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TEARS OF SCRUTINY

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ABSTRACT

For decades, every law student in the United States has learned that there are three levels of judicial scrutiny that guide the reasoning of courts deciding questions of constitutionality. That is no longer true, at least with regard to freedom of speech. In several recent compelled speech decisions, including rulings in Americans for Prosperity Foundation v. Bonta and Janus v. ASCME, the Supreme Court has articulated and applied a fourth tier of scrutiny. Unfortunately, the Court's description and application of the newest tier of review, "exacting scrutiny," has been inconsistent and vague. Worse still, the indeterminacy surrounding exacting scrutiny reflects a larger problem in the way that the Court defines and uses the judicial scrutiny doctrines.

Justices and scholars long have argued over whether First Amendment analysis should be based on application of the tiers of scrutiny or through the balancing of competing interests. This is similar to the long-standing debate about whether it is better to have "rules" or "standards." But the Supreme Court's approach to free speech cases is the worst of both: it creates the false appearance that the Court is following rules by applying the levels of scrutiny, while in reality the levels of scrutiny are so manipulable and manipulated that they allow for any result and without the explication and weighing of competing interests that interest balancing should entail. Scrutiny doctrine now serves more to disguise the Court's reasoning than to guide it.

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I. INTRODUCTION

The conventional wisdom is that there are three tiers of scrutiny, each with a fixed definition, that control analysis in constitutional cases.[1] That conventional wisdom is wrong. In recent free speech cases, such as *Americans for Prosperity Foundation v. Bonta*[2] and *Janus v. AFSCME*,[3] the Supreme Court has indisputably indicated that there are four levels of scrutiny: rational basis,[4] intermediate scrutiny,[5] strict scrutiny,[6] and a new tier,

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1. *See, e.g.*, Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) ("The Constitution does not prescribe tiers of scrutiny. The three basic tiers—'rational basis,' intermediate, and strict scrutiny."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 687 (6th ed. 2019) [hereinafter E. CHEMERINSKY] ("[T]he three levels of scrutiny."); RICHARD H. FALLON JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 106 (2019) ("[I]ntermediate scrutiny stands along with strict scrutiny and rational basis-review.").

2. 141 S. Ct. 2373 (2021).

3. 138 S. Ct. 2448 (2018).

4. *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010) ("[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.") (citation omitted).

5. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 475 U.S. 557, 573 (1980) (Blackmun, J., concurring) ("I agree with the Court that this level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech.").

6. *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2374 (2018) ("[T]his Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, professional fundraisers, and organizations that provided specialized advice about international law.") (internal citations omitted).

"exacting scrutiny," that is now the second-most stringent level of review.[7] Although all twelve regional United States Courts of Appeals have considered the application of exacting scrutiny in at least one case since 2009,[8] the newest tier of review is still largely overlooked in constitutional law scholarship.[9]

Unfortunately, inconsistent definition and application of exacting scrutiny is sure to cause great confusion among judges, lawyers, and academics. It is difficult to figure out why the Court developed the new tier, or what role it will serve in future cases. Worse still, the Court's incomprehensible approach to exacting scrutiny is a symptom of a much larger problem. It is just one of many ways in which the Court's inconsistent application—and indeed, I would argue, manipulation—of scrutiny doctrine at each step of the analytical process and at each tier of review has rendered the doctrine little more than "a meaningless formulation."[10] The Court is able to justify virtually any conclusion by how the issue is framed,[11] and yet still benefit from the illusion that a particular outcome was preordained by law.

The First Amendment's Free Speech Clause, the only area of constitutional law in which the Court clearly applies four (not three) tiers of scrutiny,[12] is an area in which the scrutiny framework is most comprehensively developed. In the context of free speech cases, scrutiny analysis proceeds in three steps: categorization, classification, and application. A court first places the challenged state action into a *category* based on what speech it regulates (such as libel of a public official,[13] obscenity,[14] or commercial

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7. *See, e.g.*, *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 ("Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny."); *Janus*, 138 S. Ct. at 2465 ("'[E]xacting' scrutiny, a less demanding test than the 'strict' scrutiny that might be thought to apply outside the commercial spere.") (internal citation omitted).

8. *See, e.g.*, Nat'l Org. for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011); Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118 (2d Cir. 2014); Del. Strong Fams. v. Att'y Gen. of Del., 793 F.3d 304 (3d Cir. 2015); Wash. Post v. McManus, 944 F.3d 506 (4th Cir. 2019); Justice v. Hosemann, 771 F.3d 285 (5th Cir. 2014); Libertarian Party of Ohio v. Husted, 751 F.3d 403 (6th Cir. 2014); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012); Minn. Citizens Concerned for Life, Inc v. Swanson, 692 F.3d 864 (8th Cir. 2012); Nat'l Ass'n for Gun Rights, Inc. v. Mangan, 933 F.3d 1102 (9th Cir. 2019); Free Speech v. FEC, 720 F.3d 788 (10th Cir. 2013); Worley v. Fla. Sec'y of State, 717 F.3d 1238 (11th Cir. 2013); Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1 (D.C. Cir. 2009).

9. The only law review article that explores exacting scrutiny in detail, written prior to the Court's recent major First Amendment cases, similarly notes the peculiar lack of attention to exacting scrutiny in scholarship. *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 207 (2016).

10. Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2326–27 (2016) (Thomas, J., dissenting).

11. *Cf.* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007) ("[I]ndividual Justices tend to vary their applications of strict scrutiny based on their personal assessments of the importance of the right in question.").

12. Although the Supreme Court has occasionally used the phrase "exacting scrutiny" in the generic sense outside of First Amendment law, *see, e.g.*, United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938), I cannot identify any cases in which the Court applied exacting scrutiny as a discrete tier of judicial scrutiny outside of the context of free speech.

13. *Cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (requiring "actual malice" for a public official to recover damages in a libel action).

14. *Cf.* Miller v. California, 413 U.S. 15 (1973) (creating a three-part test for scrutinizing regulations of obscenity).

speech[15]) and how that speech is regulated (such as content-based[16] or content-neutral[17] laws). In step two, the court uses an elaborate taxonomy developed by the Supreme Court to link the category selected in step one to a particular level of scrutiny. It makes this link by *classifying* the category of state action as one requiring strict, exacting, intermediate, or rational basis review. For instance, the Court often has said that content-based regulation of speech must meet strict scrutiny, and it is settled that a content-neutral time, place, or manner restriction of a public forum receives intermediate scrutiny.[18] The chosen level of scrutiny is then *applied* in step three. At least in theory, one strength of sticking to this process is that it imbues transparency and consistency in the process of adjudicating controversial questions of constitutional law because the level of scrutiny chosen by a court is relatively predictable and frequently dispositive.[19]

But constitutional scrutiny is a formalized system that only works if the Court has the self-discipline to apply it consistently. That discipline has been lacking.[20] As the Court's recent decisions in *National Institute of Family and Life Advocates* ("*NIFLA*") *v. Becerra*,[21] *Janus*, and *Americans for Prosperity* demonstrate, the scrutiny doctrine has been manipulated so persistently that it is nearly indecipherable. The Court's inconsistent recategorization makes it harder to identify which regulations of speech fit into which recognized categories.[22] In *Janus* and *American for Prosperity*, the Court classified some compelled speech into the new "exacting scrutiny" tier but used two different formulations of exacting scrutiny that have made it unclear whether there are two versions of exacting scrutiny, which categories of speech exacting scrutiny applies to, and how it relates to or is different from the other levels of heightened scrutiny.[23] And the Court's recent cases have continued the trend, recognized by other scholars,[24] in which the levels of scrutiny vary from case-to-case both rhetorically and in degree of strictness.[25]

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15. *Cf.* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

16. *Cf.* Reed v. Town of Gilbert, 576 U.S. 155 (2015) (applying strict scrutiny to a content-based regulation).

17. *Cf.* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (applying intermediate scrutiny to a content-neutral regulation).

18. *Id.*

19. *Compare* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 589 (6th ed. 2019) ("If rational basis review is applied, the law is likely to be upheld."), *with* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (demonstrating that, from 1990 to 2003, the survival rate of laws challenged on free speech grounds and tested under strict scrutiny was approximately twenty-two percent (N=222)).

20. *See* JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 74 (2001) (arguing that the Court's "continuous reworking of the multi-tier" constitutional review architecture has made the system "highly rarefied to the point where it threatens to collapse of its own complexity"); Fallon, *supra* note 11, at 1272 ("Probably in common with many other doctrinal formulas, strict scrutiny developed partly as a device of judicial self-discipline, but judicial self-discipline is always imperfect and fraught with ambivalence, as the history and practice of strict judicial scrutiny unmistakably teach.").

21. 138 S. Ct. 2361, 2372 (2018).

22. *See infra* Part III.A.

23. *See infra* Part III.B.

24. For excellent discussions of the Court's inconsistent application of scrutiny, see FALLON, *supra* note 1; SHAMAN, *supra* note 20; Fallon, *supra* note 11; R. George Wright, *Wiping Away the Tiers of Judicial Scrutiny*, 93 ST. JOHN'S L. REV. 1119 (2019).

25. *See infra* Part III.C.

The Justices themselves have complained about both the reshuffling of the boundaries of each form of scrutiny and the redefining of what each inquiry entails. Some Justices have worried that a persistent ratcheting up of scrutiny[26] marks a return "to the bygone era of *Lochner v. New York*"[27] that "threaten[s] to distort or undermine legitimate legislative objectives."[28] Other Justices lament the "Court's increasingly common practice of invoking a given level of scrutiny . . . while applying a different standard of review entirely."[29]

Exploring the Court's recent high-profile compelled and commercial speech cases, I hope to demonstrate three things about the Court's First Amendment scrutiny jurisprudence. First, I argue that complete scrutiny analysis always entails three conceptual steps. A court applying scrutiny in free speech cases must always categorize the speech or regulation at issue, link the category with a class of scrutiny,[30] and apply a standard associated with the chosen level of scrutiny.

Second, I argue that when the Court changes scrutiny doctrine it does so by altering one or more of the three steps. In other words, the Court instructs lower courts how to decide scrutiny cases by recategorizing, reclassifying, or changing how a tier of scrutiny is applied. Courts are expected to follow the redefined categorization, classification, or application in subsequent cases. These changes dictate how courts define much of constitutional law and many of the most fundamental constitutional rights.

Finally, I argue that the Court has been so inconsistent and vague in its changes to all three steps of scrutiny—including the creation of a poorly defined and frequently overlooked fourth tier of scrutiny—that it has made scrutiny doctrine inscrutable. Much of the ambiguity that now shrouds the constitutional scrutiny doctrine results from the Court's unwillingness to embrace a flexible form of scrutiny doctrine, despite its inability in practice to adhere to the rigid formalism that tiered scrutiny requires. I do not mean to imply that a flexible doctrine is inherently more desirable than a rigid one, or vice-versa. Instead, I argue that the Court should either embrace a flexible approach, as some Justices favor, or adhere to the limitations imposed by rigid formulations. Its insistence on flexibly applying inflexible standards is counterproductive. Constitutional scrutiny is intended to guide a court's reasoning; the current approach serves mostly to disguise it.

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26. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in part) ("The two cases the Court cites in its rational-basis discussion . . . expose the special nature of the rational-basis test employed today. As two of only a handful of modern equal protection cases striking down legislation under what purports to be a rational-basis standard, these cases must be and generally have been viewed as intermediate review decisions masquerading in rational-basis language.") (internal citations omitted).

27. Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n of N.Y., 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

28. Sorrell v. IMS Health, Inc., 564 U.S. 552, 585 (2011) (Breyer, J., dissenting). *See also* United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it).").

29. Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2322 (2016) (Thomas, J., dissenting). *See also* Fallon, *supra* note 11, at 1303 ("[T]here are three strict scrutiny tests, not one, though all bear the same label. Not surprisingly, uncertainty and confusion have arisen about which version the Court will apply in cases in which differences among the tests would result in different outcomes.").

30. Note that courts sometimes avoid linking to a particular class of scrutiny by using a generalized term, such as "heightened scrutiny." I nevertheless treat this as a form of classification. For discussion of the merits or demerits to this flexible approach to classification, see *infra* Part IV.

This argument proceeds in three parts. In Part II, I introduce the tiers of scrutiny and explain that scrutiny analysis requires three conceptual steps: categorization, classification, and application. In Part III, I assert that when the Supreme Court updates First Amendment law through the scrutiny doctrine, it does so by *re*categorizing, *re*classifying, or *re*applying scrutiny in different fashion. Part III then demonstrates that although the Court frequently recategorizes, reclassifies, and changes the application of scrutiny, it has done so in an inconsistent and poorly explained fashion that makes the law more difficult to interpret or apply. Part IV situates scrutiny doctrine in the context of the familiar jurisprudential divide between "rules" and "standards." I argue that the Court's rigid-in-theory but flexible-in-practice approach to scrutiny fails to realize either the benefits of rules or standards. Ultimately, I suggest that the Court is faced with a choice between formalism or flexibility.

II. CONSTITUTIONAL SCRUTINY AND FREE SPEECH

Although the conventional wisdom is that there are three levels of scrutiny, today, there are four that have been expressly articulated by the Supreme Court. Rational basis is a highly deferential review that will uphold a challenged law if it is rationally related to any legitimate government purpose.[31] Intermediate scrutiny asks the government to show that the law is narrowly tailored to serve an important government interest.[32] Strict scrutiny, the most demanding method of review, asks whether the challenged law is necessary to effectuate a compelling government interest.[33] Gerald Gunther famously dubbed strict scrutiny "'strict' in theory and fatal in fact"—and rational basis, "virtually none in fact."[34] The newest test, exacting scrutiny, is the only level of scrutiny exclusive to the First Amendment. Although there is some uncertainty over what exacting scrutiny requires,[35] recent cases make it clear that it is intended to be at least as demanding as intermediate scrutiny, but less so than strict. Part of the puzzle concerning exacting scrutiny is how it differs from intermediate scrutiny and why the Court created it at all.

A. The Origin of First Amendment Scrutiny

i. Three-tiered Scrutiny

The foundation for the scrutiny structure was laid in *United States v. Carolene Products*' famous footnote four.[36] The Court there suggested in dictum that laws challenged under some constitutional prohibitions, such as those in the Bill of Rights,

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31. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–15 (1993).

32. CHEMERINSKY, *supra* note 19, at 587–88.

33. *Id.* at 588.

34. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

35. *Compare* Janus v. AFSCME, 138 S. Ct. 2448, 2465 (2018) (Alito, J.) ("Under 'exacting' scrutiny, . . . a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'") (quoting Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 310 (2012)), *with* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) (plurality) (writing, in a portion of the opinion that did not receive major support, that a law may survive exacting scrutiny only if there is a "substantial relation between the disclosure requirement and a sufficiently important governmental interest").

36. 304 U.S. 144, 152 n.4 (1938).

might "be subjected to more exacting judicial scrutiny," rather than the baseline presumption of constitutionality now associated with rational basis review.[37] Over the next twenty years, the Court occasionally invoked terms like "strict scrutiny"[38] and "most rigid scrutiny,"[39] or suggested that violations of "preferred" constitutional rights would be scrutinized more intensely than others,[40] but it did not employ the compelling government interest test or any element of it.[41]

The other pieces of constitutional scrutiny did not come together all at once. Rational basis review's presumption of constitutionality has, in some form, been a feature of the Court's jurisprudence since the nineteenth century.[42] It came to be clearly expressed in the post-1937 rejection of *Lochner*-era decisions, such as in *Carolene Products*. "Narrow tailoring," now a principal element of intermediate and exacting scrutiny, is the next oldest element,[43] incepted in Gilded Age Commerce Clause cases and made "a prominent part of First Amendment jurisprudence" by the New Deal Court.[44]

Strict scrutiny's "compelling" state interest standard first appeared in a 1957 concurring opinion by Justice Frankfurter.[45] The compelling state interest requirement was restated in various cases over the next several years.[46] For example, in the 1963 case *Sherbert v. Verner*, sometimes suggested to be the genesis of strict scrutiny[47] (though it did not actually use the word "scrutiny"), the Court held that South Carolina did not have a compelling interest in denying unemployment benefits to a woman who was fired because of her religion.[48] By the end of the 1960s, the Court had put the pieces together and made strict scrutiny a fixture of constitutional jurisprudence.[49]

Unlike its counterparts that developed over time, intermediate scrutiny came all in one piece.[50] In the 1976 equal protection case, *Craig v. Boren*, Justice Brennan held that

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37. *Id.*

38. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

39. Korematsu v. United States, 323 U.S. 214, 216 (1944).

40. Fallon, *supra* note 11, at 1274 (citing Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)).

41. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEG. HIST. 355, 356 (2006).

42. Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 897, 898 (2005) (citing Munn v. Illinois, 94 U.S. 113, 132 (1877) ("If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did.")).

43. Siegel, *supra* note 41, at 361.

44. *Id.* For an excellent discussion of tailoring requirements in free speech cases, see Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2147 (1996).

45. Siegel, *supra* note 41, at 367 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring)).

46. *Id.* at 369–75.

47. Fallon, *supra* note 11, at 1275.

48. 374 U.S. 398 (1963); Siegel, *supra* note 41, at 379.

49. Fallon, *supra* note 11, at 1275.

50. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 407–08 (2010):

> In the Oklahoma beer case, *Craig v. Boren*, Brennan had a shaky majority of five. Both Stewart and the newest justice, John Paul Stevens, who replaced Douglas, seemed unwilling to go any further than an amorphous endorsement of heightened scrutiny. . . . This time, he did not try to go as far as strict scrutiny. Instead, in a strategic retreat, Brennan laid out for the first time an explicit formulation of heightened scrutiny. He characterized the standard of review as requiring that classifications based on gender 'must serve important government objectives and must be substantially related to

"classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[51] Brennan asserted, without supporting citation, that this test—described by Justice Rehnquist in dissent as "an elevated or 'intermediate' level of scrutiny"[52]—originated in precedent.[53] This was not true. *Craig v. Boren* began the trend of tripartite constitutional review.

The Court imported *Craig v. Boren*'s intermediate scrutiny test into First Amendment analysis four years later.[54] In that case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court considered an energy crisis era restriction on commercial advertising by electric utilities in New York.[55] The Court had recognized in the years preceding *Central Hudson* that although commercial speech benefits from First Amendment protection, it is in a separate category receiving less protection than ideological speech.[56] *Central Hudson* reflected this somewhat diminished protection by applying a test a step below strict scrutiny's compelling state interest standard, but still above rational basis.[57] Although the government is free to suppress "commercial messages that do not accurately inform the public about lawful activity,"

> [i]f the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal.[58]

The majority clarified that "in proportion to that interest" meant that "if the government interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive."[59] In his concurring opinion, Justice Blackmun labeled this analysis "an intermediate level of scrutiny."[60]

ii. Exacting Scrutiny

For decades thereafter, constitutional scrutiny was understood as a three-part doctrine composed of rational basis, intermediate, and strict scrutiny.[61] But the Court's

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> achievement of those objectives.' The term 'important government objectives' fell somewhere between the 'compelling' requirement of strict scrutiny and the looser 'legitimate' requirement of rational basis.

51. 429 U.S. 190, 197 (1976).

52. *Id.* at 218 (Rehnquist, J., dissenting).

53. *Id.* at 197.

54. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

55. *Id.* at 559.

56. Va. Pharm. Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978); Bates v. State Bar of Ariz., 433 U.S. 350, 363–64 (1977); Friedman v. Rogers, 440 U.S. 1, 11 (1979).

57. 447 U.S. at 573 (Blackmun, J., concurring).

58. *Id.* at 564.

59. *Id.*

60. *Id.* at 573 (Blackmun, J., concurring).

61. *See, e.g.*, Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) ("Three basic tiers—'rational basis,' intermediate, and strict scrutiny . . ."); Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. of N.J., 974 F.3d 237, 242 n.2 (3d Cir. 2020) ("There are three levels of scrutiny: rational basis,

recent decisions in *Janus v. AFSCME* and *Americans for Prosperity v. Bonta* have clearly established that there is a fourth tier of constitutional scrutiny.[62] They label it "exacting scrutiny," and suggest that it applies to at least some (though perhaps most, or even all) compelled subsidies and disclosures in the context of campaign finance and expressive association.[63] And given its recent development, it may come to be used in other areas of free speech law and constitutional law.[64]

It is difficult to pin down precisely when exacting scrutiny became a discrete tier of review. For decades, "exacting scrutiny," and the tests now associated with exacting scrutiny, were loose language used to signify review greater than rational basis. Somewhere along the way, the Court began to treat it as a formal test, and eventually as a discrete tier of scrutiny.[65] The precise nature of exacting scrutiny remains unclear because, although both *Janus* and *Americans for Prosperity* based their definition of exacting scrutiny on precedents, they quoted different standards from different threads of First Amendment case law. Each nevertheless labeled their standard "exacting scrutiny."[66]

Janus held that public sector agency shop arrangements—which obligate non-union employees to pay some dues and fees toward a union's collective bargaining activities—violate the First Amendment because they compel employees to subsidize union speech that they may disagree with.[67] Justice Alito, writing for the Court, held that public sector agency fees could not survive "'exacting' scrutiny, a less demanding test than the 'strict' scrutiny that might be thought to apply outside the commercial sphere."[68] Justice Alito suggested that "[t]he exacting scrutiny standard we apply in this case was developed in the context of commercial speech."[69] But the *Janus* standard ("compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms") was in fact first articulated in expressive association case law, beginning with *Roberts v.*

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intermediate scrutiny, and strict scrutiny."); Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 847 (9th Cir. 2017) ("[T]hree levels of scrutiny—rational basis, intermediate, and strict."); Apache Bend Apartments, Ltd. v. U.S. Through I.R.S., 987 F.2d 1174, 1183 n.13 (5th Cir. 1993) (en banc) (Goldberg, J., dissenting) ("[T]hree tiers of scrutiny.").

62. Janus v. AFSCME, 138 S. Ct. 2448, 2477 (2018); Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2018).

63. *Janus*, 138 S. Ct. at 2477–78; *Ams. for Prosperity Found.*, 141 S. Ct. at 2382–83.

64. *Ams. for Prosperity Found.*, 141 S. Ct. at 2391–92. (Alito, J., concurring).

65. The line between loose language, a legal test, and a tier of scrutiny is difficult to draw. I use the phrase "loose language" to refer to the situations in which the Court used the word "exacting" as an adjective merely to signify a demanding form of review. *Carolene Products*' use of the term "more exacting judicial scrutiny" is an example of this because Justice Stone simply meant to indicate that the manner of review would be more searching than ordinary reasonableness review. A legal test refers to a formalized inquiry that is not one of the four levels of constitutional scrutiny. An example of this includes the test for battery in tort law, which requires proof of two elements: intent and offensive contact. A tier of scrutiny is a type of legal test. The scrutiny architecture offers a menu of tests that courts choose among when deciding a variety of different constitutional questions. The fact that exacting scrutiny is a tier of scrutiny, and not just an ordinary test, is significant because the tiers of scrutiny exist in ranked format relative to one another and are applied across constitutional law. The addition of exacting scrutiny means that intermediate scrutiny is no longer the second-highest form of review but is still the second lowest. As Part III explains, it is not clear how intermediate scrutiny *Americans for Prosperity*'s exacting scrutiny are different.

66. For more detail on exacting scrutiny, see *infra* Parts III.B and III.C.3.

67. *Janus*, 138 S. Ct. at 2478.

68. *Id.* at 2465 (citing Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 310 (2012)).

69. *Id.* at 2477.

U.S. Jaycees in 1984.[70] Part of the puzzle is that the requirement of a "compelling interest" and no less restrictive alternative are the very core of strict scrutiny, yet the Court said it was not using strict scrutiny, but a different test, "exacting scrutiny".

When the Court first applied the standard in *U.S. Jaycees*—which held that a state anti-discrimination law did not violate the First Amendment rights of a exclusively male civic organization that wanted to exclude women—it included a string-cite to expressive association and compelled disclosure cases, including *Brown v. Socialist Workers* and *Buckley v. Valeo*.[71] Although the *U.S. Jaycees* inquiry originated in 1984, it was not labeled "exacting scrutiny" until *Knox v. Service Employees International Union* in 2012.[72] In *Knox*, Justice Alito held that under the *U.S. Jaycees* standard, "non-union members must 'opt in' to supporting the political activities of the union, that it is not sufficient that they can opt out."[73] Although *Knox* marked the first time that the Court used the phrase "exacting First Amendment scrutiny" to describe the *U.S. Jaycees* test, it was not clear whether the Court intended to imply that exacting scrutiny is a distinct tier of scrutiny, or whether it just used "exacting . . . scrutiny" in the generic sense to mean a demanding form of judicial review.[74] By contrast, *Janus* explicitly referred to exacting scrutiny as a standard of First Amendment review.[75]

Three years after *Janus*, in *Americans for Prosperity*, the Court, in an opinion by Chief Justice Roberts, held facially unconstitutional a California regulation which, among other things, required charitable organizations to disclose major donors to the state Attorney General's Office.[76] The Court held that, like intermediate scrutiny, exacting scrutiny analysis requires narrow tailoring: "a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored."[77] The "dramatic mismatch," Justice Roberts held, "between the interest the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end" meant the compelled disclosure could not survive exacting scrutiny.[78]

Justice Roberts's version of exacting scrutiny, developed in a series of election law

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70. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

71. *See id.* at 623, 628.

72. *Knox*, 567 U.S. at 310 (modification in original).

73. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1024 (5th ed. 2015).

74. *See Knox*, 567 U.S. at 310:

> [C]ompulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a "mandated association" among those who are required to pay the subsidy. Such situations are exceedingly rare because, as we have stated elsewhere, mandatory associations are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'

(citing United States v. United Foods, 533 U.S. 405, 414 (2001); *U.S. Jaycees*, 468 U.S. at 623).

75. 138 S. Ct. 2448, 2477 (2018) ("The exacting scrutiny standard we apply in this case was developed in the context of commercial speech.").

76. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2379–80, 2389 (2021). California required charities to submit a copy of the Form 990, Schedule B document that charitable organizations are required to submit to the IRS. *Id.*

77. *Id.* at 2384.

78. *Id.* at 2386.

cases, can also trace its origin to *Buckley v. Valeo*.[79] *Buckley* used the phrase "exacting scrutiny" in several places, but did not use it to describe the standard it applied.[80] Instead, *Buckley* used the phrase "exacting scrutiny" in the same generic manner as it was first employed in *Carolene Products*—to convey a more searching form of review than rational basis. Or, in other words, it was used in *Buckley* the way a court might use the phrase "heightened scrutiny" today.[81] Indeed, Justice Thomas wrote as recently as 2016 that *Buckley* applied "closest scrutiny,"[82] itself a phrase *Buckley* borrowed from *NAACP v. Alabama* (a case which, as Justice Roberts notes in *Americans for Prosperity*, "did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure.")[83] Professor Eugene Volokh has suggested that *Buckley* applied strict scrutiny.[84] The *Buckley* standard reappeared in *Nixon v. Shrink Missouri Government PAC* in 2000, where it was called simply "*Buckley*'s standard of scrutiny."[85]

Americans for Prosperity's scrutiny standard seems to have acquired the name "exacting scrutiny" in the 2003 election finance case, *McConnell v. FEC*.[86] In his *McConnell* partial concurrence, Justice Scalia bemoaned "the steady decrease in the level of scrutiny applied to restrictions on core political speech," which he attributed to *Buckley*'s use of "exacting scrutiny," and the later cases, including *Nixon*, that applied the same test under varying labels.[87] "Exacting scrutiny" was finally invoked as a term of art to strike down a law in the landmark 2010 case, *Citizens United v. FEC*.[88] *Citizens United*, however, modified the terms of the inquiry slightly, to the same exacting scrutiny language ultimately recited in *Americans for Prosperity*: "'exacting scrutiny,' . . . requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[89] The distinction between *Citizens United* and its precedents is that *Citizens United* required a "substantial relation" between ends and means, rather than being "closely drawn."

Thus, although the phrase "exacting judicial scrutiny" has been around since *Carolene Products*, it only recently became apparent that exacting scrutiny is a tier of review unto itself. As Part III explains, the Court has not been clear or consistent in its phrasing of the new class of scrutiny. At a minimum, there is a conflict between *Janus*'s "compelling" interest requirement and *Americans for Prosperity*'s "sufficiently

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79. *Id.* at 2383; 424 U.S. 1, 64 (1976) (per curiam).

80. 424 U.S. at 16, 44, 64, 93–94.

81. *See, e.g.*, Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 847 (9th Cir. 2017) ("There is nothing novel in *Sorrell*'s use of the term 'heightened scrutiny' to distinguish from rational basis review.").

82. Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (citing *Buckley*, 424 U.S. at 25). *But see* McConnell v. FEC, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part) (discussing "the 'exacting scrutiny' test of *Buckley*").

83. *Ams. for Prosperity Found.*, 141 S. Ct. at 2382–83.

84. *See* Volokh, *supra* note 44, at 2426.

85. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–88 (2000).

86. *Cf. McConnell*, 540 U.S. at 251 (Scalia, J., concurring in part) ("Our traditional view was correct, and today's cavalier attitude toward regulating the financing of speech (the 'exacting scrutiny' test of *Buckley* is not uttered in any majority opinion, and is not observed in the ones from which I dissent) frustrates the fundamental purpose of the First Amendment.").

87. *Id.* at 272 (Scalia, J., concurring in part) (citing *Buckley*, 424 U.S. at 16).

88. 558 U.S. 310 (2010).

89. *Id.* at 366–67.

important" interest standard. Even upon a close reading of the exacting scrutiny precedent, it is difficult to determine exactly what exacting scrutiny requires, how *Americans for Prosperity*'s standard differs from intermediate scrutiny, or how *Janus*'s standard is distinguishable from strict scrutiny. At least through the 2020 term—more than two years after *Janus*—lower courts continue to confidently declare that "[t]here are three levels of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny" in First Amendment cases,[90] even though all twelve regional circuit court of appeals have considered the applicability of exacting scrutiny in at least one case since 2009.[91] It is now quite clear that courts apply four tiers of scrutiny in free speech cases, not just the traditional three.

B. First Amendment Scrutiny Is a Three-step Process

First Amendment free speech analysis involves more than applying a level of scrutiny to facts; it is a three step process. The Court first places the challenged law and the speech it regulates into a pre-defined category of speech. Although strict scrutiny "provides 'the baseline rule' under the First Amendment for assessing laws that regulate speech on the basis of content,"[92] there are myriad exceptions.[93] There are categories of unprotected speech (such as incitement, obscenity, child pornography, and false and deceptive advertising) and categories of less protected speech (such as commercial speech). For some types of speech, like defamation, there are separate elaborate rules outside of the ordinary constitutional scrutiny structure. In some contexts—such as speech in the military, prisons, and schools—the Court applies an approach that is very deferential to the government.

A court reviewing a law alleged to unconstitutionally burden freedom of speech on the basis of content cannot reflexively apply strict scrutiny. It must instead connect the category it chose in step one with a corresponding level of scrutiny. It does this by classifying the regulation as one requiring strict, exacting, intermediate, or rational basis scrutiny. In the final step it applies the chosen level of scrutiny, itself a multi-factor inquiry because there is focus on both the sufficiency of the government's objective and the adequacy of the relationship between the means chosen and the ends sought. I refer to these steps as categorization, classification, and application. When the Court makes changes to free speech scrutiny, it does so by manipulating one of the three steps. It is

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90. *See, e.g.*, Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. of N.J., 974 F.3d 237, 242 n.2 (3d Cir. 2020) ("There are three levels of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny."); Mitchell v. Newsom, CV 20-8709, 2020 WL 7647741 (C.D. Cal. Dec. 23, 2020) ("Courts apply three levels of scrutiny to laws that affect First Amendment rights – rational basis, intermediate scrutiny, and strict scrutiny.").

91. *See, e.g.*, Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 55 (1st Cir. 2011); Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118 (2d Cir. 2014); Del. Strong Fams. v. Att'y Gen. of Del., 793 F.3d 304, 309–10 (3d Cir. 2015); Wash. Post v. McManus, 944 F.3d 506, 520–21 (4th Cir. 2019); Justice v. Hosemann, 771 F.3d 285 (5th Cir. 2014); Libertarian Party of Ohio v. Husted, 751 F.3d 403, 414 (6th Cir. 2014); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 478 (7th Cir. 2012); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 874–77 (8th Cir. 2012); Nat'l Ass'n for Gun Rights, Inc. v. Mangan, 933 F.3d 1102, 1114–15 (9th Cir. 2019); Free Speech v. FEC, 720 F.3d 788, 792–93 (10th Cir. 2013); Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1242–44 (11th Cir. 2013); Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 10–11 (D.C. Cir. 2009).

92. Content-based speech is an example of a category. Cases with speech that fall into the content-based category are "classified" into strict scrutiny in step two. Strict scrutiny is then applied to determine the validity of the speech regulation in step three.

93. FALLON, *supra* note 1, at 2–3.

helpful to separate the steps of scrutiny analysis when considering how the Court manipulates the law because it highlights the distinct ways in which such changes occur.

i. Step One: Categorization

Although there were few Supreme Court cases dealing with speech before the twentieth century, from the outset, courts have divided the Constitution's general promise of free speech into categories.[94] Some receive more First Amendment protection than others; some receive none at all. This system of categorization, built upon the categories suggested in an influential 1942 opinion by Justice Murphy,[95] gained new force during and after the Warren Court and is now a fundamental feature of First Amendment doctrine. Categories of speech diverge widely in terms of scope. Some categories, such as obscenity, are narrowly defined in the Court's case law.[96] Others, like "content-based restrictions," are capacious, generally serving as a baseline category which apply to speech that did not fall within a narrower (usually less-protected) category.

The Court categorizes speech by looking at both the regulation[97] and the regulated conduct. It generally begins by asking whether the challenged regulation is content-based or content-neutral.[98] "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[99] Content-neutral regulations, those not defined by the subject matter of the speech or the viewpoint of the speaker, are deemed a lesser threat to First Amendment rights than content-based regulations and are thus classified into a lower level of scrutiny during step two.[100]

The Court then asks whether the speech targeted by the regulation is within one of the "historic and traditional categories [of speech] long familiar to the bar" that receive less or no First Amendment protection, such as obscenity, defamation, and incitement.[101] The Court usually does not provide a comprehensive list of such categories,[102] but they are generally (though not always) clear from the Court's precedent. The Roberts Court has

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94. *See, e.g.*, Anderson v. Dunn, 19 U.S. 204 (1821) (upholding Congress's power to cite individuals for contempt); People v. Croswell, 3 Johns. Cas. 337 (N.Y. 1804) (upholding a libel conviction); Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (Pa. 1815) (discussing obscenity).

95. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

96. Miller v. California, 413 U.S. 15, 24 (1973):

> [T]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

97. The Court also occasionally looks to the secondary effects of a regulation, such as in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

98. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

99. *Id.*

100. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). For an excellent, and still relevant, analysis of the content distinction in First Amendment law, see Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

101. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring).

102. For a partial list, see United States v. Alvarez, 567 U.S. 709, 717–18 (2012).

repeatedly emphasized that it is "reluctant to mark off new categories of speech for diminished constitutional protection."[103]

Recategorization occurs when the Court clarifies that the speech at issue fits into a different category of speech than what pre-existing doctrine had indicated. For example, the Court in *New York v. Ferber* "[r]ecogniz[ed] . . . child pornography as a category of material" distinct from adult pornography.[104] The Court sometimes also recategorizes by changing the way a category of speech is defined.[105]

The choice of category is often dispositive; it can be the difference between strict scrutiny or no scrutiny.

ii. Step Two: Classification

In the second step of the scrutiny process, the Court links the category that resulted from step one to the level of scrutiny that is then applied in step three. Most aspects of the Court's classification of categories of speech into levels of scrutiny are well understood. It is settled, for example, that content-based restrictions of speech receive strict scrutiny;[106] commercial speech regulations receive at least intermediate scrutiny;[107] some compelled factual disclosures receive rational basis;[108] and that "the Government's own speech . . . is exempt from First Amendment scrutiny."[109]

Reclassification occurs when the Court changes the level of scrutiny associated with one or more categories. If the Court moved the category of commercial speech from intermediate to strict scrutiny, that would be a reclassification. In *Ferber*, the Court reclassified by declaring that "classifying child pornography as a category of material outside the protection of the First Amendment is not, incompatible with our earlier

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103. Nat'l Inst. of Fam. & Life Advocs. ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2372 (2018) (quoting Denver Area Ed. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 804 (1996) (Kennedy, J., concurring in part)). *See also, e.g.*, *Alvarez*, 567 U.S. at 722; Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011); United States v. Stevens, 559 U.S. 460, 472 (2010).

104. 458 U.S. 747, 763–65 (1982).

105. For example, in *Rust v. Sullivan*, the Court upheld a federal regulation that prohibited programs that received federal funds for family planning services from providing abortion-related counseling. The Court characterized the condition as government speech, which merited no scrutiny, rather than a viewpoint-cased restriction, which would have required strict scrutiny. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991). It thus established that the government speech category includes a restriction on speech performed as a part of a government-subsidized program. *But see* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546–49 (2001) (declining to extend *Rust* to a LSC (a federal government entity) rule that prohibited attorneys who received program funds from challenging the validity of welfare statutes and regulations); *id.* at 558–59 (Scalia, J., dissenting) (arguing the "LSC subsidy . . . is distinguishable in all respects from the subsidy upheld in *Rust v. Sullivan*"); CHEMERINSKY, *supra* note 19, at 1071 ("It is . . . quite difficult to reconcile *Legal Services Corporation v. Velazquez* with *Rust v. Sullivan*.").

106. *See* Reed v. Town of Gilbert, 576 U.S. 155, 164–65 (2015).

107. *See* Sorrell v. IMS Health, Inc., 564 U.S. 552, 583 (2011).

108. *See* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651–52 (1985).

109. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005). In other words, the "government speech" category is classified by the Court in a manner that does not require it to withstand any level of scrutiny. However, the Court has clarified that sometimes government speech nevertheless receives constitutional scrutiny—for example, if the government's message compels speech from a private individual. *Id.* at 557. But the Court has nevertheless reacted more favorably where the government compels a private entity to host or subsidize government speech than for private speech. *See* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 375 (2018).

decisions."[110]

One important distinction between the first two steps of constitutional scrutiny is that categorization tends to be fact-specific, while classification does not. Categorization asks which category of speech the facts of *this case* most readily align with. In classification, the category has already been selected and it is only a question of linking that category in general with a pre-determined, corresponding level of scrutiny. For example, in *Reed v. Town of Gilbert*, the Court held that there was "no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny."[111] The fact that the Court linked the city's regulation with categorization permits the Court to speak in terms of fact-neutral abstractions, like "compelled speech" or "government speech," and thus encourages consistent adjudication by leaving case-specific facts (which may be politically charged) out of the equation.

iii. Step Three: Application

The final and most visible step is the application of a chosen level of scrutiny. Each level of scrutiny is itself a multifactor analysis that examines the magnitude of the government interest and its relation to the challenged law. The more an issue encroaches upon constitutional value, the more strictly courts will scrutinize laws regulating it. In theory, strict scrutiny requires a stronger showing from the government than exacting scrutiny, which requires stronger support than intermediate scrutiny, which in turn requires stronger support than rational basis. One advantage of defined tests for scrutiny is that it encourages consistent adjudication of difficult, value-laden constitutional questions by dictating who bears the burden of persuasion and what that party must prove. However, as I demonstrate in Part III, the Court frequently distorts the application of scrutiny by reciting and applying the various levels of scrutiny in an inconsistent manner.

III. MANIPULATING SCRUTINY

The Court controls a great deal of First Amendment law by recategorizing, reclassifying, or redefining how the tiers of scrutiny are applied. However, the Court has been so inconsistent in modifying the doctrine that it has made each step of the scrutiny analysis, and all four tiers of scrutiny, opaque and difficult to apply consistently. Scrutiny has largely been reduced to an inconsequential exercise that serves more to disguise the reasoning behind a decision than to guide it. The Court has created contradictory categories, which it has assigned to conflicting levels of scrutiny, and it has applied the levels of scrutiny in such a varied manner that the distinction among the tiers has begun to cave in. Criticism of the Court's unpredictable application of scrutiny often focuses on only one type of change, such as inconsistent application of strict scrutiny to content regulations. When viewed in these terms, the doctrine can seem unwieldy. But when the Court's changes to the doctrine are viewed as a whole—recategorization, reclassification, *and* changes in application—it becomes clear that the scrutiny analysis has been stripped

110. 458 U.S. 747, 763 (1982).

111. 576 U.S. at 164–65 (holding that an Arizona town's regulation of temporary directional signs unconstitutional under strict scrutiny because it was "facially content based and . . . neither justified by traditional safety concerns nor narrowly tailored.").

of meaning.

Although there are only three ways in which the Court changes the scrutiny doctrine, it often makes multiple changes at once. When the Court recategorizes speech, it often entails a reclassification. For example, if the Court held, "there is a separate category for regulation of speech about dinosaurs, which receives strict scrutiny," the Court both categorizes dinosaur speech and classifies it to a level of review. The Court need not necessarily do either categorization or classification. It could, for instance, avoid classification by linking categories directly to tailor-made tests. Thus, rather than using intermediate scrutiny—a test that is designed to apply relatively equally to a huge variety of regulations which each bear upon distinct and sensitive constitutional values in diverging ways—it could simply say that regulations of dinosaur speech receive the "dinosaur speech test," which has no applicability outside the context of dinosaur speech.[112] It would make it harder to understand and talk about First Amendment law because any reference to dinosaur speech requires knowing the relevant test, rather than the familiar levels of scrutiny, but it would evade the awkward need to equate categories of speech under the general heading of a level of scrutiny. It is also conceivable (though less obviously so) that classification could occur without categorization. The Court could simply declare that categorizing speech is a reductive and fraught endeavor, and instead say that it would apply the levels of scrutiny to a challenged regulation on a case-by-case basis.

The distinction between reclassification and changes in application of scrutiny can be similarly hard to pin down, especially where changes in application are so significant that they essentially amount to a new class of scrutiny. If the Court applies, say, "exacting" scrutiny in a situation where it is settled that strict scrutiny applies, but phrases the test as requiring "substantial relation to an important government interest" (which is the intermediate scrutiny inquiry), it could be described as distorting the application of the strict scrutiny analysis by making it less demanding; or creating a new, more deferential class called exacting scrutiny; or engaging in a reclassification of the category in question into the intermediate scrutiny class.

The distinction between these three possibilities is more significant than it might initially appear. If the Court distorts the strict scrutiny analysis, it becomes less distinctive and more difficult to apply reliably because it gives courts greater leeway in which version of strict scrutiny to apply. On the other hand, when the Court creates a new level of scrutiny, it throws the previous structure into doubt and raises the possibility that there could be an avalanche of legal arguments now seeking to move speech from intermediate or strict scrutiny into the new class. Finally, if the Court reclassifies a category of speech into a lower level of scrutiny, it threatens the validity of the existing caselaw concerning that category because it now is unclear what would or would not pass the new level of scrutiny. In this sense, classification is the act of making external changes to whole levels

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112. For example, under cases such as *Pickering v. Board of Education* and *Connick v. Myers*, restrictions of speech by government employees on matters of public concern (a category) are not classified into an ordinary tier of scrutiny, but rather are tested by balancing the employer's interest in "promoting the efficiency of the public services it performs through its employees" against the employee's interest, "as a citizen, in commenting upon matters of public concern." Connick v. Myers, 461 U.S. 138, 140 (1983) (quoting Pickering v. Bd. of Educ. of Township High Sch. Dist., 391 U.S. 563, 568 (1968)).

of scrutiny, while application refers to internal changes to the analysis of a level of scrutiny itself. It is important to separate classification from application because they are distinct tools that the Court wields separately. If the Court wanted to clearly say that speech about dinosaurs gets a high degree of constitutional protection, it would be much easier, and arguably clearer, to say "dinosaur speech gets strict scrutiny" than to change what its previous level of scrutiny entails. And, at least in theory, reclassification permits the Court to make significant changes to the way categories of speech are tested (and thus modify free speech) without distorting or obscuring the three tests that are meant to have familiar and consistent meaning not only in free speech, but across all of constitutional law.

A. Recategorization

Recategorization occurs when a court modifies the way facts in free speech cases fit into the categories of speech that are ultimately used to determine how a state action should be scrutinized. It is perhaps the most common way in which the Court adjusts free speech law in part because categorization is a prerequisite to any First Amendment analysis. If the government compels speech from a corporation, such as by requiring disclosure of information,[113] or payment of a subsidy,[114] or labeling of a product,[115] it could be thought to fit within one of several categories of speech, each of which may be subject to a different test. The Court categorizes when it decides whether that regulation should be conceived of as government speech, compelled speech, commercial speech, or some other narrower (or maybe not-yet-created) category.

Compelled speech is one area in which the Court has recently engaged in a dramatic repurposing of existing categories. The Supreme Court first held a compelled speech regulation unconstitutional in *West Virginia State Board of Education v. Barnette* in 1942.[116] The Court declared unconstitutional a state law that required children to salute the flag at the beginning of the school day.[117] In the decades that followed, the Court characterized the "principle of free speech . . . that one who chooses to speak may also decide 'what not to say'"[118] as reflecting "the right of freedom of thought protected by the First Amendment."[119] In *Wooley v. Maynard*, the Court applied the "freedom of thought" principle to invalidate a state's attempt to force a resident to display the state motto on their license plate.[120] In *Miami Herald Publishing Co. v. Tornillo*, it held unconstitutional a right-of-reply statute applicable to newspapers.[121] Freedom of thought thus reached non-verbal expression emanating from a state, as well as expression by a newspaper in

113. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2379–80 (2021).

114. *See* Janus v. AFSCME, 138 S. Ct. 2448 (2018).

115. *See* Am. Beverage Ass'n v. City & Cnty. of S.F., 916 F.3d 749 (2019) (en banc).

116. 319 U.S. 624, 642 (1943).

117. *Id.*

118. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995) (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986)). *See also* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

119. *Wooley*, 430 U.S. at 714.

120. *Id.* at 715.

121. 418 U.S. 241 (1974); *see also Wooley*, 430 U.S. at 715 (1977) (explaining that *Tornillo* "illustrated" the "broader concept of 'individual freedom of mind'" underlying *Barnette*).

choosing what columns to publish.[122] The Court created a category of compelled speech and limited it generally to compulsions that infringed upon a right to conscience. But the Court did not apply the tiers of scrutiny to the compelled speech category until later cases.

At first, the Court placed compelled statements of fact and compelled statements of opinion into discrete and separated categories. In *Zauderer v. Office of Disciplinary Counsel*, the Court upheld the decision by the Ohio Supreme Court to discipline an attorney for failing to include a required notice in an advertisement telling prospective clients that they might be liable for significant litigation costs even if they lose.[123] The Court explicitly distinguished *Barnette*, *Wooley*, and *Tornillo* on the ground that they involved matters of opinion.[124] Ohio's compelled disclosure, the Court explained, was not equally objectionable because "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[125]

In the 1989 case, *Riley v. National Federation for the Blind of North Carolina*, the Court blurred the distinction between the opinion and fact categories. In surveying the cases discussed above, the Court argued "[t]hese cases cannot be distinguished simply because they involved compelled statements of opinion while we here deal with compelled statements of 'fact': either form of compulsion burdens protected speech."[126]

The equivalence between fact and opinion suggested by *Riley* has taken on new force in the Roberts Court. In his opinion for the Court in *NIFLA*, Justice Thomas held that the plaintiffs—an organization composed of Crisis Pregnancy Centers[127] ("CPCs") and two such centers, one licensed and one unlicensed—were likely to succeed on the merits in their challenge to the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act").

The FACT Act required CPCs operating in California to provide one of two government-drafted notices to patients.[128] Clinics with licenses were required to post a notice (the "licensed notice") in the clinic's waiting room (or provide the notice in print or online form) stating that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women."[129] Clinics that operated without licenses, without a licensed medical provider, and which had the "primary purpose" of "providing pregnancy-related services," had to post a different notice

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122. *But cf.* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969) (upholding the FCC's "fairness doctrine," which required that broadcasters present both sides of public issues); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 224 (1997) (upholding the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required cable television providers to dedicate some of their channels to local broadcast television stations).

123. 471 U.S. 626, 650 (1985).

124. *Id.* at 651.

125. *Id.*

126. Riley v. Nat'l Fed. of the Blind of N.C., Inc., 487 U.S. 781, 797–98 (1988).

127. Crisis Pregnancy Centers are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services," but not abortion, to patients. 138 S. Ct. 2361, 2368 (2018).

128. *Id.* at 2369–70; *see also* Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 72 (2019) ("The state simply required that CPCs post a notice on the wall, providing individuals factual information about services California provides.").

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

(the "unlicensed notice") on-site and in advertisements stating that the facility was not licensed and did not have a licensed medical provider who supervises the provision of services.[130] The Act provided that licensed and unlicensed notices must be posted in multiple languages, and provided guidance on the minimum size of the notice, its typeface and, for unlicensed notices, color.[131]

The Court held that both notices were content-based.[132] The Court's past practice had indicated that it would subcategorize the compelled notices into a less strictly scrutinized category than content-based compelled speech. It had two tools available to do so. It could either put the disclosure in the category for factual compelled commercial disclosures imposed in *Zauderer*,[133] or it could treat the FACT Act as a law directed at professional conduct only incidentally affecting speech, as in *Planned Parenthood v. Casey*.[134] The Court declined to place the *NIFLA* notices into either of these more deferential categories and held that both California requirements must therefore meet heightened scrutiny.[135]

By distinguishing *Zauderer* and *Casey*, the Court expanded the reach of the content-based category. There is now less speech that fits within the *Zauderer* factual disclosure exception. For example, lower courts now give substantial weight to *Zauderer*'s threshold categorization inquiry about whether a challenged disclosure concerns "purely factual and uncontroversial information about the terms under which . . . services will be available."[136] Speech that is not purely factual and uncontroversial is excluded from the *Zauderer* category and is not subject to the rest of the *Zauderer* test, discussed in Part II.C, which asks the government to justify the disclosure in relation to a real harm and prove that the disclosure regulation is not too broad, misleading, or unduly burdensome. In *NIFLA*, the Court held that the licensed notice was controversial because it was about abortion and abortion is "anything but an 'uncontroversial' topic."[137] In other words, it is not only that the factual statements in the compelled speech have to be uncontroversial; the subject matter those facts represent that must be as well. As others have argued, there may be a considerable amount of potentially valuable information that presumably would have been subject to reasonable disclosure before *NIFLA* that is now not subject to disclosure because

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130. *Id.* at 2370.

131. *Id.*

132. *Id.* at 2371.

133. *See* 471 U.S. 626, 651 (1985). *Zauderer*'s factual disclosure standard was far from dead letter at the time *NIFLA* was decided. The Court has recently applied it in Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010) ("The challenged provisions of § 528 share the essential features of the rule at issue in *Zauderer*.").

134. U.S. 833, 887 (1992) (upholding the power of a state to require informed consent from a patient before administering an abortion). It is also conceivable that the Court could have treated the notices as a form of government speech. If the notices had been categorized as government speech, they may have constituted a taking, but may then have received a less demanding form of scrutiny. *Cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 422, 441 (1982) (holding that installation of a 4" x 4" x 4" box and a cable constituted a taking within the meaning of the Fifth Amendment's Takings Clause).

135. 138 S. Ct. at 2378.

136. *Id.* at 2372 (omission in original). For examples of lower courts applying this threshold test to exclude or include speech in the *Zauderer* category, see, e.g., Am. Beverage Ass'n v. City & Cnty. of S.F., 916 F.3d 749 (9th Cir. 2019) (en banc); Nat'l Ass'n of Wheat Growers v. Becerra, 468 F. Supp. 3d 1247 (E.D. Cal. 2020); Masonry Bldg. Owners of Or. v. Wheeler, 394 F. Supp. 3d 1279 (D. Or. 2019).

137. 138 S. Ct. at 2372.

it is about a general topic that is controversial.[138] That speech is instead lumped in with content-based speech regulations (and classified into strict scrutiny), unless otherwise sorted into a deferential category. The Court clarified the *Zauderer* categorization presumably out of the hope that it would clear some of the widespread confusion among lower courts[139] about how the test should be applied.[140] *NIFLA* thus reflects the way the Court can adjust the law by recategorizing speech, rather than applying a different class of scrutiny to test it.

Categorization is not always quite so clear. In *NIFLA*, in response to the dissent's objection that the decision "at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation,"[141] the majority disclaimed, "we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[142] The second half of this sentence is *Zauderer*, the first *NIFLA* exception, applied to products. This leads to the potential inference that "health and safety warnings long considered permissible" refers to the second *NIFLA* exception for professional conduct incidentally affecting speech. After all, *Planned Parenthood v. Casey*, one of two cases cited by the Court as an example of the professional conduct exception,[143] upheld a Pennsylvania law requiring abortion providers to provide a health and safety notice to their patients twenty-four hours before performing an abortion.[144] But the other case cited by the Court for the professional conduct exception, *Ohralik v. Ohio State Bar Ass'n*, upheld the power of a state to regulate the method of attorney client solicitation.[145] *Ohralik* had nothing to do with health and safety warnings. The reaffirmation of the constitutionality of "health and safety warnings long considered permissible" therefore may be a third exception to *NIFLA*.[146]

However, if this is a third exception, it is by far the most vague. The other two

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138. *See, e.g.*, Andra Lim, Note, *Limiting NIFLA*, 72 STAN. L. REV. 127 (2020); Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231 (2021); Chemerinsky & Goodwin, *supra* note 128; Aaron Stenz, Note, *The Controversial Demise of* Zauderer*: Revitalizing* Zauderer *Post*-NIFLA, 104 MINN. L. REV. 553 (2015).

139. *See* Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 521 (2014) (same); Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 977 (2017) (discussing the confusion that existed in the lower courts prior to *NIFLA*).

140. However, Justice Breyer's dissent in *NIFLA*, and a great deal of scholarship, were quick to argue that the apparent breadth of the Court's holding endangered "a very wide array of federal, state and local laws"—such as those requiring warning labels on alcohol, smokeless tobacco, and vaccines—that presumptively would have found shelter in a more deferential category prior to *NIFLA*. 138 S. Ct. at 2380 (Breyer, J., dissenting) ("[T]he majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation."). *See also* Haupt & Parmet, *supra* note 138, at 286 (arguing that the "public health originalism" applied by the Court in *NIFLA* threatens "a very wide array of federal, state and local laws" and regulations, including those requiring warning labels on alcohol, smokeless tobacco, and vaccines); Chemerinsky & Goodwin, *supra* note 128, at 112–19 (surveying laws potentially endangered by the Court's decision in *NIFLA*); Wendy E. Parmet, Micah L. Berman & Jason A. Smith, *The Supreme Court's Crisis Pregnancy Center Case – Implications for Health Law*, 379 N. ENG. J. MED. 1489, 1490 (2018).

141. 138 S. Ct. at 2380 (Breyer, J., dissenting).

142. *Id.* at 2376.

143. *Id.* at 2372.

144. 505 U.S. 833, 881 (1992).

145. 436 U.S. 447, 454–56 (1978).

146. *NIFLA*, 138 S. Ct. at 2376.

exceptions were buoyed by reference to cases like *Zauderer*, *Casey*, and *Ohralik*, which each came with subsidiary jurisprudence in the Supreme Court and courts below clarifying their meaning and scope. The "health and safety warnings long considered permissible" disclaimer came with no citation or precedent.[147] This implies that it might be a new category subject to a lower standard of scrutiny, but it is unclear what qualifies to fit within the category, or what class of scrutiny the category corresponds to. Also, informing women that a reproductive health care facility is unlicensed is very much about "health," as is informing women of the availability of government assistance for contraception and abortion.

The Court created even further confusion when, in *Americans for Prosperity*, Chief Justice Roberts declared in no uncertain terms (albeit in a portion of the opinion that received only plurality support) that, "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny."[148] Neither Roberts nor any of the other three opinions so much as mentioned *NIFLA* or *Zauderer*. Justice Alito, concurring in *Americans for Prosperity*, understood Chief Justice Roberts's opinion to mean that the "Chief Justice would hold that the particular exacting scrutiny standard in our election-law jurisprudence applies categorically 'to First Amendment challenges to compelled disclosure.'"[149] This categorical statement is difficult to interpret because *Zauderer* is itself a sub-category within compelled disclosure.

In *Janus*, decided the day after *NIFLA*, the Court again recategorized in the context of compelled speech. *Janus* held unconstitutional a provision of the Illinois Public Labor Relations Act (IPLRA) authorizing public sector unions to deduct collective bargaining fees from the salary of nonmember employees.[150] Under IPLRA, government employees who chose not to become members of their labor union were "not assessed full union dues."[151] Instead, those employees had to contribute a smaller amount (called an "agency fee") toward the union's collective bargaining activities.[152] Mark Janus, a nonunion employee of the Illinois Department of Health and Family Services, asked the Court to strike down the agency fee system on the ground that "nonmember fee deductions are coerced political speech."[153]

The Court could have categorized the *Janus* challenge in one of three ways. First, it could have approached the compelled subsidy as a form of regulating government employee speech that would likely be upheld under the deferential balancing framework established in *Pickering v. Board of Education*.[154] Second, it could have treated the case as being within the category of expressive association cases that apply the relatively

147. *Id.* at 2376.

148. 141 S. Ct. 2373, 2383 (2021).

149. *Id.* at 2391 (Alito, J., concurring in part).

150. 138 S. Ct. 2448, 2460 (2018).

151. *Id.*

152. *Id.*

153. *Id.* at 2461–62 (2018). In a previous case, *Abood v. Detroit Board of Education*, the Court held agency fees relationships constitutional, provided that the fees were charged activities "germane to [the union's] duties as collective-bargaining representative," and not for the "union's political and ideological projects." *Id.* at 2460–61 (2018) (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977)) (modification in original).

154. *See* 391 U.S. 563 (1968); Garcetti v. Ceballos, 547 U.S. 410 (2006).

demanding *Roberts v. U.S. Jaycees* standard.[155] Both the *Pickering* and the *U.S. Jaycees* categories previously had been used in the union or employee speech context.[156] Third, as Professor William Baude and Professor Eugene Volokh have argued, the Court could have held that compelled subsidy is not a First Amendment problem at all. The Court chose the middle of these approaches and applied the *U.S. Jaycees* category, which it said merited "exacting scrutiny."[157]

Justice Alito, writing for the Court, distinguished the *Pickering* category on three grounds, two of which are relevant for present purposes.[158] First, he argued that *Pickering* was intended for cases that involve only a single employee's speech and was thus a poor fit for "rules that affect broad categories of employees."[159] The Court suggested that the inquiry should be adjusted when a broad category of employees is involved to "a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis."[160] The only case the Court cited in support of this proposition, *National Treasury Employees Union*, actually applied *Pickering*—not exacting scrutiny or *U.S. Jaycees*—to strike down a ban on receipt of honoraria among a larger class of government employees than was at issue in *Janus*.[161] Second, the Court noted that *Pickering* concerned restriction of employee speech, not compelled speech or compelled subsidy.[162] The majority suggested with little explanation that *Pickering* would be a poor fit for compelled speech, although no case had previously distinguished the *Pickering* category on that ground, and even though the majority was unwilling to decide that *Pickering* does not apply to compelled speech in general.[163] But again, it is not apparent why the general rule for considering

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155. The *U.S. Jaycees* standard had been applied in the union context a few years earlier. *See* Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 313–14 & n.3 (2012). For more discussion of *U.S. Jaycees*, see *supra* Part II.A.2.

156. *See* United States v. Nat'l Treasury Emps. Union (NTEU), 513 U.S. 454, 466 (1995) (applying the *Pickering* standard); *Knox*, 567 U.S. at 313–14 & n.3 (2012) (applying the *U.S. Jaycees* standard).

157. For discussion of *Janus*'s exacting scrutiny standard, see *infra* Part III.B.

158. The Court's third reason for declining to apply *Pickering* was that the *Pickering* category and its balancing test would lead to different results than the Court's prior cases upholding agency fee schemes and thus shouldn't be the basis for upholding the agency fee scheme in *Janus*. *See* 138 S. Ct. at 2472 ("Third, although both *Pickering* and *Abood* [*v. Detroit Board of Education*] divided speech into two categories, the cases' categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime."). Justice Kagan in dissent argued that *Pickering* and *Abood* are not inconsistent. *See id.* at 2493 & n.2 (Kagan, J., dissenting) ("The two cases are fraternal rather than identical twins—both standing for the proposition that the government receives great deference when it regulates speech as an employer rather than as a sovereign.").

159. *Janus*, 138 S. Ct. at 2472.

160. *Id.*

161. *See NTEU*, 513 U.S. at 466. *NTEU* struck down, as applied to federal government employees below the GS-16 salary grade, a prohibition on receiving honoraria. Crucial to the *NTEU* Court's reasoning was that the "sweeping statutory impediment to speech . . . chill[ed] speech before it happens"and applied to *all* federal employees, not only the "the relatively small group of lawmakers whose past receipt of honoraria motivated its enactment." *Id.* at 467–69. *NTEU* still applied *Pickering*, but imposed a somewhat higher government burden in light of the far-reaching chill on speech that was incidental to the law's original purpose. *See id* at 468–69. There were more than 2,000,000 employees of the federal government (not inclusive of the armed forces) at the time *NTEU* was decided. *Historic Federal Workforce Tables*: *Executive Branch Civilian Employment Since 1940*, OPM, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/ (last visited May 6, 2021).

162. *Janus*, 138 S. Ct. at 2473.

163. *Id.*

restrictions on employees' speech (the *Pickering* balancing test) would not apply to this type of regulation. Based on these novel justifications, the Court held that the *Pickering* category did not apply.[164] The Court instead held that this sort of compelled subsidy is subject to exacting scrutiny and used it to strike down the agency fee scheme.[165]

Professor William Baude and Professor Eugene Volokh have argued that *Janus* is wrongly decided because "[b]eing forced to pay money to objectionable causes is a fact of life, not a First Amendment problem."[166] The Court has held on several occasions that compelled subsidy of government speech—"even those programs of government one does not approve – is of course perfectly constitutional."[167] For example, in *Johanns v. Livestock Marketing Ass'n*, the Court upheld a Department of Agriculture program that funded beef advertising through compelled subsidy from beef producers.[168] It held: "Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech."[169] Baude and Volokh argue that *Janus* erred by categorizing compelled subsidy of government speech different from compelled subsidy of private speech.[170] They suggest that "[i]f compelling people to subsidize private speakers' ideas is 'demeaning' and 'coerc[es them] into betraying their convictions,' then compelling people to subsidize the government's ideas is just as bad."[171]

The outcome of the recategorization in *Janus* is that some compulsions in the labor or employment context are tested under very lenient standards, while some merit a version of the exacting scrutiny analysis that, as Part III.C.3 explains, is very similar to strict scrutiny. Employers may compel an "employee [to] deliver any lawful message," even if the employee disagrees with it;[172] "employee speech is largely unprotected if it is part of what the employee is paid to do, . . . or if it is a matter of only private concern."[173] And employee speech in the context of union activity "merits still less consideration under the First Amendment" if a court believes was "designed not to communicate but to coerce."[174] Compelled subsidy of government speech is in its own category that is immune from First Amendment scrutiny.[175] But any time a government employee is compelled to subsidize any activity of the union, it is treated as a subcategory of compelled speech that merits heightened review.

Categorization is a crucial and easily overlooked step in any free speech analysis.

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164. Justice Kagan in dissent argued that *Pickering* was the appropriate inquiry under the Court's precedents. *See id.* at 2492–94 (Kagan, J., dissenting) ("In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering*. . . .").

165. *Id.* at 2474.

166. William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 204 (2018).

167. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005); Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217 (2000); Keller v. State Bar of Cal., 496 U.S. 1 (1990).

168. 544 U.S. at 559.

169. *Id.* at 562.

170. *See* Baude & Volokh, *supra* note 166, at 184–87.

171. *See id.* at 182.

172. Janus v. AFSCME, 138 S. Ct. 2448, 2473 (2018) (citing Garcetti v. Ceballos, 547 U.S. 410 (2006)).

173. *Id.* at 2471 (citing *Garcetti*, 547 U.S. at 421–22; Connick v. Myers, 461 U.S. 138, 146–49 (1983)).

174. Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982).

175. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005).

When the Court speaks to whether speech is more or less protected, it does it in terms of a category. For example, when the Court refers to "political speech" as "the core of the First Amendment," it is the process of categorization that determines what "political speech" means.[176] When the Court recategorizes in contradictory, confusing, or vague ways in an attempt to achieve its desired outcome, it becomes more difficult for the Court's audience in future cases to perform the categorization antecedent to resolving any Free Speech Clause question. Because categories are used to choose the level of scrutiny, ambiguities in categorization change case outcomes.

B. Reclassification

Reclassification occurs when the Court holds that a particular category of speech should now be associated with a different level of scrutiny. The Court has changed or clarified the classification of a category of speech in a few recent cases. For example, in *NIFLA*, the Court rejected the professional speech doctrine that some courts of appeals had developed to test regulation of speech made by professionals in the course of their profession under a more lenient standard.[177] The Court, "reluctant to mark off new categories of speech for diminished constitutional protection,"[178] held that content-based regulations of professional speech are subject to strict scrutiny.[179] The regulation of professional speech, if it is a category,[180] is thus now clearly classified at strict scrutiny.

The Court's most significant reclassifications in recent years has been to move compelled disclosures and compelled subsidies into the new "exacting scrutiny" tier of review. As Part II.A.2 discussed, the Roberts Court applied, over several years, a vacillating form of exacting scrutiny. In some circumstances, such as in some election finance cases, it seemed analogous to strict scrutiny.[181] As recently as 2015, in *Williams-Yulee v. Florida Bar*, Justice Roberts used the terms "exacting scrutiny" and "strict scrutiny" interchangeably in his majority opinion.[182] In some cases, exacting scrutiny seemed as though it were equivalent to, or even less demanding than, intermediate scrutiny.[183] And in some cases the Court invoked "exacting scrutiny" without indicating

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176. Randall v. Sorrell, 548 U.S. 230, 266 (2006) (Thomas, J., concurring).

177. Nat'l Inst. of Fam. & Life Advocs. ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2371–72 (2018). At least prior to *NIFLA*, the Supreme Court's caselaw appeared to support the notion that lower standards apply to professional speech. *Cf.* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

178. *NIFLA*, 138 S. Ct. at 2372 (quoting Denver Area Ed. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 804 (1996) (Kennedy, J., concurring in part)).

179. *Id.* at 2371–72.

180. *Id.* (expressing doubt about professional speech as a distinct category, which would be a question of categorization).

181. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 197 (2014) ("Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.") (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

182. *Compare* Williams-Yulee v. Fla. Bar, 573 U.S. 433, 443 (2015) ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest.") (citation omitted), *with id.* at 444 ("This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.").

183. The standard invoked in *Citizens United* was the "substantial relation" + "sufficiently important interest" inquiry later recited in *Americans for Prosperity*. At least until *Americans for Prosperity*, it seemed possible that the adverb "sufficiently" required something slightly below the "important interest" required in intermediate

whether it was a tier of review or a synonym for an existing type of scrutiny.[184] The uncertain nature of the exacting scrutiny analysis created confusion and gave credence to the notion that the Court was putting its thumb on the scale to favor some corporate speech interests over other interests in a way not connected to doctrine.[185]

In *Janus*, the Court took a highly unusual approach to address this concern: it classified exacting scrutiny as "a less demanding test than 'strict' scrutiny," and therefore as a discrete, newly-recognized level of review.[186] The Court stated: "Under 'exacting' scrutiny, . . . a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"[187] We know that this "less demanding" test is not equivalent to intermediate scrutiny because the Court still required a "compelling state interest"—a standard that is the hallmark of strict scrutiny.[188] Indeed, Justice Alito's majority opinion in *Janus* connected "exacting scrutiny" to commercial and compelled speech, but did not indicate that it is a replacement for the *Central Hudson* or a related intermediate scrutiny standard, and lower courts have continued to describe *Central Hudson* as intermediate scrutiny.[189] Although Justice Alito said the Court was using less than strict scrutiny, it is unclear how its analysis was different from what it would have been under that test. Both Justice Alito's test and strict scrutiny require a compelling interest and least restrictive alternative analysis.

Exacting scrutiny returned with vigor three years later in *Americans for Prosperity v. Bonta*. Like *NIFLA*, *Americans for Prosperity* asked the Court to determine what standard of scrutiny should apply to a California compelled disclosure regulation.[190] The California Attorney General's Office required charities renewing their registrations to file with the state copies of their Internal Revenue Service Form 990.[191] Form 990 "contains information regarding tax-exempt organizations' mission, leadership, and finances."[192] Schedule B to Form 990 requires the charities to disclose the names and addresses of major

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scrutiny analysis. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 366–67 (2010) ("The Court has subjected these [disclaimer and disclosure] requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.") (quoting Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976)). For an excellent pre-*Janus* discussion of exacting scrutiny, see Wright, *supra* note 9.

184. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 724 (2012) (the Court invoked "most exacting scrutiny" without identifying what inquiry, if any, is associated with the most exacting scrutiny analysis); Davis v. FEC, 554 U.S. 724, 744 (2008) ("Instead, there must be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed, *and* the governmental interest 'must survive exacting scrutiny.' That is, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.") (emphasis added) (citations omitted) (internal quotation marks omitted).

185. *Cf.* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 248–65 (2015) (explaining that the Court has become more favorable to corporate interests).

186. 138 S. Ct. 2448, 2465 (2018).

187. *Id.* (quoting Knox v. Serv. Emps. Int'l Union, 567 U.S. 298, 310 (2012)).

188. Wright, *supra* note 9, at 207 ("Nor, even more importantly, should exacting scrutiny be thought of as either a synonym for traditional strict scrutiny, or as an awkward compromise between traditional strict judicial scrutiny on the one hand and either mid-level or minimum scrutiny on the other.").

189. *See* Am. Beverage Ass'n v. City and Cnty. of S.F., 916 F.3d 749, 755 (9th Cir. 2019) (en banc).

190. *Ams. for Prosperity Found.*, 141 S. Ct. 2373, 2380 (2021).

191. *Id.* at 2380.

192. *Id.*

donors.[193] For several years, the *Americans for Prosperity* plaintiffs—two charitable organizations registered in California—resisted disclosure of the Schedule B information based on the fear that "disclosure of their Schedule Bs would make their donors less likely to contribute and would subject [the donors] to the risk of reprisals."[194] In 2012 and 2013, after the Attorney General warned the organizations that if they continued to resist disclosing their contributors' identities the Attorney General would suspend the organizations' registrations and levy fines on officers and directors, the organizations sued to enjoin enforcement of the disclosure requirement.[195]

The district court granted preliminary injunctions in both cases.[196] On appeal, the Ninth Circuit narrowed the scope of both injunctions under exacting scrutiny, permitting the Attorney General to collect the plaintiffs' Schedule Bs provided that he did not disclose them publicly.[197] On remand, after a bench trial, the district court found that Schedule B collection burdened the organizations' First Amendment rights and permanently enjoined the Attorney General from demanding their Schedule Bs.[198] It also found "the disclosure regime burdened the associational rights of donors. In both cases, the court found that the petitioners had suffered from threats and harassment in the past, and that donors were likely to face similar retaliation in the future if their affiliations became publicly known."[199]

A lackluster history of protecting information privacy on the part of the Attorney General's Office exacerbated the risk of reprisal. At trial, Americans for Prosperity Foundation identified 1,778 confidential Schedule Bs that the Attorney General's office had posted on a public-facing website.[200] One of the Foundation's expert witnesses testified that he was able to access hundreds of thousands of confidential documents on the website by changing a single digit in a URL.[201] Although California subsequently updated its policies to prohibit public disclosure, the district court found that, "[g]iven the extensive disclosures of Schedule Bs, even after explicit promises to keep them confidential, the Attorney General's current approach to confidentiality obviously and profoundly risks disclosure of any Schedule B the Registry may obtain from AFP."[202]

The Ninth Circuit once again vacated the district court's injunctions. It reversed and remanded for entry of judgment in favor of the Attorney General on the ground that the district court erred by imposing a narrow tailoring requirement in its exacting scrutiny analysis.[203] Relying in part on a Second Circuit decision upholding an analogous Schedule

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193. *Id.* ("Schedule B to Form 990 . . . requires organizations to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year (or, in some cases, who have given more than 2 percent of an organization's total contributions).") (citing 26 C.F.R. §§ 1.6033–2(a)(2)(ii)(f), (iii) (2020)).

194. *Id.*

195. *Ams. for Prosperity Found.*, 141 S. Ct. at 2380.

196. *Id.*

197. *Id.* at 2380–81.

198. *Id.* at 2381; Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1055 (C.D. Cal. 2016).

199. *Ams. for Prosperity Found.*, 141 S. Ct. at 2381.

200. *Harris*, 182 F. Supp. 3d at 1057.

201. *Id.*

202. *Id.*

203. Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1008 (9th Cir. 2018).

B disclosure,[204] the Ninth Circuit found that Schedule B provides better and more efficient means for the Attorney General to prevent fraud than alternatives, like subpoenas or audits.[205] An Assistant Attorney General who oversaw the Charitable Trusts Section testified that if "we subpoenaed [Schedule B information] or sent a letter to the charity, that would tip them off to our investigation, which would allow them potentially to dissipate more assets or hide assets or destroy documents, which certainly happened several times."[206] The Ninth Circuit held that the government had an important interest in its enforcement objectives substantially related to the disclosure. It rejected the contention by plaintiff Thomas More Law Center that compliance with the disclosure would impose First Amendment burdens on the ground that the plaintiffs failed to show that the disclosure would "meaningfully deter contributions."[207] Although, under Supreme Court precedent, "those resisting disclosure can prevail under the First Amendment if they can show 'a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties,'"[208] the Ninth Circuit found no such reasonable probability existed in light of California's newly-codified privacy policies.[209]

Although the case did not come to the Supreme Court as a question of classification—both parties and the United States as *amicus curiae* all agreed that "exacting scrutiny, not strict scrutiny" was the appropriate standard[210]—the Justices ultimately divided on classification. A six-justice majority held the Schedule B disclosure requirements facially unconstitutional.[211] Although the Court did "not doubt that California has an important interest in preventing wrongdoing by charitable organizations,"[212] it held that California's "showing falls far short of satisfying the means-end fit that exacting scrutiny requires" because California failed to "demonstrate its need for universal production in light of any less intrusive alternatives."[213] The majority, however, could not agree on which categories of speech should be subjected to exacting scrutiny standard.[214] Chief Justice Roberts, writing for Justice Kavanaugh and Justice Barrett, sought to hold that "[r]egardless of the type of association, compelled disclosure

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204. *See* Citizens United v. Schneiderman, 882 F.3d 374 (2d Cir. 2018).

205. *See Becerra*, 903 F.3d at 1009–11.

206. *Id.*

207. *Id.* at 1014.

208. Doe v. Reed, 561 U.S. 186, 200 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976)) (modification in original).

209. *Becerra*, 903 F.3d at 1019.

210. *See* Brief for Respondents at 15, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (No. 19-251 & 19-255) ("[I]nformation-reporting requirements are subject to exacting scrutiny, not strict scrutiny."); Brief for Petitioner at 20, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) ("While the Court's compelled-disclosure decisions have used various formulations to describe the constitutional test, that test has always remained in substance a form of either strict or at the very least 'exacting scrutiny.'"); Brief for United States as *amicus curiae* at 8, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) ("The compelled disclosure of an organization's contributors that carries a reasonable probability of harassment, reprisals, and similar harms must satisfy exacting scrutiny.").

211. *Ams. for Prosperity Found.*, 141 S. Ct. at 2385.

212. *Id.* at 2385–86.

213. *Id.* at 2386.

214. In other words, the majority agreed that California's Schedule B disclosure requirement merited exacting scrutiny, but could not agree how broadly exacting scrutiny should extend in the future.

requirements are reviewed under exacting scrutiny."[215] Justice Alito, joined by Justice Gorsuch, concurred in the majority and agreed that exacting scrutiny applies in some cases (he did, after all, author *Janus* three years earlier) but he would not apply it "categorically 'to First Amendment challenges to compelled disclosure.'"[216] Justice Thomas, the author of *NIFLA*, "by contrast, would hold that strict scrutiny applies in all such cases."[217] The disagreement among the Justices in the *Americans for Prosperity* majority clearly illustrate the conceptual difference between classification and application of scrutiny. The six Justices in the majority largely agreed on how *Americans for Prosperity*'s "exacting scrutiny" should be applied, they just could not come to common terms over which categories of speech should be classified into exacting scrutiny.[218]

Bewilderingly, none of the opinions engaged with the apparent tension between the *Americans for Prosperity* opinions and the Court's decisions in *NIFLA* and *Janus* three years earlier. The classification perspective advocated by Chief Justice Roberts—that all compelled disclosure requirements are reviewed under exacting scrutiny—appears to conflict with *NIFLA* and *Janus* in two ways. First, as Part III.C.3 below explains,[219] the exacting scrutiny test recited in *Americans for Prosperity* was not the same as the one Justice Alito invoked in *Janus*.[220] This creates significant confusion because it is not clear whether there are two different exacting scrutiny tests, whether the two tests are the same, or whether one test should be seen to supplant the other. Second, *NIFLA* held that content-based compelled disclosures are subject to strict scrutiny, unless an exception such as *Zauderer* applies.[221] This is the approach Justice Thomas advocated for in *Americans for Prosperity*, but he did so without mentioning *NIFLA* or *Zauderer*. Chief Justice Roberts's approach to exacting scrutiny classification could be seen as an attempt to partially overrule *NIFLA*'s approach either by carving a big exception out of its strict scrutiny holding, or by replacing *Zauderer*'s compelled disclosure standard with exacting scrutiny.

The Court is not even always quite so explicit about reclassification. For decades, the Court repeatedly reaffirmed that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[222] Although it is generally settled that content-based commercial speech regulations receive intermediate

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215. *Ams. for Prosperity Found.*, 141 S. Ct. at 2383.

216. *Id.* at 2391 (Alito, J., concurring in part).

217. *Id.*

218. *See id.* at 2390 (Thomas, J., concurring in part) ("Although the Court rightly holds that even the less demanding 'exacting scrutiny' standard requires narrow tailoring for laws that compel disclosure, invoking exacting scrutiny is at odds with our repeated recognition 'that privacy of association is protected under the First Amendment.'" (quoting Doe v. Reed, 561 U.S. 186, 240 (2010) (Thomas, J., dissenting))); *id.* at 2391 (Alito, J., concurring in part) ("In particular, I agree that the exacting scrutiny standard drawn from our election-law jurisprudence has real teeth. It requires both narrow tailoring and consideration of alternative means of obtaining the sought-after information.").

219. *See also supra* Part II.A.2.

220. *Compare* Janus v. AFSCME, 138 S. Ct. 2448, 2465 (2018) ("Under 'exacting' scrutiny, . . . a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." (quoting Knox v. Serv. Emps. Int'l Union, 567 U.S. 298, 310 (2012))), *with Ams. for Prosperity Found.*, 141 S. Ct. at 2383 ("Under that [exacting scrutiny] standard, there must be 'a substantial relation between the disclosure requirement and a sufficiently important government interest.'" (quoting *Doe*, 561 U.S. at 196)).

221. *See* Nat'l Inst. of Fam. & Life Advocs. ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2371 (2018).

222. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980).

scrutiny,[223] in a series of recent cases the Court has seemed to indicate that *viewpoint*-based commercial speech regulations should be classified at a higher level of scrutiny. In both *Sorrell v. IMS Health* and *NIFLA v. Becerra*, the Court indicated that an elevated level of scrutiny was appropriate because the regulation targeted a speaker based on their identity.[224] This fits within the general trend, which many also point to *Citizens United* to substantiate, that the Court has grown more favorable to corporate interests over time.[225] As I argue below, this aspect of *Sorrell* and *NIFLA* is best interpreted as the Court manipulating the application of the intermediate scrutiny test. Some, however, have argued that *Sorrell* reflects the Court moving this sort of restriction to "a more stringent level of review than the intermediate scrutiny traditionally accorded restrictions on commercial speech."[226]

The Court has now announced that four distinct scrutiny standards exist. From most to least deferential: rational, intermediate, exacting, and strict. Yet how "exacting scrutiny" compares to intermediate and strict scrutiny has been left unclear by the Supreme Court. This is sure to cause great confusion in future Supreme Court cases as well as in the lower courts that must apply these tests.

C. Inconsistent Application

Each tier of scrutiny triggers different responsibilities from those challenging a law and those defending it. For example, in rational basis review, the burden is on the challenger to prove the law at issue is not supported by a legitimate government interest, or is not rationally related to that interest. In intermediate, exacting, and strict scrutiny, that burden is borne by the government. A crucial difference is that for rational basis review any conceivable purpose is sufficient,[227] while for heightened scrutiny courts look only at the government's actual purpose. Therefore, although regulators need not produce legislative facts on the record to support a law scrutinized for a rational basis,[228] there is effectively a requirement to do so for stricter tiers of review. The Court varies greatly from case to case in how it applies the levels of scrutiny. Justices in dissent frequently protest that the majority has departed from the level of scrutiny it purported to apply.[229] Many scholars have argued the distinction among the tiers of scrutiny has deteriorated.[230]

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223. E. CHEMERINSKY, *supra* note 1, at 1437.

224. *See* Sorrell v. IMS Health, Inc., 564 U.S. 552, 571 (2011) (appearing to give significant weight to the fact that the challenged Vermont law was "in practice, viewpoint discriminatory").

225. *See, e.g.*, Coates, *supra* note 185, at 248–65; Amanda Shanor, *The New* Lochner, 2015 WISC. L. REV. 133.

226. Note, *Repackaging Zauderer*, *supra* note 139, at 973.

227. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993).

228. *Id.* at 315.

229. *See, e.g.*, Williams-Yulee v. Fla. Bar, 573 U.S. 433, 465 (2015) (Scalia, J., dissenting) ("This is not strict scrutiny; it is sleight of hand."); Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2326–27 (2016) (Thomas, J., dissenting) ("And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right . . . is increasingly a meaningless formulation. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.").

230. SHAMAN, *supra* note 20, at 74 ("In the last five decades, the Supreme Court has engaged in a continuous reworking of the multi-tier system . . . Through this ongoing exercise, the system has become highly rarefied to the point where it threatens to collapse of its own complexity."); FALLON, *supra* note 1, at 38 ("[S]ome

Through a close review of the blurred standards of scrutiny in the Court's free speech cases, this section hopes to dispel the image of self-discipline and consistency the judicial scrutiny doctrine is meant to foster. In particular, I argue the Court's inconsistent definition and application of intermediate and strict scrutiny, in addition to the invention of an amorphous form of exacting scrutiny, has largely defeated the distinction among the three forms of heightened scrutiny.

i. Rational Basis

Under rational basis review, "a law is upheld if it is rationally related to a legitimate government purpose."[231] The test is often characterized in extraordinarily deferential terms[232] and the burden is ordinarily on the challenger, not the government.[233] The Supreme Court has held that a law subject to rational basis review ordinarily "comes . . . bearing a strong presumption of validity" and "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis" for the law.[234] The test "is a paradigm of judicial restraint."[235] Justice Thomas has noted that "the absence of 'legislative facts' explaining the distinction '[o]n the record,' has no significance in rational-basis analysis" "because we never require a legislature to articulate its reasons for enacting a statute."[236]

Unlike in other areas of constitutional law, application of rational basis is relatively uncommon in free speech cases.[237] It most commonly arises in cases concerning persons uniquely subject to government authority, such as prison inmates[238] and members of the armed services,[239] or content-neutral regulations in non-public forums.[240] The Court thus has had relatively few opportunities to blur the rational basis standard.

One important place where rational basis is nominally applied is *Zauderer*. Recall from Part III.A that *NIFLA* gave new weight to the requirement that a disclosure be "purely factual and uncontroversial information about the terms under which . . . services will be available."[241] In addition to changing this aspect of categorization, the *NIFLA* Court also made the *Zauderer* analysis significantly more stringent. The government now bears the

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commentators depict the tiered regime of judicial review as decayed and crumbling.").

231. CHEMERINSKY, *supra* note 19, at 587 (emphasis omitted).

232. *See Beach Commc'ns*, 508 U.S. at 313–15; *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in part).

233. CHEMERINSKY, *supra* note 19, at 587.

234. *Beach Commc'ns*, 508 U.S. at 313–14.

235. *Id.* at 315.

236. *Id.* (internal citations omitted).

237. Janus v. AFSCME, 138 S. Ct. 2448, 2465 (2018) ("The dissent . . . proposes that we apply what amounts to rational basis review. . . . This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here.") (internal citation omitted).

238. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977) (asking whether a "ban on inmate solicitations and group meetings" was "rationally related to reasonable . . . objectives of prison administration").

239. *Cf.* Lawrence J. Morris, *Free Speech in the Military*, 65 MARQ. L. REV. 660, 683 (1982).

240. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 679 (2010) ("[T]he Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral.").

241. 138 S. Ct. 2361, 2372 (2018) (omission in original).

burden of demonstrating that a compelled disclosure of factual and uncontroversial information is not misleading, "unjustified[,] or unduly burdensome," "remed[ies] a harm that is 'potentially real not purely hypothetical,'" and "extend[s] 'no broader than reasonably necessary.'"[242] Whatever the *Zauderer* test is, it is clear that it is not rational basis review—even though the Court still labels it, "deferential."[243]

Although the "deferential" label for the *Zauderer* scrutiny is somewhat confusing post-*NIFLA*, it is nevertheless an example of the Court adjusting the application of scrutiny in a way that enhances transparency. In other contexts, the rational basis inquiry has long been criticized on the ground "that in some cases where the Court says that it is using rational basis review, it is actually employing a test with more 'bite' and not the customary very deferential rational basis test."[244] In *Zauderer* and *NIFLA*, the Court expressly established a standard and applied it accordingly in a manner that can be analyzed and emulated. In contrast to the times when the Court recites one test and applies something that seems stricter, or when it seems to use multiple distinct tests interchangeably as discussed below in intermediate and strict scrutiny, the use of a clear standard permits courts to resolve issues by applying the test as the Court defined it, rather than trying to read through the lines. The *Zauderer* standard encourages debate over what words like "unjustified," "not misleading," or "no broader than reasonably necessary" mean. But when the Court fails to indicate whether it is applying rational basis or an implicitly more demanding form of rational basis, it only leads to the perception that the Court came to its conclusion because of tacit bias or pretextual decisionmaking.

ii. Intermediate Scrutiny

Like rational basis, there are at least two versions of intermediate scrutiny.[245] It is most commonly articulated such that "a law will be upheld if it is substantially related to an important government purpose" and is narrowly tailored to meet that purpose.[246] But the Court has occasionally transposed some of the strict scrutiny analysis into this midlevel review and instead indicated that a law will not be upheld if there exists a "less restrictive alternative."[247] In the area of commercial speech, the Court has been flat-out inconsistent as to whether the least restrictive alternative analysis is to be used. For example, in cases such as *Greater New Orleans Broadcasting Ass'n v. United States*, the Court has explicitly held that "[t]he government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the

242. *Id.* at 2377 (internal citations omitted).

243. *Id.*

244. CHEMERINSKY, *supra* note 19, at 589 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)); FALLON, *supra* note 1, at 38 n.147. *See generally* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evan, 32 IND. L. REV. 357 (1999) (discussing various forms of rational basis review applied between 1971 and 1996).

245. *Cf.* FALLON, *supra* note 1, at 105 ("In addition, commentators sometimes use the term 'intermediate scrutiny' more loosely to characterize a variety of tests of constitutional validity that are more stringent than rational basis review, less exacting than strict judicial scrutiny, and more structured than open-ended balancing.").

246. CHEMERINSKY, *supra* note 19, at 587–88 (emphasis omitted).

247. *See id.* at 588 n.14.

asserted interest."[248] But in other cases decided around the same time, including *44 Liquormart v. Rhode Island*, it instead held that the state must "satisfy the requirement that its restriction be no more extensive than necessary."[249] The rhetorical distinction matters. There are many forms of regulation that could simultaneously be deemed "narrowly tailored." Only one can be the least restrictive alternative.

In *NIFLA*, the Court subjected the licensed notice to intermediate scrutiny.[250] Although it recited the "narrow tailoring" standard, the standard applied could only be described as asking for the least restrictive option.[251] The Court held that the FACT Act was not narrowly tailored on the ground that California "could inform the women itself with a public-information campaign."[252] That California had already tried an advertising campaign did not sway the Court, it said, because the state could just have expended more resources.[253] To the state's insistence "that many women who are eligible for publicly-funded healthcare have not enrolled," the Court retorted, "[b]ut California has identified no evidence to that effect."[254] As commentators have noted, there is ample evidence that many CPCs mislead patients.[255] A 2010 investigation into CPCs in California found that forty percent "advised that hormonal birth control increases the risk of infertility and breast cancer"[256] and "a confounding 70% made the ridiculous assertion that 'abortion increases the risk of breast cancer.'"[257] Although there might be other narrow options, the Court identified only one more narrowly tailored than the one employed by California, and it was one that the state objected it had already tried without adequate success. This can only be described as a "least restrictive alternative" analysis—and a strict one at that. If anything, the intermediate scrutiny standard applied by the Court in *NIFLA* seems to reflect the trend Richard Fallon has identified—in the context of *strict* scrutiny—as "nearly categorical prohibition."[258]

iii. Exacting Scrutiny

For decades, the Court used "exacting scrutiny" as a catch-all for its inconsistent

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248. 527 U.S. 173 (1999). Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (noting that *Central Hudson* did not require the least restrictive means).

249. 517 U.S. 484, 507 (1996) ("The State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary."); Rubin v. Coors Brewing Co., 514 U.S. 476, 486 (1995) ("The remaining *Central Hudson* factors require that a valid restriction on commercial speech directly advance the governmental interest and be no more extensive than necessary to serve that interest.").

250. 138 S. Ct. 2361, 2375 (2018). Note that the Court did this not because the licensed notice was normally subject to intermediate scrutiny. It indicated that because the professional speech exception did not apply, the notice was subject to strict scrutiny. Rather, the Court applied intermediate scrutiny because it insisted that the statute failed either level of scrutiny. *Id.*

251. *Id.*

252. *Id.* at 2376.

253. *Id.*

254. *Id.*

255. *See* Chemerinsky & Goodwin, *supra* note 128, at 64.

256. *Id.* (citing NARAL PRO-CHOICE CAL FOUND., UNMASKING FAKE CLINICS: THE TRUTH ABOUT CRISIS PREGNANCY CENTERS IN CALIFORNIA 2 (2010) [hereinafter NARAL REPORT], https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf).

257. *Id.* (citing NARAL REPORT, *supra* note 256, at 2).

258. Fallon, *supra* note 11, at 1303.

language in applying both intermediate and strict scrutiny, and sometimes something between the two.[259] In *McCutcheon v. FEC*, for example, the Court held that a restriction on aggregate contribution limits by individual political donors failed a form of "exacting scrutiny" which was exactly the same as strict scrutiny: "Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest."[260] *Williams-Yulee v. Florida Bar* used the terms "exacting" and "strict" interchangeably.[261] On the other hand, other election cases, such as *Citizens United* and *Doe v. Reed*, held that "'exacting scrutiny' . . . requires a 'substantial relation' between [a] disclosure requirement and a 'sufficiently important' governmental interest."[262] Meanwhile, *Knox v. Service Employees International Union*, drawing on a case that did not purport to apply any level of scrutiny, held that exacting scrutiny requires a "compelling state interes[t] … that cannot be achieved through means significantly less restrictive of associational freedoms."[263] In cases such as *United States v. Alvarez*[264] and *Turner Broadcasting Systems v. FCC*,[265] the Court used the terms "*most* exacting scrutiny." The adjective "most" implies the existence of a lesser form of exacting scrutiny, which creates the impression that—at least prior to *Janus*—there were two or more levels of exacting scrutiny that may or may not have corresponded to the familiar intermediate-strict distinction. R. George Wright argues that "exacting scrutiny correspondingly lacks internal structure, internal differentiation, mediating elements, internal cues as to its proper application, and meaningful substantive guiding or directive principles."[266]

In the wake of *Americans for Prosperity* and *Janus*, exacting scrutiny has gone from merely confusing to nearly unintelligible. *Americans for Prosperity* and *Janus* each took one of the tests above and called it exacting scrutiny. *Americans for Prosperity* borrowed the "substantial relation between the disclosure requirement and a sufficiently important governmental interest" standard from *Doe v. Reed*.[267] *Janus* took *Knox*'s "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[268] The former is indistinguishable from intermediate scrutiny,[269]

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259. *See supra* Part II.A.2.

260. 572 U.S. 185, 197 (2014).

261. 573 U.S. 433, 442–43 (2015).

262. Citizens United v. FEC, 558 U.S. 310, 366–67 (2010); Doe v. Reed, 561 U.S. 186, 196 (2010). Recall from Part II that *FEC v. Beaumont* and *Nixon v. Shrink Missouri* had applied a similar standard, but did not label it "exacting scrutiny." 539 U.S. 146, 161 (2003) ("[S]atisfies the lesser demand of being 'closely drawn' to match a sufficiently important interest.") (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–88 (2000)). The standard originated in Buckley v. Valeo, 424 U.S. 1, 64 (1976).

263. 567 U.S. 298, 310 (2012) (modification in original) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

264. 567 U.S. 709, 724 (2012) (emphasis added). *Alvarez* held unconstitutional the Stolen Valor Act, a federal statute that made it a misdemeanor to falsely represent that one had received a military decoration or award, on the ground that it was a content-based restriction on free speech. *Id.* at 715, 730.

265. 512 U.S. 622, 642 (1994). *Turner Broadcasting* held that intermediate scrutiny applied to a First Amendment challenge to "must carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992. *Id.* at 661–62.

266. Wright, *supra* note 9, at 208.

267. 141 S. Ct. 2373, 2385 (2021) (quoting *Doe*, 561 U.S. at 196).

268. 138 S. Ct. 2448, 2465 (2018) (quoting *Knox*, 567 U.S. at 310).

269. The only distinction between *Americans for Prosperity*'s exacting scrutiny standard and intermediate

while the latter is essentially the same as strict scrutiny.[270] Neither case— nor any precedent—explained how these two standards relate to each other. There are three ways that one could interpret the differing standards.

First, it is possible that exacting scrutiny in *Americans for Prosperity* and *Janus* are two sides of the same coin. In other words, despite the rhetorical variation they might just be the same test (or close enough to be functionally analogous). However, this possibility seems unlikely because the Court has long used the distinction between a "compelling" interest and an "important" one as a primary difference between strict and intermediate scrutiny. If a "sufficiently important" interest is equivalent to a "compelling" interest, it would throw an enormous amount of constitutional scrutiny jurisprudence out of whack because then the only distinction between intermediate, exacting, and strict scrutiny would be that intermediate and exacting scrutiny require narrow tailoring, while strict (usually)[271] requires the least restrictive alternative. If there is to be any coherent differentiation among the three levels of heightened scrutiny, there must be a distinction between the levels of government interest required for a law to be upheld.

Second, it is possible that there are two versions of exacting scrutiny. In this case, the *Janus* test might control in compelled subsidy and mandatory association cases, with *Americans for Prosperity* as the dominant test in election finance and compelled disclosure cases. Or, given the Court's inconsistent application of the other levels of scrutiny, it might apply the tests on an ad hoc basis. As Justice Thomas complained in a vigorous dissent in a 2016 abortion case,

> the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right – be it 'rational basis,' intermediate, strict, or something else – is increasingly a meaningless formulation. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.[272]

Under this theory, exacting scrutiny could further expand the capacity of the Court to achieve any outcome it likes on an ad hoc basis by offering standards that are even more malleable and ill-defined than the traditional three tiers of scrutiny. Lending some credence to this theory is the fact that Justice Alito, concurring in *Americans for Prosperity*, spoke approvingly of Chief Justice Roberts's version of exacting scrutiny, but was careful to describe it as "the exacting scrutiny standard *drawn from our election-law jurisprudence*" in the topic sentence of two of the three paragraphs in his opinion.[273] The qualifier linking this exacting scrutiny to election law might imply that *Janus*'s exacting scrutiny applies to other categories of speech.

Third, it is possible that one of the two versions of exacting scrutiny is mislabeled.

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scrutiny is that intermediate scrutiny asks for an "important interest," while *Americans for Prosperity* asks for a "sufficiently important interest." *See supra* Part II.A.1.

270. The only distinction between *Janus*'s exacting scrutiny and strict scrutiny is that strict scrutiny requires least restrictive means analysis (or, in some circumstances, narrow tailoring), while *Janus* asks whether the state interest could be vindicated through means significantly restrictive of associational freedoms. *See supra* Part II.A.1.

271. *See infra* Part III.C.4.

272. Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2236–37 (2016) (Thomas, J., dissenting).

273. 141 S. Ct. 2373, 2391 (2021) (Alito, J., concurring in part) (emphasis added).

Chief Justice Roberts espoused the "substantial relation to a sufficiently important interest" in a portion of the *Americans for Prosperity* opinion which did not receive majority support.[274] It thus might not be law—yet. But Justice Alito wrote that he did not join the majority in that portion because he did not think exacting scrutiny should apply categorically to compelled disclosures, not because he disagreed with the standard.[275] If you count the statements of approval of Roberts's standard in Justice Alito's opinion (which Justice Gorsuch joined), there are five votes for *Americans for Prosperity*'s version of exacting scrutiny. So, if it is not binding law yet, it seems likely that it will be soon. On the other hand, *Janus*'s use of the term "exacting scrutiny" could be perceived as a misnomer. Recall from Part I.A.2 that *Janus*'s version of exacting scrutiny only acquired its label in 2012 in *Knox v. Service International Employees Union*. It has only been applied under that name in three Supreme Court cases: *Knox*, *Harris v. Quinn*,[276] and *Janus*.[277] Before *Knox*, it was just the *U.S. Jaycees* test for determining when an incursion upon a group's right to expressive association infringes First Amendment rights. It is therefore possible that the *Janus* form of exacting scrutiny was a misnomer and that it will no longer be treated as a separate form of constitutional scrutiny in the future.

Perhaps the most befuddling aspect of the *Americans for Prosperity*'s version of exacting scrutiny is that it is nearly identical to intermediate scrutiny. *Americans for Prosperity* asks for "substantial relation between the disclosure requirement and a sufficiently important interest" and "requires narrow tailoring."[278] Under intermediate scrutiny, "a law will be upheld if it is substantially related to an important government purpose" and is narrowly tailored to meet that purpose.[279] The only distinction between these standards is that *Americans for Prosperity* asks that the interest be *sufficiently* important, rather than merely important. "Sufficient importance" is a tautology. If something is important within the meaning of constitutional scrutiny, it is sufficiently so. If it is not, it is insufficient. The only way that the adverb, "sufficiently," could be seen as distinguishing the standards is if it *lowers* the level of significance required to qualify as "important." But the tone of *Americans for Prosperity,* as well as the other cases applying the "sufficiently important" standard going all the way back to *Buckley*, imply that exacting scrutiny is probably not a lesser standard than intermediate.

The Court has clearly classified at least some categories of compelled speech into the new exacting scrutiny tier of review. But when applying exacting scrutiny, the Court has varied its recitation and application of the standard so much that it is nearly impossible to say exactly what the standard asks for, specifically when it applies, or how it is distinguishable from the other forms of heightened review. Remarkably, this is true even

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274. *Id.* at 2385.

275. *Id.* at 2391.

276. 573 U.S. 616, 648 (2014).

277. 138 S. Ct. 2448, 2465 (2018) (discussing the cases in which the Court applied the *Janus* form of exacting scrutiny).

278. 141 S. Ct. at 2385.

279. CHEMERINSKY, *supra* note 19, at 587–88 (emphasis omitted). The intermediate scrutiny standard is sometimes said to require a "significant government interest," rather than an important one. *See* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2356 (2020) (Sotomayor, J., concurring) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Because I cannot think of a definitional difference between "significant" and "important," I do not treat the variations in the standard separately here.

though the Justices in the *Americans for Prosperity* majority seemed to largely be in agreement over what the exacting scrutiny inquiry requires.[280]

iv. Strict Scrutiny

Strict scrutiny has developed a multi-track approach that mirrors the rhetoric associated with intermediate scrutiny. In strict scrutiny, as with exacting and intermediate scrutiny, but unlike rational basis, the burden is on the government.[281] The Court sometimes holds that a law will be upheld under strict scrutiny only "if it is necessary to achieve a compelling government purpose."[282] The word "necessary" "requires proof that the law is the least restrictive . . . alternative. If the law is not the least restrictive alternative, then it is not 'necessary' to accomplish the end."[283] But especially in recent cases, the Court has asked only whether a challenged law is "narrowly tailored to serve compelling state interests."[284] The Court has implicitly acknowledged that "narrowly tailored" is a less demanding inquiry than "least restrictive alternative." In *Adarand Constructors v. Pena*, it said that something which is "necessary" is narrowly tailored.[285] The Court has never held a showing that something is narrowly tailored is sufficient to prove that it is necessary. The Court has also repeatedly held in the context of strict scrutiny that "[t]he First Amendment requires that [the challenged law or regulation] be narrowly tailored, not that it be 'perfectly tailored.'"[286]

Richard Fallon persuasively argues that there are actually three forms of strict scrutiny, "each of which produces a different inquiry," and that the availability of alternative analyses "has not infrequently occasioned confusion among the Justices themselves."[287] The first version, "nearly categorical prohibition," is available "to protect rights that are so constitutionally preferred that they can be infringed, if at all, only to avert imminent catastrophic harms."[288] In this category, Fallon includes opinions that speak in absolute terms, including: Judge Easterbrook's famous opinion in the free speech case *American Booksellers Ass'n v. Hudnut*,[289] Justice Scalia in *City of Richmond v. J.A.*

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280. *See supra* Part III.B.

281. Edenfield v. Fane, 507 U.S. 761, 770 (1993).

282. CHEMERINSKY, *supra* note 19, at 588. *See also, e.g.*, Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) ("[T]he State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."); Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (same).

283. CHEMERINSKY, *supra* note 19, at 589.

284. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); Nat'l Inst. of Fam. & Life Advocs. ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2371; Williams-Yulee v. Fla. Bar, 573 U.S. 433, 442 (2015). *But cf.* FALLON, *supra* note 1, at 22 (treating "necessity" and "narrow tailoring" as the same requirement and instead suggesting that the tailoring requirement in strict scrutiny is composed of up to four elements).

285. 515 U.S. 200, 237 (1995).

286. *Williams-Yulee*, 575 U.S. at 454 ("The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be 'perfectly tailored.'") (quoting Burson v. Freeman, 504 U.S. 191, 209 (1992)).

287. Fallon, *supra* note 11, at 1302–03.

288. *Id.* at 1303.

289. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986) (striking down a municipal regulation that prohibited pornography which "tend[s] to perpetuate subordination" of women on the ground that the city sought to enforce "an approved point of view"). Fallon reads the holding to mean that "no governmental interest could be strong enough to justify a city in enforcing 'an approved point of view.'" Fallon, *supra* note 11, at 1304.

Croson Co.,[290] and Justice Thomas in *Grutter v. Bollinger*.[291] In the second version, strict scrutiny works as a weighted balancing test, "distinguished from other balancing tests by its premise that the stakes on the right side of the scale are unusually high and that the government's interest must therefore be weighty to overcome them."[292] This version of strict scrutiny finds its support in, for example, freedom of association cases in which the government seeks compelled disclosure of information about a group,[293] as well as repeated arguments by Justice Marshall.[294] The third version applies strict scrutiny as a means to ferret out illicit motives. Supported by a bevy of scholarship produced by respected academics such as John Hart Ely, Charles Fried, and Elena Kagan, Fallon asserts that when "the government discriminates on the basis of race or bans speech of a particular kind, experience suggests that it may be animated by racial prejudice or hostility to certain messages."[295] For example, the Court wrote in *Johnson v. California* that "[t]he reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose."[296]

The distinction between a strict form of strict scrutiny and a less strict form is perhaps easiest to demonstrate by comparison. In a plurality opinion in *Burson v. Freeman*, the Court considered whether a Tennessee law creating content-based exclusion of some speakers from the vicinity of polling places could withstand strict scrutiny.[297] *Burson* actually referred to the test it was applying as "exacting scrutiny" but the standard itself (the "State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to that end'") and the law at issue ("a facially content-based restriction on political speech in a public forum") are both nearly universally associated with strict scrutiny throughout the Court's case law.[298] In *Burson*, the Court found that the

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290. 488 U.S. 469, 521 (1989) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." (Scalia, J., concurring) (modification in original) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). In *J.A. Croson*, the Court held a plan promulgated by the City Council of Richmond, Virginia unconstitutional under strict scrutiny. *Id.* at 511. "The plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises." *Id.* at 478.

291. 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part) ("[O]nly those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity'" sufficient to satisfy strict scrutiny). In *Grutter*, the Court applied strict scrutiny, but nevertheless upheld a "race-conscious" affirmative action program used by the University of Michigan Law School. *Id.* at 343.

292. Fallon, *supra* note 11, at 1306.

293. *See id.* at 1306 n.227 (Fallon cites to Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 92–98 (1982) and Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 467–68 (1977)).

294. Fallon, *supra* note 11, at 1306 ("Justice Marshall has repeatedly argued that strict scrutiny should be understood in these terms. According to him, the requirement that infringements on certain rights be justified by a '[c]ompelling state interest' is merely a shorthand description of the difficult process of balancing individual and state interests that the Court must embark upon when faced with a classification touching on fundamental rights." (quoting Richardson v. Ramirez, 418 U.S. 24, 78 (1974) (Marshall, J., dissenting))). Justice Stevens and Justice Marshall both advocated for a "sliding scale" approach in their opinions. *See* CHEMERINSKY, *supra* note 19, at 590.

295. Fallon, *supra* note 11, at 1308 & n.234.

296. Johnson v. California, 543 U.S. 499, 505 (2005); Fallon, *supra* note 11, at 1309–10. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

297. 504 U.S. 191 (1992).

298. *See* Volokh, *supra* note 44, at 2426 (suggesting that *Burson v. Freeman* applied a "strict scrutiny

state had a compelling interest and gave considerable attention to whether the boundary was necessary, and whether a 100-foot curtilage was narrowly tailored. The plurality argued that the buffer zone was necessary because it felt criminal enforcement would be inadequate to prevent voter intimidation and election fraud and because of a "common sense" connection "between ballot secrecy and some restricted zone surrounding the voting" not already satisfied by ballot secrecy provisions.[299] It expressly declined to ask the state to demonstrate the boundary was narrowly tailored on the ground that the difference between 100 feet and 25 "is a difference only in degree, not a less restrictive alternative in kind."[300] Justice Stevens, in dissent, protested that the plurality forsook the strict scrutiny analysis it invoked in favor of a mere appeal to the challenged rule's historical pedigree: "what the plurality early in its opinion calls 'exacting scrutiny,' appears by the end of its analysis to be neither exacting nor scrutiny."[301]

Burson's deferential strict scrutiny standard has been invoked on multiple occasions since. Most recently, in *Williams-Yulee v. Florida Bar*, the Court held that a state restriction on monetary solicitation by candidates for judicial office survived strict scrutiny.[302] Each of the three dissenting opinions vigorously objected that the challenged rule was not narrowly tailored, much less the least restrictive alternative.[303] As Justice Kennedy wrote: "This law comes nowhere close to being narrowly tailored. And by saying that it survives that vital First Amendment requirement, the Court now writes what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes."[304]

The not-so-strict, strict scrutiny of *Burson* and *Williams-Yulee* stands in stark contrast to the not-so-intermediate, intermediate scrutiny of *NIFLA* and *Sorrell*. Even when the Court invokes, say, "necessary," the only way to know whether it means "necessary" or merely "narrowly tailored" is to read between the lines. Dissents on both sides of the political aisle regularly complain that the standards are being abandoned, and with good reason. If the distinction between "narrowly tailored" and "least restrictive alternative" fades, the only thing really separating intermediate scrutiny and strict scrutiny is that the former requires a substantial or important interest, while the latter requires one that is compelling. The Court's history demonstrates that weighing the level of government interest is inherently a fraught endeavor likely to depend heavily on a justice's personal

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framework").

299. *Burson*, 504 U.S. at 207–09.

300. *Id.* at 209–10.

301. *Id.* at 226 (Stevens, J., dissenting).

302. 575 U.S. 433, 457 (2015). Like *Burson*, *Williams-Yulee* uses the terms "exacting scrutiny" and "strict scrutiny" interchangeably, with the majority and the dissents each referring to the test as strict scrutiny in some places. *See id.* at 444 ("This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny."); *id.* at 464 (Scalia, J., dissenting) ("[The Court] purports to reach this decision by applying strict scrutiny, but it would be more accurate to say that it does so by applying the appearance of strict scrutiny."); *id.* at 465 (Kennedy, J., dissenting) ("That is its error in the application of strict scrutiny."); *id.* at 479 (Alito, J., dissenting) ("The Florida rule regulates that speech based on content and must therefore satisfy strict scrutiny.").

303. *Id.* at 464 (Scalia, J., dissenting) ("Canon 7C(1) does not narrowly target concerns about impartiality or its appearance . . ."); *id.* at 479 (Alito, J., dissenting) ("Indeed, this rule is about as narrowly tailored as a burlap bag.").

304. *Id.* at 478 (Kennedy, J., dissenting).

predilection.[305] The Court has never articulated criteria for determining what is a compelling or an important government interest. Indeed, in many cases, the Court evades the difficult question of deciding what qualifies as enough government interest by simply presuming that an adequate interest exists and instead focusing on why a given law is not adequately tailored.[306]

Worse still, the Court varies wildly from case to case in how it calculates the required interest. In *Burson* and *Williams-Yulee*, the Court recognized the state's generally compelling interest in safeguarding public confidence in elections.[307] For example, *Williams-Yulee* observed that "public perception of judicial integrity is 'a state interest of the highest order'"[308] not readily subject to "precise definition, nor does it lend itself to proof by documentary record."[309] But in other election cases, including *Citizens United* and *McCutcheon v. FEC*, the Court focused only on the interest "limited to *quid pro quo* corruption."[310] In direct contrast to the *Burson* and *Williams-Yulee* emphasis on electoral confidence, the Court wrote in *Citizens United* that "[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."[311] In *NIFLA*'s *Zauderer* inquiry into unlicensed notices (which declined to specify what level of government interest was required), the Court entirely rejected California's interest in "ensuring that 'pregnant women in California know when they are getting medical care from licensed professionals'" on the ground that California did not prove that women were actually confused "[a]nd California already makes it a crime for individuals without a medical license to practice medicine."[312] *Burson*, on the other hand, found that related criminal laws did not defeat the state's interest "because they 'deal with only the most

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305. *Cf.* FALLON, *supra* note 1, at 55 ("Sometimes . . . the Supreme Court labels interests as compelling on the basis of little or no textual inquiry."); Timothy M. Bagshaw, *The Phantom Standard: Compelling State Interest Analysis and Political Ideology in the Affirmative Action Context*, 2013 UTAH L. REV. 409, 427 ("[B]ecause of the lack of any explicit standard governing whether an asserted state interest is compelling for purposes of strict scrutiny analysis, justices may craft strict scrutiny's ends analysis in such a way as to privilege particular ideological understandings in their jurisprudence.").

306. *See, e.g.*, Janus v. AFSCME, 138 S. Ct. 2448, 2465 (2018) ("We assume that 'labor peace,' in this sense of the term, is a compelling state interest."); Nat'l Inst. of Fam. & Life Advocs. ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2375 (2018) ("Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it."). *See also* Note, *Let the Ends Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1418 (2016) ("[T]he Court virtually never invalidates state action on the sole ground that it serves an insufficiently consequential end. When it appears to do so, its holding typically rests on a conclusion that the state's asserted interest is per se illegitimate.").

307. *Williams-Yulee*, 575 U.S. at 445 ("The interest served by Canon 7C(1) has firm support in our precedents. We have recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'" (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009))); Burson v. Freeman, 504 U.S. 191, 199 (1992) ("[T]his Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence.").

308. 575 U.S. at 445 (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009)).

309. *Id.* at 447.

310. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359 (2010); McCutcheon v. FEC, 572 U.S. 185, 192 (2014) ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance."). *See also* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 751 (2011) ("The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned.").

311. *Citizens United*, 558 U.S. at 359.

312. Nat'l Inst. of Fam. & Life Advocs. ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2377 (2018).

blatant and specific attempts' to impede elections."[313] The demonstrably lower standard applied in *Burson* and *Williams-Yulee* leads to the untoward inference that the Court was manipulating application of scrutiny on an ad hoc basis to tip the scales in its preferred direction. Of these five cases—*Burson*, *Williams-Yulee*, *NIFLA*, *Citizens United*, and *McCutcheon*— only *Burson* and *Williams-Yulee* upheld the law or regulation challenged. Of all five, only *Burson* and *Williams-Yulee* purported to apply strict scrutiny.

Even if the Court were perfectly clear about how to categorize and classify (and that has been far from the case), the Court's repeated manipulation of the terms of each tier of scrutiny alone would render the levels of heightened scrutiny indistinguishable. The Justices often speak as if there is real significance to selecting one level of scrutiny rather than another. But the Court is so inconsistent in applying the scrutiny analysis that differences among the tiers seem more illusion than reality. If the pieces of strict scrutiny, exacting scrutiny, and intermediate scrutiny are interchangeable, what purpose does the rest of the scrutiny analysis serve? Moreover, if the Court really wants the discretion to deliver ad hoc justice, why have four levels of scrutiny in the first place?

IV. IDENTIFYING CONCERNS IN FREE SPEECH SCRUTINY

Manipulation of each step of the constitutional scrutiny procedure is the fundamental feature of the Court's free speech jurisprudence. It permits the Justices to speak in the commonly accepted, general terms of the what the country values—not the individual justice—and, in doing so, impart the impression that the judiciary is objective and impartial.[314] This allows the Justices to avoid the perception that a decision is motivated by their unacknowledged personal preference.[315] But the illusion of impartiality only works if the courts have the self-discipline to make it work. When a rule established in one case is ignored, misapplied, or implicitly abrogated in the next, it enhances the impression that the judge is not impartial. Worse still, it obscures the law, making it difficult for regulators, courts, and the public to know what the Constitution requires. This encourages litigation; the more uncertain the outcome in the courts, the greater the incentive to litigate. It is out of step with the Court's emphasis elsewhere on judicial and administrative economy.

A certain degree of inconsistency and opacity in the law is inevitable—and probably desirable. The Constitution is vague. It requires courts to expound it and to mete out justice in novel and unpredictable situations. That, in turn, requires judgment-calls and discretionary decision-making that will engender inconsistencies, even among like-minded jurists. And, as I explain below, the constitutional scrutiny structure is (at least in theory) well-equipped to strike an appealing middle ground between consistency and individual fairness.

The Court, however, has failed to apply the system consistently and, in doing so, has gained little from its approach. To the greatest degree possible, the Court should seek to

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313. 504 U.S. 191, 199 (1992).

314. *Cf.* Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 6–8 (1983) (discussing the "vice" of being result-oriented).

315. *Cf. id.* at 7 ("[I]f judges based decisions on unacknowledged personal preferences the law would be unpredictable.").

impart constitutional clarity. In this Part, I argue that although the Court does not need to adopt a formal structure to adjudicate constitutional issues, when it does so, it should stick to that structure. When it chooses to change that structure, it should endeavor to do so clearly and not by implication.

A. Three Step Scrutiny as Rules and Standards

It may be helpful to think of formal and flexible approaches to constitutional scrutiny in terms of the familiar jurisprudential debate between legal rules and legal standards. Professor Louis Kaplow has suggested that legal "rules" are situations in which the court gives content to the law before regulated individuals act; "standards" permit the court to give content to the law after those individuals act.[316] There are, in general, well identified advantages and disadvantages to structuring a doctrine around rules versus standards. Generally, rules promote certainty, uniformity, stability, and security.[317] Pierre Schlag labels these "rule virtues."[318] On the other hand, "standard virtues" favor flexibility, individualization, open-endedness, and dynamism.[319]

The three-step process of constitutional scrutiny features both rules and standards. Categorization and classification are rules; application involves one of several standards. Categorization and classification are designed as bright line formulations that, at least in theory, do not change from case to case. They are thus future-oriented rules meant to constrain and guide courts in cases that have not yet arisen. For example, if the Court assigns "regulation of content-based notices" to the strict scrutiny class in Case A it is presumed that when Case B involves a state proscription of speech about abortion, the Court will apply strict scrutiny.

On the other hand, the application of a level of scrutiny is a standard. It permits courts some leeway to measure competing interests to determine, on balance, whether a regulation violates the standard set in an earlier case. It asks a court to engage in case-specific weighing of means and ends. Although a future court interpreting a restriction of speech about abortion might be guided by *NIFLA*'s application of scrutiny, it is not bound to follow *NIFLA* in rigid fashion. That court still has discretion to reach a different outcome than *NIFLA*, if it thinks the government interest and tailoring requirements are satisfied based on that case's facts.

If applied appropriately, there is significant value in the tiers of constitutional scrutiny. It gives the Court a consistent way to structure and modify doctrine, it offers an appealing and familiar rhetorical scheme to discuss and apply that structure, and it gives regulators and regulated parties a sense of what the Constitution means in the most sensitive and most significant areas of law. Perhaps most of all, it evokes the impression that constitutional law is not based on personal disposition—the faith, politics, and prejudices of the jurist holding the pen—legitimating a doctrine that otherwise might seem anti-democratic and arbitrary.

But, although constitutional scrutiny doctrine features something for both the

316. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).
317. Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 403 (1985).
318. *Id.*
319. *Id.*

"Justice of rules" and the "Justice of standards,"[320] the Court has made the rules rule-less and the standards standard-less. As Part II demonstrated, the Court has capriciously recategorized to achieve unpredictable outcomes, redefined classes so far that it is not even clear which categories get which tiers of review, and misapplied scrutiny past the point of coherence. This version of constitutional scrutiny does not vindicate either "rule virtues" or "standard virtues." It defeats them.

i. Categorization

Some cases readily lend themselves to resolution by categorization. For example, in *NIFLA*, the Court tasked itself with resolving, among other things, the question whether professional speech is a distinct category.[321] The majority answered this question clearly: professional speech is not its own category.[322]

But in other cases, the Court has recategorized unnecessarily to achieve a desired outcome. As Part III.A explained, in *NIFLA*, the Court redefined the *Zauderer* category of compelled disclosure by excluding factual speech that happens to be about a controversial subject. In *Americans for Prosperity*, a plurality wanted to hold that compelled disclosures, in general, are a category subject to exacting scrutiny, without any reference to how that holding might affect *NIFLA* or *Zauderer*.[323] And, in *Janus*, the Court relied on novel factors to distinguish the *Pickering* category and declined to categorize compelled subsidy of private speech together with compelled subsidy of government speech, so that it could instead apply the expressive association category.[324] The result is that, with each inexplicable recategorization, the categories created by the Courts become ever more fractured and categorizing becomes more difficult to perform reliably. The more categories a regulation of speech could fit into, the greater discretion courts have to cherry pick the category that will lead to their ideologically preferred outcome, even where it is not required by precedent. In other words, the greater the discretion in categorization, the more categorization looks like a doctrine of standards, rather than rules.

Categorization is designed to be rule-based. The Court defines a category in Case A and then approaches future regulations that meet that definition in Case A in a fashion consistent with Case A. When the Court has a change of heart, categorization requires explicit redefinition of categories in a manner that acknowledges that the Court is recategorizing. Otherwise, the categories are no longer coherent. Simply put, the Court has produced enough case law that it can always rely on dicta from a past case[325] or heretofore

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320. Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 121 (1992).

321. *See* 138 S. Ct. 2361 (2018); *see also supra* Part III.A.

322. *NIFLA*, 138 S. Ct. at 2372.

323. Ams. For Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) ("*NAACP v. Alabama* did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure. We have since settled on a standard referred to as 'exacting scrutiny.'") (citation omitted).

324. 138 S. Ct. 2448, 2472–74 (2018).

325. For example, recall from Part III that the *Janus* Court distinguished *Pickering* in part on the ground that *National Treasury Employees' Union*, which applied *Pickering*, had said that *Pickering* is a poor fit for large classes of employees. *See Janus*, 138 S. Ct. at 2472. One might also argue that the new emphasis on non-controversiality under *Zauderer* fits within this heading.

unmentioned indicia[326] to avoid an inconvenient category. When it does so, the Court makes it substantially harder for regulators and regulated parties to stay within the bounds of constitutional law both in the narrow sense that the categories at issue in a given case are less clear, and in the broader sense that parties must recognize that the diminished salience of *stare decisis* norms means that any area of law is subject to unpredictable changes. If the virtues of rules are, as Pierre Schlag asserts, certainty, uniformity, stability, and security,[327] this dubious pattern of recategorization fails on all counts.

ii. Classification

Classification is the most rule-based step in the constitutional scrutiny process. Unlike categorization, which involves some individualized inquiry to associate the facts of a case with a category, classification is entirely divorced from the individual circumstances of the case in which it occurs. Instead, a court identifies a pre-defined category and links it with a pre-defined class, which is in turn associated with pre-defined scrutiny analysis.[328] Every aspect of classification readily lends itself to prescription before individual action so that it can be consistently applied after that action is complained of. And yet the Court has even muddied these waters.

The Court still refers to the three levels of scrutiny and occasionally rejects flexible departures from the formal system, not just in First Amendment law, but across a variety of constitutional doctrine (sometimes even when the Court declines to apply scrutiny at all).[329] But it is often evasive about classification, using the catch-all term "heightened scrutiny" to avoid dictating in the future whether intermediate or strict scrutiny applies.[330] For example, in *Sorrell v. IMS Health*, the majority applied "heightened scrutiny" to strike down a Vermont statute restricting the sale and disclosure of pharmacy records on the ground that it constituted a content- and viewpoint-based restriction.[331] The dissent

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326. For example, recall that the *Janus* Court distinguished *Pickering* in part by suggesting (without deciding) that the *Pickering* framework is less apt to deal with compelled speech than restrictions on speech. *See id.* at 2473.

327. Schlag, *supra* note 317, at 403.

328. For example, if a case challenges the constitutionality of a regulation restricting use of directional street signs, the court must first use the facts of the case—the regulation and the street sign—to choose the content-based category. Classification, on the other hand, uses no facts because it is only the content-based category that is relevant to selecting the level of scrutiny. *See* Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015) (holding that content-based regulations receive strict scrutiny, regardless of "the government's justifications or purposes"). Once the court determines that content-based restrictions get strict scrutiny, it is expected that the court will then recite the correct ("least restrictive" + "compelling interest) standard.

329. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("Justice Breyer . . . criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry.").

330. *Compare* Sorrell v. IMS Health, Inc., 564 U.S. 552, 565 (2011) (applying "heightened scrutiny" to strike down a statute on free speech grounds without referencing intermediate scrutiny and only using the term "strict scrutiny" in a parenthetical explanation of a precedential case), *with id.* at 583–84 (Breyer, J., dissenting) (criticizing the majority for applying "heightened scrutiny" where precedent indicates that intermediate scrutiny should apply).

331. *See id.* at 571 (majority opinion) ("§ 4631(d) imposes a *speaker*- and content-based burden on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny.") (emphasis added). *See also* Matal v. Tam, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring in part) (pointing to *Sorrell* for "the principle that the First Amendment 'requires heightened scrutiny whenever the government creates a

criticized the majority for applying a more demanding inquiry in place of "a less than strict, 'intermediate' First Amendment test" that the Court "has applied . . . when the government directly restricts commercial speech."[332] Application of an undefined form of scrutiny evades the rule-based nature of classification by simply refusing to classify where it would otherwise be required.

The classification puzzle has been further complicated by the emergence of "exacting scrutiny" as a fourth class. As Parts III.B and III.C.3 explain, the Court has subtly adapted exacting scrutiny over time. Although the "exacting scrutiny" standards were just loose language at first, recent cases indicate that exacting scrutiny has been reified into a formal tier of review within the scrutiny architecture. But the Court's exacting scrutiny jurisprudence is contradictory. And although the Court has been clear that exacting scrutiny is distinct from the three traditional tiers of scrutiny, it is not clear how exacting scrutiny is distinguishable from intermediate scrutiny on one end, or strict on the other. Moreover, it is entirely unclear *why* the Court created a fourth level of review. Or why the standard associated with exacting scrutiny changes from case to case. If enough Justices feel that intermediate scrutiny is too deferential and strict is too demanding, why not say so?

By dancing around the meaning of terms like "exacting scrutiny," and by applying ambiguous forms of "heightened scrutiny" where precedent indicates a distinct level applies, the Court obscures the rules in the most rule-like area of the constitutional scrutiny process. And it does so unnecessarily. There is no reason why the Court cannot say what it is doing. The opportunity costs of applying intermediate scrutiny, as such, are extremely low unless the Court is convinced that the ordinary class of scrutiny would achieve an undesirable outcome. But if that is the basis for declining to specify what level of scrutiny is being applied—or what levels of scrutiny exist in general and what they mean—the only interest the Court is serving is the desire to justify an outcome that could not be obtained under existing law and to obscure the fact that, and the degree to which, the holding departs from existing law.

The best justification for the Court's practice is a theory of avoidance. If the Justices can agree what the outcome of a case should be without determining classification, they might think it best to avoid resolving the classification question until it is necessary to a later case. By applying a lowest common denominator—for example, heightened scrutiny in *Sorrell* and intermediate scrutiny in *NIFLA*—the Court tries to skip straight from categorization to application.[333] That way, the Court does not have its hands tied in the future. The problem is that it is difficult to understand and adhere to the Court's precedents if those precedents are unclear whether review should be strict (and thus usually fatal), merely intermediate, or something else. That task becomes even harder when the amorphous exacting scrutiny standards are thrown into the mix.

Classification uses rules to inject consistency and rhetorical familiarity into the law.

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regulation of speech because of disagreement with the message it conveys'").

332. *See Sorrell*, 564 U.S. at 583–84 (Breyer, J., dissenting).

333. *Cf.* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 Seattle U. L. REV. 135, 136 n.5 (2011) (noting, in the context of equal protection, that "courts occasionally skip the step of deciding if a group is suspect or even what level of scrutiny it will employ.").

This is advantageous, unique to this area of law, and may be the reason for the enduring salience of constitutional scrutiny. But the benefits are lost when the Court classifies ambiguously or in a manner inconsistent with its precedent. Worse still, because the classes of scrutiny are consistent across many fields of constitutional law, when the Court muddles free speech scrutiny, it runs the risk of causing confusion across all areas of constitutional law that apply the classes of scrutiny.

iii. Application

Unlike the two steps that precede it, application is designed to function as a standard. It offers courts the discretion to weigh case-specific costs and benefits to achieve the individualized justice that the law often requires. But as application of scrutiny classes has been distorted beyond even the permissive bounds that standards offer, the distinction among the tiers has begun to cave in.

As Part III.C explains, the Court has capitalized on this area of discretion to such a great degree that the tests have begun to blur together. Intermediate scrutiny in one case may be applied as essentially rational basis in the next and strict scrutiny in the one after that. The Court has so stretched the bounds of each class of scrutiny that it has become unclear what exactly is required under each level, or what the inquiry might look like in any given case. The analysis of the licensed notices in *NIFLA*, for example, which asked for the least restrictive option, is hardly in line with most intermediate inquiries.[334] And the heightened scrutiny applied in the election cases discussed in Part III.C.4—*Burson*, *Williams-Yulee*, *Citizens United*, and *McCutcheon*—is inconsistent to the point that the distinctions between the terms "intermediate" and "strict" become meaningless. Despite the formalized categorization, classification, and application of scrutiny, the outcome of each case appears driven more by the arbitrary recapitulation of personal preferences than the inquiry recited.

Although standards permit courts to choose among a range of outcomes, the court must nevertheless choose an outcome within the range of acceptable discretion. If it does not, the standard becomes, for lack of a better term, standardless. Ascertaining the appropriate range of discretion, and whether a court is within it, is necessarily challenging. The boundary of discretion of a standard is inherently subjective. At a minimum, if we are to presume that standards are meant to offer at least some guidance to those who must apply them or comply with them, I suggest that standards become standardless when the outcome appears arbitrary.

In a well-regarded 1992 Foreword to the *Harvard Law Review*, Kathleen Sullivan offered four arguments for standards. She suggested that individualized standard-based inquiries bring about: (1) substantive fairness; (2) continued utility where rules might rapidly become obsolete; (3) redistributive equality; and (4) judicial deliberation where rules might lead a judge to feel their hands are tied.[335] She asserted that "[o]n this view, judicial legitimacy depends on using standards rather than rules, as standards 'affirm rather than deny . . . responsibility.'"[336] The issue is that even standards need guardrails or they

334. *See infra* Part III.C.2.
335. Sullivan, *supra* note 320, at 66–69.
336. *Id.* at 69.

become standardless. This may be inevitable to a degree. As Judge Posner has observed, "the cognitive limitations that judges share with mere mortals may constitute an insuperable obstacle to making distinctions any finer than that of plenary versus deferential review."[337]

When viewed in combination with the rule-less approach to the rules in the first two constitutional scrutiny steps, the standardless-ness of the third step confers unconstrained judicial discretion. If, as Louis Kaplow suggested, rules are defined pre-conduct and standards are defined after, the current system of constitutional scrutiny is neither. At best, it is a series of loose principles that regulators and regulated parties might use to hazard a guess at what the Court thinks Constitution means. At worst, it is a façade erected by the Court to capitalize on the legitimating value of rules and standards, but without the restrictions that would prevent the Court from deciding that the Constitution means whatever they want it to mean.

iv. The Consequence of Standardless Standards and Rule-less Rules

In her *Harvard Law Review* Foreword, Kathleen Sullivan summarized six reasons offered by Justice Scalia before he was appointed to the Court as to why rules are better than standards: "(1) Consistency and the appearance of consistency; (2) Uniformity among the lower courts; (3) Predictability, or the avoidance of uncertainty; (4) Judicial restraint; (5) Judicial armor against popular disapproval; (6) Keeping matters of law separate from matters of fact."[338] The standardless standards and the rule-less rules of contemporary constitutional scrutiny vindicate, at most, only the fifth reason. A cursory inquiry demonstrates that the Court is not consistent. If, as Professor Margaret Jane Radin suggests, rules and standards are more hypothetical endpoints on a continuum than distinct categories in themselves,[339] the system of constitutional scrutiny has broken the continuum because it exists at both ends of the spectrum and neither all at once. The Court need not have chosen this hybrid procedure of rules and standards to organize and decide constitutional claims. However, because it has chosen, it should stick to the schema it designed unless and until it is expressly modified or replaced. Instead, the Court has subverted its own doctrine in order to reach its desired outcomes without much regard to its precedent. The effect is that the Court is free to decide most cases however it wants, with existing doctrines of constitutional law standing only as illusory guardrails constraining its decisions.

I suggest two further reasons why the Court's current approach is undesirable. First, it defeats the advantages that accrue from having the Court write opinions explaining its reasons if those reasons are not a plausible basis of the Court's decision. The point of having written opinions is so that the Court's audiences can get a sense of *why* a given case was decided the way it was. This creates a sense of legitimacy and makes it possible for courts and litigants to emulate the Court's reasoning. As Justice Kagan has argued,

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337. Sch. Dist. of Wisc. Dells v. Z.S. ex rel. Littlegeorge, 295 F.3d 671, 674 (7th Cir. 2002) (Posner, J.).

338. Sullivan, *supra* note 320, at 65 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177–83 (1989)).

339. *See* Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828–32 (1991).

adherence to precedent "fosters respect for and reliance on judicial decisions. And it 'contributes to the actual and perceived integrity of the judicial process' by ensuring that decisions are 'founded in the law rather than in the proclivities of individuals.'"[340] When the Court offers a justification for decision that is implausible in light of precedent, it leaves the Court's audience to guess at the real reasons, and whether they will drive outcomes in future cases. For example, lower courts and litigants seeking to apply *Zauderer* after *NIFLA* are left to wonder whether the Court's searching inquiry applies with equal force outside the context of abortion. The expansive reading of the content-based category in the Court's recent jurisprudence, including *NIFLA*, has left commentators, litigants, and even other Justices scratching their head as they try to figure out which previously accepted laws are now unconstitutional.[341] The Court's lack of clarity as to whether compelled health and safety disclosures are a category that receive special treatment under *NIFLA*, and its inability to decide which compelled disclosures receive *Americans for Prosperity*'s exacting scrutiny, will only exacerbate confusion.

Much like administrative law's reasoned explanation requirement, the Court's written opinions serve the important purpose of permitting all other actors within the legal system to scrutinize its decisions and its justifications. The Roberts Court has been highly critical of the executive branch when it justifies its actions with fabricated reasons. In *Department of Commerce v. New York*, Chief Justice Roberts set aside a decision by the Secretary of Commerce to add a question to the national census on the ground that the Secretary provided only a "contrived" reason for his decision.[342] Despite the ordinarily deferential review,[343] Roberts explained:

> The reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.[344]

If it is essential that courts and the public be able to scrutinize the reasoning behind administrative actions, why is the same not true in the context of the courts? When the Court appears arbitrary in manipulating the scrutiny process and offers patently implausible justifications for doing so, or entirely ignores the fact that it is doing so, it fails to engage in the kind of reasoned decision making that the Court itself has recognized as the hallmark of legitimate governmental action. And it makes it more difficult for courts

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340. Janus v. AFSCME, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991); Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

341. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 180 (2015) (Kagan, J., concurring) ("Given the Court's analysis, many sign ordinances of that kind are now in jeopardy. . . . And although the majority holds out hope that some sign laws with subject-matter exemptions 'might survive' that stringent review the likelihood is that most will be struck down.") (internal citation omitted); Nat'l Inst. of Fam. & Life Advocs. ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2380 (Breyer, J., dissenting) ("[T]he majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation."). *See also supra* note 138.

342. 139 S. Ct. 2551, 2575 (2019).

343. *See id.* ("Our review is deferential, but we are not required to exhibit a naiveté from which ordinary citizens are free.") (internal quotation omitted).

344. *Id.* at 2575–76.

and litigants to emulate the Court's reasoning in the future if the basis behind the reasoning is unclear.

Second, the Court's practice is inconsistent with the avowed goal of limiting judicial discretion that is especially popular among the Court's conservative majority. Three of the six justifications Justice Scalia provided for rules—consistency, uniformity, and predictability—focused on limiting judicial discretion. Indeed, conservative Justices tout their originalist approach to constitutional law as a way to have an objective basis for decisions as opposed to their being based on the values and preferences of the individual justices. As explained above, the Court's failure to safeguard these justifications has broader harms to legal legitimacy, clarity, and functionality. But it also has the milder effect of making a very reasonable and widely held approach to achieving justice seem internally inconsistent. Seeking to avoid bias, and the appearance of bias, in decision making is a common goal pursued by (among many other areas) the law of ethics,[345] administrative law,[346] constitutional due process.[347] Rules, where applied in a disciplined fashion, come with the considerable advantage that they decrease the appearance and actuality of bias because they limit the discretion that permits bias to foster. If the constitutional scrutiny structure was intended to mitigate the impression of bias, it in its current version has the opposite effect.

B. Choosing Between Formalism and Flexibility

The Constitution offers very little interpretive guidance. The scrutiny doctrine is just one of many ways that the Court could have chosen to expound from the Constitution's terse ambiguity. Although the Court ultimately settled upon a framework of constitutional review that is quite rigid by nature, several (generally left-leaning) Justices have advocated for a more flexible approach to review designed to facilitate greater case-specific balancing.

One common suggestion is to conceive of strict scrutiny as an interest balancing formulation, rather than a restricted inquiry into government justification.[348] Justice Thurgood Marshall made this argument in multiple dissenting opinions.[349] For example, in the Fourteenth Amendment case, *Richardson v. Ramirez*, he posited that "'[c]ompelling state interest' is merely a shorthand description of the difficult process of balancing individual and state interests that the Court must embark upon when faced with a classification touching on fundamental rights."[350] In similar fashion, Justice Breyer has

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345. *See* AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT: RULE 1.2 (July 16, 2020).

346. *See* Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 592 (D.C. Cir. 1970):

> The rationale for remanding the case despite the fact that former Chairman Dixon's vote was not necessary for a majority is well established: Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.

347. *See* Gibson v. Berryhill, 411 U.S. 564, 578 (1973).

348. FALLON, *supra* note 1, at 45 ("Justices of pragmatic sensibility have sometimes interpreted strict scrutiny as contemplating relatively flexible inquiries, not designed to prove 'fatal' in nearly all cases.").

349. Fallon, *supra* note 11, at 1306.

350. 418 U.S. 24, 78 (1974) (Marshall, J., dissenting). *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) (arguing that the application of strict scrutiny in equal protection cases has involved interest balancing).

indicated that interest balancing is practically necessary in First Amendment cases where "a law significantly implicates competing constitutionally protected interests in complex ways."[351] In the landmark Second Amendment case, *District of Columbia v. Heller*, Breyer argued, "any attempt in theory to apply strict scrutiny to gun regulations will in practice turn into an interest-balancing inquiry . . . I would simply adopt such an interest-balancing inquiry explicitly."[352] The Justices who favor a loose interest balancing approach "contend that under the rigid tiers of review the choice of the level of scrutiny is usually decisive and unduly limits the scope of judicial analysis."[353] Richard Fallon notes that, "[c]onsistent with this philosophy, the Supreme Court has often appeared to engage in a relatively ad hoc, weighted balancing of public and private interests in freedom of association cases in which it has strictly scrutinized governmental demands for information."[354]

In her dissent in *Americans for Prosperity*, Justice Sotomayor advocated for flexibility at every step of the scrutiny process. She rejected Justice Roberts's "one size fits all" approach to categorization and classification.[355] Rather than fit the facts of the case into the general category of compelled disclosures, Sotomayor argued that disclosure requirements that may impact associational rights should be tested under "a level of means-end tailoring proportional to" the burden on the plaintiffs.[356] Under this theory, the severity of the burden, not the category of regulation or speech regulated, would dictate the classification. She pointed to *Doe v. Reed*, which upheld a state rule requiring disclosure of the identities of referendum signatories, as an example of the approach to categorization and classification rejected by the majority.[357] The majority's categorization analysis was flawed, the dissent asserted, because it was too inflexible: "no matter if the burdens on associational rights are slight, heavy, or nonexistent, disclosure regimes must always be narrowly tailored. The Court searches in vain to find a foothold for this new approach in precedent."[358]

Like the Ninth Circuit below, Justice Sotomayor thought "[m]uch of the Court's tailoring analysis is categorically inappropriate under the correct standard of review."[359] The dissent argued that the classification and application in constitutional review of compelled disclosures should move along a spectrum based on the strength of the government interest in disclosure relative to the private interest in non-disclosure.[360]

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351. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring); Doe v. Reed, 561 U.S. 186, 202 (2010) (Breyer, J., concurring). *See also* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096–97 & n.7 (discussing Justice Breyer's "proportionality" approach to constitutional law).

352. 554 U.S. 570, 689 (2008) (Breyer, J., dissenting).

353. E. CHEMERINSKY, *supra* note 1, at 687.

354. FALLON, *supra* note 1, at 45 (citing Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 92–98 (1982); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 467–68 (1977)).

355. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2398 (2021) (Sotomayor, J., dissenting).

356. *Id.* at 2394 (Sotomayor, J., dissenting).

357. *See id.* at 2404 (Sotomayor, J., dissenting) ("Just 11 years ago, eight Members of the Court, including two Members of the current majority, recognized that disclosure requirements do not directly interfere with First Amendment rights." (citing Doe v. Reed, 561 U.S. 186, 196 (2010))).

358. *Id.* at 2398 (Sotomayor, J., dissenting).

359. *Id.* at 2401 (Sotomayor, J., dissenting).

360. *Ams. for Prosperity Found.*, 141 S. Ct. at 2396 (Sotomayor, J., dissenting):

Rather than applying a rigid form of review in associational privacy cases, she suggested that "to decide how closely tailored a disclosure requirement must be, courts must ask an antecedent question: How much does the disclosure requirement actually burden the freedom to associate."[361] The theory is that a flexible approach would ensure that the analysis in the case is commensurate to its stakes and would therefore prevent "the Court giv[ing] itself license to substitute its own policy preferences for those of politically accountable actors" by imposing demanding requirements where they do not belong.[362]

On the other hand, there are strong arguments for rigid formulations. Many of the benefits have already been suggested earlier in this paper, including predictability, consistency, and clarity. These, of course, are the classic benefits identified for rules. One important argument in favor of a formalized, rule-like approach to scrutiny is the idea that a demanding standard, like "strict scrutiny marks a genuine alternative to the kind of balancing that would . . . allow First Amendment and other similarly fundamental rights to be 'balanced away.'"[363] Under this view, there are some liberties that are simply too important to be displaced and an "absolutist" perspective is the best way to discourage courts from creating exceptions to those liberties. For example, Professor Charles Black once argued that although "[t]he right not to be tortured cannot, literally, be an 'absolute' . . . the right not to be tortured is entirely unsuitable for 'balancing' against competing considerations of convenience, comfort, and safety."[364] Justice Hugo Black was perhaps the most consistent champion of this perspective.[365] In his concurrence in the 1967 free speech case, *Time, Inc. v. Hill*, he wrote,

> it would be difficult, if not impossible, for the Court ever to sustain a judgment against Time in this case without using the recently popularized weighing and balancing formula. . . . First Amendment freedoms could not possibly live with the adoption of that Constitution-ignoring-and-destroying technique . . . .[366]

Following through on this inclination, the Court has repeatedly rejected "as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.'"[367] Similarly, some Justices have argued that there are certain government powers (rather than individual rights) that should not be subject to balancing because balancing permits error. For example, in his concurrence in *Doe v. Reed*, Justice Scalia argued, "this is not a matter for interest

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> [E]xacting scrutiny [in *Doe v. Reed*] thus incorporate[d] a degree of flexibility into the means-end analysis.The more serious the burden on First Amendment rights, the more compelling the government's interest must be, and the tighter must be the fit between that interest and the government's means of pursuing it. By contrast, a less substantial interest and looser fit will suffice where the burden on First Amendment rights is weaker (or nonexistent).

361. *Id.* at 2396 (Sotomayor, J., dissenting).

362. *Id.*

363. FALLON, *supra* note 1, at 45.

364. *Id.* at 41 (quoting Charles Lund Black, Jr., *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, HARPER'S MAG. 63, 67 (Feb. 1961)).

365. *See id.* at 19–23; Patrick McBride, *Mr. Justice Black and His Qualified Absolutes*, 2 LOY. L.A. L. REV. 37 (1969).

366. 385 U.S. 374, 399 (1967) (Black, J., concurring).

367. United States v. Alvarez, 567 U.S. 709, 717 (2012) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

balancing. Our Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect."[368] Under the view of "absolutist" Justices, there are some things too sacred to be up for debate.

The Roberts Court speaks of scrutiny in formal terms that suggest it is more interested in something like the absolutist approach than the looser frameworks advocated by some justices.[369] However, its First Amendment scrutiny cases tell another story. Although the Court has declined to expressly adopt the generalized interest balancing scheme advocated for by Justice Marshall and Justice Breyer, or the case-specific tailoring of means and ends Justice Sotomayor called for in *Americans of Prosperity*, the version of scrutiny doctrine it applies is essentially just as flexible. The Court retains discretion to pick and choose among categories and classes, and to apply different versions of the same test, based on what one can only assume is an unstated balancing of interests.

Exacting scrutiny is an example of the tension between formalized analytical structure and flexible outcomes in the Roberts Court. In the most thorough treatment of exacting scrutiny to date, Professor R. George Wright emphasizes the "almost limitless malleability" that results from exacting scrutiny's vagueness and "built-in normativity."[370] He suggests that "exacting scrutiny offers greater . . . inherent flexibility, than does strict scrutiny, or than standard fixed intermediate scrutiny, or than any version of minimum scrutiny. Exacting scrutiny offers the flexibility, in light of the stakes and circumstances, of a broad and genuinely multi-dimensional sliding scale test."[371] Wright draws a parallel between exacting scrutiny's flexibility and the form of proportionality advocated for by Justice Breyer.[372] He argues that the emptiness of the exacting scrutiny standard, both in terms of a lack of close precedents and the vagueness of the inquiry, permits something similar to the type of balancing Breyer has championed.[373] Despite the attractiveness of a flexible approach, he concludes:

> the basic problem with standard formulations of exacting scrutiny is the inherent lack of institutional legal guidance in characterizing, let alone resolving, the various arguably relevant . . . problems that attend constitutional adjudication. In itself, exacting scrutiny, more than other approaches to constitutional adjudication, comes uncomfortably close to a broad injunction to do the right or best thing. . . . [E]xacting scrutiny does not seem to manifest the advantages of an institutional rule of law.[374]

In *Janus* and *Americans for Prosperity*, which both postdate Professor Wright's 2016 article, the Court further expanded upon exacting scrutiny. It is now clearer than ever that exacting scrutiny is a fourth tier of review. But it is no clearer which categories are

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368. 561 U.S. 186, 221 (2010) (Scalia, J., concurring).

369. *Id.*

370. Wright, *supra* note 9, at 208, 231. Professor Wright's article, however, was published two years prior to *Janus* and five years before *Americans for Prosperity*. As a result, he focuses more on the election law version of exacting scrutiny represented in *Americans for Prosperity* than on the expressive association standard from *U.S. Jaycees* that was labeled "exacting scrutiny" in *Janus* and *Knox*.

371. *Id.* at 214.

372. *Id.* at 208.

373. *Id.* at 221–22.

374. *Id.* at 231.

linked to exacting scrutiny. And it is even less clear which version of exacting scrutiny controls in which cases, now that the Court has repeatedly labeled the *Janus* expressive association standard exacting scrutiny.

If there is value in rigid formulations, it is wasted by the Court's approach to scrutiny. The Court cannot have a rigid doctrine to prevent rights from being balanced away and, at the same time, retain flexibility without sacrificing the benefits of both formalism and flexibility. The Justices are thus presented with a choice. They can either acknowledge that what they are doing is interest balancing, or they can adhere to the theory that scrutiny process is useful.

If they choose the former, they will retain greater discretion to achieve just outcomes in each case (though how much discretion would depend on what form the new schema took). But it comes with the risk that a loose balancing formula may to lead to even greater disarray and confusion in the doctrine than already exists, as courts realize they are no longer constrained by the strictures of a given tier of review. Perhaps laws that would normally have survived under rational basis review might be struck down by a hostile court, or a law that would normally wither under strict scrutiny might be preserved by a sympathetic one. It is difficult to say for sure.

On the other hand, if the Justices stick to the formal scrutiny architecture, they are left with the difficult task of refocusing the doctrine into a system of categories, tiers of scrutiny, and scrutiny analyses that can be applied consistently. And, they are left with the task of repairing the system in the future when the Court categorizes, classifies, or scrutinizes in a way that is likely to engender confusion. This must include both addressing the problems with inconsistent application that have been well surveyed by scholars such as Richard Fallon, Jeffrey Shaman, and R. George Wright, as well as tightening categories and classes to limit inconsistency and contradiction. Fixing only one step in the analysis, alone, would not resolve the issues latent in scrutiny doctrine because all three steps contribute to the inscrutable nature of constitutional scrutiny.

If the Court fails to recognize the flexibility in its approach, and remains unwilling to scrutinize using the inflexibility that their rigid approach to constitutional review suggests, the doctrine will continue to grow more unwieldy. The Court should either articulate consistent categories and select and apply uniform levels of scrutiny, or it should disavow the approach in favor of something, like interest balancing, that offers greater flexibility. What exists now is the worst of both worlds. Rather than lighting a path toward constitutional meaning, judicial scrutiny permits post hoc rationalizations based more on fact than law, and more politics than precedent, with merely a veneer of disciplined reasoning.

V. CONCLUSION

The Court controls a great deal of First Amendment doctrine by changing the relationships of categories of speech to the facts of cases, reclassifying categories of speech into new or different levels of scrutiny, and adjusting application of the scrutiny inquiries themselves. It is a clever system in design that permits the Court to make large and small changes to free speech law in terms that are immediately comprehensible to anyone familiar with constitutional law. When it works well, the constitutional scrutiny schema

guides lower courts, regulators, and regulated parties, facilitates consistency and predictability, and imbues the law of free speech with greater legitimacy.

Unfortunately, the system often does not work well. The Court frequently takes significant liberties to evade its own precedent by recategorizing, reclassifying, and misapplying scrutiny in ways that have impaired the significance of each step of the process and of each level of scrutiny. In cases like *NIFLA* and *Janus*, the Court has distinguished pre-existing categories on the basis of arbitrary factors that had never been relied on before and may never be again. In its election finance and labor cases, including *Americans for Prosperity* and *Janus*, the Court has muddled the familiar system of classification by creating a new "exacting" level of scrutiny without being clear about what it is doing and why. And in a variety of free speech and other constitutional cases, the Court has manipulated the application of scrutiny far enough that the distinction between the inquiries has begun to cave in. When commentators analyze the system of constitutional scrutiny, they typically focus on only one step of the process, which can lead to the impression that the system is more coherent than it really is. Viewed as a whole, it seems clear that constitutional scrutiny works merely a façade erected to hide the fact that the First Amendment's meaning is not ultimately dictated by the Court's precedent or by the familiar scrutiny process. Rather, the Constitution means whatever the Court wants it to mean based on their own predilections. Constitutional scrutiny is just the vehicle the Court uses to get there.

Rather than facilitating judicial self-discipline, the system of constitutional scrutiny has been used to conceal undisciplined reasoning and to subvert norms of *stare decisis* that should serve as the "foundation stone of the rule of law."[375] In doing so, the Court has obfuscated a doctrine—constitutional scrutiny—tasked with resolving some of the most important legal issues in the country. This only promises to confuse the other actors in the legal system who must figure out how to litigate, analyze, and comply with the indecipherable First Amendment doctrine that has resulted from the Court's dubious explanation of its decisions.

375. Janus v. AFSCME, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting) (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015)).

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