).

[161] *Id.*

[162] *Id.* at 2376 (majority opinion); *see also id.* at 2379, 2381 (Breyer, J., dissenting) (quoting the majority's language).

[163] *See* Am. Beverage Ass'n v. City & Cnty. of San Francisco, 916 F.3d 749, 762 (9th Cir. 2019) (en banc) (Ikuta, J., dissenting from most of the reasoning, concurring in the result). *Compare id.*, *with Am. Beverage Ass'n*, 916 F.3d at 756 n.4 (majority opinion) (disputing Judge Ikuta's reasoning).

[164] *See Am. Beverage Ass'n*, 916 F.3d at 756 n.4.

[165] *See supra* notes 57–58 and accompanying text.

strict scrutiny rule will entice litigants to challenge mandated disclosures. As he said, the resulting uncertainty would likely trigger litigation that "invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle."[166] That unpredictability rests, at least in part, on the character of the Court's carve-out as vaguely worded and lacking any content deriving from precedent.[167]

To be sure, the Court's concession that not all content-based speech compulsions are created equal sends a welcome signal, albeit one that stands in some tension with the Court's tendency to draw a strict doctrinal line between content-based and content-neutral laws. Nevertheless, the Court's refusal to ground its distinctions in an explicitly stated line between ideological and nonideological compulsions will likely create the litigation Justice Breyer feared and the disagreements featured in the Ninth Circuit case. Even more importantly, because the decision on any such carve-out will likely determine the ultimate fate of the challenged law, courts may feel tempted to manipulate the Court's vague, unreasoned language in order to reach the results they want. Concededly, an ideological versus nonideological line might generate similar temptations. However, that line's greater specificity and grounding in existing law would likely mitigate the potential for mischief. Reliance on such a line would also better align this aspect of the compelled speech doctrine with its conceptual foundations.[168]

B. The Manipulation of Categories: Government Speech

A similar manipulation of a threshold free speech question arose in 2015 in a case implicating the so-called government speech doctrine.[169] The government speech inquiry

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[166] *NIFLA*, 138 S. Ct. at 2381 (Breyer, J., dissenting).

[167] The degree of that unpredictability would also surely depend in part on future courts' decisions to apply a historical test to such carve-outs, given the extreme malleability of any inquiry into whether a warning about a modern health or safety risk had a historical analogue. *See Am. Beverage Ass'n*, 916 F.3d at 762 (Ikuta, J., dissenting from most of the reasoning, concurring in the result) (applying such a historical approach).

[168] See Hill, *supra* note 152, at 411; Lakier, *supra* note 148, at 743 (describing the freedom protected in Barnette as "the freedom to express whatever 'belief and . . . attitude of mind' one desired") (alteration in original) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 633 (1943)).

[169] The government speech doctrine holds that, when government is deemed to be the speaker in a given context, it is not required to abide by foundational First Amendment principles such as the content- and viewpoint-neutrality rules. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 467–69 (2009) (describing the concept of government

itself is not governed by a rigid scrutiny test.[170] However, because the doctrine uses the government speech label as an explicitly outcome-determinative category of speech,[171] it raises similar concerns about doctrinal manipulation.

Even more than scrutiny levels, the categories into which speech is slotted can be decisive to the constitutionality of a given speech restriction. For example, categorizing speech as incitement removes much of its constitutional protection,[172] but concluding that incendiary political speech is not incitement gives it strong protection, given the centrality of political speech to the First Amendment.[173] Similarly, concluding that a government employee's speech occurred as part of the employee's normal work responsibilities completely removes it from First Amendment protection,[174] while a contrary conclusion triggers a balancing test that may result in a decision protecting the speech.[175]

The most recent controversy about such categorizations deals with the attribution of particular speech to the government or to private persons. As with other categorization decisions, the government speech/private speech decision is critical to the ultimate fate of a First Amendment claim. Government speech is understood to be free of any First Amendment restrictions even when a different categorization would trigger strong

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speech). For a thorough discussion of the government speech idea, see generally HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION (2019).

[170] *See*, *e.g.*, *Summum*, 555 U.S. at 470–80 (applying various considerations to determine that a large monument in a city park constitutes government speech, without any application of tiered scrutiny); *id.* at 470 ("Permanent monuments displayed on public property typically represent government speech.").

[171] *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

[172] The qualifier "much of" is necessary because of the Court's conclusion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), that even "unprotected" speech remains protected from content-based restrictions that are not aimed at the reason such speech falls into the unprotected category. *See id.* at 383–86; *id.* at 383–84 ("We have sometimes said that these categories of expression are 'not within the area of constitutionally protected speech,' or that the 'protection of the First Amendment does not extend' to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all.' What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." (citations omitted)).

[173] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329 (2010) (describing political speech as "speech that is central to the meaning and purpose of the First Amendment").

[174] *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[175] *See, e.g.*, Lane v. Franks, 573 U.S. 228, 237–41 (2014) (finding that the requisite balancing fell on the side of protecting the employee's speech).

protection.[176] For example, if speech held to be private was made in a public forum[177] and subjected to a content-based restriction, it would enjoy a strong presumption of constitutional protection. By contrast, if that same speech was held to be governmental, then the government would have free rein to shape it to its liking. Obviously, then, much rides on the initial categorization decision, and thus, on the coherence of the criteria governing that decision.

This exact situation—a categorization of speech as government speech when otherwise it would have been private speech in a public forum restricted on the basis of its content—arose in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[178] At issue in *Walker* was Texas's specialty license plate program, under which interested persons could seek the state's approval for license plates featuring particular designs and wording.[179] A confederate memorial group sued when the state denied approval for its design, which featured an image of the confederate battle flag.[180]

The question in *Walker* was whether the speech produced pursuant to Texas's specialty license plate program constituted government speech or whether the program created a public forum for private speech.[181] As explained above, this question was critical to the eventual outcome of the lawsuit, since government is permitted to favor particular topics and propound particular viewpoints when it engages in its own speech, but is largely precluded from doing so when it creates a forum for private speech.[182]

The Court, in a 5–4 decision, concluded that the language and images displayed pursuant to the program constituted

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[176] *Livestock Mktg. Ass'n*, 544 U.S. at 553 ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

[177] The Court's forum doctrine categorizes among places where speech is made, triggering differing levels of scrutiny depending on the categorization of the location. Speech in so-called public forums enjoys the highest level of constitutional protection, including the content-neutrality rule. Speech in so-called non-public forums enjoys much less scrutiny; in such locations, speech restrictions need only be viewpoint-neutral and reasonable. *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678–79 (1992) (setting forth this delineation). In some cases, the Court has also spoken of "'limited public forum[s]' . . . where . . . government has reserved a forum for certain groups or for the discussion of certain topics." Walker v. Tex. Div., Sons of Confederate Veterans, 576 U.S. 200, 215 (2015) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

[178] *Walker*, 576 U.S. 200.

[179] *See id.* at 203–04.

[180] *See id.*

[181] *See id.* at 215–17.

[182] *See id.* at 207–08. See also *supra* note 177, which sets forth the basics of the Court's forum doctrine.

government speech.[183] Writing for the majority, Justice Breyer reached that conclusion after considering three factors: the historical pedigree of state control of license plates, the public identification of license plate speech with the state, and the state's ultimate control over the designs private persons offered.[184] Writing for the dissenters, Justice Alito took issue with each of these points.[185] He observed that, while state-issued license plates have existed for more than a century, specialty plates of the sort at issue in *Walker* were of much more recent vintage.[186] He also ridiculed the majority's public perception point, observing that Texas specialty plates included messages (such as "Rather Be Golfing," advertisements for particular businesses, and praise for out-of-state college athletic teams) that simply could not be understood as reflecting the state government's own views.[187] Finally, he noted that the state had approved the vast majority of proposed designs, thus rendering illusory any claim that the state exercised meaningful control over them.[188] Beyond those factors, Justice Alito noted that the main precedent case, his own opinion in the 2009 case *Pleasant Grove City v. Summum*,[189] relied on an additional factor that the *Walker* majority conceded was absent in that case.[190]

Walker is controversial among scholars because of the green light it allegedly gives governments to avoid the First Amendment's content- and viewpoint-neutrality strictures by claiming speech as its own. For example, Mary-Rose Papandrea argues that Justice Breyer "manipulated" the history of specialty license plates to favor the majority's government speech holding, given his conflation of the long history of license plates in general and the much more recent history of specialty plates.[191] She also notes the difficulty courts have faced in relying on the likely impressions of a reasonable observer in the context of the Court's

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[183] *See id.* at 202 (showing the justices' line-up).

[184] *Id.* at 210–14.

[185] *See generally id.* at 221–36 (Alito, J., dissenting).

[186] *Id.* at 223–24.

[187] *See id.* at 222.

[188] *See id.* at 231–32.

[189] Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

[190] *Summum*, which held that a large, permanent monument in a city park constituted government speech, observed that space limitations prevented the city from accommodating such structures from any person who wished to donate one to the city, as would be presumptively required if the city's acceptance of one monument thus created a public forum open to private speech. *Id.* at 478–81. As both the majority and dissent noted in *Walker*, no such space limitations prevented Texas from accommodating any and all license plate designs offered by individuals. *See Walker*, 576 U.S. at 214; *id.* at 232–33 (Alito, J., dissenting).

[191] Mary-Rose Papandrea, *The Government Brand*, 110 NW. L. REV. 1195, 1210–12 (2016).

establishment clause jurisprudence, and applies that observation to Justice Breyer's conclusion that a reasonable observer would impute specialty plates' speech to the state.[192] For example, she questions the assumption that a reasonable observer, aware that license plates are state property, would therefore impute speech on the plates to the state.[193] She argues that such a conclusion would seemingly undermine public forum law since it would mean that private speech in such government-owned forums would be imputable to the state, therefore rendering it unprotected.[194]

More generally, Professor Papandrea cites approvingly Justice Alito's mocking evaluation of the majority's government speech conclusion, including, for example, his incredulousness that a reasonable observer would think that the state was endorsing out-of-state college football teams.[195] Finally, she expresses agreement with Justice Alito's skepticism about the extent of the government's control over the license plate designs, and worries that citing such control as a reason for imputing the speech to the state will incentivize states to impose more stringent review of proposed speech.[196]

Regardless of whether one agrees with critiques like these, a more foundational question dogs the Court's analysis—and, indeed, the entire government speech idea. Like incitement speech discussed earlier, the government speech category is a binary: either the speech is deemed to be government speech, or it is not. In the context of government speech, this binary quality may be inappropriate. This is not because the government speech determination is likely outcome determinative. Other similarly critical binary choices may be appropriate because of the nature of the speech in question. Again, consider incitement. As noted earlier,[197] the determination of whether particular speech constitutes incitement is likely critical to the constitutionality of any restriction on that speech: if the speech is incitement, it is subject to prohibition, but if it is not, then it is fully protected political speech. But that binary is appropriate: speech *really is* either incitement or

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[192] *Id.* at 1215–18.

[193] *Id.* at 1217.

[194] *Id.* ("The Court [in *Walker*] appears to embrace what was only a suggestion in *Summum*—that the government's mere ownership of property has expressive value that would be obvious to the reasonable observer. The Court's willingness to accept this argument potentially turns the public forum doctrine on its head. . . . [T]he public forum doctrine rejected the traditional assumption that the government had the same property rights as private property owners to control the speech appearing on their property. The appearance of private speech on public property cannot be sufficient to convert that speech into government speech without eviscerating the public forum doctrine entirely.").

[195] *See id.* at 1218.

[196] *Id.* at 1220–22.

[197] *See supra* text accompanying notes 172–173.

it is not—it makes no sense to say that any particular statement is both incitement and fully-protected political speech.[198]

Speech of the sort at issue in *Walker* is different. Even when one bores down to its most granular character—beyond license plates themselves to the speech comprising the specialty design[199]—as a practical matter it remains quite difficult, and perhaps nearly impossible, to categorize it as pure government speech or as pure private speech. In 2008, Caroline Mala Corbin correctly concluded that speech of this sort should be understood as "mixed" speech—that is, speech that should be attributed to both the government and private parties.[200] Professor Corbin went on to suggest that government limits on such speech should be subject to intermediate scrutiny.[201]

This article does not conclusively analyze the question of how to resolve the question posed when the speech at issue is arguably the government's own. Instead, it raises the argument to make a more foundational point, raised by Professor Corbin as well: in borderline cases, attempts to categorize speech as purely governmental or purely private may be deeply unsatisfactory.[202] Yet current doctrine still subjects such borderline cases to a binary, either–or analysis that, as noted earlier, is largely outcome determinative. The specialty license plates in *Walker* are a prime example of such borderline cases. Like rigid applications of the content-neutrality rule, a binary yes–no answer to the government speech question may lead to manipulation of the Court's analysis in ways Justice Alito critiqued in his *Walker* dissent.[203]

It is ironic that categorization played the critical role that it did in *Walker*, since the majority opinion was written by Justice Breyer, who, of all the current justices, has cautioned most

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[198] To be sure, a given speech act—say, a speech or an exhortation on social media—might contain elements that are protected speech and elements that are not. *See, e.g.*, Debs v. United States, 249 U.S. 211, 214 (1919) (discussing particular statements made by the incitement defendant's speech to a crowd); Hess v. Indiana, 414 U.S. 105, 107 (1973) (analyzing one particular statement made by a protester when determining whether his arrest was constitutional). But isolating any one such element or part or statement and concluding that it constitutes both incitement and fully protected speech is incoherent. As this article section explains, this is not the case with speech of the sort at issue in *Walker*.

[199] *See* Walker v. Tex. Div., Sons of Confederate Veterans, 576 U.S. 200, 220, 222–23 (2015) (Alito, J., dissenting) (conceding that parts of the license plate may consist of government speech while arguing that other parts, like the privately-proposed design and language, do not).

[200] *See* Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 610 (2008).

[201] *See id.*

[202] *Id.* at 607 ("The trouble with [the private speech/government speech] dichotomy is that not all speech is purely private or purely governmental.").

[203] *See supra* text accompanying notes 185–190, which recounts Justice Alito's critique.

frequently against overreliance on categorical rules in free speech cases.[204] Of course, he was writing for a majority in *Walker*. That fact may have limited his freedom to write the opinion he would have preferred to write, especially since his narrow five-justice majority included Justice Thomas, who likely would have been hostile to a less categorical approach.[205] Moreover, one must concede that his approach to that binary either–or question itself derived from the sort of multi-factor test Justice Breyer tends to favor.[206] Nevertheless, the categorization issue this article discusses relates to the outcome of that test—the either–or answer to the government speech question—rather than the analysis that led to that outcome. When a context-specific, multi-factor test leads to a binary conclusion that obscures the reality of the situation, the same potential for manipulation exists as when the Court employs rigid approaches more directly, as with the approaches exemplified by the strict scrutiny and compelled speech cases this article has already discussed.

III. TOWARD A LAW OF LICENSE PLATES

Speech situations like those described above do not present appropriate occasions for the application of rigid tests. The speech restrictions in *Humanitarian Law* and *Williams-Yulee* reflect contexts where, rightly or wrongly, the Court appeared to perceive the government interest as one that required more judicial deference. In *Humanitarian Law*, the Court accorded that deference via its intricate and opaque verbal formulations that seemed to seek to avoid uttering the phrase "strict scrutiny" and indeed any scrutiny formula at all.[207] In *Williams-Yulee*, it accorded that deference through an application of strict scrutiny that, as Justice Scalia demonstrated, was anything but strict.[208] Despite the Court's seeming recognition of a special need for deference in those cases, the Court purported to apply longstanding precedent requiring stringent scrutiny. Nevertheless, it did so in a way that suggested *sub silentio* deviations.

NIFLA feinted toward a rule according strict scrutiny to all content-based speech compulsions. But it eventually drew

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[204] *See, e.g.*, Benjamin Pomerance, *An Elastic Amendment: Justice Steven G. Breyer's Fluid Conceptions of the Freedom of Speech*, 79 ALB. L. REV. 403, 490–95 (2016).

[205] Justice Thomas wrote the majority opinions in both *Reed* and *NIFLA*, both of which are notable, the first for its application of a rigid content-neutrality rule, *see* Araiza, *supra* note 51, at 881–86, 890–96; and the second for its strong hinting in that direction, *see supra* Section II.A.2.

[206] *See supra* text accompanying note 184.

[207] *See supra* text accompanying notes 79–90.

[208] *See supra* text accompanying notes 98–111.

back, applying only intermediate scrutiny to the California law while acknowledging both an exception derived from a (narrowly read) *Zauderer* opinion and a second vaguely worded and doctrinally unexplained carve-out for "health and safety warnings long considered permissible."[209] The Court's acceptance of those latter caveats reflects the difficulty with a broad application of the content-neutrality rule to all speech compulsions. However, the ambiguities they create raise the prospect of doctrinal manipulation.

Finally, the specialty license plate program at issue in *Walker* resists definitive categorization as either government or private speech.[210] Even using *Walker*'s own criterion of public perception, one can readily intuit that reasonable observers would understand Texas's specialty plates as a mixture of official government speech (given the official nature of license plates) and private speech (given the wide variety of private messages communicated by the specialty designs).[211] Drilling down to focus on only the actual specialty designs and language themselves yields the same intuition: presumably, most Texans know that anything that goes on a license plate must somehow obtain government approval, but they would also likely conclude that "Rather Be Golfing"[212] or "Get it Sold with RE/MAX"[213] do not reflect the state's official views. On the other hand, Texas acted as more than a simple passive host for private expression, in contrast, for example, with how it might have acted when renting a public auditorium to a private speaker. Rather, a plausible intuition suggests that the state's involvement in actually mandating the display of license plates, manufacturing plates on which those private messages appear, and affixing the state's name (and its own speech) to that plate renders those plates something akin to a speech joint venture. Once again, a rigid doctrinal rule—here, a binary either–or decision on the government versus private speech issue—does not account for that reality. And in turn, the failure to

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[209] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2372, 2376 (2018). See also *supra* text accompanying notes 134–141 for discussion of the majority's and dissent's analyses in *NIFLA*.

[210] *See supra* text accompanying notes 178–206 for discussion of *Walker*.

[211] Indeed, in a subsequent case raising the question whether government-issued trademarks constitute government speech, a unanimous Court speaking through Justice Alito concluded that they did not, relying in part on the cacophony of messages communicated by trademarks. *See* Matal v. Tam, 137 S. Ct. 1744, 1748 (2017) ("It is thus far-fetched to suggest that the content of a registered mark is government speech . . . ." If the federal registration of a trademark makes the mark government speech, "the Federal Government is babbling prodigiously and incoherently.").

[212] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 221–22 (2015) (Alito, J., dissenting).

[213] *Id.* at 205 (majority opinion) (identifying this language).

account for reality once again generated a judicial analysis that obscures more than it enlightens.[214]

Nor do such rigid rules satisfactorily promote First Amendment values. Among others, Professor Ronald Krotoszynski has urged courts to adopt a context-specific proportionality analysis in free speech cases, not as a complete substitute for such rules, but as a complement when such rules fail to adequately promote the democratic self-government that he sees as the First Amendment's primary goal.[215] Speaking in a similar register, Justice Kagan has suggested that some applications of rigid rules do little to promote the First Amendment's underlying goals.[216] Both perspectives reflect dissatisfaction with exclusive reliance on such rules, even as they recognize their utility at times.[217] It is easy to sympathize with these concerns. While most First Amendment categorical rules trace back to the First Amendment's foundational purposes, their rigid application over time risks converting those rules into ends in themselves, rather than means to promote those fundamental values.[218] To prevent such a diversion of courts' attention toward the rules themselves rather than those underlying values, sensitivity to context is a must. To paraphrase Justice White, we must create and apply a law of specialty license plates.[219]

But how should courts account for such context specificity? While this article cannot comprehensively canvass and analyze possible answers, it can make several general points. First, if the problem identified above really does boil

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[214] *See, e.g.*, Papandrea, *supra* note 191, at 1209–26 (critiquing the Court's analysis in *Walker*).

[215] *See generally* Krotoszynski, *supra* note 19, at 153–54 (describing as a "caveat" to his thesis the observation that "[I]t would be mistaken to posit that First Amendment jurisprudence should not feature *any* bright line rules. Bright line rules can and do play an important role in safeguarding the process of democratic deliberation from ham-fisted government efforts to censor or even simply reshape the political marketplace of ideas. Even so, however, bright line rules are not enough." (footnote omitted)).

[216] *See* Reed v. Town of Gilbert, 576 U.S. 155, 181 (2015) (Kagan, J., concurring in judgment) ("Although the majority insists that applying strict scrutiny to all [facially content-discriminatory] ordinances is 'essential' to protecting First Amendment freedoms, I find it challenging to understand why that is so.").

[217] *See* Krotoszynski, *supra* note 19, at 153–54; *Reed*, 576 U.S. at 182 (Kagan, J., concurring in judgment) ("We apply strict scrutiny to facially content-based regulations of speech . . . when there is any 'realistic possibility that official suppression of ideas is afoot.'" (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

[218] *See, e.g.*, *Reed*, 576 U.S. at 181–83 (Kagan, J., concurring in judgment) (arguing that the content-neutrality rule is best understood as reflecting more foundational goals of preventing government distortion of public debate, and thus critiquing the majority's application of that rule in a context where there was little risk of such distortion).

[219] *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

down to one of acontextual overgeneralization, then the obvious answer is to give more weight to context—and to do so explicitly. In cases such as *Humanitarian Law* and *Williams-Yulee*, that contextualization would entail explicitly recognizing that some speech restrictions merit more deferential scrutiny. In *NIFLA*, it would entail recognizing a constitutional difference between compulsions of ideological viewpoints and nonideological ones. In *Walker*, it would entail recognizing that specialty license plates simply do not fit into a neat government speech versus private speech binary.

Such contextualization may be promoted by the sort of proportionality analysis Justice Breyer has often advocated. Such analysis, by inquiring into the degree of First Amendment harm and the extent to which the government action pursues its interests with minimal impact on free speech interests, can more realistically account for the type of fact- and context-intensive situations this article contemplates. For example, it would more transparently account for both the deference the Court seemed to think was owed to the political branches in *Humanitarian Law* and the underinclusiveness arising from the fact that the judicial ethics canon in *Williams-Yulee* left open paths for judicial candidates to request expressions of support that did not amount to campaign contributions. A focus on First Amendment harm would fit particularly well within the exceptions and carve-outs the *NIFLA* majority created from the otherwise-broad strict scrutiny regime it hinted at, by providing a principled basis for those exceptions and carve-outs. In particular, such a focus would easily accommodate an emphasis on whether the challenged law compelled statements of ideological belief. Finally, such analysis could avoid the binary choice imposed by current government speech doctrine, as demonstrated by *Walker*.

To be sure, analysis of this sort raises its own problems of outcome-driven judicial decision-making and analytical inconsistency.[220] In *Walker*, Justice Alito protested that the majority's decision identifying specialty plate speech as government speech effectively allowed government to discriminate against certain content and viewpoints.[221] He noted that the Court's characterization of that speech as governmental allowed the state to refuse the confederate flag plate design because of protests while still accepting another design that commemorated

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[220] *See, e.g.*, Krotoszynski, *supra* note 19, at 153 ("Balancing tests can give rise to an appearance of content, viewpoint, or even speaker discrimination because reasonable jurists can and will reach conflicting results in cases featuring very similar facts.").

[221] *See* Walker v. Tex. Div., Sons of Confederate Veterans, 576 U.S. 200, 227 (2005) (Alito, J., dissenting).

the "Buffalo Soldiers" who fought in the military's "Indian Wars" after the Civil War, despite anguished opposition from Native American groups.[222] It is easy to imagine protests that the sort of approach suggested here opens the door to similar outcome-based decision-making by explicitly allowing judges to consider factual contexts when deciding cases.

Perhaps a balancing approach might lead to an incoherent, purely ad hoc, First Amendment. Or perhaps not.[223] But more fundamentally, such an approach may force courts into delicate line drawing situations. For example, if a judge following Justice Breyer's general approach to free speech cases concludes that government should have more leeway to restrict nonideological messages on specialty plates because of the lesser First Amendment harm such restrictions impose, then courts would be faced with a barrage of cases whose outcome would turn on fact-intensive judgments about the ideological heft of the speech that is being restricted. They would be faced with similar problems if an ideological/nonideological line governed the scrutiny courts accorded speech compulsions.

But such line drawing is already implicit in much of the Court's free speech doctrine. Recall the Court's manipulation of strict scrutiny itself in *Humanitarian Law* and *Williams-Yulee*, suggesting the Court was applying special, ad hoc rules in speech cases implicating national security and judicial speech.[224] Recall further that in *NIFLA*, the Court both recognized *Zauderer*'s allowance of compelled statements of "factual and uncontroversial information"[225] and did not "question the legality of health and safety warnings long considered permissible."[226] Lurking in those exceptions to the majority's flirtation with an otherwise-broad application of the content-neutrality rule to speech compulsions is the prospect of the same sort of line drawing that would accompany an ideological/nonideological speech line. Finally, recall the seeming arbitrariness of *Walker*'s all-or-nothing decision on the government

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[222] *See id.*

[223] *See* Krotoszynski, *supra* note 19, at 172 (arguing that "[o]ver time courts would work out an analytical framework that establishes clear rules of the road (so to speak); as decisions accrete over time, one would expect to see greater consistency of results. This is, in important respects, the essence of the common law method of adjudication.").

[224] Indeed, Justice Ginsburg's partial concurrence in *Williams-Yulee* explicitly rested on her view that a special rule should apply to speech implicating judicial integrity interests. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 457–62 (2015) (Ginsburg, J., concurring in part and concurring in judgment).

[225] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372 (2018) (quoting Zauderer v. Off. of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).

[226] *Id.* at 2376.

speech question. The question, then, is not whether line drawing will be done, but rather, whether it will be done transparently.[227]

CONCLUSION

Recognition of a speech restriction's factual surroundings, or of the ideological quality of a speech compulsion, or of the reality of mixed government/private speech: all these doctrinal moves would reflect sensitivity to context of one sort or another. They all push against acontextual rules: respectively, strict scrutiny for all content-based speech restrictions and compulsions and a binary yes–no answer to the government speech question. Each of these moves would push free speech jurisprudence toward a variety of different standards and approaches—a law of billboards, as Justice White stated in *Metromedia*, or, as this article suggests, a law of specialty license plates or national security-justified speech restrictions.[228] The resulting variety of

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[227] *See, e.g.*, Corbin, *supra* note 200, at 677 (observing that "the current categorization approach [that makes the government speech doctrine] is already ad hoc, just not transparently so").

[228] Such an approach would move the United States closer to the approach taken by the European Convention on Human Rights (ECHR). Article 10 of the ECHR, after setting forth the basic right to freedom of expression, then continues as follows:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, ¶ 2, Nov. 4, 1950, 213 U.N.T.S. 222. A quick perusal of these particular contexts justifying limitations on the free expression right yields the initial impression that, in fact, American law has found itself in approximately the same place as the ECHR, through a combination of purported historically grounded exceptions to free speech rights and *de facto* exceptions from the First Amendment's content-neutrality rule. *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 39–40 (2010) (upholding a national security-based speech restriction); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."); Miller v. California, 413 U.S. 15, 23–25, 36–37 (1973) (finding obscenity to be unprotected through a test that in part rests on the offensiveness of the material); Gertz v. Robert Welch, Inc., 418 U.S. 323, 343–48 (1974) (announcing a test for when the First Amendment allows libel verdicts on matters of public interest, based in part on the libel victim's interest in and ability to protect his reputation); Cohen v. Cowles Media, 501 U.S. 663, 665–66, 669–70 (1991) (allowing a contract cause of action to go forward, despite the First Amendment, when the plaintiff sued a media company after the company breached its promise to keep his identity confidential when publishing information he had provided the publisher); *Williams-Yulee*, 575 U.S. at 445–48, 456–57 (upholding a speech restriction justified as "protecting the integrity of the judiciary" (internal quotation marks omitted)). This very quick

approaches and tests that would arise from this splitting would surely generate a very different free speech jurisprudence than one resulting from the lumping[229] that reflects the tendency to apply (or purport to apply) unitary standards to vastly different speech situations.[230]

Some might decry this disaggregation as an invitation to results-based decision-making. As Justice Souter once remarked, "[r]eviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."[231] But that benefit only obtains if courts are hardy enough to actually add that starch to their doctrinal laundry loads. The Court's decisions in *Humanitarian Law*, *Williams-Yulee*, and *Walker*—all cases in which dissenters perceived both a less-than-robust application of the relevant law and outcome-driven reasons for that allegedly flawed application—give reason to doubt that the Supreme Court is consistently up to that task.[232] For that reason, it might be more helpful if the Court simply recognized that these situations themselves, as well as those encompassed by the Court's underexplained carve-outs in *NIFLA*, are sufficiently different such that different standards—and not just different applications of the purported same standard—should apply. Perhaps there should indeed be a law of specialty license plates. Perhaps that is the best we can hope for in a world in which every speech situation really does "have differing natures, values, abuses and dangers."[233]

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comparison obviously does not comprehensively answer the question about the underlying symmetry between the two legal systems, a question that lies far beyond the scope of this article.

[229] For a general discussion of the distinction between lumping and splitting approaches in law, see Bradley C. Karkkainen, *"New Governance" in Legal Thought and in the World: Some Splitting as an Antidote to Overzealous Lumping*, 81 MINN. L. REV. 471, 479 & n.33 (2004) (explaining the concepts of "lumping" and "splitting" and citing their relevance to various disciplines).

[230] *See generally* Bhagwat, *The Test*, *supra* note 7 (discussing the wide use of intermediate scrutiny in free speech law).

[231] Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n, 518 U.S. 727, 774 (1996) (Souter, J., concurring) (citing Blasi, *supra* note 62, at 474 (arguing that "courts . . . should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense" (alteration in original))).

[232] For an additional doubt on this score, see Brandenburg v. Ohio, 395 U.S. 444, 450, 454 (1969) (Douglas, J., concurring) ("When one reads the opinions closely and sees when and how the 'clear and present danger' test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous.").

[233] Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).