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Curing the First Amendment Scrutiny Muddle Through a Breyer-Based Blend Up? Toward a Less Categorical, More Values-Oriented Approach for Selecting Standards of Judicial Review

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CURING THE FIRST AMENDMENT SCRUTINY MUDDLE THROUGH A BREYER-BASED BLEND UP? TOWARD A LESS CATEGORICAL, MORE VALUES-ORIENTED APPROACH FOR SELECTING STANDARDS OF JUDICIAL REVIEW

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ABSTRACT

This Article argues that the United States Supreme Court should significantly alter its current categorical approach for discerning standards of judicial review in free-speech cases. The present system should become nondeterminative and be augmented with a modified version of Justice Stephen Breyer's long-preferred proportionality framework. Specifically, the Article's proposed tack fuses facets of today's policy, which largely pivots on distinguishing content-based laws from content-neutral laws and letting that categorization determine scrutiny, with a more nuanced, values-and-interests methodology. A values-and-interests formula would allow the Court to climb up or down the traditional ladder of scrutiny rungs – strict, intermediate or rational basis – depending on whether a statute jeopardizes a core rationale for safeguarding free expression and the degree to which that rationale is threatened. Given the frequent divide along partisan lines on today's Supreme Court over scrutiny in First Amendment speech cases, a two-tiered approach that blends aspects of a categorical strategy with a values-and-interests tack provides a path forward as the Court moves fully into the third decade of the twenty-first century.

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INTRODUCTION

Justice Elena Kagan, writing in 2018 on behalf of the United States Supreme Court's four liberal-leaning members in dissent in *Janus v. American Federation of State, County and Municipal Employees*, chided the five-justice conservative majority for "weaponizing the First Amendment."[1] Elaborating on this accusation, she criticized the majority for "turning the First Amendment into a sword, and using it against workaday economic and regulatory policy."[2] What partly piqued Kagan's ire in *Janus* was the majority's decision to deploy a heightened level of scrutiny, rather than a variation of the deferential rational basis standard of review, to analyze and strike down a state statute affecting funding for public-sector labor unions during collective bargaining for violating the First Amendment.[3] As Professor Erica Goldberg encapsulated it, Kagan "accused . . . the majority of demeaning the majesty of the First Amendment in order to use it to suit their own political preferences – in this case, defunding public sector unions."[4]

The day before ruling in *Janus*, the same five-to-four composition of justices fractured over the use of heightened scrutiny by the majority in

1. 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting). *See id.* at 2487 (noting that Kagan was joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor). The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety-five years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties applicable for governing the actions of state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (finding "that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

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

3. There are three traditional tiers of judicial review in U.S. constitutional law – strict scrutiny, intermediate scrutiny and rational basis review – with rational basis being the most deferential test and the one that applies when "a law . . . only minimally burdens constitutional rights (the vast bulk of all laws) . . . ." Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of Nixon v. Shrink Missouri Government*, 66 MO. L. REV. 141, 158 (2001). Writing for the majority in *Janus*, Justice Samuel Alito Jr. concluded that the dissent's call for using a version of "rational-basis review" amounted to a "form of minimal scrutiny [that] is foreign to our free-speech jurisprudence, and we reject it here." *Janus*, 138 S. Ct. at 2465. *See* Clay Calvert, *Is Everything a Full-Blown First Amendment Case After* Becerra *and* Janus*? Sorting Out Standards of Scrutiny and Untangling "Speech as Speech" Cases from Disputes Incidentally Affecting Expression*, 2019 MICH. ST. L. REV. 73, 125–28 (addressing the majority's decision to use heightened scrutiny in *Janus*).

4. Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. CIN. L. REV. 959, 969 (2020).

National Institute of Family and Life Advocates v. Becerra.[5] The majority opinion, authored by Justice Clarence Thomas, held that a California statute that compelled licensed crisis pregnancy centers—facilities commonly operated by pro-life, anti-abortion religious groups—to notify women on their premises that the state provides free and low-cost abortions was subject to heightened review because it was a content based statute.[6] The majority, in turn, concluded that the organizations challenging the law were likely to succeed on their First Amendment-based speech claim against California.[7]

Writing in dissent on behalf of the Court's liberal wing in *Becerra*, Justice Stephen Breyer attacked the majority's conclusion that heightened scrutiny was presumptively warranted simply because the statute was content based.[8] He contended that "[b]ecause much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation."[9] By "suggesting that heightened scrutiny applies to much economic and social legislation"[10] merely because laws regulating it are content based, the majority—as Breyer averred—does "a serious disservice through dilution"[11] to traditional rationales for protecting speech, including facilitating truth seeking in the marketplace of ideas and shielding from censorship unpopular ideas.[12]

In her *Janus* dissent, Justice Kagan also intimated that deploying heightened scrutiny degrades another core First Amendment value—namely, protecting democratic self-governance.[13] Ultimately, the majority's approach to scrutiny in *Becerra* and *Janus* readily taps into what Professor Tabatha Abu El-Haj calls the Roberts Court's "increasing suspicions of

5. 138 S. Ct. 2361 (2018).

6. *Id.* at 2371. The majority ultimately concluded the law could not "survive even intermediate scrutiny," much less strict scrutiny. *Id.* at 2375.

7. *Id.* at 2376.

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

9. *Id.*

10. *Id.* at 2382.

11. *Id.* at 2383.

12. *Id.* at 2382–83.

13. *See* Janus v. Am. Fed'n State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting) (concluding that "almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but *to protect democratic governance* . . . .") (emphasis added).

content-based speech regulation."[14]

Indeed, the macro-level fear here is that applying heightened scrutiny solely because a law is categorized as a content based regulation, rather than using heightened scrutiny because a law threatens traditional First Amendment values,[15] facilitates the First Amendment's deployment as a wrecking ball against a wide range of economic and social legislation that otherwise would face only rational basis review.[16] This tack signals, as Breyer suggested in *Becerra*, a return to the *Lochner* era, with the First Amendment now being used for goring social, economic and welfare legislation.[17] In brief, selecting heightened scrutiny simply because a law is categorized as content based greases the skids for "the process of deregulation by First Amendment."[18]

This Article addresses the growing friction over how standards of judicial scrutiny should be selected in First Amendment cases. Part I reviews the Court's current categorical methodology for free-speech jurisprudence generally and, more specifically, as it affects scrutiny by categorizing laws as either content based or content neutral.[19] Part II then explores Justice Breyer's alternative approach to scrutiny, which considers categories such as content based and content neutral merely as rules of thumb and that, instead, leans more heavily on whether core First

14. Tabatha Abu El-Haj, *"Live Free or Die"—Liberty and the First Amendment*, 78 OHIO ST. L.J. 917, 917 (2017).

15. For example, truth seeking and democratic self-governance are traditional First Amendment values that Breyer dubbed in *Becerra* as "the true value[s] of protecting freedom of speech." *Becerra*, 138 S. Ct. at 2383 (2018) (Breyer, J., dissenting).

16. *See* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 403 (2016) (observing that rational basis is used "to analyze government economic regulations and social welfare legislation when there is no discrimination based on a suspect classification or infringement of a fundamental right").

17. *Becerra*, 138 S. Ct. at 2381 (Breyer, J., dissenting) ("Historically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution. Ever since this Court departed from the approach it set forth in *Lochner v. New York*, 198 U.S. 45 (1905), ordinary economic and social legislation has been thought to raise little constitutional concern." (citations omitted)). In *Lochner,* the Court concluded that an individual's liberty and freedom of contract took priority over the government's police power to enforce, in the interest of public health, a labor law limiting the number of hours per week that bakers could work. During the so-called *Lochner* era, the Court declared invalid many laws "for infringing freedom of contract." Chemerinsky, *supra* note 16, at 408.

18. Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 331 (2016).

19. *Infra* notes 22–55 and accompanying text.

Amendment ideals are imperiled.[20] Finally, Part III advocates for replacing today's categorical framework for scrutiny with a modified version of Breyer's approach that blends consideration of current categories with a values-based balancing methodology.[21]

I. LIVING IN A CATEGORICAL WORLD: LEVELS OF PIGEONHOLING IN FIRST AMENDMENT JURISPRUDENCE AND THEIR IMPACT ON SCRUTINY

First Amendment free-expression jurisprudence is systemically categorical. It is a framework that, on first glance, appears to foster predictability and consistency by warding off dangers of an ad hoc balancing methodology that inefficiently weighs anew, with each case, speech interests against the harms that such expression might cause.[22] Today's categorical approach to free-speech disputes is multi-tiered, featuring at least four levels of categorization.[23]

At the threshold level, the issue is whether the underlying matter spawning a lawsuit should be categorized as speech or conduct.[24] Matters falling into the latter grouping generally reside outside the scope of First Amendment protection.[25] "Generally" is purposefully deployed above

20. *Infra* notes 56–77 and accompanying text.

21. *Infra* notes 78–86 and accompanying text.

22. *See* Wayne Batchis, *On the Categorical Approach to Free Speech – And the Protracted Failure to Delimit the True Threats Exception to the First Amendment*, 37 PACE L. REV. 1, 2–3 (2016) (noting that "[o]n its face, a categorical structure establishes a consistent rule-based methodology that constrains courts, promoting – if not ensuring – disciplined predictability in free speech jurisprudence," and adding that "it allows for a default rule that – consistent with the unequivocal language of the First Amendment itself – affords virtually absolute protection against content based suppression . . . ."); *see also* Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 673 (1983) ("An ad hoc approach weighs, in each particular case, the interests served by the speech against the asserted state interest in prohibition or regulation.").

23. *Cf.* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 386 –87 (2009) (identifying three levels of categorical analysis in First Amendment law).

24. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2373 (2018) (noting that "[w]hile drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it.").

25. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (Scalia, J., concurring in the judgment) (noting that "a general law regulating conduct and not specifically directed at expression . . . is not subject to First Amendment scrutiny at all."); *see also* R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 356 (2019) (noting that "[g]overnmental

because a second tier of categorization is whether conduct may be classified as symbolic expression, thereby triggering possible First Amendment protection.[26] Examples of symbolic speech range from burning the flag of the United States of America in political protest to dancing naked in a sexually oriented business as a form of sexual expression.[27] This caveat of symbolic expression to the speech-conduct dichotomy ultimately is just one of multiple exceptions to the categorical rules that animate First Amendment law and that, in turn, muddle what at first seemingly are crisp, clear-cut distinctions.[28] In brief, these carveouts shatter the illusion of clarity that a categorical framework for judicial analysis appears to hold.

The categorizing, however, does not stop with the first two levels. A third stage arises once a court determines that either "pure speech" or symbolic expression is in play.[29] The issue here is whether the speech falls into a category of expression that the Supreme Court has deemed generally outside the wall of First Amendment coverage. As Justice Anthony Kennedy wrote in 2002, "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."[30] The Court began identifying such categorical carveouts from First Amendment

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regulations of conduct . . . are outside of the ambit of the First Amendment"); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 319 (2018) ("The animating premise of much First Amendment theory and case law is that some things are speech, which fall within the First Amendment's ambit, and others are conduct, and so fall outside it.").

26. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech."); *see also* Diahann DaSilva, *Playing a "Labeling Game": Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 773 (2015) ("Conduct receives First Amendment protection when it is intended to convey a message and that message is likely to be understood.").

27. *See* Texas v. Johnson, 491 U.S. 397, 406 (1989) (concluding that Gregory Lee Johnson's burning of the flag of the United States of America outside of the 1984 Republican National Convention "implicate[d] the First Amendment"); *Barnes*, 501 U.S. at 566 (1991) (observing, in the context of a lawsuit involving two businesses that wanted to provide totally nude dancing to patrons as a form of entertainment, that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so").

28. *See infra* notes 35–36 and 41 and accompanying text (addressing exceptions to other categorical rules in First Amendment law).

29. *Cf.* Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (describing a federal statute that barred the disclosure of information obtained from an illegally intercepted telephone call as "a regulation of pure speech"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (describing the wearing of black armbands to protest the Vietnam War as being "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment").

30. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002).

protection nearly eighty years ago in *Chaplinsky v. New Hampshire*, opining that "[t]here 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."[31] The *Chaplinsky* Court excluded categories of speech from First Amendment shelter based upon their lack of value when weighed against society's interests in order and morality.[32] *Chaplinsky*, in short, "modeled the categorical approach to setting the First Amendment's boundaries."[33]

Here too there are caveats that cloud the "categorical exclusion doctrine,"[34] such as the fact that while it is illegal to distribute obscene speech, one can freely possess it at home.[35] Similarly, while fighting words constitute a generally unprotected category of expression, the government cannot go inside that free-speech exception and selectively restrict fighting words regarding only some topics, but not others, "based on hostility—or favoritism—towards the underlying message expressed."[36]

If, however, the speech at issue is not pigeonholed into one of these unprotected categories—if, in contrast, it is presumptively safeguarded by

31. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). *See* Burton Caine, *The Trouble With "Fighting Words": Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 443 (2004) (observing that in *Chaplinsky* the Court decided "to carve out, in wholesale fashion, vast categories of exceptions to the First Amendment's otherwise unqualified protection of speech").

32. Justice Frank Murphy wrote for the Court that categories of speech such as obscenity and fighting words could be jettisoned from the First Amendment's penthouse of protection because they serve "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky, 315 U.S. at 572. This is known as the low-value theory of free expression. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983) (noting that "[t]he 'low' value theory first appeared in the famous dictum of *Chaplinsky v. New Hampshire*").

33. Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1343 (2015).

34. Charles W. "Rocky" Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 407 (2014).

35. *Compare* Roth v. United States, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press."), *with* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.").

36. R.A.V. v. St. Paul, 505 U.S. 377, 386 (1992). In this instance, the Court held unconstitutional a St. Paul, Minnesota, ordinance that applied "only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics." *Id.* at 391.

the First Amendment—then a fourth categorization phase comes into play when lawmakers nonetheless attempt to regulate it. This fourth tier of categorization is the one at the heart of this Article, and it directly affects how rigorously or deferentially a court examines a statute restricting protected speech. It pivots on classifying a statute as content neutral, content based, or viewpoint based.[37]

Laws falling into the content neutral category are subject to the heightened yet generally deferential intermediate scrutiny standard,[38] while content based measures must surmount the more rigorous and demanding strict scrutiny test.[39] Viewpoint-based laws—a subset of content based ones that involve government discrimination against some viewpoints, but not others, on a particular subject or topic—are considered especially reprehensible to the First Amendment and are always unconstitutional.[40]

37. *See* Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 131 (2008) ("In its jurisprudence, the Court has recognized three categories of regulations on expression: content neutral, content based, and viewpoint based. Whether a regulation will be upheld depends in large measure on the Court's initial determination of the category to which it belongs.").

38. *Id.* at 131–32. Intermediate scrutiny requires the government to demonstrate that it has a significant interest justifying a law and that the law's terms are narrowly drawn. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017). Under intermediate scrutiny, however, a law "need not be the least restrictive or least intrusive means of" serving the government's interest in order for it to be narrowly drawn. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). As the Court has noted, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. Additionally, when intermediate scrutiny is applied in the context of content-neutral time, place and manner regulations, the test requires the regulation in question to "leave open ample alternative channels for communication of the information" rather than completely banning the speech. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). This is sometimes known as the "alternative-channels-of-communication prong" of intermediate scrutiny. Clay Calvert & Minch Minchin, *Can the Undue-Burden Standard Add Clarity and Rigor to Intermediate Scrutiny in First Amendment Jurisprudence? A Proposal Cutting Across Constitutional Domains for Time, Place & Manner Regulations*, 69 OKLA. L. REV. 623, 630 (2017). In practice, intermediate scrutiny in free-speech cases often amounts to "a highly deferential form of review which virtually all laws pass." Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012).

39. Strict scrutiny is "a demanding standard" that requires the government to prove that a law "is justified by a compelling government interest and is narrowly drawn to serve that interest." Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011). Narrowly drawn, in contrast to its meaning for the intermediate scrutiny test noted immediately above, means that a law "must be the least restrictive means of achieving a compelling state interest." McCullen v. Coakley, 573 U.S. 464, 478 (2014). Strict scrutiny "nearly always proves fatal" for the laws that are subjected to it. Kendrick, *supra* note 38, at 237.

40. *See* Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) (asserting that "what we have termed 'viewpoint discrimination' is forbidden") (quoting Rosenberger v. Rector & Visitors of Univ. of Va.,

Exceptions from the categorical approach at this fourth level exist that once again muddy the seeming clarity. For example, statutes regulating advertising content—commercial speech, in First Amendment nomenclature—are reviewed under a version of intermediate scrutiny rather than, as one might expect for a content-based regulation, strict scrutiny.[41]

Nonetheless, there is a "nearly categorical application of strict scrutiny in cases involving content-based speech restrictions."[42] The Supreme Court added teeth to this inelastic categorical principle in the 2015 case of *Reed v. Town of Gilbert*.[43] Writing for the majority, Justice Clarence Thomas observed that a law is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed"[44] thereby "draw[ing] distinctions based on the message a speaker conveys."[45] Thomas wrote that laws that are content based on their face are subject to "strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[46] In other words, a noble legislative purpose will not spare a law from the arduous strict scrutiny test. Additionally, even facially neutral laws are categorized as content based and must surmount strict scrutiny if they were adopted because lawmakers disagreed with the underlying message conveyed.[47] In short, a law that by its terms seemingly applies equally—i.e.,

515 U.S. 819, 831 (1995)); *Rosenberger*, 515 U.S. at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination."); *see also* Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, 76–77 (1997) ("Viewpoint regulations go beyond regulating speech on a particular topic or subject matter. They regulate one side of a debate or topic but not the other. In brief, one viewpoint on a particular issue is treated more favorably under a law . . . than another on the same issue.").

41. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (noting that "we engage in 'intermediate' scrutiny of restrictions on commercial speech," and explaining that the Court has "always been careful to distinguish commercial speech from speech at the First Amendment's core"); *see also* Marc Jonathan Blitz, *The Pandora's Box of 21st Century Commercial Speech Doctrine: Sorrell, R.A.V., and Purpose-Constrained Scrutiny*, 19 NEXUS: CHAP. J.L. & POL'Y 19, 31 (2014) (noting that the Supreme "Court has chosen to apply intermediate scrutiny to commercial speech regulation rather than a stricter or more lenient standard of review").

42. David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 398 (2015).

43. 576 U.S. 155 (2015).

44. *Id.* at 163.

45. *Id.*

46. *Id.* at 165.

47. *Id.* at 164.

neutrally – to all topics and subjects, but which was, in fact, adopted for a content based "purpose and justification," faces strict scrutiny review.[48]

The ramifications of this categorical approach to scrutiny are enormous. As Professors Dan Kozlowski and Derigan Silver note, "it is much easier for a law to pass intermediate scrutiny than strict scrutiny, making the distinction between content-based and content-neutral laws important."[49] First Amendment scholar David Hudson agrees, writing that "[t]he distinction is often outcome determinative in free-speech cases, as most content-based laws are struck down and most content-neutral laws are upheld."[50] To paraphrase Justice Kagan's concerns from *Janus*, strict scrutiny is a powerful First Amendment weapon in the judiciary's arsenal for attacking and destroying the handiwork of lawmakers.[51]

Applying strict scrutiny to content-based laws is a blunt, short-cut methodology for resolving First Amendment battles. That is because, as Professor Han remarks, it eliminates the need for judges and justices "to meaningfully articulate and wrestle with their foundational intuitions regarding the value of the right at stake and the relevant regulatory interests in order to reach the preordained outcome."[52] That preordained outcome is a law being struck down, as "strict scrutiny leaves few survivors."[53]

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48. *Id.* at 166.

49. Dan V. Kozlowski & Derigan Silver, *Measuring* Reed's *Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMM. L. & POL'Y 191, 196 (2019).

50. David L. Hudson, Jr., *The Content-Discrimination Principle and the Impact of* Reed v. Town of Gilbert, 70 CASE W. RES. L. REV. 259, 261 (2019).

51. Janus v. Am. Federation of State, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting); *supra* note 1 accompanying text.

52. Han, *supra* note 42, at 399.

53. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (Souter, J., dissenting).

More problematically, the logic that strict scrutiny must be used because a law is content-based means that strict scrutiny applies even when the content being regulated is of exceedingly low value and a more deferential standard of review might be more appropriate. As Professor Han explains, although certain categories of speech have been excluded from all First Amendment coverage because of their low value,[54]

> there remains a strong intuition that not all remaining speech ought to be valued equally, and that applying the strict scrutiny default rule is too severe in particular cases. In other words, in some subset of cases, the default rule of strict scrutiny does not fit, in that its application does not match our fundamental intuitions regarding the value of speech and the social harms associated with the speech.[55]

In brief, applying strict scrutiny when core First Amendment values are not threatened by a statute that regulates low-value speech is judicial overkill. However, Justice Breyer's approach for determining scrutiny directly injects a healthy dose of First Amendment values into the equation to counteract this malady.

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54. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Stone, *supra* note 32 and accompanying text (addressing *Chaplinsky's* low-value theory of expression to eliminate certain varieties of speech from any First Amendment protection).

55. Han, *supra* note 42, at 400–01.

II. THE BREYER APPROACH: DEVOLVING RIGID CATEGORIES INTO RULES OF THUMB, LETTING FIRST AMENDMENT VALUES TAKE CENTER STAGE

When it comes to scrutiny in First Amendment cases, Justice Stephen Breyer is the Court's categorical contrarian. He even questions the merits of the threshold inquiry addressed earlier of categorizing the underlying artifact in a case as speech or conduct.[56] Breyer explained in 2017 that "because virtually all government regulation affects speech," it often is better for the Court "not to try to distinguish between 'speech' and 'conduct'" when the government regulates activities in which humans relate via speech.[57] The implication here is that just because speech may be affected by a law does not turn a case challenging it into an all-out First Amendment battle over freedom of speech, writ large, necessitating heightened scrutiny standards. Justice Kagan seemingly endorsed Breyer's desire to collapse the speech-versus-conduct dichotomy in *Janus*, observing that "[s]peech is everywhere – part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech."[58] To the extent that initially categorizing a law as affecting speech, rather than as regulating conduct, triggers the need to apply a heightened tier of First Amendment review (either intermediate or strict scrutiny), rather than a lower level of analysis (rational basis),[59] then the first-level phase of categorization should be jettisoned.[60] Speech and conduct are simply too inextricably intertwined

56. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2373 (2018); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (Scalia, J., concurring in the judgment); *supra* notes 24–25 accompanying text (describing this first-level phase of categorization).

57. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring). Justice Breyer reinforced his stance regarding the intertwined—rather than separable and dichotomized—nature of speech and conduct the next year in *Becerra*, observing there that "much, perhaps most, human behavior takes place through speech." *Becerra*, 138 S. Ct. at 2380 (Breyer, J., dissenting).

58. Janus v. Am. Fed. State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

59. *See* Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-McDonald?*, 21 CORNELL J. L. & PUB. POL'Y 489, 495 (2012) ("The lowest level of review is the rational basis test—a highly deferential form of scrutiny. In order for a regulation to survive rational basis review, the challenger must prove that the regulation does not bear a 'rational relationship' to a 'legitimate governmental purpose.'").

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

in many laws, particularly those affecting economic and social welfare, that time is better spent on tasks other than untangling them.

Beyond this first-level categorical concern, Breyer contended in 2019 that the "Court's speech-related categories," such as "content discrimination" and "viewpoint discrimination," should serve only "as rules of thumb," rather than as "outcome-determinative rules," when resolving First Amendment cases.[61] He elaborated that "[r]ather than deducing the answers to First Amendment questions strictly from categories, as the Court often does, I would appeal more often and more directly to the *values the First Amendment seeks to protect*."[62] He sounded the same sentiment in *Reed v. Town of Gilbert*,[63] contending that:

> [t]he First Amendment requires greater judicial sensitivity both *to the Amendment's expressive objectives* and to the public's legitimate need for regulation than a simple recitation of categories, such as "content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.[64]

As these quotations reveal, Breyer's approach to scrutiny is not dictated by categories. Categories simply are rules of thumb—they are "helpful, but not determinative legal tool[s]" that serve "as a supplement" to another analysis.[65] That other analysis hinges on the extent to which a law threatens First Amendment values and objectives. Focusing on First Amendment values is essential for Breyer because they are, in his view, "the constitutional analogue of statutory purposes."[66]

In particular, Breyer's approach to scrutiny asks whether a law "work[s] harm to First Amendment interests that is disproportionate to their

61. Iancu v. Brunetti, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring part, dissenting in part).
62. *Id.* at 2305 (emphasis added).
63. 576 U.S. 155 (2015); *see supra* notes 43–48 accompanying text (addressing *Reed*).
64. *Reed*, 576 U.S. at 175–76 (Breyer, J., concurring) (emphasis added).
65. *Id.* at 179.
66. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 162 (2010).

furtherance of legitimate regulatory objectives."[67] This "proportionality question" is the heart of his methodology for determining if a law passes First Amendment muster.[68] In brief, the "seriousness of the harm to speech" must be weighed against "the importance of the countervailing objectives" in regulating it.[69] This, Breyer acknowledges, is a balancing tack.[70]

What is key here is that laws receive closer, more exacting scrutiny when they threaten "the speech interests that the First Amendment protects"[71] and more deferential, relaxed review when they do not. As Breyer explains, when "'core' political speech" is threatened, then "the First Amendment imposes tight constraints" on lawmakers.[72] That is because, in his view, "the processes through which political discourse or public opinion is formed or expressed" are "interests close to the First Amendment's protective core."[73] Breyer notes that other "widely accepted First Amendment goals" meriting heightened scrutiny when they are truly threatened include protecting unpopular ideas and viewpoints from censorship and facilitating truth-seeking in the marketplace of ideas.[74] Indeed, for Breyer, the value of protecting a robust marketplace of ideas is linked to the promotion of democratic self-governance.[75]

Conversely, laws that only minimally effect such core First Amendment interests—laws regulating ordinary business transactions, for instance—are

67. Sorrell v. IMS Health Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting). *See also Reed*, 576 U.S. at 179 (Breyer, J. concurring) (describing the "basic analysis" as "ask[ing] whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives").

68. Iancu v. Brunetti, 139 S. Ct. 2294, 2306 (2019) (Breyer, J., concurring in part, dissenting in part).

69. *Reed*, 576 U.S. at 179 (Breyer, J. concurring).

70. *See* BREYER, *supra* note 66, at 164 ("Judges who use proportionality ask whether the restriction on speech is proportionate to, or properly *balances*, the need.") (emphasis added).

71. *Brunetti*, 139 S. Ct. at 2304-06 (Breyer, J., concurring in part, dissenting in part).

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

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

74. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2382–83 (2018) (Breyer, J., dissenting). *See also Reed*, 576 U.S. at 176 (Breyer, J., concurring) (suggesting that strict scrutiny applies when law regulates content in order to suppress a viewpoint).

75. *See Sorrell*, 564 U.S. at 583 (Breyer, J., dissenting) (stressing "the constitutional importance of maintaining a free marketplace of ideas . . . that provides access to 'social, political, esthetic, moral, and other ideas and experiences,'' and adding that "[w]ithout such a marketplace, the public could not freely choose a government pledged to implement policies that reflect the people's informed will") (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

subject to much more deferential review akin to rational basis.[76] Measures limiting the flow of truthful information about commercial goods face a level of review somewhere in between those affecting political speech and laws implementing economic and social policies.[77]

How might facets of this methodology improve the Court's current approach to scrutiny when laws are challenged on First Amendment free-speech grounds? The Article next proposes a two-level analysis that melds aspects of the current categorical approach with Justice Breyer's appeal to First Amendment values.

III. TOWARD A TWO-STEP APPROACH TO SCRUTINY: BLENDING CATEGORIES AND VALUES

This Article explained the friction on today's Supreme Court over First Amendment scrutiny standards, especially when it comes to using heightened scrutiny to evaluate laws regulating economic and social activities.[78] It also addressed the worry that applying the sledgehammer test that is strict scrutiny to measure the validity of laws regulating low-value expression amounts to judicial overkill of legislative handiwork.[79] The root problem in both scenarios is that categorizing a law as content based presumptively triggers strict scrutiny, especially after *Reed* held that a benign justification cannot transform a facially content based law into a content neutral one.[80]

Rather than deploying strict scrutiny solely because a law is categorized as content based, greater energy, in Justice Breyer's view, should be expended on analyzing whether a law threatens core values that the First Amendment safeguards, including protecting political speech and unpopular viewpoints, as well as facilitating a robust marketplace of ideas to promote truth discovery.[81] Categories, in Breyer's view, remain useful, but only as rules of thumb that play a flexible—not definitive—role in

76. *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring).
77. *Id.*
78. *Supra* notes 1–18 and accompanying text.
79. *Supra* notes 54–55 and accompanying text.
80. *See supra* notes 43–48 and accompanying text (addressing *Reed*).
81. *Supra* notes 62–75 and accompanying text.

discerning the scrupulousness of scrutiny.[82]

This Article advocates for a sequential, two-step or two-prong approach to scrutiny determinations. The first step is categorical. It embraces the current approach for selecting scrutiny, but in a nonbinding fashion. Specifically, it requires courts to decide if a statute is content neutral, content based or viewpoint based, with such categorization creating a rebuttable presumption that a particular level of scrutiny applies (intermediate for content neutral laws, strict scrutiny for content based and viewpoint based ones).[83]

The second step then is values oriented. It mandates that courts evaluate whether the initial scrutiny presumption should be rebutted. In particular, it obliges them, in Breyer-based fashion, to analyze whether the statute at issue threatens a core First Amendment value (or values) and, if so, the gravity of the threat to that value. Those key values include, but are not limited to, ones Breyer has, to one degree or another, already recognized:[84] (1) protecting political speech and political discourse that might, as philosopher-educator Alexander Meiklejohn put it, facilitate "the voting of wise decisions;"[85] (2) safeguarding the processes of truth-seeking and truth-testing in the metaphorical public marketplace of ideas; and (3) shielding ideas, viewpoints and information from censorship simply because they are unpopular. Courts are free here to consider if other First Amendment values, such as individual self-realization and self-fulfillment through the receipt of speech and engagement in it, are jeopardized.[86]

Depending on whether or not a court determines that any such values are threatened by a statute and, in turn, how serious or grave the threat is to those values, it is then free to rebut the initial scrutiny presumption and work its way up or down the three typical tiers of scrutiny in constitutional law—

82. *See supra* note 65 and accompanying text (setting forth Breyer's articulation of a rule of thumb).

83. *See supra* notes 37–40 and accompanying text (summarizing this aspect of the categorical approach).

84. *See supra* notes 72–75 and accompanying text (addressing First Amendment values and interests that Breyer has recognized).

85. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

86. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 6 (1970) (asserting that "freedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being").

strict, intermediate and rational basis. A jump downward by more than one tier of scrutiny—in other words, moving down from strict scrutiny to rational basis review—would require a greater level of proof by a court that no First Amendment interests are jeopardized in any serious fashion than would a move downward by only one tier of scrutiny from either strict to intermediate or from intermediate to rational basis review.

This approach, in turn, would also encourage attorneys in First Amendment speech cases to elaborate in their briefs and during oral argument on whether or not First Amendment values are endangered by a statute. Attorneys, in other words, would have the opportunity to argue to courts something along the lines of—colloquially speaking—"I know this law is content based and thus presumptively should face strict scrutiny under *Reed*, but here's why you should not follow that presumption and, instead, why you should apply a lower standard of review. In short, no First Amendment values are possibly harmed in any serious fashion by the statute." Or, in another scenario, they might contend, "We understand this law is content neutral and thus presumptively is subject to intermediate scrutiny, but the law nonetheless seriously imperils multiple core First Amendment values and thus we respectfully request that you ratchet upward the level of review to strict scrutiny."

This obviously is a rough, working framework for First Amendment scrutiny going forward. The nuances must be worked out over time by courts, but the values-based second prong is deliberately flexible in order to afford courts latitude in their analysis rather than being boxed in, as they now are, by a purely categorical methodology. The constricted and restricted nature of the categorical approach, after all, is a primary complaint of Justice Breyer, whose values-centric tack animates this second step of this proposal. The bottom line is that a blend of nonbinding categories, supplemented by serious consideration and analysis of First Amendment values, may offer the Court the best of both the categorical and balancing worlds.