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## Invasion of the Content-Neutrality Rule

William D. Araiza

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# Invasion of the Content-Neutrality Rule

*William D. Araiza\**

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## INTRODUCTION

In the classic 1956 movie, *Invasion of the Body Snatchers*, alien beings encased in plant pods kill people and assume their physical forms. The resulting “pod people” are flat, one-dimensional versions of their hosts, in stark contrast to the fully rounded, nuanced human beings whose bodies they colonized. First Amendment doctrine might seem far removed from such goings-on,<sup>1</sup> but in recent years a similarly mindless attack on First Amendment common sense<sup>2</sup> threatens to wreak havoc not just on First Amendment doctrine but on government’s ability to enact ordinary regulatory legislation that poses no threat to the values the Speech Clause seeks to protect. Just like the pod people in the movie, the reconstituted doctrine lacks the nuance and subtlety of the older doctrine that it threatens to kill and replace with a colorless one-dimensionality.

This attack comes in the form of the imposition of a strict content-neutrality requirement<sup>3</sup> in contexts where it does not make sense. The most obvious recent example of this phenomenon is the 2015 case *Reed v. Town of Gilbert*,<sup>4</sup> in which the Supreme Court held that the facial content focus of a law sufficed to render such a law formally “content-based,” with all the stringent judicial scrutiny that label triggers—even in situations that pose no plausible threat to First Amendment values. Certainly, *Reed*’s expansion of the

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1. Nevertheless, this Article is not the first to analogize First Amendment doctrine to science fiction or horror movie characters. See, e.g., Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1120 (2015) (“[A] zombie free speech jurisprudence: a body of doctrine robbed of its animating spirit of expressive equality and enslaved in the service of economic power.”). Thanks to Kyle Langvardt for this pointer.

2. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2236, 2238 (2015) (Kagan, J., concurring) (“We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.”).

3. Scholars often identify this strict rule disfavoring laws that regulate speech differently depending on its content as the “content-neutrality rule.” See, e.g., Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 227 (1982) (identifying as the “content neutrality” rule the rule from *Police Department v. Mosley*, 408 U.S. 92 (1972), that strongly disfavored laws that regulate speech differently based on its content). Today, the content-neutrality rule takes the form of a requirement that content-based laws satisfy what has come to be known as strict scrutiny. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (“Because the [California law challenged in that case] imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”).

4. *Reed*, 135 S. Ct. 2218.

definition of content-discrimination is open to critiques, which scholars have already begun to provide.<sup>5</sup> Yet, as I discuss below, *Reed* is in many ways the least objectionable example of the invasion of the content-neutrality rule. Rather, the more significant threat arises from cases endorsing a broader *application* of the rule strongly disfavoring content-based laws.<sup>6</sup>

Two such cases stand out.<sup>7</sup> First, in *Sorrell v. IMS Health*,<sup>8</sup> the Court struck down a Vermont statute that regulated the transfer of physicians' prescription history information to so-called detailers, who sought to use that information for marketing purposes. The Court treated that law as a regulation of commercial speech,<sup>9</sup> a category that is governed by a unique First Amendment test.<sup>10</sup> Nevertheless, in applying that test, the Court expressed significant concern in large part because the challenged law discriminated on the basis of the content of the speech it regulated.<sup>11</sup> As I argue below, an approach to commercial speech regulation that focuses on the content-based/content-neutrality question reflects either a misunderstanding of foundational commercial speech doctrine or a larger agenda to alter that doctrine by removing commercial speech as a distinct category of First Amendment law.

Second, in the 2018 case *National Institute of Family and Life Advocates v. Becerra (NIFLA)*,<sup>12</sup> the Court struck down a California

5. See, e.g., Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J. F. 150, 162 (2017) ("Commentators have noted that 'the standard for deeming a regulation content-based' 'divorces the content distinction from its intended purpose of ferreting out impermissible government motive.'" (quoting Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1986 (2016))). For a defense of a stringent content-neutrality/strict scrutiny rule, see, for example, Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1305 (2014). "[I]n the confrontation between village tyrant [sic] and village Hampdens, a strong doctrine requiring content neutrality has real virtues in the real world." *Id.* For a more ambivalent conclusion about *Reed*, see Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233 (2016).

6. See *supra* note 3 (identifying this rule as "the content neutrality rule").

7. This Article focuses on recent expansions of the content-neutrality rule to new contexts. However, such expansionism has been going on since at least the early 1990s. See *infra* text accompanying notes 123–130.

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

9. *Id.* at 571.

10. See *infra* note 109 (setting forth that test).

11. See *Sorrell*, 564 U.S. at 565 ("Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted.").

12. *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018).

law mandating the posting of abortion-availability and medical-licensing information in so-called crisis pregnancy centers.<sup>13</sup> Such a law appropriately triggers First Amendment scrutiny, consistent with Supreme Court compelled speech jurisprudence dating back seventy-five years.<sup>14</sup> Yet, just like in *Sorrell*, the Court's analysis in *NIFLA* was remarkable for its explicit focus on the content-basis of the regulation. If that focus does not seem remarkable, think again: almost any law compelling speech necessarily draws content-based distinctions by virtue of mandating that the coerced speaker mouth a particular message.<sup>15</sup> To be sure, a law could conceivably require a person to say something, but leave the content of that speech totally up to the speaker<sup>16</sup> or a third party who is given access to the regulated person's facilities for use as a speech platform.<sup>17</sup> But such laws are outliers compared with the heartland of compelled speech doctrine, which involves government compulsion of a particular message.<sup>18</sup> Thus, unless the Court intends to apply strict scrutiny to nearly every law that compels speech, the invasion of the content-neutrality rule into the realm of compelled speech doctrine constitutes at best an odd mismatch between situation and doctrine. At worst, it suggests a near-*per se* prohibition on the vast majority of laws compelling speech.<sup>19</sup> An invasion, indeed.

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13. *See id.* at 2368.

14. *See* *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

15. *See NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting) (making this point).

16. *See, e.g., Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 62 (2006) ("The Solomon Amendment, unlike the laws at issue in [*Barnette* and *Wooley*], does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.").

17. For an example of such a content neutral law requiring a person to open up his or her facilities for others to use as a speech platform, see *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), which upheld a state law requiring owners of shopping centers to open their facilities to other persons' speech, regardless of the content of that speech.

18. *See, e.g., NIFLA*, 138 S. Ct. at 2379, 2381 (Breyer, J., dissenting) (identifying everyday government regulations that take the form of speech compulsions, acknowledging the majority's attempt to protect such regulations' constitutionality, but concluding that the majority's attempt is inconsistent with *NIFLA*'s own facts and at any rate is sufficiently vague as to create uncertainty and invite litigation).

19. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory.").

This Article examines the invasion of the content-neutrality rule by first examining the most important recent cases that reflect that invasion and then considering, in turn, the explanations for and implications of that invasion. After Part I quickly summarizes the basic doctrinal background, Parts II through IV of this Article consider *Reed*, *Sorrell*, and *NIFLA*, each in turn. Part V considers possible explanations for the invasion. Those explanations range from the Court's continued pro-business agenda,<sup>20</sup> to the internal logic of the content-neutrality rule,<sup>21</sup> to a free speech romanticism that endows every speech act with seemingly transcendent importance.<sup>22</sup> Part VI considers possible implications of the invasion of the content-neutrality rule. It concludes that those implications could stretch from lower court defiance of the invasion to the implementation of major changes to foundational First Amendment doctrines. Part VII concludes by briefly speculating about the future course of this invasion. It identifies two remaining areas – secondary effects doctrine and professional speech – that so far remain unconquered but presumably vulnerable to attack.

### I. THE DOCTRINAL BACKGROUND

A foundational Speech Clause rule presumptively forbids government from banning speech because of the message that speech communicates.<sup>23</sup> Scholars<sup>24</sup> generally trace this rule to the

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20. See *infra* Part V.A.

21. See *infra* Part V.B.

22. See *infra* Part V.C.

23. See, e.g., *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); see also Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996) (“The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law.”); Kreimer, *supra* note 5, at 1263 n.2 (2014) (citing scholars echoing the foundational nature of the content neutrality rule); Lee Mason, *Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert*, 84 U. CHI. L. REV. 955, 959 (2017) (“The distinction between content-neutral and content-based speech first emerged in *Police Department of the City of Chicago v. Mosley*.”). The “presumptively” in the text statement reflects the fact that content-based laws sometimes do survive, if they are held to satisfy strict scrutiny. See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015) (“We have emphasized that ‘it is the rare case’ in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. But those cases do arise.” (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992))).

24. See, e.g., Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232 (2012) (citing *Mosley* for the proposition that “[f]or forty years, the prohibition on content

Court's 1972 decision in *Police Department of Chicago v. Mosley*, and in particular the *Mosley* Court's statement that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>25</sup> The rule responds to the basic instinct that speech restrictions based on the content of the restricted message suggest a government motive to skew the subjects and terms of public debate,<sup>26</sup> or at least provide a tool for censorship-minded government officials.<sup>27</sup> Given that instinct, it should be unsurprising that inquiry into a speech restriction's content-basis is a fundamental part of any inquiry into its constitutionality.

This First Amendment principle is generally accepted, as is its justification. But scholars and judges have divided on important follow-on questions. Most relevantly for our purposes, they have disagreed on the appropriate depth and scope of the content-neutrality idea. By "depth," I mean both the force of any content-neutrality principle—for example, whether a content-discriminatory law automatically triggers strict judicial scrutiny—and the definition of "content discrimination." The concept of "depth" thus speaks to how far down the content-neutrality principle bores, in terms of both its effect on judicial review and its very definition of the phenomenon (content discrimination) that

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discrimination has been a touchstone of First Amendment law"); Stephan, *supra* note 3 (identifying "the new content neutrality rule [the Court] was announcing" in *Mosley*).

25. *Mosley*, 408 U.S. at 95. Ironically, the Court decided *Mosley* on an equal protection ground. *See id.* at 94–95 ("Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment."). Relatedly, in a 1991 concurring opinion, Justice Kennedy traced back the strict scrutiny requirement that is often associated with the content neutrality rule to a post-*Mosley* equal protection case, *Carey v. Brown*. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124–25 (1991) (Kennedy, J., concurring) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." (quoting *Carey v. Brown*, 447 U.S. 455, 461–62 (1980)); *see also id.* at 126 (quoting *Mosley's* "above all else" language).

26. *See, e.g.*, Kagan, *supra* note 23, at 445–50 (arguing that Free Speech doctrine, including the content neutrality rule, reflects a search for invidious government motives).

27. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015) ("Innocent [governmental] motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."). *See also infra* note 85 (quoting additional justifications for strict scrutiny of content-based laws provided by the Court in *NIFLA*).

triggers the resulting stringent level of scrutiny. By “scope,” I mean the applicability of any doctrinal rule presumptively condemning content-based speech restrictions to a given context—for example, to commercial speech, an area that, at least currently, is governed by a less stringent doctrinal rule.<sup>28</sup> As this Article’s analysis will make clear, these two concepts are closely related.

As Part II explains, in recent years the Court has provided a seemingly definitive definition of content-neutrality that deepens the impact of the content-neutrality rule, while simultaneously insisting on a rigid form of strict scrutiny when reviewing a law it deems content-based. As Parts III and IV of this Article demonstrate, the Court has also been broadening the scope of the content-neutrality rule to new areas. Both of these moves are controversial and potentially troubling.

## II. REED V. TOWN OF GILBERT: DEEPENING THE CONTENT-NEUTRALITY RULE

In *Reed v. Town of Gilbert*,<sup>29</sup> the Court considered a town’s ordinance that imposed varying regulations of privately placed signs on public property, depending in part on the message the sign conveyed. In particular, the ordinance imposed differing size and duration requirements for such signs, depending on their content.<sup>30</sup> A unanimous Court struck the ordinance down. However, the Justices fractured in their reasoning. Six Justices, speaking through Justice Thomas, held that the ordinance triggered strict scrutiny under the content-neutrality rule because it drew facial distinctions based on the content of the message a given sign conveyed.<sup>31</sup> In

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28. See *infra* note 109 (setting forth the current test for commercial speech restrictions); *infra* note 74 (citing one Justice’s description of that test as “intermediate scrutiny”); see also *infra* Part III (discussing the applicability of the content neutrality rule to commercial speech restrictions). Indeed, in an earlier case, the Court expanded the content neutrality rule to speech that is often described as lacking First Amendment protection entirely. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). *R.A.V.* is discussed in more detail *infra*, text accompanying notes 123–130.

29. *Reed*, 135 S. Ct. 2218.

30. See *id.* at 2224–25 (explaining the ordinance’s distinctions and providing the examples, from the town’s official code, of the categories of “ideological” signs, “political” signs, and “Temporary Directional Signs Relating to a Qualifying Event,” each of which was subject to different size and duration requirements).

31. *Id.* at 2227 (“On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.”).

doing so, the Court held that laws that draw facial distinctions are necessarily “content-based” as the Court’s free speech doctrine understands that term.<sup>32</sup>

Thus, the Court rejected the lower court’s conclusion, supported by the United States as an *amicus*,<sup>33</sup> that Court precedent had defined “content-based” laws solely as those “that cannot be justified without reference to the content of the regulated speech.”<sup>34</sup> The Court acknowledged that such laws were also “content-based” as the Court uses that term.<sup>35</sup> However, the Court in *Reed* supplemented that definition with what it described as “the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face.”<sup>36</sup> Given that the town’s ordinance drew facially content-based lines, the Court subjected it to strict scrutiny which, unsurprisingly, it failed.<sup>37</sup>

The Court provided relatively little in the way of a justification for this rule, other than its asserted consistency with the Court’s prior cases.<sup>38</sup> It did, however, provide the following explanation for

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32. For a comparison of *Reed*’s embrace of a facial classification rule in the speech context to its similar embrace of a facial classification rule in the equal protection context, see Lakier, *supra* note 5.

33. Brief for the United States as Amicus Curiae Supporting Petitioners, *Reed*, 135 S. Ct. 2218 (No. 13-502), 2014 WL 4726504.

34. *Reed*, 135 S. Ct. at 2227; *see id.* at 2227–28 (rejecting the lower court’s argument). *See also* *Reed v. Town of Gilbert*, 707 F.3d 1057, 1068 (9th Cir. 2013) (“[W]e . . . noted [in an earlier case] the Supreme Court’s advice that ‘laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based,’ and that a ‘speech restriction is content neutral if it is justified without reference to the content of the regulated speech.’” (quoting *Foti v. Menlo Park*, 146 F.3d 629, 636, 638 (9th Cir. 1998))), *rev’d*, 135 S.Ct. 2218 (2015); *id.* at 1071 (“As we have repeatedly explained, government regulation of expressive activity is ‘content neutral’ if it is justified without reference to the content of regulated speech.” (quoting *Hill v. Colorado*, 530 U.S. 703, 720 (2000))).

35. *See Reed*, 135 S. Ct. at 2227; *see also* *Iancu v. Brunetti*, 139 S. Ct. 2294, 2308, 2314 (2019) (Sotomayor, J., concurring in part and dissenting in part) (citing this definition of content discrimination).

36. *Reed*, 135 S. Ct. at 2228.

37. Indeed, the town’s ordinance, which regulated the legal size and duration of signs placed on private property based on the message the sign conveyed, failed even the more generous scrutiny the dissenters would have provided. *See id.* at 2236, 2239 (Kagan, J., concurring) (“The Town of Gilbert’s defense of its sign ordinance—most notably, the law’s distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test.”).

38. *See id.* at 2228 (majority opinion) (“[W]e have repeatedly considered whether a law is content neutral on its face *before* turning to the law’s justification or purpose.” (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–64 (2011), *United States v. Eichman*, 496 U.S. 310, 315 (1990), *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), *Clark v.*

its rejection of the idea that only content-based government *intent* mattered to the content-neutrality inquiry:

Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i.e.*, the “abridg[ement] of speech”—rather than merely the motives of those who enacted them.<sup>39</sup>

The three remaining Justices agreed that the ordinance was unconstitutional, but on very different grounds.<sup>40</sup> Justices Kagan and Breyer each wrote concurring opinions<sup>41</sup> that criticized the majority’s invocation of the content-neutrality rule, and in particular its holding that strict scrutiny applies in each and every case considering a law that draws a facially content-based speech distinction.<sup>42</sup> Both opinions recognized that the strict scrutiny that applies to content-based regulations plays an important role in promoting core First Amendment values.<sup>43</sup> But they questioned

Cnty. for Creative Non-Violence, 468 U.S. 288, 293 (1984), and *United States v. O’Brien*, 391 U.S. 367, 375, 377 (1968))). The concurring opinion of Justice Kagan disputed this reading of the Court’s cases. *See id.* at 2238–39 (Kagan, J., concurring).

39. *Id.* at 2229 (majority opinion) (alteration in original) (quoting U.S. CONST. amend I). A sizable literature considers the question whether subjective intent, *ex post* justification, or simply effects should determine whether a law should be considered content based for First Amendment purposes. *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 362 (1997); Kagan, *supra* note 23. This Article does not engage that normative argument, as its focus is to consider what *Reed*’s broader definition of content discrimination means for First Amendment doctrine, particularly in light of *Sorrell* and *NIFLA*.

40. *See Reed*, 135 S. Ct. at 2239 (Kagan, J., concurring, joined by Ginsburg & Breyer, JJ.) (arguing that the Court should have struck the ordinance down based simply on its breadth). *See also infra* note 41 (citing Justice Breyer’s concurrence).

41. *Id.* at 2234 (Breyer, J., concurring); *id.* at 2236 (Kagan, J., concurring, joined by Ginsburg & Breyer, JJ.).

42. *See, e.g., id.* at 2236–38 (Kagan, J., concurring) (“We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any ‘realistic possibility that official suppression of ideas is afoot.’ . . . But when that is not realistically possible, we may do well to relax our guard so that ‘entirely reasonable’ laws imperiled by strict scrutiny can survive.” (first quoting *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 189 (2007); and then quoting *id.* at 2231 (majority opinion))).

43. *See id.* at 2234–35 (Breyer, J., concurring); *id.* at 2237 (Kagan, J., concurring) (“This Court’s decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is ‘to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’ The second is to

whether every single instance of a content-based distinction implicated those values. For example, Justice Kagan cited another city's ordinance that allowed residents to illuminate only signs identifying the street number and the name of the family living at the residence.<sup>44</sup> She argued that striking down ordinances such as that did not promote those underlying free speech values, and indeed, cited the majority's concession that many such laws were "entirely reasonable."<sup>45</sup>

Justice Breyer echoed many of these points.<sup>46</sup> Indeed, he began his concurring opinion by criticizing the idea that a finding of content discrimination should automatically trigger strict scrutiny.<sup>47</sup> Instead, he described the content-neutrality rule (that is, the presumptive prohibition on content discriminatory statutes<sup>48</sup>) as merely "a rule of thumb"<sup>49</sup> rather than a rigid command. Reprising a theme he had raised four years earlier in *Sorrell*<sup>50</sup> and that he would raise three years later in *NIFLA*,<sup>51</sup> Justice Breyer also expressed worry about the impact of a rigid application of the content-neutrality rule on day-to-day regulation that normally is not thought to trigger significant First Amendment concerns:

[T]o use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong

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ensure that the government has not regulated speech 'based on hostility – or favoritism – towards the underlying message expressed.'" (first quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014); and then quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)).

44. *See id.* at 2237 (Kagan, J., concurring).

45. *Id.* at 2236 (quoting *id.* at 2231 (majority opinion)). Justice Alito, joined by Justice Kennedy and Justice Sotomayor, wrote a brief concurrence that sought to reassure local governments and others that a variety of types of sign restrictions remained within the government's power to enact. *See id.* at 2233–34 (Alito, J., concurring).

46. *See, e.g., id.* at 2234 (Breyer, J., concurring) (identifying the underlying free speech values served by focusing on the content-neutrality of the challenged law).

47. *Id.* ("The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny,' would permit. In my view, the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic 'strict scrutiny' trigger, leading to almost certain legal condemnation.").

48. *See supra* note 3.

49. *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring); *see also* *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring in part and dissenting in part) (repeating this phraseology and citing his opinion in *Reed*).

50. *See infra* text accompanying notes 63–65.

51. *See infra* text accompanying notes 89–98.

presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.<sup>52</sup>

Thus, just as Justice Breyer worried in *Sorrell* and *NIFLA* about the expansion of the content-neutrality rule into new contexts, in *Reed* he worried about a rigid application of the content-neutrality rule's strict scrutiny requirement—here, to apply in every situation where a law drew facial content-based distinctions. In critiquing both of these closely related phenomena, Justice Breyer argued that the majority's approach would be problematic because of its potential to intrude into the realm of legitimate government regulation.<sup>53</sup>

Given his concern about such First Amendment rigidity, it should not be surprising that he concluded his analysis in *Reed* by repeating his familiar call for an explicit balancing approach to free speech issues, in which a court “asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives.”<sup>54</sup> In the context of *Reed*, that balancing would replace a rigid insistence on performing strict scrutiny in every case of content-based regulation. Accordingly, he argued in *Reed* that

[t]he better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of

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52. *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring).

53. See, e.g., Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 179 (“[W]ere *Reed* applied universally as advocates urge, the commercial speech doctrine—along with other topic-based sub-doctrines such as those that currently permit the greater regulation of child pornography, obscenity, fraud, perjury, price-fixing, conspiracy, or solicitation—would be rendered obsolete, thereby rendering large swaths of the administrative state presumptively unconstitutional.”).

54. *Reed*, 135 S. Ct. at 2235–36 (Breyer, J., concurring); see *id.* at 2236 (citing two of his earlier opinions calling for a similar balancing approach); *Brunetti*, 139 S. Ct. at 2305 (Breyer, J., concurring in part and dissenting in part) (repeating this same call).

thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification.<sup>55</sup>

### III. *SORRELL*: THE CONTENT-NEUTRALITY RULE'S INVASION OF COMMERCIAL SPEECH DOCTRINE

*Sorrell v. IMS Health, Inc.* involved a First Amendment challenge to a Vermont law prohibiting the sale, for marketing purposes, of information related to physicians' prescribing practices. Such information could include, for example, whether a physician favors certain families of drugs or normally prescribes more expensive "brand-name" drugs rather than their cheaper generic versions.<sup>56</sup> As the Court explained, such information is highly useful to pharmaceutical marketers who seek to convince doctors to prescribe their firms' drugs.<sup>57</sup> Those marketers work with so-called data miners—entities that acquire that information from pharmacies and aggregate it into reports that are then sold to so-called detailers, who use those reports to refine marketing presentations to doctors.<sup>58</sup> For a variety of reasons, such as a desire to encourage doctors to prescribe lower-cost generic drugs rather than more expensive brand-name varieties, Vermont prohibited the sale or use of doctors' prescription information for marketing purposes.<sup>59</sup>

The Court struck down the law, holding that it violated the First Amendment. Most notably for current purposes, the six-Justice majority, speaking through Justice Kennedy, emphasized that the Vermont law enacted a content-, viewpoint-, and speaker-based restriction on speech: respectively, it restricted marketing speech (as opposed, say, to research speech) that invariably favored brand-name drugs and that was uttered by detailers.<sup>60</sup> Even

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55. *Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring).

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

57. *See id.* at 558 ("Salespersons can be more effective when they know the background and purchasing preferences of their clientele, and pharmaceutical salespersons are no exception. Knowledge of a physician's prescription practices—called 'prescriber-identifying information'—enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message.").

58. *Id.*

59. *See id.* at 557–61 (setting forth the law and its factual background).

60. *See id.* at 565 (content and viewpoint basis); *id.* at 563 (content and speaker basis); *see also* Tamara R. Piety, "A Necessary Cost of Freedom"? *The Incoherence of Sorrell v. IMS*, 64

assuming that the law triggered more relaxed scrutiny because of its focus on assertedly commercial speech, the Court concluded that the law had to be invalidated,<sup>61</sup> largely because of its content-discriminatory nature.<sup>62</sup>

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented. Again for our current purposes, the most important point of his dissent is his critique of the majority's heavy focus on the content-neutrality requirement.<sup>63</sup> He expressed concern about the majority's suggestion that the content-based nature of the Vermont law justified more stringent scrutiny than a commercial speech regulation would normally trigger, pointing out that laws regulating business and incidentally impacting speech *usually* target particular content and particular speakers.<sup>64</sup> As Justice Breyer asked, "[g]iven the ubiquity of content-based regulatory categories, why should the 'content-based' nature of typical regulation require courts (other things being equal) to grant legislators and regulators *less* deference [than in a normal commercial speech case]?"<sup>65</sup>

Engaging his own question with a word of caution, he then wrote that "[i]f the Court means to create constitutional barriers to regulatory rules that might affect the content of a commercial message, it has embarked upon an unprecedented task—a task that threatens significant judicial interference with widely accepted

ALA. L. REV. 1, 39 (2012) ("[I]n *Sorrell*, content neutrality is the first and most critical inquiry, with *Central Hudson* bringing up the rear.").

61. *See Sorrell*, 564 U.S. at 571 (concluding that there was "no need to determine whether all speech hampered by § 4631(d) is commercial, as our cases have used that term" because the result would be the same even under a commercial speech analysis).

62. *See id.* ("In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory. The State argues that a different analysis applies here because, assuming § 4631(d) burdens speech at all, it at most burdens only commercial speech. As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.") (citations omitted).

63. Justice Breyer highlighted the majority's emphasis on the content-based nature of the Vermont law. *See id.* at 588 (Breyer, J., dissenting) (citing the parts of the majority opinion that focused on this aspect of the law).

64. *See id.* at 589–90 (citing examples of both content-based and speaker-based business regulation laws that impact speech); *see also, e.g.,* Mason, *supra* note 23, at 983 ("Almost by definition, a law regulating commercial speech will distinguish speech facially based on its content.").

65. *Sorrell*, 564 U.S. at 589 (Breyer, J., dissenting)

regulatory activity.”<sup>66</sup> Unsurprisingly, he concluded this part of his analysis by warning that the Court’s approach to this question threatened to revive *Lochner*-era judicial scrutiny of business regulations.<sup>67</sup>

*Sorrell* laid the groundwork for increased emphasis on the content-based nature of a challenged law as part of a court’s First Amendment review.<sup>68</sup> Of course, as Part I explained,<sup>69</sup> the content-neutrality rule has been a foundation of First Amendment jurisprudence for nearly fifty years. In recent years, the Court has relied heavily on that rule,<sup>70</sup> rejecting arguments that either the rule fails to furnish a sure-fire guide to decision<sup>71</sup> or that the context calls for a different approach.<sup>72</sup> But *Sorrell* is different from those other cases because, as Justice Breyer explains, it applies the content-neutrality rule in an unusual context—that is, a context in which essentially *all* regulation of that type (i.e., all commercial speech regulation) could be described as content-based. Thus, in colonizing commercial speech doctrine the content-neutrality rule would devour it, by implying that all commercial speech regulations should be tested by the more stringent standards

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66. *Id.* at 590; see also Mason, *supra* note 23 at 984 (“[I]t is difficult to imagine a regulation of commercial speech that would not trigger *Reed*’s strict scrutiny analysis.”).

67. See *Sorrell*, 564 U.S. at 591–92 (Breyer, J., dissenting). Justice Breyer then moved on to apply standard commercial speech scrutiny to the Vermont law, which he concluded the law survived. See *id.* at 593–602. To be sure, this Article is far from the first one to discuss the alleged “*Lochnerization*” of the First Amendment or the increased interest business groups have shown in using (some say “weaponizing”) the First Amendment in pursuit of a deregulatory agenda. See, e.g., Shanor, *supra* note 53. But this Article attempts to link that concern as reflected in Justice Breyer’s dissent to the Court’s more general expansion of the domain of the content-neutrality rule, as discussed in Parts III and IV, and its more rigid definition of content-neutrality, see *supra* Part II.

68. See, e.g., Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 335–36 (2016) (noting the importance of this aspect of *Sorrell*’s analysis).

69. See *supra* Part I.

70. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011).

71. See, e.g., *Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part) (describing the rule as a “glittering generality”).

72. See, e.g., *Entm’t Merchs.*, 564 U.S. at 818 (Alito, J., concurring) (arguing that the anti-social and destructive nature of violent video games warrants their regulation).

triggered by the content-neutrality rule<sup>73</sup> rather than the ostensibly default rule applicable to such regulations.<sup>74</sup>

To be sure, the majority's concluding paragraphs in *Sorrell* attempted to steer the Court's analysis back toward a more conventional commercial speech inquiry.<sup>75</sup> The Court thus kept open the question of whether the content-neutrality rule has in fact fully colonized commercial speech doctrine. Nevertheless, the signals it sent earlier in the opinion suggest an approach that would call into serious question the viability of a distinct, less speech-protective commercial speech jurisprudence.<sup>76</sup>

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73. See, e.g., Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW. 569, 596 (2015) (“[T]he Court’s application of content neutrality review in *Sorrell* seems to upset prior judicial approaches to reviewing commercial speech regulations.”); Mason *supra* note 23, at 983 (“complete application of *Reed* to commercial speech would essentially overrule all existing commercial speech doctrine”); Shanor, *supra* note 53 at 150 (“[*Sorrell*] goes the furthest in chipping away the initial architecture of the commercial speech doctrine and in undermining the features that the Court that created the doctrine put in place to ensure that the First Amendment would not be the undoing of the regulatory state.”).

74. See Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (describing review under *Central Hudson* as “intermediate scrutiny”); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (describing the level of scrutiny the Court held as applicable to commercial speech as “intermediate scrutiny”).

75. Those paragraphs began with Justice Kennedy’s concession that “content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech.” *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 579 (2011). Of course, this statement does not single out commercial speech doctrine as uniquely accommodating of content-based restrictions; indeed, if anything, it lumps that doctrine in with more general First Amendment law. However, he then focuses on the doctrinal elements of commercial speech regulation. He noted that there was no claim that the speech in question was misleading. See *id.* He then concluded that Vermont’s goals in enacting the law did not center on privacy protection, an interest he suggested might have placed the law on firmer constitutional footing, but instead on “advanc[ing] its own side in a debate . . . burden[ing] a form of protected expression that it found too persuasive . . . , [and leaving] unburdened those speakers whose messages are in accord with its own views.” *Id.* at 580. These arguments suggest the law’s grounding, not in the types of commercial harms that normally justify commercial speech regulation, but in ideologically-based skewing of the marketplace—the type of grounding that would normally doom even a commercial speech regulation. See also *id.* at 571 (concluding that the Court need not decide whether the same presumptive invalidity that attends content-based distinctions within non-commercial speech should apply to content-based distinctions within commercial speech since, according to the Court, “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied”).

76. See *supra* note 75.

#### IV. NIFLA: THE CONTENT-NEUTRALITY RULE'S INVASION OF COMPELLED SPEECH DOCTRINE

In *National Institute of Family and Life Advocates v. Becerra* (NIFLA),<sup>77</sup> the Court held that a California law violated the First Amendment when it required certain types of medical institutions specializing in pregnancy care to post state-created messages concerning the availability of free or low-cost state-provided pregnancy services, including abortions,<sup>78</sup> and requiring similar facilities, if they were unlicensed by the state, to disclose that fact.<sup>79</sup> Considered as a First Amendment matter,<sup>80</sup> both provisions presented a straightforward question of the government's authority to compel an entity's speech.<sup>81</sup>

In NIFLA, just as in *Sorrell*, the Court emphasized the fact that the compelled speech required the institutions in question to communicate a particular message—that is, the law imposed a speech compulsion that was content-based.<sup>82</sup> Indeed, the Court, speaking through Justice Thomas, began its analysis by emphasizing the doctrinal distinction between content-neutral and content-based legislation.<sup>83</sup> That introductory analysis started by repeating *Reed*'s insistence that all content-based laws be subject to

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77. Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361 (2018).

78. See *id.* at 2368–69 (discussing the “licensed notice” provision).

79. See *id.* at 2369–70 (describing the “unlicensed notice” provision).

80. The case, of course, also implicated governmental power to influence a woman's decision whether to have an abortion—a question that itself implicates the First Amendment when such an attempt takes the form of requiring a doctor or other medical provider to communicate particular information to the pregnant woman. See *id.* at 2373–74 (discussing this aspect of the case); *id.* at 2384–86 (Breyer, J., dissenting) (same).

81. See *id.* at 2371 (majority opinion) (“The licensed notice is a content-based regulation of speech.”); *id.* at 2377 (“The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement . . .”).

82. See, e.g., James A. Campbell, *Compelled Speech in Masterpiece Cakeshop: What the Supreme Court's June 2018 Decisions Tell Us About the Unresolved Questions*, 19 FEDERALIST SOC'Y REV. 142, 146 (2018) (“The majority opinion [in NIFLA] . . . began by announcing that the licensed notice ‘is a content-based regulation of speech.’” (quoting NIFLA, 138 S. Ct. at 2371)).

83. The first substantive statement on the merits of the case reads as follows: “The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech.” NIFLA, 138 S. Ct. at 2371; see also *supra* note 82.

strict scrutiny<sup>84</sup> and the principle underlying that requirement<sup>85</sup> and then finding the California law to be content-based.<sup>86</sup> The Court then proceeded to consider, and reject, the possibility that the professional-speech context of the California law constituted “a unique category [of speech] that is exempt from ordinary First Amendment principles.”<sup>87</sup> It then assumed that such “a unique category” did exist, because it concluded that, even if it did, the law in question would fail intermediate scrutiny.<sup>88</sup>

As he did in *Sorrell*, Justice Breyer wrote the dissent, this time for four Justices.<sup>89</sup> Just like the majority, he began his analysis with the content-neutrality point—but with a very different agenda. Justice Breyer expressed concern with the Court’s emphasis on the

84. See *NIFLA*, 138 S. Ct. at 2371 (“As a general matter, [content-based] laws ‘are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.’” (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015))). For a discussion of *Reed*, and in particular, *Reed*’s insistence that all content-neutral laws be automatically subject to strict scrutiny, see Part II of this Article.

85. *NIFLA*, 138 S. Ct. at 2371 (“This stringent standard [the strict scrutiny standard] reflects the fundamental principle that governments have ‘no power to restrict expression because of its message, its ideas, its subject matter, or its content.’” (quoting *Reed*, 135 S. Ct. at 2226)); see also *id.* at 2374 (“The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals’ speech ‘pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.’ . . . Further, when the government polices the content of professional speech, it can fail to ‘preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’” (first alteration in original) (first quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); and then quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014))).

86. *Id.* at 2371 (“The [law’s] licensed notice [requirement] is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices ‘alte[r] the content of [their] speech.’” (quoting *Riley v. Nat’l Fed’n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988))).

87. *Id.* at 2375. The Court made this statement in the context of its review of the licensed notice provision. The Court struck down the unlicensed notice provision using, for purposes of argument, the relatively deferential review the Court has accorded to requirements that commercial speakers disclose “factual and uncontroversial information.” See *id.* at 2372, 2376–78 (noting the parties’ disagreement about the applicability of the more deferential review standard for disclosures of “factual and uncontroversial information,” *id.* at 2372, under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), but concluding that the unlicensed notice provision failed even *Zauderer* scrutiny).

88. See *id.* (“In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny.”).

89. See *id.* at 2379 (Breyer, Ginsburg, Sotomayor & Kagan, JJ., dissenting). Justices Ginsburg and Kagan had joined Justice Breyer’s dissent in *Sorrell*, while Justice Sotomayor had joined the majority.

content-neutrality rule, arguing that such an emphasis “threatens to create serious problems.”<sup>90</sup> Repeating the concern he expressed in *Reed v. Town of Gilbert*,<sup>91</sup> he observed that “much, perhaps most, human behavior takes place through speech and . . . much, perhaps most, law regulates that speech in terms of its content.”<sup>92</sup> Thus, he cautioned, an approach that automatically applied strict scrutiny to any law deemed content-based would, in Justice Breyer’s words, “at the least threaten[] considerable litigation over the constitutional validity of much, perhaps most, government regulation.”<sup>93</sup>

Justice Breyer’s statement focused on what I call the “depth” aspect of the content-neutrality rule—here, the requirement that content-based laws automatically trigger strict scrutiny.<sup>94</sup> But he then focused on the closely-related “scope” aspect of that rule—here, the application of the content-neutrality requirement to the compelled speech context at issue in *NIFLA*. Addressing that context against the backdrop of the majority’s focus on the content-neutrality requirement, he wrote: “Virtually every disclosure law could be considered ‘content-based,’ for virtually every disclosure law requires individuals ‘to speak a particular message.’”<sup>95</sup> After discounting the majority’s notably offhand statement that “we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products,”<sup>96</sup> Justice Breyer

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90. *Id.* at 2380.

91. *See supra* Part II (discussing the majority and dissenting opinions in *Reed*).

92. *NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting).

93. *Id.*

94. *See id.* (“Before turning to the specific law before us, I focus upon the general interpretation of the First Amendment that the majority says it applies. It applies heightened scrutiny to the Act because the Act, in its view, is ‘content based.’ *Ante*, at 2371. ‘By compelling individuals to speak a particular message,’ it adds, ‘such notices “alte[r] the content of [their] speech.”’ *Ante*, at 2371. ‘As a general matter,’ the majority concludes, such laws are ‘presumptively unconstitutional’ and are subject to ‘stringent’ review. *Ante*, at 2371. . . . This constitutional approach threatens to create serious problems. Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority’s approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation.” (first and second alterations in original)).

95. *Id.*; *see also, e.g.*, Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1291 (2014) (equating compelled speech with content-based regulation).

96. *NIFLA*, 138 S. Ct. at 2381 (Breyer, J., dissenting) (quoting *id.* at 2376 (majority opinion)). Justice Breyer questioned the usefulness of that unsupported statement. *Id.*

concluded his general remarks by expressing the same concern he raised in *Sorrell* and *Reed*<sup>97</sup> about the Court's use of the First Amendment as a weapon against the type of business regulation long presumed constitutional.<sup>98</sup>

To be sure, *NIFLA* was not the first case to expand the content-neutrality rule (and its strict scrutiny requirement) into the realm of compelled speech.<sup>99</sup> Nevertheless, its emphasis on that rule is notable when one recognizes that many previous compelled speech cases relied on other factors when determining the appropriate judicial scrutiny. *Barnette*<sup>100</sup> was decided decades before the content-neutrality rule was announced and has been understood as grounded in the First Amendment's prohibition on viewpoint discrimination.<sup>101</sup> The other foundational statement on compelled speech, *Wooley v. Maynard*,<sup>102</sup> largely ignored the content-neutrality question in favor of *Barnette*'s focus on the state's attempt to force citizens to propagate its own preferred ideological message.<sup>103</sup>

97. See *supra* Part II (discussing the majority and dissenting opinions in *Reed*).

98. See *NIFLA*, 138 S. Ct. at 2381–83 (Breyer, J., dissenting).

99. See, e.g., *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the [challenged] Act as a content-based regulation of speech."); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny.")

100. In *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court struck down a school's mandatory flag salute. It is generally considered to be the foundational compelled speech case.

101. See, e.g., Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 61 ALB. L. REV. 501, 507 (2000) ("*West Virginia State Board of Education v. Barnette* . . . is probably the Court's best known and most eloquent expression of the First Amendment's prohibition on viewpoint discrimination." (footnote omitted)). This characterization of *Barnette* necessarily raises the thorny question of the difference between content discrimination and viewpoint discrimination. For one careful analysis of that distinction, see Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315 (1997).

102. *Wooley v. Maynard*, 430 U.S. 705 (1977).

103. See *id.* at 715 ("Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" (quoting *Barnette*, 319 U.S. at 642)); see also, e.g., *Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016) (rejecting a compelled speech challenge to a law requiring that a convicted sex offender's passport convey information attesting to that

Since *Wooley*, the Court has continued to focus on questions unrelated to content-neutrality when considering compelled speech issues,<sup>104</sup> including the nature of the compelled speech.<sup>105</sup> By contrast, the Court's analysis in *NIFLA* led off with<sup>106</sup> and

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conviction, in part because the speech was government speech, but also, distinguishing *Wooley* and *Riley*, because the law simply required the communication of facts rather than an ideological message); *id.* at \*16 ("The test of whether the state has violated an individual's right to refrain from speaking is 'whether the individual is forced to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'" (quoting *Wooley*, 430 U.S. at 715)); *Beeman v. Anthem Prescription Mgmt., Inc.*, No. EDCV 04-407-VAP (SGLx), 2007 WL 8433882, at \*5 (C.D. Cal. May 7, 2007) ("The Court [in *Wooley*] applied strict scrutiny, because '[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.'" (second alteration in original) (quoting *Wooley*, 430 U.S. at 715)). See generally *Sadurski*, *supra* note 101 (examining the distinction between content and viewpoint discrimination).

104. See, e.g., *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469-70 (1997) (upholding a compelled advertising subsidy exacted on California tree fruit producers and distinguishing earlier compelled speech cases on the grounds that the exaction did not stop producers from engaging in their own speech, did not compel actual speech on the part of the growers, and did not compel them to fund any "political or ideological views"); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (striking down a mushroom advertising exaction without identifying the content-based nature of the subsidized speech as constitutionally relevant, and relying instead on the ground that, unlike the program in *Glickman*, it was not part of a comprehensive regulatory program of the industry); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[T]he interests at stake in [requiring an attorney to disclose the possibility of client liability for litigation costs in a contingency fee arrangement] are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" (quoting *Barnette*, 319 U.S. at 642)); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232-35 (1977) (holding that the First Amendment required that non-members of public sector unions in closed shops not be compelled to subsidize the union's political speech, given the importance of the right to engage in or subsidize, or refrain from engaging in or subsidizing, political speech); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (overruling the part of *Abood* that allowed compulsory exaction of fees from non-union members for purposes of defraying the union's representation and negotiation expenses, without referencing the content-basis of the compelled exaction); *id.* at 2464 (identifying the "additional damage" done by laws compelling, rather than preventing, speech as the "demeaning" effect of "[f]orcing free and independent individuals to endorse ideas they find objectionable"); see also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986) (plurality opinion) ("Were the government freely able to compel corporate speakers to propound political messages with which they disagree, [the] protection [corporations enjoy to decide what not to say] would be empty."). But see *supra* note 99 (citing compelled speech cases where the Court did in fact focus on the content-neutrality issue).

105. See, e.g., *Glickman*, 521 U.S. at 469-70; *Pac. Gas*, 475 U.S. at 16; *Zauderer*, 471 U.S. at 651; *Abood*, 431 U.S. at 232-35.

106. See *supra* note 83.

continually emphasized<sup>107</sup> the content-neutrality rule. That emphasis is particularly notable in light of *Sorrell*'s similar expansion and, as explained in Part II, in light of *Reed*'s more stringent definition of content discrimination.<sup>108</sup>

Just as notable as the parallel between the majority opinions in *NIFLA* and *Sorrell* is the parallel between the concerns Justice Breyer expressed in his dissents in those two cases. Recall that in *Sorrell*, Justice Breyer noted that, almost by definition, most commercial speech regulation singled out speech based on the identity of the speaker (that is, the particular type of business the speaker was in) and the content of that speech (speech about that particular product or service). Thus, given the *Sorrell* majority's focus on the content-neutrality rule, most commercial speech regulation would trigger the strict scrutiny that rule demands. Justice Breyer found that result both substantively problematic and inconsistent with existing free speech jurisprudence (that is, the intermediate scrutiny for commercial speech the Court announced in *Central Hudson*).<sup>109</sup>

Similarly, in *NIFLA*, Justice Breyer observed that most compelled speech mandates, by definition, single out particular speakers and particular content.<sup>110</sup> Just as with commercial speech, Justice Breyer worried that the across-the-board imposition of strict scrutiny anytime a compelled speech mandate rested on speaker identity or content raised serious policy concerns and

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107. See *supra* note 85.

108. But see Corbin, *supra* note 95, at 1283 ("The default rule is that as a content-based regulation, compelled speech must pass strict scrutiny."). Professor Corbin's statement appears to focus on the intuitive characterization of compelled speech mandates as content-based regulations, rather than on any doctrine that explicitly relied on the content-neutrality rule in a compelled speech case. See *id.* (making that characterization).

109. See *supra* text accompanying notes 64–65 (noting these points about Justice Breyer's dissent in *Sorrell*). In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Court adopted a four-part test for judging restrictions on commercial speech. As the *Central Hudson* Court itself set the test out, "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* at 566. See also Tamara R. Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. & TECH. L. 1, 10 (2016) (locating *Central Hudson* scrutiny on the spectrum between rational basis review and strict scrutiny).

110. See *supra* note 95.

threatened to undermine existing precedents.<sup>111</sup> In his view, *NIFLA*'s approach to compelled speech, just like *Sorrell*'s approach to commercial speech, threatened to supplant pre-existing doctrine with an inappropriate and dangerous importation of the content-neutrality rule.

## V. EXPLAINING THE INVASION

At this point, an obvious question arises: *Why* has the Court launched the invasion of the content-neutrality rule? Recognizing that it is difficult to accurately ascribe motivations to multi-member institutions with complex internal dynamics,<sup>112</sup> possible explanations, both external and internal to legal doctrine, nevertheless readily emerge.

### A. *The Campaign for Business*

Externally, one can understand the invasion of the content-neutrality rule as part and parcel of—or, to continue the invasion metaphor, a front in—business interests' decades-long campaign to shape legal rules to their benefit. On this theory, the expansion of strict First Amendment rules constitutes simply one part of a broader litigation campaign by business interests.<sup>113</sup> That campaign aims at, among other goals, limiting access to federal courts on the

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111. See *supra* text accompanying notes 89–98. Indeed, one could combine these concerns and suggest that a subset of commercial speech regulation consisting of compulsions of commercial speech raise particularly acute worries about imposition of a strict content-neutrality requirement. Such compulsions—such as warning labels, notifications of legal rights, and statements about the lack of governmental verification of product claims—are a staple of modern regulation. For a discussion of a regulation that compels speech that the majority assumed to be commercial, compare *National Association of Manufacturers v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), concluding that, even if the compelled disclosures regarding “conflict minerals” regulated commercial speech it was nevertheless unconstitutional, with *id.* at 373 (Srinivasan, J., concurring in part), noting that a preliminary legal conclusion relevant to that holding was at that point currently under consideration by the en banc court. Thanks to Ashutosh Bhagwat for suggesting this point.

112. Cf. William D. Araiza, *Playing Well with Others – But Still Winning: Chief Justice Roberts, Precedent, and the Possibilities of a Multi-Member Court*, 46 GA. L. REV. 1059 (2012) (considering one facet of the dynamics present on a multi-member court).

113. See, e.g., Shanor, *supra* note 53, at 154–63 (tracing the evolution of this campaign).

part of consumers,<sup>114</sup> employees,<sup>115</sup> and foreigners<sup>116</sup> injured by businesses; ratcheting up judicial review of takings claims;<sup>117</sup> and, more generally, arguing that corporations enjoy the protections of the Bill of Rights.<sup>118</sup> In terms of the First Amendment itself, for years now scholars have identified and (mostly) decried “First Amendment *Lochnerism*” — that is, the use of the First Amendment as a tool for business to pursue a deregulatory agenda.<sup>119</sup> Of course, this campaign (both more generally and as applied to the First Amendment in particular) could not have succeeded without the agreement of the Justices themselves. In this sense, the now-famous 1971 memo written by Lewis Powell shortly before ascending to the Court, concerning the need for business to promote its interests more aggressively, can stand as the starting point for the Justices’ receptivity to this campaign.<sup>120</sup>

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114. This aspect of the campaign includes, for example, expanding the reach and force of mandatory arbitration agreements in consumer contracts. *See, e.g.*, Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL’Y REV. 329, 330 (2015) (explaining how recent Court decisions have strengthened the force of such agreements).

115. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (rejecting the use of statistical evidence to establish the commonality of legal claims necessary to bring a class action on behalf of 1.5 million female employees of Wal-Mart); *see also* Andrew J. Trask, *Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change*, 62 DEPAUL L. REV. 791, 792–93 (2013) (citing cases disagreeing over the change *Dukes* made in class action law).

116. *See, e.g.*, *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013) (limiting the jurisdictional reach of the Alien Tort Statute); *see also* Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158 (2014) (considering the implications of *Kiobel* and other cases that limit U.S. judicial remedies for legal violations that occur abroad).

117. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (reviewing the constitutionality under the Takings Clause of government exactions imposed in exchange for development permits); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (same); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (same); *see also* David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 44 (2014) (noting the Court’s creation of the exactions doctrine in *Nollan* and *Dolan*).

118. *See generally* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990) (describing this development).

119. For an early statement of this idea, see Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech, Economic Due Process, and the First Amendment*, 65 VA. L. REV. 1, 30–31 (1979), for a discussion linking *Lochner* with the Court’s then-newly minted commercial speech doctrine.

120. *See, e.g.*, Shanor, *supra* note 53, at 155 (“The origins of th[e] mobilization [described in the text] are often attributed to Justice Lewis Powell.”); *id.* at 155–63 (describing the Powell Memo and its effects).

An evaluation of this possible justification need not require extended discussion. Whatever one might think about the legitimacy and desirability of increased legal protection for business operations, obtaining such protection under the banner of the First Amendment is inappropriate unless such protection reflects the underlying reasons for protecting speech or a coherent jurisprudential theory of free speech. In other words, if First Amendment protection for business operations is justified, it must be for a reason other than the fact that it is business that stands to reap the benefit.

*B. The Logic of the Content-Neutrality Rule*

Additional explanations for the invasion arise both from the general nature of legal doctrine as well as from within the four corners of First Amendment doctrine more particularly. Speaking first to the former, it remains as true today as a century ago that doctrinal rules tend to expand to their logical limit.<sup>121</sup> If the content-neutrality rule is indeed foundational to First Amendment doctrine, we should not be surprised when it colonizes the doctrine's every nook and cranny.<sup>122</sup>

Perhaps the opening bell for this colonization sounded in 1992, when the Court, over several bitter opinions concurring only in the judgment, held in *R.A.V. v. City of St. Paul*<sup>123</sup> that the content-neutrality rule applied even in cases of unprotected speech.<sup>124</sup> In *R.A.V.*, the Court struck down a municipal ordinance that criminalized the placing of any object on public or private property "which one knows or has reasonable grounds to know arouses

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121. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921).

122. See, e.g., Morton J. Horowitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 110 (1993) ("The generalization and universalization of freedom of speech, and the Court's concomitant devotion to its abstract doctrine of 'content neutrality' . . . have combined to produce a *Lochnerization* of the First Amendment.").

123. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

124. See *id.* For the criticism leveled at the majority by the main concurrence, see *id.* at 397-98 (White, J., concurring in the judgment) ("[I]n the present case, the majority casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory. This is hardly a judicious way of proceeding, and the Court's reasoning in reaching its result is transparently wrong."). See also *id.* at 415 (Blackmun, J., concurring in the judgment) (also criticizing the majority's reasoning); *id.* at 416 (Stevens, J., concurring in the judgment) (same).

anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>125</sup> While the Court followed the state supreme court’s construction of the ordinance to apply only to constitutionally unprotected “fighting words,”<sup>126</sup> it nevertheless held that “the ordinance [wa]s facially unconstitutional in that it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses.”<sup>127</sup> If the content-neutrality rule applied in *R.A.V.*, even when the speech at issue was otherwise assumed to lack constitutional protection,<sup>128</sup> we should not be surprised when it was held to apply in other areas that had previously been governed by a unique set of rules that, ostensibly<sup>129</sup> unlike the rule at issue in *R.A.V.*, provided at least some degree of protection to speech.<sup>130</sup>

This tentative conclusion—that the content-neutrality rule tends to expand to the limits of its logic—assumes that the First Amendment is, or should be,<sup>131</sup> “a law of rules”<sup>132</sup> which is best implemented when courts apply doctrinal rules consistently across the board, with little or no recognition of differences in factual

125. *Id.* at 380 (quoting the ordinance).

126. *See id.* at 381 (recognizing the Court’s mandate to accept the state court’s construction of the ordinance).

127. *Id.*; *see also id.* at 391 (“In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.”).

128. *But see id.* at 383 (“We have sometimes said that . . . categories of expression [including fighting words] are ‘not within the area of constitutionally protected speech,’ or that the ‘protection of the First Amendment does not extend’ to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity ‘as not being speech at all.’” (first quoting *Roth v. United States*, 354 U.S. 476, 483 (1957); and then quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984); and then quoting Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 615 n.46)).

129. *But see supra* note 128 (*R.A.V.* majority’s suggestion that even “unprotected speech” does not fall completely outside of the First Amendment’s protection).

130. This is not to say that Justices favoring expansion of the content-neutrality rule necessarily favor its introduction into every single area of free speech law. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 341 (2010) (“The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.” (citing cases dealing with the First Amendment rights of students, prisoners, soldiers, and federal employees)).

131. *See, e.g.*, *Kendrick, supra* note 24, at 234 (defending a rule-grounded First Amendment doctrine because of the predictability it would provide).

132. *Cf. Antonin Scalia, The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing in favor of rigid doctrinal rules rather than vague, context-specific standards in adjudication).

context.<sup>133</sup> An analogous dynamic might also explain the Court's embrace of a rigid definition of content-neutrality in *Reed*. It is consistent with a rigid insistence that all content-based laws trigger strict scrutiny to embrace an analogously formal definition of content discrimination—especially one that denominates facially classifying laws as “content-based” —rather than a more contextual definition that focuses only on the government's justifications.<sup>134</sup> Just as a rigid anti-race-classification rule in equal protection logically suggests that any facial race classification will trigger strict scrutiny regardless of its underlying justifications,<sup>135</sup> so too a rigid insistence on content-neutrality logically implies a rule that disfavors facial content distinctions, even if those distinctions are justified by benign (i.e., noncensorial) motives.<sup>136</sup>

This logic is not inevitable: one can envision a First Amendment doctrine that reserves strict scrutiny for laws a court holds pose

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133. See, e.g., Horwitz, *supra* note 122, at 112 (“[T]he Burger and Rehnquist Court Justices [made efforts] to create a formal and neutral system of free speech doctrine that could escape from what it regarded as the ‘subjective’ and ‘political’ criteria of the Warren era.”). For an incisive examination of Justice Scalia's attempt to impose a “law of rules” in several First Amendment areas (an attempt the author believes to have failed), see Ashutosh Bhagwat, *Free Speech and a “Law of Rules,”* 15 FIRST AMEND. L. REV. 159 (2017).

134. See Horwitz, *supra* note 122, at 112 (describing the Burger and Rehnquist Courts' attempts to create a formal and value-neutral free speech doctrine).

135. Cf. Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012). In *Intentional Blindness*, Professor Haney-Lopez explains how in the immediate aftermath of the Court's statement of the discriminatory intent requirement and its explication of the factors relevant to the intent inquiry the Court applied that requirement and those factors in a more contextual, less rigid manner, only ultimately to adopt a more rigid approach that viewed all facial racial classifications as reflecting “discriminatory intent.”

136. See Horwitz, *supra* note 122, at 102–16 (identifying both the Court's race and speech jurisprudence in the early 1990s as reflecting a search for neutral, value-free judicial decision-making, but at the price of ignoring factual contexts that make such formality counterproductive in terms of the goals underlying the Equal Protection and Free Speech clauses); Lakier, *supra* note 5 (analogizing between free speech and equal protection doctrine on this basis). Indeed, one can analogize between the Justices' explanation that a broad rule demanding strict scrutiny of any race classification serves to “smoke out” ultimate illegitimate intent. See, for example, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1988) (plurality opinion), and their explanations for similarly rigid standards in First Amendment cases. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015) (“Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech.”); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774, (1996) (Souter, J., concurring) (“Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.”).

clear threats to free speech values,<sup>137</sup> just as one can envision an equal protection doctrine that distinguishes between race classifications justified on benign grounds and those that lack such a justification.<sup>138</sup> Justice Stevens famously insisted that First Amendment cases should be decided based on first principles, rather than rigid doctrinal rules.<sup>139</sup> Thus, for example, he fiercely opposed laws—in particular, commercial speech regulations—that he viewed as reflecting governmental paternalism toward consumers,<sup>140</sup> even while he abjured reflexive reliance on the content-neutrality rule.<sup>141</sup> On the current Court, Justice Breyer has adopted a somewhat similar position. He has acknowledged that viewpoint neutrality, rather than content-neutrality, is

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137. See, e.g., *Reed*, 135 S. Ct. at 2237–38 (Kagan, J., concurring in the judgment) (offering criteria to determine whether any given content-based law merits strict scrutiny). To be sure, adherents of a more rigid approach to defining constitutionality might well find threats to free speech values lurking in any facial content discrimination. See, e.g., *id.* at 2229 (majority opinion) (“Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the ‘abridg[ement] of speech’—rather than merely the motives of those who enacted them.” (alteration in original) (quoting U.S. CONST. amend. I)).

138. See, e.g., *United Jewish Orgs. of Williamsburgh, Inc., v. Carey*, 430 U.S. 144, 165 (1977) (“There is no doubt that in [the challenged legislative creation of legislative districts] the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment . . .”); *Adarand Constructors v. Peña*, 515 U.S. 200, 242, 245 (1995) (Stevens, J., dissenting) (faulting the majority for failing to see the difference “between a ‘No Trespassing’ sign and a welcome mat” in the context of an equal protection challenge to a race-based set-aside). But see *id.* at 229–30 (majority opinion) (answering that argument); *id.* at 240 (Thomas, J., concurring in the judgment) (same).

139. See generally John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293 (1993). Perhaps unsurprisingly, he consistently argued for analogous attention to first principles in equal protection adjudication. See Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339 (2006) (considering this aspect of Justice Stevens’s equal protection jurisprudence); William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L.A. L. REV. 889 (2011) (considering the parallels between Justice Stevens’s approach to the First Amendment and equal protection).

140. See, e.g., *Liquormart v. Rhode Island*, 517 U.S. 484, 510 (1996) (plurality opinion) (“[I]n keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes . . .”); *Meese v. Keene*, 481 U.S. 465, 481–82 (1987) (criticizing a lower court injunction for keeping speech away from the public as reflecting a “paternalistic strategy”).

141. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (noting that the challenged law could be analyzed under the content-neutrality requirement but declining to do so on the ground that a result based on that rule would allow the government to cure the violation by banning even more speech).

indeed a free speech first principle that warrants careful judicial protection,<sup>142</sup> even while insisting in case after case that First Amendment questions should be decided by balancing the government's interest against the extent of the First Amendment harm the law imposed.<sup>143</sup>

But despite these (mostly) dissenting voices, the logic that dictates a rigid strict scrutiny rule for any content-based law slides easily into logic that insists on a rigid approach to defining content discrimination, and vice-versa. In other words, the horizontal logic of the content-neutrality rule's rigidity, which I have called the rule's scope (i.e., applying to more and more speech contexts) both influences and is influenced by a vertical logic, which I have called its depth (i.e., insisting on a similarly rigid approach to the prior, definitional, step in the analysis). When combined, these logics exert an expansionist pressure that results in the jurisprudence this Article has examined and critiqued.

### C. *The Romance of Free Speech*

The content-neutrality rule may also be appealing to a majority of Justices—including some liberal ones<sup>144</sup>—because of the First Amendment's romantic quality. Put (perhaps too) simply, the First Amendment, and in particular its Speech Clause, has become iconic. It has generated some of the most eloquent language the U.S.

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142. See, e.g., *Reed*, 135 S. Ct. at 2233, 2235 (Breyer, J., concurring in judgment) (“The better approach [in First Amendment cases] is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule . . . where viewpoint discrimination . . . is threatened . . .”).

143. See, e.g., *Iancu v. Brunetti*, 139 S. Ct. 2294, 2305 (2019) (Breyer, J., concurring in part and dissenting in part); *Reed*, 135 S. Ct. at 2236 (Breyer, J., concurring in judgment); *United States v. Alvarez*, 567 U.S. 709, 730–34 (2012) (Breyer, J., concurring in judgment); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400–03 (2000) (Breyer, J., concurring). For an appraisal of this approach, and of Justice Breyer's approach to First Amendment cases more generally, see Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280 (2005).

144. Notably, Justice Sotomayor joined the majority opinions in *Reed* and *Sorrell*, although she joined Justice Breyer's dissent in *NIFLA*. See also *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2487 (2018) (Sotomayor, J., dissenting) (explaining that she joined the majority in *Sorrell*, but expressing concern about how the Court has applied the case, for example, in *NIFLA*, where she joined the dissent). See also *supra* note 136 (citing Justice Souter's concurrence in *Denver Area Educational Telecommunications Consortium*, which approved of “fairly strict categorical rules” in the First Amendment context). Indeed, Justice Souter joined the majority opinion in *R.A.V.* See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 378 (1992).

Reports can offer.<sup>145</sup> That language often speaks in soaring terms of the fundamentals of American freedom: democratic self-government, a collective and fearless search for truth, and individual autonomy in its most foundational embodiment—the freedom to form and express one’s own thoughts.<sup>146</sup> Beyond making the First Amendment a favored argument for would-be plaintiffs,<sup>147</sup> this romanticism influences First Amendment doctrine in at least two ways. First, it makes it difficult for the Court to justify excluding a type of speech from any First Amendment

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145. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”). See generally ARTHUR D. HELLMAN ET AL., *FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION*, at xxxv (4th ed. 2018) (“No other area of law has so often inspired the Justices of the Supreme Court to write opinions marked by eloquence and passion.”).

146. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“The First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’ That is because ‘speech concerning public affairs is more than self-expression; it is the essence of self-government.’” (first quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); and then quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)); *Barnette*, 319 U.S. at 642 (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”). Canonical statements of First Amendment law from the earlier years of its developments reflect this same idea. See, e.g., *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”); see also Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1450–51 (2017) (“Over the years, scholars and judges have identified three principle [sic] theories explaining why the First Amendment protects freedom of expression. The first is that free speech is necessary to advance the search for truth . . . . The second . . . is that speech is an essential component of individual autonomy and self-fulfillment . . . . The third . . . is that the First Amendment is intended to enable democratic self-governance and participatory politics.”).

147. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1789–90 (2004) (“Any account of the political, cultural, and economic dynamics of the First Amendment must start with what we can call the First Amendment’s *magnetism* . . . . To an extent unmatched in a world that often views America’s obsession with free speech as reflecting an insensitive neglect of other important conflicting values, the First Amendment, freedom of speech, and freedom of the press provide [litigants] considerable rhetorical power and argumentative authority.” (footnote omitted)).

protection.<sup>148</sup> Second, and more relevant for current purposes, that romanticism finds ready expression in a rule forbidding government from setting the terms of allowable speech by marking off some topics as off-limits – that is, the content-neutrality rule.<sup>149</sup>

Nevertheless, as illustrated by the cases this Article has discussed,<sup>150</sup> the content-neutrality rule may not be capable of serving as a reliable guide to deciding as many free speech cases as the current Court seems to think. Scholars have argued powerfully that the broad range of human communication that can serve personal autonomy, marketplace of ideas, and even self-government interests requires some trimming of the values the First Amendment is understood to protect, lest every government regulation of the content of speech become subject to stringent First Amendment scrutiny.<sup>151</sup> That trimming could take the form of settling on one, relatively cabined, justification for free speech, a development that would limit the categories of communication subject to the First Amendment at all.<sup>152</sup> Alternatively, it could take the form of creating a hierarchy of protected speech, with speech at

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148. See, e.g., Tabatha Abu El-Haj, *Live Free or Die – Liberty and the First Amendment*, 78 OHIO ST. L.J. 917, 925 (2017) (“[T]he notion that the First Amendment has multiple ends, including fostering a competitive marketplace of ideas and protecting individual autonomy [beyond the self-governance goal the author focused on], has flourished . . . First Amendment pluralism, however, provides few meaningful limits on the freedom of speech . . . Both the metaphor of an unfettered marketplace of ideas and the emphasis on individual expression and autonomy make it exceedingly difficult to articulate a principled justification for denying coverage to any speech.”).

149. Of course, such romanticism could trigger very different First Amendment doctrines. For example, a commitment to equal participation in the political marketplace could be expressed in a rhetorical commitment to political equality that would justify speech regulations deeply inconsistent with the current libertarian approach to the Free Speech Clause. Cf. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”).

150. See *supra* Parts II–IV.

151. See, e.g., Ashutosh Bhagwat, *When Speech is Not “Speech,”* 78 OHIO ST. L.J. 839 (2017) (arguing that such trimming is necessary given recent expansions of the First Amendment’s scope and the increased social importance of data as a market commodity); *id.* at 850 (arguing that such trimming is best accomplished by identifying self-government as “an overarching theory of First Amendment coverage”). To be sure, it is uncontroversial that some limited speech restrictions – for example, those applied in non-public forums – may legitimately be content-based. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (finding a fundraising campaign taking place in federal workplaces to be a non-public forum, and thus allowing the government to draw content-based distinctions when deciding which non-profits may participate).

152. See generally Bhagwat, *supra* note 151.

the apex accorded particularly careful protection—for example, enjoying the protection of a strict content-neutrality requirement.

While the Court has declined to adopt the first of these approaches,<sup>153</sup> it has taken some steps toward the second. The modern Court<sup>154</sup> has subdivided the First Amendment into a variety of speech categories and contexts, some of which are quite specific,<sup>155</sup> that call forth lesser judicial protection.<sup>156</sup> That process started with the Court's recognition of intermediate protection for commercial speech in 1976 and 1980, and continued through both its recognition of government authority to "require professionals to disclose factual, noncontroversial information in their commercial speech," and its statements (and doctrine) relegating sexual speech to a lower rung of protection.<sup>157</sup> And indeed, despite the Court's seeming commitment to protecting all forms of speech, it has all but assumed that some speech restrictions simply do not implicate the Speech Clause.<sup>158</sup> This process of subdividing categories of

153. See *id.* at 850 (suggesting this failure and urging that it be corrected).

154. For a careful discussion of earlier Court statements about whether different types of speech enjoy the same level of protection (whatever that level may have been), see Genevieve Lakier, *The Invention of Low Value Speech*, 128 HARV. L. REV. 2166 (2015); *id.* at 2196–97, for a commentary focusing on political speech in particular.

155. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (“[W]e deal here with the [First Amendment] law of billboards.”).

156. See *id.*; see also *Citizens United v. FEC*, 558 U.S. 310, 341 (2010) (“The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.”); *id.* (citing cases dealing with the First Amendment rights of students, prisoners, soldiers, and federal employees); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (discussing setting forth forum doctrine and noting the different rules that apply to speech in different fora).

157. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality opinion) (describing the scrutiny applied in *Renton* as “intermediate scrutiny”); *City of Renton v. Playtime Theaters*, 475 U.S. 41 (1986) (applying lesser First Amendment scrutiny to laws regulating sexual speech if those laws were justified based on the so-called secondary effects of that speech).

158. See, e.g., Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Law*, in UNIV. OF VA. SCH. OF LAW: PUB. LAW & LEGAL THEORY PAPER SERIES (2019), <https://ssrn.com/abstract=3437289> (discussing tort law more generally, and advocating that tort law remain largely outside the realm of the First Amendment); Bhagwat, *supra* note 151, at 866–67 (discussing products liability claims based on failure to warn and faulty explanation theories). Of course, the Court has also explicitly recognized the unprotected status of the well-known *Chaplinsky* categories of speech, such as obscenity and fighting words. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional

protected speech, and excluding some speech entirely from First Amendment protection, suggests a more pragmatic, less romantic, understanding of the free speech guarantee.<sup>159</sup>

Still, the romanticism tugs. For every pragmatic statement that an arguably weak claim of compelled speech “trivializes the freedom protected in *Barnette*[.]”<sup>160</sup> one can find a statement that the difference between *Barnette* and a different, arguably weak compelled speech claim “is essentially one of degree.”<sup>161</sup> Similarly, for every statement that speech relevant to self-government stands at the apex of First Amendment concerns,<sup>162</sup> one can find statements questioning courts’ ability to identify such speech<sup>163</sup> or their authority to accord it unusually heightened First Amendment protection.<sup>164</sup> While such statements could be understood as

problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” (footnote omitted)). *But see* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a municipal ordinance because it drew content-based speech distinctions, even though the ordinance was assumed to regulate only constitutionally “unprotected” fighting words).

159. To be sure, this more pragmatic understanding may itself flow from understandings of why free speech is important. Those understandings may well be couched in similarly rhetorically resonant terms. *See, e.g.*, *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion) (“Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”).

160. *Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc.* 547 U.S. 47, 62 (2006) (“Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto ‘Live Free or Die,’ and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.”); *see also supra* note 100 (explaining *Barnette*).

161. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

162. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“The First Amendment “has its fullest and most urgent application” to speech uttered during a campaign for political office.” (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989))).

163. *See, e.g.*, *Winters v. New York*, 333 U.S. 507, 510 (1948) (“The line between the informing and the entertaining is too elusive for the protection of th[e] basic right [to press freedom]. Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.”).

164. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 479–80 (2010) (“Most of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value), but it is still sheltered from government regulation. Even ‘[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.’” (alterations in original) (second emphasis added)

themselves pragmatic responses to messy realities, the Court's expressions of these ideas have often sounded in loftier registers.<sup>165</sup>

That romanticism lurks just below the surface of both *Sorrell's* and *NIFLA's* application of the content-neutrality rule. For example, even though the law struck down in *Sorrell* sought only to prevent marketers from accessing physician prescribing information so they could tailor the marketing pitches they made to those same doctors, Justice Kennedy characterized the free speech issue it presented in stark anti-paternalistic terms.<sup>166</sup> Similar romanticism characterized both the majority's embrace of the

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(quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)). Scholars have also questioned the very coherence of a judicial pretension to identify speech that counts as relevant to self-government. See, e.g., Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 670 (1990) ("The Court is most comfortable with the normative conception of 'public concern,' and in most instances its use of the phrase signifies that the content of the speech at issue refers to matters that are substantively relevant to the processes of democratic self-governance. But it is not difficult to see why this conception of public concern would lead directly to a doctrinal impasse. Democratic self-governance posits that the people, in their capacity as a public, control the agenda of government. They have the power to determine the content of public issues simply by the direction of their interests. This means that every issue that can potentially agitate the public is also potentially relevant to democratic self-governance, and hence potentially of public concern. The normative conception of public concern, insofar as it is used to exclude speech from public discourse, is thus incompatible with the very democratic self-governance it seeks to facilitate."). Indeed, even scholars who advocate the Court's identification of the self-government rationale as the sole justification for First Amendment speech coverage acknowledge the potentially broad implications of that rationale. See, e.g., Bhagwat, *supra* note 151, at 874 ("It should be noted . . . that the word 'political' [as used in this context] should not be defined narrowly . . . to encompass only speech directly related to elections or public policy issues. Scientific knowledge, cultural sharing and development, and more broadly the shaping of values are surely highly relevant to citizenship. More to the point, permitting the state to control the knowledge, culture, and values of its citizens is entirely inconsistent with the principle of popular sovereignty that underlies the American vision of democratic citizenship . . . . A further implication of this insight is that speech need not be 'public' in the sense of directed at large audiences to fall within the class of speech relevant to citizenship.").

165. See, e.g., *Stevens*, 559 U.S. at 479–80.

166. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 576 ("Speech remains protected even when it may 'stir people to action,' 'move them to tears,' or 'inflict great pain.' The more benign and, many would say, beneficial speech of pharmaceutical marketing is also entitled to the protection of the First Amendment. If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it." (quoting *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011))). Amazingly, immediately after this quote the Court cited for support an incitement case about core political speech. See *id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

content-neutrality rule in *NIFLA*<sup>167</sup> and Justice Kennedy's concurrence in that case, the latter of which castigated California's alleged smug self-congratulation for, in his view, "compel[ling] individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these."<sup>168</sup> Together, the romanticism of the Speech Clause's pro-democratic, anti-authoritarian, truth-seeking goals, when combined with the internal logic of the content-neutrality rule and any subconscious (or indeed, conscious) preference for economic deregulation help explain developments this Article has recounted up to now. They also at least suggest the Court's future trajectory.<sup>169</sup>

## VI. THE INVASION'S IMPLICATIONS

### A. *The Risks*

Parts II–IV of this Article have sketched out both a vertical and horizontal expansion of the content-neutrality rule, while Part V has offered possible explanations for those phenomena. The Court's explicit holding in *Reed* expanding the definition of a content-based law<sup>170</sup> reflects a vertical deepening of the content-neutrality rule. The horizontal, or scope, expansion in *Sorrell* and *NIFLA*<sup>171</sup> reflects the extension of that rule's domain into new doctrinal areas: commercial and compelled speech. These expansions could significantly impact those two areas of First Amendment law. More generally, they could undermine the rationales for other free speech doctrines in which a rigid application of the content-neutrality rule does not yet hold sway.

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167. See *NIFLA*, 138 S. Ct. 2361, 2382 (Breyer, J., dissenting) ("The Court, in justification, refers to widely accepted First Amendment goals, such as the need to protect the Nation from laws that 'suppress unpopular ideas or information' or inhibit the 'marketplace of ideas in which truth will ultimately prevail.'" (quoting *id.* at 2374 (majority opinion))).

168. *Id.* at 2379 (Kennedy, J., concurring). *NIFLA* may have presented a particularly tempting target for application of this romanticism, given that the clinics targeted by California's speech compulsion appeared to be closely related to one side in the ideological debate about abortion. See *id.* at 2377 (majority opinion) (stating that the California law's unlicensed notice provision "covers a curiously narrow subset of speakers").

169. See, e.g., Kyle Langvardt, *The Doctrinal Toll of "Information as Speech,"* 47 LOY. U. CHI. L.J. 761, 801–07 (2016) (predicting courts' future path with regard to applications of the content-neutrality rule to new forms of expression such as computer code).

170. See *supra* Part II.

171. See *supra* Parts III–IV.

If the Court takes them seriously, *Sorrell* and *NIFLA* portend a major expansion of the content-neutrality rule's domain.<sup>172</sup> The effects of such an expansion, while not fully knowable at this point, give reason for concern. As a doctrinal matter, the content-neutrality rule's applicability both to commercial speech and compelled speech would necessarily mean that most instances of compelled speech and/or commercial speech regulation would be constitutionally suspect—to use *NIFLA*'s language, “presumptively unconstitutional.”<sup>173</sup> Indeed, both *Sorrell*'s and *NIFLA*'s additional emphasis on the speaker-based focus of the challenged laws<sup>174</sup> makes this result all the more likely, given that such laws, essentially by definition, single out for regulation a particular type of business.<sup>175</sup> Beyond the doctrinal disturbance this phenomenon would cause, Justices Breyer's and Kagan's dissents in these cases have identified how an increasingly singled-minded focus on content neutrality in these contexts would have the practical result of calling into question a great variety of reasonable economic and social regulation.

Beyond these specific concerns, a more general problem with this expansion of the content-neutrality rule's domain is that it devours the more context-specific aspects of commercial speech and compelled speech doctrines. Thus, for example, this expansion means that inquiries into whether a commercial speech regulation reflects illegitimate information paternalism,<sup>176</sup> or whether a speech

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172. Again, while the Court has at times given such a broad application to the content-neutrality rule in previous compelled speech cases, see *supra* note 99, it has often declined to rely on that rule, see *supra* notes 100–104. The statement in the text considers the implications if that broad application becomes dominant in compelled speech cases and, in particular, if that dominance is paired with a new willingness, as in *Sorrell*, to apply that rule to commercial speech as well. See *supra* note 111 (noting “particularly acute” issues that would arise from imposition of a strict content-neutrality rule in the combined context of compelled commercial speech).

173. See *NIFLA*, 138 S. Ct. at 2371.

174. See *id.* at 2378 (“This Court’s precedents are deeply skeptical of laws that ‘distinguish[h] among different speakers, allowing speech by some but not others.’” (alteration in original) (citing *Citizens United v. FEC*, 558 U.S. 310, 340 (2010))); *id.* (“Speaker-based laws run the risk that ‘the State has left unburdened those speakers whose messages are in accord with its own views.’” (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011))).

175. See *supra* note 64.

176. This Article uses the term “information paternalism” rather than simply “paternalism” to account for the reality that, in non-speech contexts, government paternalism is generally accepted as a legitimate justification for regulation. For an example

compulsion requires affirmation of a particular ideological viewpoint,<sup>177</sup> become irrelevant once a court determines that the law in question regulates speech based on content (or speaker identity).<sup>178</sup> Like the pod people in *Invasion of the Body Snatchers*, First Amendment doctrine transforms from a fully-rounded and relational entity to a flattened, one-dimensional entity, disconnected from its surroundings. As this Article has already alluded to and as it discusses more fully in its Conclusion, this flattening presents real reason for worry.

*Reed*'s rigid insistence on bringing every facially content-based law within the domain of the content-neutrality rule's strict scrutiny requirement threatens to impose a similar deadening uniformity on Speech Clause analysis. Concededly, it is difficult to deny that a law such as Gilbert's sign ordinance is, as a common-sense matter, "content based." This may explain why Justices Breyer's and Kagan's concurrences focused instead on what should be the implications of a finding of content discrimination for the appropriate level of judicial scrutiny. Of course, abjuring automatic application of strict scrutiny to every law labelled as content-based

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of the Court's recognition of the anti-paternalistic thrust of its commercial speech jurisprudence, see *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 631 n.2 (1995). "There is an obvious difference between situations in which the government acts in its own interests, or on behalf of entities it regulates, and situations in which the government is motivated primarily by paternalism." *Id.*

177. See, e.g., *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469-70 (1997) (upholding against a First Amendment challenge a compelled exaction to growers to fund a marketing program, in part on the ground that the challenged marketing orders "do not compel the producers to endorse or to finance any political or ideological views"); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))). For a critique of the Court's doctrinal statements refusing to consider this issue in First Amendment analysis, see Ashutosh Bhagwat, *Reed v. Town of Gilbert: Signs of (Dis)content*, 9 N.Y.U. J.L. & LIBERTY 137, 146 (2015) "Th[e] current doctrine . . . [that] forbids placing higher value on political and ideological speech than other speech is . . . bizarre." *Id.*

178. So-called speaker-based discrimination also constitutes the type of circuit-breaker that causes courts to bypass the more contextual aspects of commercial speech and compelled speech doctrine. See, e.g., *Citizens United*, 558 U.S. at 346 ("[Precedent] reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity."); *id.* at 340 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

would effectively repeal the content-neutrality rule as it is currently understood, in favor of a rule that considers a law's content discrimination as simply a factor to consider in the analysis.<sup>179</sup> But the *Reed* majority's cursory suggestion at the end of its opinion that some content-based sign ordinances might survive strict scrutiny<sup>180</sup> suggests that it understood that the scrutiny it calls for, if applied with its normal rigor, would indeed have revolutionary and deeply troubling implications.<sup>181</sup>

### B. Mitigation Strategies

None of these fundamental changes are a foregone conclusion. For example, shortly after the Court decided *Reed*, a commentator suggested that the case could be distinguished "up, down, and sideways,"<sup>182</sup> and thus its effect limited. Indeed, this potential exists, at least for some types of speech regulations. First, and most obviously, courts deciding commercial speech cases could simply acknowledge the well-established understanding that commercial speech regulations are, essentially by definition, already considered content-based. Under this approach, *Reed*'s application of strict scrutiny to the town's sign ordinance has no significance for commercial speech doctrine, which already concedes the inherent content discrimination of the types of regulations it governs and provides a unique doctrinal structure for evaluating them.<sup>183</sup>

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179. See *supra* note 47 (citing an opinion by Justice Breyer in which he calls for the content-neutrality rule to be considered as merely a "rule of thumb").

180. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015).

181. Indeed, one might draw a very rough analogy to the Court's similarly quick and unsupported statement in *District of Columbia v. Heller* that the majority's embrace of an individual rights reading of the Second Amendment did not call into doubt longstanding restrictions on the possession of guns by certain people and in certain places. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

182. Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1987 (2016) (referring to "up" in terms of courts continuing to find laws content-neutral, or finding them content-based but satisfying strict scrutiny; "down," in terms of construing a regulation as regulating conduct rather than expression; and "sideways" in terms of failing to apply *Reed* in the commercial speech context). This Article focuses on the first and third of these mechanisms, given its focus on regulation of what is unambiguously speech, as opposed to speech that could be redescribed as conduct.

183. See *id.* at 1991 ("Lower courts can take the Supreme Court at its word (or rather, its silence) by distinguishing *Reed* sideways and continuing to evaluate challenges to regulations of commercial speech under intermediate scrutiny.").

While a good number of courts have taken this approach,<sup>184</sup> and while scholars have suggested that this approach will limit the impact of *Reed*'s expanded definition of content discrimination,<sup>185</sup> *Sorrell*'s focus on the content-neutrality rule makes it risky to believe that this trend will necessarily prevail.<sup>186</sup> To be sure, *Sorrell* is already nearly a decade old, and even relatively recent lower court opinions have continued to resist imposing strict scrutiny on commercial speech regulations, despite *Sorrell*'s implication that they should.<sup>187</sup> Thus, *Sorrell*'s effect on lower courts may remain limited, even in light of *Reed*. This would hardly constitute a surprising result, given the fact that *Sorrell* ultimately applied conventional *Central Hudson* scrutiny<sup>188</sup> and that lower courts are generally reluctant to rely on inferences to conclude that the Court has overruled old doctrine.<sup>189</sup>

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184. See, e.g., *Reagan Nat'l Advert. of Austin, Inc. v. City of Cedar Park*, 387 F. Supp. 3d 703, 712–13 (W.D. Tex. 2019) (declining to apply *Reed* to a commercial speech case); *Wash. Post v. McManus*, 355 F. Supp. 3d 272, 296 (D. Md. 2019) (describing a “prevailing consensus” that *Reed* did not disturb doctrines calling for less-than-strict scrutiny of particular types of content-based laws, including commercial speech regulations); *CTIA – The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) (same); Note, *supra* note 182, at 1991–92 (discussing other such cases in the commercial speech context); see also, e.g., *Kersten v. City of Mandan*, 389 F. Supp. 3d 640, 646 (D.N.D. 2019) (citing *Reed* to apply strict scrutiny to a law that distinguished between commercial and non-commercial speech). *But see* *Ocheesee Creamery L.L.C. v. Putnam*, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017) (suggesting uncertainty about *Reed*'s effect on commercial speech); *GJJM Enters., L.L.C. v. City of Atlantic City*, 352 F. Supp. 3d 402, 405–06 (D.N.J. 2018) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” “Commercial speech is no exception.” (first quoting *Reed*, 135 S. Ct. at 2226; and then quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011))).

185. See, e.g., Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65, 70 (2017) (“For so long as the Court continues to distinguish between commercial and noncommercial speech . . . *Reed*'s reach will be inherently limited.”). The omitted clause in this sentence concedes that whether that distinction will retain vitality constitutes “an open question,” but nevertheless concludes that “the commercial speech doctrine is safe at least for now.” *Id.* *Sorrell* gives reason for more pessimism than perhaps Professor Armijo acknowledges. Indeed, later in that same article he concedes that the changing composition of the federal judiciary could create a situation in which “*Reed*'s Two-Step could become the very weapon used to blow the commercial speech doctrine away altogether.” *Id.* at 73.

186. See *id.* at 70 (acknowledging the possibility that increased judicial reluctance to carve out commercial speech for special treatment could result in the imposition of a strict content-neutrality requirement on commercial speech regulations).

187. See *supra* note 184 (citing recent cases that continue to insist on applying relatively more deferential review to commercial speech regulations).

188. See *supra* note 109 (explaining *Central Hudson* scrutiny).

189. See *infra* note 197 (noting that reluctance).

Nevertheless, one can never be too sure. *NIFLA*'s more recent emphasis on the content-neutrality rule<sup>190</sup> could portend a new-found focus on the content-neutrality rule in compelled speech cases.<sup>191</sup> In addition to impacting compelled speech doctrine, *NIFLA*'s emphasis on the content-neutrality rule could reinforce the implicit message sent by *Sorrell* (and, less directly, by *Reed*) that content-neutrality should be a strictly enforced, broadly applicable rule.<sup>192</sup> To be sure, *NIFLA*'s recognition of more relaxed *Zauderer* scrutiny for compelled statements of "factual, noncontroversial" information in commercial speech<sup>193</sup> continues to provide a carve-out for a discrete category of compelled commercial speech. But the narrow, seemingly grudging application of that carve out in *NIFLA* itself<sup>194</sup> reinforces the opinion's overall signal favoring a generally applicable strict scrutiny requirement for all, or nearly all, content-based speech regulations.

Second, regarding commercial speech in particular, *Sorrell* could be read as simply applying standard *Central Hudson*-style scrutiny.<sup>195</sup> In *Sorrell*'s concluding paragraphs, Justice Kennedy returned to those more traditional commercial speech factors, and explicitly reserved the question of whether a content-based commercial speech regulation is presumptively invalid in the same way that a content-based regulation of non-commercial speech is.<sup>196</sup>

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190. It bears noting that many commercial speech cases involved speech compulsions rather than speech restrictions, and thus implicate the analyses in both *Sorrell* and *NIFLA*. See, e.g., *Greater Balt. Ctr. for Pregnancy Concerns v. Mayor of Balt.*, No. MJG-10-760, 2016 WL 10893970, at \*8 (D. Md. Oct. 4, 2016) (noting that content-based speech compulsions trigger strict scrutiny, but recognizing an exception to that rule for commercial speech).

191. See, e.g., *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1324–25 (11th Cir. 2017) (en banc) (Wilson, J., concurring) (insisting that *Reed* applies to a regulation of professional speech, a subset of commercial speech regulation, at least in certain contexts); see also *Wash. Post v. McManus*, 355 F. Supp. 3d 272, 296 (D. Md. 2019) (finding in *NIFLA* a "signal" that content-based laws "as a general matter, are suspect").

192. See, e.g., *Smith v. Keurig Green Mountain, Inc.*, 393 F. Supp. 2d 837, 849 (N.D. Cal. 2019) (noting the defendant's argument that *NIFLA* "stands for the principle that strict scrutiny should apply to [the] compelled commercial speech [allegedly at issue in that case]"). To be sure, the court in that case found the argument "unwarranted," but only because it concluded that the plaintiff was not seeking to compel the defendant to engage in any particular speech. See *id.*

193. See *NIFLA*, 138 S. Ct. 2361, 2372 (2018).

194. See *id.* (holding this carve-out to be inapplicable to one of the two mandated disclosures at issue in that case).

195. See *supra* text accompanying note 109 (setting forth the *Central Hudson* test).

196. See *supra* text accompanying note 75; *infra* note 200.

Given lower courts' reluctance to recognize implicit but unacknowledged changes in Supreme Court doctrine,<sup>197</sup> *Sorrell's* ambiguity raises the real possibility that, in the absence of further word from the Justices, lower court judges will find ways to integrate into the traditional *Central Hudson* framework both *Sorrell's* emphasis on the content-neutrality rule and *Reed's* more stringent definition of content-neutrality.<sup>198</sup>

Such an integration might push *Central Hudson* review—in particular, its “tailoring” requirement<sup>199</sup>—in the direction of strict(er) scrutiny,<sup>200</sup> but would preserve the traditional framework for commercial speech regulation.<sup>201</sup> Alternatively, it could simply create a sub-set of the content-neutrality rule, in which content-based commercial speech regulations remained subject to standard *Central Hudson* scrutiny, despite those regulations having been formally identified as content-discriminatory.<sup>202</sup> This latter

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197. See, e.g., *United States v. Duncan*, 413 F.3d 680, 684 (7th Cir. 2005) (“[I]t certainly is not our role as an intermediate appellate court to overrule a decision of the Supreme Court or even to anticipate such an overruling by the Court.”); see also *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (agreeing with the lower court’s decision to rely on Court precedent even when that lower court recognized the tenuousness of that precedent’s continued vitality).

198. See *Mason*, *supra* note 23, at 987–91 (suggesting how courts might incorporate *Reed* into commercial speech analysis); *id.* at 987 (suggesting that lower courts have incorporated *Reed* either by making more stringent the tailoring prong of the *Central Hudson* test or simply by making the content-neutrality inquiry “a threshold question” in the *Central Hudson* analysis).

199. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (asking, as the fourth prong of the commercial speech inquiry, “whether [the challenged law] is not more extensive than is necessary to serve that interest”).

200. See *Mason*, *supra* note 23, at 988–89 (“Under *Sorrell* . . . content-based restrictions must at least satisfy the standard *Central Hudson* test. What more they must satisfy is unclear.”); *id.* at 978 (“[O]ne could imagine how content neutrality would aid th[e] inquiry [into *Central Hudson's* “tailoring” prong]: a content-based law seems undesirable if a content-neutral alternative would satisfy the same government objective.”). But see *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (declining to decide whether the challenged commercial speech regulation’s content-basis justified application of “a stricter form of judicial scrutiny” rather than “a special commercial speech inquiry” since the outcome would be the same under either).

201. See *supra* text accompanying note 198 (suggesting that *Reed* could effectively ratchet up *Central Hudson's* “tailoring” prong).

202. See *Mason*, *supra* note 23, at 978–79 (noting how one court that incorporated *Reed's* content-neutrality analysis into the *Central Hudson* test did not mention the word “content” in its analysis of *Central Hudson's* tailoring prong); *supra* note 200 (implying that “a special commercial speech inquiry,” presumably the one announced in *Central Hudson*, would continue to apply despite the identified content discrimination of the challenged commercial speech regulation).

development would be both odd and unwelcome, as it would create an additional doctrinal complexity that changes no results. The justification for such a gratuitous complexification would be, at best, unclear.<sup>203</sup>

Third, courts could integrate *Reed* into the content-neutrality rule's expanded horizontal application by concluding that, indeed, commercial speech and compelled speech regulations necessarily trigger strict scrutiny, but then finding such scrutiny to be satisfied. Doctrinal tools exist that would allow this development. At the most general constitutional law level, in contexts ranging from the dormant Commerce Clause to the Equal Protection Clause the Court has sometimes cautioned that context matters when applying heightened scrutiny.<sup>204</sup> In terms of commercial speech, the Court now has over forty years of caselaw explaining the distinct characteristics of commercial speech and why those characteristics justify a different standard of review.<sup>205</sup> It would not take extraordinary creativity to incorporate that acknowledgement of commercial speech's distinctiveness into a jurisprudence that, as a practical, if not formal, matter, justifies a "strict scrutiny lite" standard for commercial speech restrictions. Analogously, the Court's foundational compelled speech cases have recognized the fact- and context-sensitivity of judicial review in that area.<sup>206</sup> Just as with commercial speech, it would not take extraordinary creativity to channel that sensitivity into a more deferential variant of strict scrutiny.

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203. Cf. Mason, *supra* note 23, at 989 (arguing that the work content-neutrality has previously done in commercial speech cases has been accomplished via judicial disfavoring of laws *justified* based on the content of the disfavored speech, and suggesting that *Reed*'s facial content-discrimination standard would add little to that benefit).

204. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (upholding a state law that concededly discriminated against interstate commerce because the law was sufficiently narrowly tailored); *id.* at 144-45 ("Although the proffered justification for any local discrimination against interstate commerce must be subjected to 'the strictest scrutiny', the empirical component of that scrutiny, like any other form of factfinding, 'is the basic responsibility of district courts, rather than appellate courts.'" (first quoting *Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979); and then quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982))).

205. For a concise summary of that jurisprudence, see Lora E. Barnhart Driscoll, *Citizens United v. Central Hudson: A Rationale for Clarifying and Simplifying the First Amendment's Protections for Nonpolitical Advertisements*, 19 GEO. MASON L. REV. 213, 216-29 (2011).

206. See cases cited *supra* notes 103 and 104.

But despite its ease and the existence of antecedents in other areas of constitutional law, judicial embrace of a contextualized version of strict scrutiny is treacherous. At the very least, it creates confusion about the “real” meaning of strict scrutiny.<sup>207</sup> Watering down strict scrutiny in order to reach acceptable results in light of that test’s expanded applicability after *Reed* also risks infecting other applications of strict scrutiny where that tool is particularly necessary to smoke out invidious favoring of certain speech or certain viewpoints.<sup>208</sup> Nevertheless, if the Court is going to insist on expanding content-neutrality’s domain and depth, such a contextualization of strict scrutiny may be its most plausible next move as it plots that rule’s trajectory.<sup>209</sup>

### C. Another Approach?

Space limitations on this Article, when combined with its focus on identifying and critiquing the invasion of the content-neutrality rule, preclude a comprehensive analysis of other approaches the Court could take when reviewing speech regulations that currently remain outside that rule’s domain. However, it bears making the general point, consistent with this Article’s focus on the acontextual nature of the opinions this Article has critiqued, that Speech Clause doctrine should at least presumptively reflect awareness of the context of the speech regulation confronting the Court in a given case. Concepts such as content-neutrality can be exceptionally useful, but only if they are applied with an awareness of issues such

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207. See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1675, 1677 (2015) (Scalia, J., dissenting) (lodging this complaint about the majority’s conclusion that a content-based state judicial ethics canon satisfied strict scrutiny).

208. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring in the judgment) (worrying that this phenomenon may come to pass); see also *Mason*, *supra* note 23, at 980 (discussing a post-*Reed* case that arguably applied a less stringent version of strict scrutiny to content-based regulation of professional speech). *But see Armijo*, *supra* note 185, at 82–84 (arguing that courts could in fact uphold much of the regulation that critics of *Reed* have worried is newly endangered by holding that such regulation satisfies strict scrutiny, and applauding the prospect of such a result); cf. *Kagan*, *supra* note 23, at 414 (arguing that a rule distinguishing between content-based and content-neutral speech restrictions, and applying heightened scrutiny to the former, would be a natural first step in constructing a First Amendment doctrine that was ultimately concerned with ferreting out invidious government intent).

209. Cf. *Langvardt*, *supra* note 169 (forecasting just such a dilution in the context of judicial review of government regulation of new information technologies such as 3D printing).

as the nature of the speech in question or the reasons that regulation of such speech is potentially problematic.

For example, as Justice Breyer pointed out in his opinions in *Reed*, *Sorrell*, and *NIFLA*, the ubiquity of content-based speech regulations makes a rigid strict scrutiny requirement seriously problematic for the modern regulatory state.<sup>210</sup> Similarly, Justice Kagan's concurrence in *Reed* questioned whether a rigid strict scrutiny mandate applicable to every content-based law furthered the Speech Clause's underlying goals as she understood them.<sup>211</sup>

As applied to the contexts explored by this Article, these observations suggest the lack of wisdom in rigid application of a content-neutrality rule. With regard to commercial speech, scholars have argued that protection for commercial speech is founded on a concern for consumer/listeners.<sup>212</sup> Such a foundation is ill-suited to a blanket content-neutrality rule that shifts the focus of protection from listeners to speakers.<sup>213</sup> That ill-suitedness becomes clear when one remembers that the current test for commercial speech requires that the speech in question propose a transaction that is lawful<sup>214</sup> and that it be truthful and non-misleading.<sup>215</sup> Both of these limits make perfect sense for a consumer/listener-based regime designed to enable those listeners to participate effectively in a regulated marketplace. But as the Court's non-commercial

210. For one of many scholarly statements to this effect, see Piety, *supra* note 109, at 22. "I remain concerned that th[e] expansive First Amendment [she described earlier in her article] will prove to be an unworkable burden on beneficial regulation intended to protect public health, safety, and welfare." *Id.*

211. See *Reed*, 135 S. Ct. at 2236–37 (Kagan, J., concurring in the judgment) (questioning whether such a mandate furthered the goals of preserving "an uninhibited marketplace of ideas" or preventing government from singling out speech for regulation because of hostility or favoritism toward its message (quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014))).

212. See, e.g., Piety, *supra* note 109, at 13 (observing that the Court's foundational case protecting commercial speech, *Va. Bd. of Pharmacy v. Va. Citizens Consumers Council*, 425 U.S. 748 (1976), rested to a significant degree on consumers' interest in receiving accurate commercial information).

213. See, e.g., *id.* at 21 ("[W]hat started out as a limited right to hear truthful information (but not false information and without any rationale for a speaker's right to speak commercial information) has morphed into a right which resides primarily in the speaker . . .").

214. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (providing significant protection to a non-commercial speaker who advocates unlawful activity).

215. Cf. *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (protecting untruthful speech in a non-commercial setting).

speech cases reveal,<sup>216</sup> neither limit makes sense for a speaker-focused regime.<sup>217</sup>

One can find a similar ill fit in the compelled speech context. Beginning with *Barnette*,<sup>218</sup> the foundational statement of compelled speech doctrine, the Court has often focused its compelled speech scrutiny on whether the challenged compulsion required the regulated party to utter a political or ideological statement with which she disagreed.<sup>219</sup> That focus reflects the arguably more serious infringement on individual autonomy when government uses an individual to express its preferred ideological message as opposed to “merely” preventing the individual from expressing her own.<sup>220</sup> The increased gravity of that constitutional sin surely turns on the ideological nature of the compelled statement. That focus on the nature of the compelled expression is in deep tension with *NIFLA*’s suggestion that any government compulsion to speak any message defined by its content is presumptively unconstitutional.<sup>221</sup>

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216. See *supra* notes 214–215.

217. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 27–28 (2000) (“Public discourse is where citizens attempt to render the state responsive to their views, and hence where individual and collective self-determination is reconciled. In such circumstances, compulsory speech disrupts the very point of public discourse. . . . Within commercial speech, by contrast, the primary constitutional value concerns the circulation of accurate and useful information. For the state to mandate disclosures designed more fully and completely to convey information is thus to advance, rather than to contradict, pertinent constitutional values.” (footnotes omitted)).

218. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635–36 (1943) (“The question which underlies the flag salute controversy [at issue in that case] is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority . . .”).

219. See *supra* notes 100–104 and accompanying text.

220. See, e.g., *Barnette*, 319 U.S. at 633 (suggesting this hierarchy of concern).

221. To be sure, *NIFLA* acknowledged the Court’s “precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’” *NIFLA*, 138 S. Ct. 2361, 2372 (2018). By itself, this carve-out reflects a more contextual approach to compelled and commercial speech regulation. Almost immediately, though, the Court limited this carve-out to compelled disclosures of such “information about the terms *under which* . . . [such] services will be available.” *Id.* (first alteration in original) (emphasis added) (quoting *Zauderer v. Office of Disciplinary Counsel of Sup. Ct.*, 471 U.S. 626, 651 (1985)). Thus, for example, in *NIFLA* itself, the Court held this carve-out inapplicable to a requirement that a family planning clinic that did not offer abortions post information about state-provided abortion services. See *id.*; cf. *id.* at 2387 (Breyer, J., dissenting) (arguing for a broader reading of this carve-out, precisely

Such attention to context may require the Court to craft more fact-based, nuanced Speech Clause decisions. It should hardly be surprising that this Article would suggest such an approach, given its general criticism of the Court's rigidity in the cases it has discussed. To be sure, such a suggestion is not free of risk. It is fair to object that this approach threatens to authorize the Court to make subjective decisions based on its idiosyncratic or motivated reasoning-based understanding of the nature of the speech and the speech regulation at issue. Put another way, it is fair to argue that a strict content-neutrality rule provides a rule-based approach to issues that, because of their importance to both individuals and society, should be as free of judicial subjectivity as possible.<sup>222</sup> But the cases critiqued in this Article reveal the significant costs of such rigid rules, as do the cases that are yet to be decided, should the Court press forward with the content-neutrality rule's invasion. Like the rigidity of those rules themselves, the rigidity with which the Court threatens to apply them raises the specter of unacceptable costs.

## VII. PROSPECTS FOR THE FUTURE

But what about those future cases and that future invasion? Is the current invasion likely to succeed? Will other First Amendment areas become its new targets?

### A. *The Current Battlefield*

It is impossible to predict the Court's future path with any confidence. Still, with regard to commercial speech, several Justices have expressed discontent with the more deferential *Central Hudson* standard.<sup>223</sup> If those Justices coalesce into a bloc and find the proper vehicle, it is easy to imagine the Court solidifying *Sorrell's* still-

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on the theory that its underlying justification was to allow government to ensure that more commercial information be made available to consumer-listeners).

222. See, e.g., Kreimer, *supra* note 5, at 1265 (arguing that a strict content-neutrality rule functions as "a usable norm" courts can use to discipline local officials' tendencies to suppress speech); see also *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring) (lauding "fairly strict categorical rules" for "keep[ing] the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said").

223. See, e.g., Jonathan H. Adler, *Robert Bork & Commercial Speech*, 10 J.L. ECON. & POL'Y 615, 621 n.48 (2014) (noting this discontent).

tentative implantation of the content-neutrality rule into the commercial speech realm.

Doing so, however, would raise a host of questions about commercial speech regulations that have up to now been considered largely settled.<sup>224</sup> For example, would full application of standard free speech doctrine to commercial speech prevent government from prohibiting commercial speech about a banned product?<sup>225</sup> Such prohibitions are unquestionably constitutional today.<sup>226</sup> However, they would likely be presumptively unconstitutional under standard free speech doctrine, given *Brandenburg v. Ohio*'s requirements of specific intent to incite immediate unlawful conduct and a likelihood that the incitement would succeed.<sup>227</sup> Prospects such as these might cause this incipient majority to shrink back from taking the decisive step of formally enshrining the invasion begun in *Sorrell*. Or they may persuade the Court simply to retain the shell of the *Central Hudson* test while ratcheting up the scrutiny associated with the "fit" prong of that test. Similarly, recognition of the myriad means

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224. See, e.g., *NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting) ("[T]he majority's view [that strict scrutiny applies to a content-based disclosure law], if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.").

225. Cf. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 346 (1986) ("[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."). *Posadas* has been heavily criticized and has been all but overruled. See *44 Liquormart v. Rhode Island*, 517 U.S. 484, 509-10 (1996) (plurality opinion) ("Given our longstanding hostility to commercial speech regulation [that seeks to dampen demand for a legal product], *Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy. The *Posadas* majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available."); *id.* at 518, 531 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring in the judgment) ("Since *Posadas*, . . . this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny.").

226. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) (providing as the first element of the current commercial speech test the requirement that the speech refer to legal goods or services).

227. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (imposing these requirements for incitement liability). Most commercial speech would likely fail those immediacy and likelihood requirements.

by which government compels speech in innocuous ways<sup>228</sup> might persuade the Court to retain its more relaxed stance toward “health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products,”<sup>229</sup> despite that stance’s uneasy fit with the formalities of the content-neutrality rule.

### B. *New Beachheads?*

Regardless of its decisions on the commercial speech and compelled speech issues, the Court may strike out in search of new territory ripe for an invasion by the content-neutrality rule. After *Reed v. Town of Gilbert*, scholars, perhaps prompted by Justice Kagan’s dissent,<sup>230</sup> immediately noticed the inconsistency between *Reed*’s holding that facial content-discrimination triggers strict scrutiny and the Court’s secondary effects doctrine, which

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228. See, e.g., *NIFLA*, 138 S. Ct. at 2381 (Breyer, J., dissenting) (providing examples of such regulations).

229. *Id.* at 2376 (majority opinion). In recent years the D.C. Circuit has issued opinions expressing a variety of views about the applicability of *Zauderer*’s standard. In *National Association of Manufacturers v. SEC (National Association I)*, 748 F.3d 359 (D.C. Cir. 2014), *aff’d on reh’g*, 800 F.3d 518 (D.C. Cir. 2015), a panel of that court declined to apply *Zauderer*’s more deferential standard to an SEC rule requiring disclosure of manufacturers’ use of so-called conflict minerals, reasoning that *Zauderer* did not apply because the challenged rule did not aim at combatting consumer deception. See *id.* at 370–71. After that opinion, the full D.C. Circuit, sitting en banc, applied *Zauderer* to a disclosure requirement that was justified by interests other than combatting consumer deception. *Am. Meat Inst. v. Dep’t. of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *id.* at 22 (“The language with which *Zauderer* justified its approach . . . sweeps far more broadly than the interest in remedying deception. . . . All told, *Zauderer*’s characterization of the speaker’s interest in opposing forced disclosure of such information as ‘minimal’ seems inherently applicable beyond the problem of deception . . .”). After the en banc decision in *American Meat*, the panel in *National Association of Manufacturers* reaffirmed its prior decision (despite that earlier decision being explicitly overruled by the en banc court in *American Meat*, see *Am. Meat*, 760 F.3d at 22–23). *National Association of Manufacturers v. SEC (National Association II)*, 800 F.3d 518 (D. C. Cir. 2015). *National Association II* based its decision in part on the ground that the conflict minerals rule failed *Zauderer* review because the government failed to demonstrate how the rule furthered the government’s stated interest. See *id.* at 527 (“[W]hether [the statute on which the rule was based] will work is not proven to the degree required under the First Amendment to compel speech.”). It also suggested, more speculatively, that the required disclosure was not “purely factual and uncontroversial.” See *id.* (quoting *Am. Meat*, 760 F.3d at 27); *id.* at 528–30 (applying the purely factual and uncontroversial standard to the disclosure challenged in that case).

230. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring) (citing *City of Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986) (applying intermediate scrutiny to a law that was facially content-based)).

subjected laws regulating the location of sexual speech outlets to what the Court itself called the “intermediate scrutiny”<sup>231</sup> appropriate for content-neutral speech restrictions.<sup>232</sup> Of course, the foundational secondary effects case, *City of Renton v. Playtime Theatres*, was able to label such laws content-neutral only because it defined as content-neutral those laws that “are justified without reference to the content of the regulated speech.”<sup>233</sup> The tension between *Renton* and *Reed* is obvious. It is a fascinating question whether the Court that produced *Reed* will see that expanded definition of content discrimination to its logical endpoint if that endpoint is a strip club or adult theater.<sup>234</sup>

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231. See *Playtime Theatres*, 475 U.S. at 48 (setting forth more deferential standard for reviewing such types of regulation). Scholars have already begun to discuss the implications of *Reed* for secondary effects doctrine. See Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW. 569, 598 (2015) (“The secondary effects doctrine is at odds with both the *Reed* majority’s ‘on its face’ rule and the concerns about limiting disfavored messages underlying that rule. On that ground it seems a likely candidate to be revisited in the near future.”); Anthony Lauriello, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 COLUM. L. REV. 1105, 1140–41 (2016) (“[A]fter *Reed* it is still an open question if the secondary-effects doctrine remains relevant in determining content-based speech regulations.”).

232. Indeed, when the *Playtime Theatres* Court rejected the theater’s argument that the city’s ordinance was under-inclusive because “it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by” the regulated theaters, *Playtime Theatres*, 475 U.S. at 52, the Court cited a canonical equal protection rational basis case, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 498–99 (1955), for the proposition that the Court could not assume that the city would not amend its ordinance to reach “other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters.” *Playtime Theatres*, 475 U.S. at 52–53. The citation to *Lee Optical* suggests that secondary effects review, at least under the *Playtime Theatres* regime, involves scrutiny even more deferential than that suggested by the “intermediate scrutiny” label. To be sure, scholars have argued that at least one post-*Playtime Theaters* appellate case instituted a somewhat more stringent test for secondary effects regulation. See Daniel R. Aaronson, Gary S. Edinger, & James S. Benjamin, *The First Amendment in Chaos: How the Law of Secondary Effects is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741, 746–47 (2009). *But see id.* at 748–51 (explaining how that later test has sometimes been applied very deferentially by one federal circuit).

233. *Playtime Theatres*, 475 U.S. at 48 (emphasis omitted) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

234. To be sure, of the Justices that joined the Court’s most recent application of traditional secondary effects doctrine, only Justice Thomas remains on the Court. *Compare Reed*, 135 S. Ct. at 2223 (identifying the Justices joining the majority opinion) with *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 428 (2002) (identifying the Justices who joined the plurality opinion’s traditionally deferential application of secondary effects review). Justices Ginsburg and Breyer joined Justice Souter’s opinion which offered a less-deferential approach to secondary effects analysis that nevertheless reflected more deference to government regulation than would be expected under traditional free speech doctrine. See

That endpoint might also be a professional office.<sup>235</sup> In *NIFLA*, the Court expressed doubt about a broad “professional speech” exception to the content-neutrality rule.<sup>236</sup> To be sure, the Court acknowledged the line of cases resting on *Zauderer v. Office of Disciplinary Counsel*,<sup>237</sup> in which the Court used a relatively relaxed standard of scrutiny<sup>238</sup> to review compelled commercial disclosures of “purely factual and uncontroversial information about the terms under which [the speaker-offeror’s] services will be available.”<sup>239</sup> Nevertheless, the Court read the subject of *Zauderer*-governed speech restrictions narrowly. In *NIFLA*, the Court, speaking through Justice Thomas, distinguished *Zauderer* on the ground that the posting required by California’s licensed notice law addressed services the state itself offered, rather than services offered by the clinics that were the subject of the regulation. Or so the majority concluded, despite the fact that, as Justice Breyer noted in dissent, the compelled speech (about state-financed abortion services) was closely related to the non-abortion pregnancy services the speaker offered.<sup>240</sup> Justice Breyer also insisted that *Zauderer* should be read more broadly than the majority did, given that case’s focus on the

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*Alameda Books*, 535 U.S. at 453 (Souter, J., joined by Breyer & Ginsburg, JJ., dissenting). Thus, the way might be clear for the Court to import the content-neutrality rule into the secondary effects doctrine and thus essentially subsume that doctrine entirely within the standard approach. For a consideration of *Reed*’s impact on secondary effects regulation, see Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 SANTA CLARA L. REV. 385 (2017).

235. See Haupt, *supra* note 5, at 151 (describing “a new form of aggressive content neutrality . . . on the rise in First Amendment jurisprudence” and describing its application to regulations of the speech of professionals).

236. See *NIFLA*, 138 S. Ct. 2361, 2371–72 (2018).

237. *Zauderer v. Office of Disciplinary Counsel of Sup. Ct.*, 471 U.S. 626 (1985).

238. See *id.* at 651 (reviewing compelled disclosures of the type at issue in that case to ensure that they “are reasonably related to the State’s interest in preventing deception of consumers”).

239. *Id.*

240. See *NIFLA*, 138 S. Ct. at 2387 (Breyer, J., dissenting) (“[I]nformation about state resources for family planning, prenatal care, and abortion is related to the services that licensed clinics [which were the subjects of the speech compulsion] provide. . . . The required disclosure is related to the clinic’s services because it provides information about state resources for the very same services.” (emphasis in original)).

interests of listeners (the targets of professional speech)<sup>241</sup> — a focus that he argued justified that broader reading of *Zauderer*'s scope.<sup>242</sup>

Going beyond the Thomas-Breyer debate in *NIFLA* about the proper reading of *Zauderer*, the developments this Article has recounted raise questions about the future viability of *Zauderer*, even narrowly read. *Sorrell*'s and *NIFLA*'s incorporation of the content-neutrality rule into, respectively, commercial speech and compelled speech doctrine<sup>243</sup> render anomalous a rule, like *Zauderer*'s, that allows content-based commercial speech compulsions based on the factual and uncontroversial nature of the speech. Simply put, *Zauderer*'s distinction between compulsions of factual, uncontroversial speech and compulsions of ideological viewpoints<sup>244</sup> becomes more difficult to sustain in a regime governed by a strict content-neutrality rule, especially when that rule, in turn, defines content-neutrality as formalistically as *Reed* does.<sup>245</sup> Of course, *Zauderer*'s distinctions fit easily within a doctrinal structure that considers whether the speech compulsion forces the target to affirm a political or ideological position.<sup>246</sup> But it is precisely this regime that is threatened by both the horizontal expansion of the content-neutrality rule into new domains and the deepening of that rule via *Reed*'s more stringent definition of content-neutrality.

If the Court does take the steps contemplated above, and expands the (newly-stringent) content-neutrality rule into these additional domains,<sup>247</sup> then it will have accomplished a revolution

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241. See *id.* (“In *Zauderer*, the Court emphasized the reason that the First Amendment protects commercial speech at all: ‘the value to consumers of the information such speech provides.’” (quoting *Zauderer*, 471 U.S. at 651)).

242. See *id.* (“[T]his [listener-focused] rationale is not in any way tied to advertisements about a professional’s own services.”).

243. See *supra* Parts III and IV (discussing these points, respectively, in the contexts of *Sorrell* and *NIFLA*).

244. On the importance of viewpoint, rather than content discrimination, as the most important consideration in determining the constitutionality of speech compulsions, see *NIFLA*, 138 S. Ct. at 2388–89 (Breyer, J., dissenting), in which Justice Breyer suggested that the clinics in *NIFLA* would have had a stronger compelled speech claim if they had developed a viewpoint discrimination argument in the lower court.

245. See *supra* Part II (discussing this point in the context of *Reed*).

246. See cases cited *supra* note 104 (focusing on whether the challenged law forced the speaker to utter ideas about politics or ideology).

247. Other domains also exist as possible targets for this expansion. The two trademark registration cases the Court has recently decided on First Amendment grounds — *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) and *Matal v. Tam*, 137 S. Ct. 1744 (2017) — relied on the

in First Amendment law.<sup>248</sup> It will have succeeded in applying standard First Amendment doctrine to types of speech that for decades have been exempted from that doctrine's default rules.<sup>249</sup> Any suggestion that such a development indicates a healthy doctrinal standardization or harmonization should not mislead: on the contrary, it would be unfortunate. Those exemptions from standard First Amendment doctrine exist for a reason. The First Amendment protects commercial speech for reasons that really do differ from the reasons it protects other types of speech.<sup>250</sup> If the Court does not believe this, then it will have to adjust its doctrine allowing the government to ban commercial speech advocating illegal transactions, in order to account for the latitude such advocacy enjoys in non-commercial contexts. For their part, compelled speech regulations really are ubiquitous: strict application of a facially defined content-neutrality requirement would indeed call into question a variety of innocuous speech

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viewpoint discrimination inherent in the trademark registration prohibitions the Court struck down. But other trademark registration restrictions, such as the prohibition on registering "the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof," 15 U.S.C. § 1052(b) (2018), are best understood as content, but not viewpoint, based. Whether such restrictions therefore comport with the First Amendment, or whether by contrast they are invalid based on the content-neutrality rule, is a question the Court has so far left undecided.

248. See, e.g., Lakier, *supra* note 5, at 235 ("Reed . . . represents an important change in First Amendment doctrine, and one that will in all likelihood have a significant impact in many areas of law.").

249. See *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997) (upholding a compelled speech subsidy and distinguishing unconstitutional speech subsidies in part based on the ideological nature of the speech they compelled); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995) (describing review under *Central Hudson* as "intermediate scrutiny"); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 573 (1980) (Blackmun, J., dissenting) (same); *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down a speech compulsion, largely based on the constitutional objection to government compulsion of ideological speech); *Young v. Am. Mini Theatres*, 427 U.S. 50 (1976) (plurality opinion) (applying a proto-secondary effects doctrine to sexual speech a decade before a majority in *Playtime Theatres* solidified that approach).

250. See, e.g., *Zauderer v. Office of Disciplinary Counsel of Sup. Ct.*, 471 U.S. 626, 651 (1985) ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . ."). For scholarly explanations of why commercial speech is a distinct category of speech, see for example, Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 N.W. U. L. REV. 372 (1979); Post, *supra* note 217. This is not to underplay the difficulties of identifying "commercial speech" as a species of speech different from more generally protected speech. See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 638–48 (1990) (explaining the definitional difficulty).

compulsions. Other current exceptions from the content-neutrality rule, such as *Zauderer*, reflect similarly important social interests.

These realities would force a Court promoting the expansion of the content-neutrality rule to choose among several unpalatable alternatives. It could water down the resulting strict scrutiny, thus creating confusion among litigants and lower courts and rendering that tool less useful as inherently strong medicine.<sup>251</sup> Alternatively, it could bite the bullet and strike down such reasonable or innocuous laws, thus trivializing First Amendment protections and endangering common-sense regulations that pose no threat to foundational First Amendment values.<sup>252</sup> Finally, it could create *ad hoc* exceptions to the rule it had just crafted, with all the mischief such *ad hoc*ery creates.<sup>253</sup>

If the Court acts on these expansionist possibilities, then the content-neutrality rule's conquest will be complete.<sup>254</sup> In that case we will be left with a free speech doctrine bereft of context-sensitivity, one that lumbers through the pages of case reporters with scarcely a nod at nuance<sup>255</sup>—a doctrine that, to quote

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251. Cf. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring) (“Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.”).

252. See *supra* note 160.

253. Indeed, Justice Breyer accused the *NIFLA* majority's carve out for “health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products,” *NIFLA*, 138 S. Ct. 2361, 2376 (2018), as just such an *ad hoc* exception creating this sort of mischief. See *id.* at 2381 (Breyer, J., dissenting) (“The majority . . . adds a general disclaimer. It says that it does not ‘question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.’ *Ante*, at 2376. But this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification. The majority, for example, does not explain why the Act here, which is justified in part by health and safety considerations, does not fall within its ‘health’ category. *Ante*, at 2375. Nor does the majority opinion offer any reasoned basis that might help apply its disclaimer for distinguishing lawful from unlawful disclosures. In the absence of a reasoned explanation of the disclaimer’s meaning and rationale, the disclaimer is unlikely to withdraw the invitation to litigation that the majority’s general broad ‘content-based’ test issues. That test invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle.”).

254. Recall that the content-neutrality rule applies even to government regulation of unprotected speech. See *supra* note 28.

255. See, e.g., Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 181–82 (2015) (“First Amendment doctrine is plural. There is no single structure of First Amendment doctrine. . . . Different kinds of speech embody different

one description of the “pod people” from *Invasion of the Body Snatchers*, is “devoid of all human emotion.”<sup>256</sup> As a doctrinal structure overseeing governmental power over that most human of activities—speech—that would be a truly ironic and unfortunate result.<sup>257</sup>

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constitutional values, and each kind of speech should receive constitutional protections appropriate to the value it embodies. . . . [S]ubject[ing] all speech to a single set of rules can lead only to doctrinal chaos.”).

256. *Invasion of the Body Snatchers*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Invasion\\_of\\_the\\_Body\\_Snatchers](https://en.wikipedia.org/wiki/Invasion_of_the_Body_Snatchers) (last visited Oct. 19, 2019).

257. Cf. Note, *supra* note 182, at 1999 (“In [*Reed*], the Court elevated its concern for rule-bound doctrine over sensitivity to facts on the ground and the purposes underlying enhanced First Amendment protection.”).

