University of Florida Levin College of Law

UF Law Scholarship Repository

UF Law Faculty Publications

Faculty Scholarship

2021

Scrutiny-Determination Avoidance in First Amendment Cases: Laudable Minimalism or Condemnable Evasion?

Clay Calvert
University of Florida Levin College of Law, profclaycalvert@gmail.com

Follow this and additional works at: https://scholarship.law.ufl.edu/facultypub

Part of the Constitutional Law Commons, First Amendment Commons, and the Jurisprudence Commons

Recommended Citation
Clay Calvert, *Scrutiny-Determination Avoidance in First Amendment Cases: Laudable Minimalism or Condemnable Evasion?*, 22 Nev. L.J. 1 (2021)

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

SCRUTINY-DETERMINATION AVOIDANCE IN FIRST AMENDMENT CASES: LAUDABLE MINIMALISM OR CONDEMNABLE EVASION?

Clay Calvert*

This Article examines the United States Supreme Court's practice in First Amendment cases of not resolving the precise level of scrutiny that applies to measure a statute's validity. Rather than opting for one of two tiers of scrutiny—one more rigorous than the other—the Court sometimes dodges the issue. It does this by concluding that a statute would not pass muster under the more lenient standard, thereby rendering it unnecessary to decide which test was, in fact, more appropriate. The Court thus adopts an "assuming-without-deciding" logic in such cases, simply supposing the lesser standard applies without definitively holding as much. In turn, when lower courts confront uncertainty regarding the correct level of scrutiny, they too sometimes avoid picking one standard of review by embracing this "it wouldn't make any difference anyway" brand of reasoning. This Article addresses why the Supreme Court engages in this practice. Additionally, it considers how this variety of procedural minimalism, which it dubs scrutiny-determination avoidance, affects doctrinal development of the pivotal division between content-based and content-neutral laws. First Amendment scrutiny selection hinges largely on that distinction. Furthermore, this Article analyzes what the implementation of this minimalistic tack may indicate about the practical differences between the strict and intermediate scrutiny standards in their real-world application.

TABLE OF CONTENTS

INTRODUCTION 2
I. DODGING SCRUTINY DETERMINATIONS: THE NATION'S HIGH COURT PAVES THE PATH 7
A. Scrutiny-Determination Avoidance as an Exercise in Judicial Minimalism and a Mechanism to Unite the Justices Around a Single Opinion 8

* Professor of Law, Brechner Eminent Scholar in Mass Communication, and Director of the Marion B. Brechner First Amendment Project at the University of Florida in Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. The author thanks students Amber Edney, Julia Gibson, and Natanel Wainer of the University of Florida for their assistance with this Article.

B. *Scrutiny-Determination Avoidance in the Name of Judicial Economy* ... 10
C. *Scrutiny-Determination Avoidance to Evade the Application of Strict Scrutiny in All Future Cases Regulating a Specific Variety or Medium of Expression* ... 12
D. *Scrutiny-Determination Avoidance to Evade Definitive Conclusions in Cases Featuring Politically and Socially Polarizing Issues, and Scrutiny-Determination Avoidance in the Interest of Stare Decisis* ... 17
E. *Scrutiny-Determination Avoidance in Emerging Doctrinal Areas of First Amendment Law* ... 26
II. SCRUTINY-DETERMINATION AVOIDANCE IN THE FEDERAL APPELLATE COURTS IN 2020: EXPOSING PROBLEMS WITH SELECTING A STANDARD OF REVIEW ... 33
A. *Billups v. City of Charleston* ... 33
B. *Harbourside Place, LLC v. Town of Jupiter* ... 37
C. *McCraw v. City of Oklahoma City* ... 42
CONCLUSION ... 45

INTRODUCTION

In June 2020, the United States Court of Appeals for the Fourth Circuit in *Billups v. City of Charleston* considered a First Amendment free-speech challenge to an ordinance that required individuals seeking to lead paid tours of Charleston, South Carolina, to first obtain a license by passing a written examination regarding the metropolis and its history.[1] The Fourth Circuit initially concluded that the ordinance burdened not simply conduct, but speech safeguarded by that constitutional provision.[2] It succinctly reasoned that "the business of leading tours depends on the expression of ideas."[3]

---

[1] Billups v. City of Charleston, 961 F.3d 673, 676–78 (4th Cir. 2020). The First Amendment to the US Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety-six years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties applicable for governing the actions of state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

[2] *Billups,* 961 F.3d at 683 ("The Ordinance undoubtedly burdens protected speech, as it prohibits unlicensed tour guides from leading paid tours—in other words, speaking to visitors—on certain public sidewalks and streets."). Charleston unsuccessfully argued that the regulation did not raise any First Amendment concerns because it targeted only the economic con-

The Fourth Circuit then turned to another issue—namely, identifying the level of scrutiny the law needed to clear to be constitutional.[4] This step is routine, as selecting scrutiny standards is a well-established facet of First Amendment analysis.[5] It usually involves determining if a law is content-based or content-neutral.[6] This is part of the U.S. Supreme Court's content-neutrality doctrine,[7] under which content-based discrimination is considered especially abhorrent.[8] Content-based statutes either single out particular topics, ideas, or subjects for regulation—while leaving others unfettered—or are enacted because of governmental disagreement with a particular message.[9] In contrast, content-neutral measures regulate "speech unrelated to its content"[10] and "without regard to what is said."[11] Content-neutral laws thus typically govern only the time, place, or manner of speech, not its substance.[12]

---

duct of leading paid tours and affected speech merely incidentally to that conduct. *Id.* at 682–83.

[3] *Id.* at 684.

[4] *Id.*

[5] *See* R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 355 (2019) ("The preliminary decision that must be made in First Amendment free speech cases is what level of review to apply.").

[6] *See* Susan L. Trevarthen & Adam M. Hapner, *The True Impact of* Reed v. Town of Gilbert *on Sign Regulation*, 49 STETSON L. REV. 509, 511 (2020) ("[T]o assess whether a regulation of speech violates the First Amendment, the analysis should always begin by determining whether the regulation is 'content-based' or 'content-neutral.' ").

[7] *See* Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content-Neutrality*, 16 U. PA. J. CONST. L. 1261, 1265–66 (2014) (observing that "[t]he Roberts Court has adverted to content neutrality as a defining element of First Amendment doctrine" in numerous cases).

[8] *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("But, 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.").

[9] *See* Reed v. Town of Gilbert, 576 U.S. 155, 155–56, 163–64 (2015) (noting that content-based regulations "target speech based on its communicative content," including "draw[ing] distinctions based on the message a speaker conveys" and applying "to particular speech because of the topic discussed or the idea or message expressed," and adding that laws can be content-based even when they are facially neutral if they were adopted due to disagreement with the message being conveyed); *see also* Kent Greenfield, *Trademarks, Hate Speech, and Solving a Puzzle of Viewpoint Bias*, 2019 SUP. CT. REV. 183, 184 ("[C]ontent-based laws make regulatory choices on the basis of the topic or subject matter of the speech in question[.]").

[10] McCullen v. Coakley, 573 U.S. 464, 477 (2014).

[11] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996); *see* Howard M. Wasserman, Bartnicki *as* Lochner*: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 434 (2006) ("Content-neutral laws apply to all speech, regardless of subject matter, speaker, or point of view, and are justified or explained without regard to the substance of the speech regulated.").

[12] *See* Clay Calvert & Minch Minchin, *Can the Undue-Burden Standard Add Clarity and Rigor to Intermediate Scrutiny in First Amendment Jurisprudence? A Proposal Cutting Across Constitutional Domains for Time, Place & Manner Regulations*, 69 OKLA. L. REV.

Drawing this distinction between content-based and content-neutral laws is pivotal. That is because content-based laws generally are subject to the rigorous strict scrutiny standard of review, while content-neutral measures face the more lenient and deferential intermediate scrutiny test.[13] To pass strict scrutiny, the government must prove two things—that it possesses a compelling interest in regulating speech and that the law at issue is narrowly tailored such that it restricts no more speech than is necessary to serve that compelling interest.[14] In contrast, intermediate scrutiny usually requires the government to demonstrate that a content-neutral law serves a significant interest and is narrowly tailored, although the law need not use the least restrictive means of aiding that interest.[15] Scrutiny selection thus is crucial: while statutes rarely surmount strict scrutiny, they are much more likely to survive intermediate review.[16] Put differently, strict scrutiny normally sounds the death knell for legislative handi-

---

623, 626 (2017) (noting that the intermediate scrutiny test is "generally applicable to content-neutral regulations affecting the time, place, and manner . . . of speech").

[13] Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346 (2020). As Professor Genevieve Lakier encapsulates it:

> The distinction between content-based and content-neutral regulations of speech is one of the most important in First Amendment law. For decades now, the Supreme Court has insisted that content-based laws—laws that restrict speech because of its ideas or messages or subject matter—are presumptively unconstitutional, and will be sustained only if they can satisfy strict scrutiny. In contrast, content-neutral laws—laws that regulate speech for some reason other than its content—are reviewed under a lesser, and often quite deferential, standard.

Genevieve Lakier, Reed v. Town of Gilbert*, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 233 (2017); *see also* Judith Welch Wegner & Matthew Norchi, *Regulating Panhandling:* Reed *and Beyond*, 63 S.D. L. REV. 579, 593 (2019) (describing strict scrutiny as "the most stringent constitutional test" and intermediate scrutiny as "a less exacting test").

[14] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011); United States v. Playboy Ent. Grp., 529 U.S. 803, 813 (2000).

[15] *McCullen*, 573 U.S. at 486. The word "usually" is important in this sentence in articulating the intermediate scrutiny test because "the precise formulation of the standard has varied based on the context." David S. Han, *Middle-Value Speech*, 91 S. CALIF. L. REV. 65, 114 (2017). For example, sometimes other terms are used in place of "significant" when describing the requisite level of governmental interest. *See* Wynter K. Miller & Benjamin E. Berkman, *The Future of Physicians' First Amendment Freedom: Professional Speech in an Era of Radically Expanded Prenatal Genetic Testing*, 76 WASH. & LEE L. REV. 577, 611 (2019) (noting that under intermediate scrutiny, the question is whether a regulation serves "a 'significant/substantial/important' government interest" (quoting Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 801 (2007))).

[16] *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) ("This is . . . one of the rare cases in which a speech restriction withstands strict scrutiny."); *see also* Bhagwat, *supra* note 15, at 809 (concluding, based on an examination of cases that applied the intermediate scrutiny test in First Amendment disputes, that the government won 73 percent of the time).

work,[17] while the Supreme Court's implementation of intermediate scrutiny typically is "extremely light and deferential."[18]

The Fourth Circuit in *Billups*, however, declined to resolve whether Charleston's ordinance requiring individuals to pass a written examination to obtain a license before leading paid tours of the city was content-based or content-neutral.[19] Rather than grappling with the content-neutrality question, the appellate court skipped it. It simply found that the law could not survive the less-stringent intermediate scrutiny test, thus rendering it unnecessary to discern if the law actually was content-based and thus should have been required to pass the higher strict scrutiny standard.[20] In brief, the Fourth Circuit (1) merely assumed the ordinance was content-neutral,[21] (2) applied intermediate scrutiny, and (3) concluded that it failed that test because it was not narrowly tailored to serve Charleston's significant interest in preventing tours led by unknowledgeable and fraudulent guides.[22]

The Fourth Circuit was not the sole federal appellate court in 2020 to dodge the issue of whether a law was content-based or content-neutral and, in so doing, to pass on identifying the more appropriate—strict or intermediate—scrutiny standard. To wit, the Eleventh Circuit in *Harbourside Place, LLC v. Town of Jupiter* addressed the constitutionality of a local noise ordinance that required businesses hosting live, outside musical performances either to comply with restrictions on sound amplification during particular hours of the day or to obtain a special permit from the municipality.[23] The Eleventh Circuit rather ruefully observed that characterizing this measure as either content-based or content-neutral was "a very tricky matter."[24] For example, the court noted that the sound ordinance applied only to one medium of expression—live musical performances—and did not affect other types of live expression, such as political speeches and poetry readings.[25] This seemingly suggested the ordinance was content-based because one variety of content—music—was regulated

---

[17] Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1351 (2006).

[18] Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in* McCullen v. Coakley, 2014 SUP. CT. REV. 215, 223.

[19] Billups v. City of Charleston, 961 F.3d 673, 684–85 (4th Cir. 2020).

[20] *See id.* at 685 ("Here . . . the Ordinance cannot survive even intermediate scrutiny. Because we therefore can resolve this appeal without deciding the content-neutrality question, we decline to rule thereon.").

[21] *See id.* ("Because we assume that the Ordinance is content-neutral, we proceed to consider the remaining requirements. The City bears the burden of proving that the Ordinance survives intermediate scrutiny.").

[22] *Id.* at 686, 690.

[23] Harbourside Place, LLC. v. Town of Jupiter, 958 F.3d 1308, 1317 (11th Cir. 2020) ("That leaves § 13-107(a)(3), which provides (emphasis ours) that '[o]utside live musical performances associated with a non-residential establishment shall meet the outdoor venue regulations . . . *or* obtain special permits[.]' ").

[24] *Id.* at 1318.

[25] *Id.*

while other types were not.[26] Yet the measure applied evenhandedly to all genres of music, be it rap, classical, country, or something else,[27] thereby indicating it was content-neutral. Also militating on the side of being content-neutral, according to the Eleventh Circuit, was the fact that the ordinance only regulated live music, not recorded music, thus suggesting it only affected the manner in which music was transmitted.[28]

Given this complexity and what it called "the lack of a fully developed record," the Eleventh Circuit deemed it "a good opportunity . . . to practice judicial minimalism" and to conclude only that the trial court had not abused its discretion when it denied a preliminary injunction that would have stopped the ordinance's enforcement.[29] In embracing this tack, the appellate court failed to answer the query of whether the ordinance was content-based or content-neutral.[30]

Scrutiny-determination avoidance also transpired in August 2020. That is when the U.S. Court of Appeals for the Tenth Circuit considered a First Amendment challenge to a local ordinance banning standing, sitting, or remaining for most purposes on the medians in public roadways.[31] The appellate court in *McCraw v. City of Oklahoma City* found it unnecessary to resolve whether the statute was a content-based law requiring strict scrutiny analysis because the court assumed it was content-neutral and then concluded it could not pass the more relaxed intermediate scrutiny test—a conclusion the U.S. Supreme Court in 2021 declined to review.[32]

Should the Fourth, Tenth, and Eleventh Circuits be chided or otherwise rebuked for engaging in scrutiny-determination avoidance? Most likely not. That is because, as this Article will explain, they were merely following the U.S.

---

[26] *See supra* note 9 and accompanying text (providing a general description of content-based laws).

[27] *Harbourside Place*, 958 F.3d at 1318.

[28] *Id.* at 1319–20 ("A non-residential establishment in Jupiter can play recorded music of any kind (assuming compliance with other provisions of the Code, such as those dealing with outdoor sound amplification), so music is not targeted generally or specifically. Viewed this way, [the statute] looks more like a content-neutral time, place, and manner regulation.").

[29] *Id.* at 1322.

[30] *See id.* ("We therefore do not definitively decide whether § 13-107(a)(3) is on its face a content-based or content-neutral regulation of speech.").

[31] McCraw v. City of Oklahoma City, 973 F.3d 1057, 1061 (10th Cir. 2020).

[32] *Id.* at 1070. As the Tenth Circuit explained:

> Plaintiffs argue that we should apply strict scrutiny because the Revised Ordinance discriminates based on content. We need not reach this argument. As discussed below, we ultimately conclude the Revised Ordinance fails even intermediate scrutiny. Because it would necessarily also fail strict scrutiny, we assume for the purposes of our analysis that the Revised Ordinance is content-neutral.

Id. The U.S. Supreme Court denied a petition for writ of certiorari in March 2021. City of Oklahoma City v. McCraw, 141 S. Ct. 1738 (2021).

Supreme Court's lead in several First Amendment cases embracing this minimalistic methodology.

More specifically, this Article will examine the practice of scrutiny-determination avoidance, why it is used, and what it may indicate not only about the sometimes-hazy distinction between content-based and content-neutral laws, but also about the meaningful differences—if any—between the strict and intermediate scrutiny tests in their real-world application, particularly when it comes to their narrow-tailoring prongs. Part I will explore the Supreme Court's practice of scrutiny-determination avoidance.[33] In particular, it will (1) address the concept of judicial minimalism; (2) discuss reasons why it may or may not be advantageous to embrace scrutiny-determination avoidance; and (3) analyze, in the process, several recent cases in which the Court either has adopted scrutiny-determination avoidance or has been rebuked by one of its members for failing to do so. Part II will then return to the trio of 2020 federal appellate court rulings described above to explore the troubles they likely reveal with the content-neutrality doctrine and how those problems, in turn, plague scrutiny selection.[34] Finally, this Article will conclude by contending that scrutiny-determination avoidance is just as much a sign of doctrinal disorder in First Amendment jurisprudence as it is an effective tool of judicial minimalism.[35]

I. DODGING SCRUTINY DETERMINATIONS: THE NATION'S HIGH COURT PAVES THE PATH

This Part explores multiple reasons why the Supreme Court might engage in scrutiny-determination avoidance in First Amendment free speech cases, as well as controversies that arose when the Court has and has not done so. Section A examines the choice to dodge scrutiny selection as a facet of judicial minimalism, with its use possibly uniting more Justices around a single opinion than without it. Next, Section B addresses scrutiny-determination avoidance in terms of promoting the interests of judicial economy and efficiency. Section C then analyzes scrutiny-determination avoidance as a means of creating precedent that strict scrutiny does not necessarily apply in all future cases involving the same form or medium of expression, especially when the application of strict scrutiny might jeopardize the constitutionality of seemingly innocuous and benign legislation. Section D turns to the use of scrutiny-determination avoidance in First Amendment cases where the underlying issue is both politically and socially divisive, such as abortion, as well as its deployment as a mechanism to avoid overruling precedent and violating the principle of stare decisis. Finally, Section E considers the use of scrutiny-determination avoid-

---

[33] *Infra* Part I.
[34] *Infra* Part II.
[35] *Infra* Conclusion.

ance when the Court is faced with adopting a standard of review in an emerging, inchoate doctrinal area.

A. Scrutiny-Determination Avoidance as an Exercise in Judicial Minimalism and a Mechanism to Unite the Justices Around a Single Opinion

Chief Justice John Roberts avers that "[i]f it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."[36] Indeed, as Professor Jonathan Adler recently wrote, Chief Justice Roberts "prefers narrow rulings over sweeping judgments."[37] He has done this in multiple cases over the years, affecting the development of various First Amendment doctrines.[38]

Chief Justice Roberts thus might be considered a minimalist, at least when it comes to implementing mechanisms that allow a case to be resolved without reaching larger issues. As Cass Sunstein crisply encapsulates it, "A minimalist court settles the case before it, but it leaves many things undecided."[39] He adds that, procedurally speaking, "minimalism is designed to leave things open, to decide cases as narrowly as possible."[40]

Under this minimalistic philosophy, it is completely sensible not to resolve the sometimes-thorny question—one over which the Justices may disagree—regarding the level of First Amendment scrutiny that should apply to measure a statute's validity if, in fact, the statute would fail to survive whatever standard was deployed. Minimalism, as Professor Robert Anderson IV writes, thus "allows Justices to reach some common ground even when they disagree about a great deal."[41] In other words, the Justices might all agree that a statute violates the First Amendment—the common ground—but differ regarding which standard of scrutiny is more appropriate to evaluate it.

---

[36] *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362 (2006) (quoting Chief Justice Roberts's remarks during a 2006 commencement address at the Georgetown University Law Center). Another source quotes Justice Roberts slightly differently for this proposition during the same address. *See* Associated Press, *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES (May 22, 2006), https://www.nytimes.com/2006/05/22/washington/22justice.html [perma.cc/23DJ-49G4] ("If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case.").

[37] Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau*, 2020 U. CHI. L. REV. ONLINE 28, 28 (2020).

[38] *See* Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943, 944–47 (2016) (reviewing multiple First Amendment cases in which the Roberts Court has practiced some combination of minimalism and avoidance).

[39] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix (2001).

[40] *Id.* at 61.

[41] Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1076 (2009).

A hypothetical illustrates how such a situation might arise. Specifically, Justice Stephen Breyer repeatedly expresses the view that strict scrutiny should not apply simply because a law is content-based.[42] As Justice Breyer explained in 2015, "the category 'content discrimination' is better considered in many contexts . . . as a rule of thumb, rather than as an automatic 'strict scrutiny' trigger, leading to almost certain legal condemnation."[43] Justice Breyer advocates for a more flexible proportionality approach to scrutiny that "appeal[s] more often and more directly to the values the First Amendment seeks to protect"[44] and examines whether a "statute works speech-related harm that is out of proportion to its justifications."[45] In brief, Justice Breyer calls "for an alternative to strict scrutiny triggered by facially content-based regulations."[46]

Now envision a scenario involving a seemingly content-based law that, under the Court's traditional approach described above, would face strict scrutiny and be declared unconstitutional.[47] If the law would also fail intermediate scrutiny, however, then the Court might simply assume, for the sake of argument, that it was content-neutral and apply intermediate scrutiny in order to bring Justice Breyer on board for a more unified opinion. Justice Breyer, on at least two occasions, has equated intermediate scrutiny with his proportionality methodology, thus suggesting such an "assuming arguendo" approach to scrutiny might succeed in some instances with him.[48] Not only would using strict scrutiny be unnecessary in these situations, but not applying it also might ward off Justice Breyer penning, as he is prone to do, a separate opinion that both attacks the application of strict scrutiny simply because a law is content-based and extolls the virtues of his preferred proportionality tack.[49]

---

[42] *See* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2360 (2020) (Breyer, J., concurring in judgment, dissenting in part) ("[T]he First Amendment does not support the mechanical conclusion that content discrimination automatically triggers strict scrutiny . . . .").

[43] Reed v. Town of Gilbert, 576 U.S. 155, 176 (2015) (Breyer, J., concurring).

[44] Iancu v. Brunetti, 139 S. Ct. 2294, 2305 (2019) (Breyer, J., concurring in part, dissenting in part).

[45] United States v. Alvarez, 567 U.S. 709, 730 (2012) (Breyer, J., concurring).

[46] Carmen Maye, *Public-College Student-Athletes and Game-Time Anthem Protests: Is There a Need for a Constitutional-Analytical Audible?*, 24 COMMC'N L. & POL'Y 55, 89–90 (2019).

[47] *Barr*, 140 S. Ct. at 2346 (noting that content-based laws generally must face strict scrutiny).

[48] *See id.* at 2362 (Breyer, J., concurring in judgment, dissenting in part) ("That inquiry ultimately evaluates a restriction's speech-related harms in light of its justifications. We have typically called this approach 'intermediate scrutiny,' though we have sometimes referred to it as an assessment of 'fit,' sometimes called it 'proportionality,' and sometimes just applied it without using a label."); *Alvarez*, 567 U.S. at 730 (Breyer, J., concurring) ("Sometimes the Court has referred to this approach as 'intermediate scrutiny,' sometimes as 'proportionality' review, sometimes as an examination of 'fit,' and sometimes it has avoided the application of any label at all.").

[49] *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 175–76 (2015) (Breyer, J., concurring) ("The First Amendment requires greater judicial sensitivity both to the Amendment's ex-

B. *Scrutiny-Determination Avoidance in the Name of Judicial Economy*

Beyond exercising minimalism—either in the name of exercising a distinct judicial philosophy or as a vehicle for bringing more Justices together in a single, unified opinion—why else might the Court choose not to pinpoint the most relevant scrutiny standard? Another possibility is that distinguishing content-based laws from content-neutral measures may not be an easy chore in any given case—the Justices might be fractured over that issue.[50] As Justice Anthony Kennedy once observed, "Deciding whether a particular regulation is content based or content neutral is not always a simple task."[51] For example, courts today are divided over whether laws regulating nonconsensual pornography—sometimes known as revenge porn—are content-based or content-neutral.[52] In brief, as Professor Joseph Blocher recently wrote, "[W]hat constitutes content discrimination is hardly straightforward."[53]

Thus, it frankly may be more expedient in situations where the Justices may split over whether a statute is content-neutral for them just to assume that the less rigorous intermediate scrutiny standard applies rather than to wrestle with the content-neutrality question, especially if all of the Justices already know they want to declare the law in question unconstitutional.[54] In other

---

pressive 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 *Alvarez*, a four-Justice plurality declared that the Stolen Valor Act was content-based and thus faced what Justice Anthony Kennedy called "exacting scrutiny," which seemingly meant strict scrutiny. *Alvarez*, 567 U.S. at 724. In applying that test, the plurality declared the law unconstitutional. *Id.* at 730. Justice Breyer, joined by Justice Elena Kagan, wrote a concurring opinion in which he agreed the law was unconstitutional, but he applied the less stringent intermediate scrutiny test in doing so. *Id.* at 730–31 (Breyer, J., concurring). If the plurality also would have struck down the law under intermediate scrutiny, then this would have provided an instance where the plurality might have simply assumed, for the sake of argument, that the law was content-neutral and also reached the same result.

[50] Recall here, for example, the U.S. Court of Appeals for the Eleventh Circuit's observation in *Harbourside Place, LLC v. Town of Jupiter* that characterizing the sound ordinance at issue there as either content-based or content-neutral was "a very tricky matter." Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1318 (11th Cir. 2020).

[51] Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

[52] *Compare* People v. Austin, 155 N.E.3d 439, 456 (Ill. 2019) (holding that an Illinois statute criminalizing nonconsensual pornography was subject to intermediate scrutiny as "a content-neutral time, place, and manner restriction"), *with* Vermont v. VanBuren, 214 A.3d 791, 807–08 (Vt. 2019) (concluding that a Vermont statute regulating nonconsensual pornography as a category of speech that was presumptively protected by the First Amendment was subject to strict scrutiny).

[53] Joseph Blocher, *Bans*, 129 YALE L.J. 308, 321–22 (2019).

[54] For instance, Justice Antonin Scalia in *McCullen v. Coakley* contended that it was unnecessary and wrong for the majority to decide that the statute at issue was content-neutral and thus did not need to surmount strict scrutiny. McCullen v. Coakley, 573 U.S. 464, 497–98 (2014) (Scalia, J., concurring). In embracing a scrutiny-determination avoidance stance in *McCullen*, Scalia pointed to the fact that "content neutrality is far from clear (the Court is divided 5-to-4), and the parties vigorously dispute the point." *Id.* at 499. Indeed, "*McCullen v. Coakley* demonstrates that the [J]ustices today cannot even agree when a regulation is con-

words, it might be more efficient, at least in terms of both time and effort, to adopt an "assuming arguendo" tactic on scrutiny if an unconstitutional end is a foregone conclusion under the lesser standard of review.[55]

Even if there were no difficulty or apparent friction among the Justices regarding whether a law was content-based or content-neutral, the interest of judicial economy still might lead the Court to apply the lesser standard if a statute were so poorly drafted that it would easily fail the narrow-tailoring prong of intermediate scrutiny. For example, the Court in 2017 in *Packingham v. North Carolina* never wrestled with whether a state statute banning access by registered sex offenders to commercial social networking websites, such as Facebook and Twitter, was content-based or content-neutral.[56] Instead, the Court cursorily assumed it was content-neutral and then applied intermediate scrutiny[57] to strike it down because it was "unprecedented in the scope of First Amendment speech it burden[ed]."[58] In delivering the Court's opinion, Justice Anthony Kennedy stressed that the law imposed a "complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture."[59]

Justice Samuel Alito, penning a concurrence in judgment joined by Chief Justice Roberts and Justice Clarence Thomas, concurred with Justice Kennedy's sentiment about the law not being sufficiently tailored.[60] As Alito put it, the statute "swe[pt] far too broadly to satisfy the demands of the Free Speech Clause."[61] Furthermore, Justice Alito joined with the Kennedy majority in con-

---

tent based or content neutral." Clay Calvert, *Content-Based Confusion and Panhandling: Muddling Weathered First Amendment Doctrine Takes Its Toll on Society's Less Fortunate*, 18 RICH. J.L. & PUB. INT. 249, 252 (2015).

Given this lack of clarity on the content-neutrality question, Justice Scalia wrote that "[o]ne would have thought that the Court would avoid the issue by simply assuming without deciding" that the law was content-neutral. *McCullen*, 573 U.S. at 499 (Scalia, J., concurring). Because the majority ultimately concluded that the law was not narrowly tailored enough to survive intermediate scrutiny, it necessarily was also not sufficiently tailored to pass the more rigorous tailoring requirement of strict scrutiny and thus would have been unconstitutional under either standard. *See id.* at 490 (concluding, under intermediate scrutiny, that the law at issue "burden[ed] substantially more speech than necessary" to serve the government's interests); *see also infra* Section I.D (addressing *McCullen* in greater detail).

[55] *McCullen v. Coakley*, which is addressed in the footnote immediately above, provides an example of such a case where all of the Justices agreed on the outcome but fractured badly over the level of scrutiny to apply. *See supra* note 54; *see also* Trevor Burrus, *Injordinances: Labor Protests, Abortion-Clinic Picketing, and* McCullen v. Coakley, 2013–2014 CATO SUP. CT. REV. 167, 167–68 (noting that in *McCullen*, the Court "unanimously struck down the law as an unconstitutional violation of the First Amendment" despite the Justices disagreeing about the standard of scrutiny to apply).

[56] Packingham v. North Carolina, 137 S. Ct. 1730, 1733–34 (2017) (describing the statute).

[57] *Id.* at 1736 ("Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand.").

[58] *Id.* at 1737.

[59] *Id.* at 1738.

[60] *See id.* (Alito, J., concurring) (referring to the law's "extraordinary breadth").

[61] *Id.* at 1743.

cluding it was unnecessary to resolve whether intermediate scrutiny or a higher standard should apply "because the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur."[62] In brief, the Justices in *Packingham* were united in their conclusion that the North Carolina statute was far too broad, thus dispensing with any need to debate whether it was content-based or content-neutral.[63] *Packingham* thus illustrates an instance of scrutiny-determination avoidance facilitating judicial economy where there was no apparent battle among the Justices over whether a law was content-based or content-neutral.

Furthermore, and returning to part of the discussion in Section A, defaulting to intermediate scrutiny in *Packingham* also might have stopped Justice Breyer from writing a separate opinion either complaining that strict scrutiny was inappropriate or lauding the merits of proportionality.[64] In *Packingham*, Justice Breyer simply joined Justice Kennedy's opinion for the Court; he did not write separately.[65] Gaining Justice Breyer's support may have been particularly important for Justice Kennedy because only three other Justices—Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan—joined him.[66] If Justice Breyer had not united with Justice Kennedy, then it would have left Justice Kennedy's take on *Packingham* with only four votes—a mere plurality of the eight Justices then on the Court.[67] In brief, adopting intermediate scrutiny, for the sake of argument, thus might have been pivotal to Justice Kennedy in keeping Justice Breyer on board with Justice Kennedy's decision.

C. *Scrutiny-Determination Avoidance to Evade the Application of Strict Scrutiny in All Future Cases Regulating a Specific Variety or Medium of Expression*

Still another reason for engaging in scrutiny-determination avoidance is that the Justices might not want to establish, as binding precedent on all lower courts, a hard-and-fast rule that laws regulating a specific variety or medium of speech must always encounter strict scrutiny and thereby are almost inevitably unconstitutional. This taps directly into Justice Elena Kagan's concern with the

---

[62] *Id.* at 1739.
[63] *See, e.g.*, *id.* at 1743 (Alito, J., concurring). The sole point of disagreement between the majority opinion and the concurring opinion was over what Justice Alito dubbed as the majority's "loose rhetoric" when it came to extolling the virtues of online social media venues as modern-day public forums akin to public streets and parks. *Id.* ("The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.").
[64] *See supra* notes 42–46 and accompanying text (addressing Justice Breyer's quibbles with the Court's current approach to scrutiny selection).
[65] *See Packingham*, 137 S. Ct. at 1733 (noting that Justice Breyer joined Justice Kennedy's opinion).
[66] *Id.*
[67] *Id.* (noting that Justice Neil Gorsuch did not participate in the opinion).

Court's conclusion in *Reed v. Town of Gilbert*[68] that a sign ordinance was content-based and thus needed to, but ultimately did not, survive strict scrutiny.[69] In delivering the Court's opinion in *Reed*, Justice Clarence Thomas declared that the ordinance was facially content-based and thus needed to surmount strict scrutiny regardless of whether the governmental purpose and motive underlying it were benign or innocuous.[70] In other words, after *Reed*, an innocent government motive will not save a facially content-based law from strict scrutiny.[71]

In a concurrence that agreed with the outcome striking down the law but not with the application of strict scrutiny to do so, Justice Kagan fretted that "[g]iven the Court's analysis, many sign ordinances of that kind are now in jeopardy."[72] She reasoned, in parade-of-horrors fashion about the dangers of adopting strict scrutiny for sign ordinances, that

> on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.[73]

The solution, Justice Kagan contended, was the one at the heart of this Article—namely, to apply a lesser standard of review (intermediate scrutiny) because Gilbert's sign ordinance would not survive it, let alone strict scrutiny. As she rather caustically wrote, the municipality's ordinance "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."[74] There was simply no need to adopt strict scrutiny—a standard that would jeopardize the constitu-

---

[68] *See* Reed v. Town of Gilbert, 576 U.S. 155 (2015).

[69] *See id.* at 172 (concluding that the sign ordinance failed strict scrutiny); *id.* at 159–60 (finding that the ordinance imposed more stringent restrictions on temporary directional signs for certain events than it did for outdoor signs conveying other information and messages).

[70] *Id.* at 167. As Justice Thomas put it:

> 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.

Id. (alteration in original) (quoting U.S. CONST. amend. I).

[71] Enrique Armijo, Reed v. Town of Gilbert*: Relax, Everybody*, 58 B.C. L. REV. 66, 67 (2017) (noting that after *Reed*, "[e]ven a benign (or at least non-content-related) purpose cannot save a law that refers to content from the most rigorous constitutional standard of review").

[72] *Reed*, 576 U.S. at 180 (Kagan, J., concurring).

[73] *Id.* at 181.

[74] *Id.* at 184.

tionality of similar sign ordinances nationwide that make distinctions based on the information signs convey.[75] Adopting strict scrutiny to measure the validity of all such sign ordinances would be tantamount to, as Justice Kagan wrote in her 2018 dissent in *Janus v. American Federation of State, County and Municipal Employees*, "weaponizing the First Amendment" against workaday regulatory policies.[76]

To buttress her argument that scrutiny-determination avoidance was proper in *Reed*, Justice Kagan cited the Court's 1994 ruling in *City of Ladue v. Gilleo*.[77] It provides an early instance of the Court "dodg[ing] the question of whether [an] ordinance was content based or content neutral."[78] *Gilleo* addressed a First Amendment challenge to a municipal ordinance banning the display of all residential signs other than those fitting into one of ten exemptions.[79] The prohibition broadly swept up window signs inside a person's residence, including the 8.5-by-11-inch message that Margaret Gilleo posted in a window in her home reading "For Peace in the Gulf."[80] In analyzing Gilleo's challenge to Ladue's ordinance, the U.S. Court of Appeals for the Eighth Circuit concluded the law was content-based and thus required examination under strict scrutiny.[81] It struck down the ordinance under that standard, holding both that Ladue's interests were not compelling and that the law did not use the least restrictive means of serving those interests.[82]

The Supreme Court, however, declined to apply strict scrutiny in *Gilleo*. Instead, it assumed, for the sake of argument—an argument, in fact, Ladue had made[83]—that the law did not discriminate based on content.[84] In other words, the Court engaged in scrutiny-determination avoidance and failed to conclu-

---

[75] *See id.* at 185 ("Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.").

[76] Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

[77] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[78] Clay Calvert, *Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After* Williams-Yulee, 48 ARIZ. ST. L.J. 525, 545 (2016).

[79] *Gilleo*, 512 U.S. at 46–47.

[80] *Id.* at 46.

[81] Gilleo v. City of Ladue, 986 F.2d 1180, 1183 (8th Cir. 1993).

[82] *Id.* at 1184.

[83] *See* Jordan B. Cherrick, *Do Communities Have the Right to Protect Homeowners from Sign Pollution?: The Supreme Court Says No in* City of Ladue v. Gilleo, 14 ST. LOUIS U. PUB. L. REV. 399, 410 (1995) ("Ladue submitted that its sign ordinance was content-neutral because its purpose was to advance significant governmental interests—prevention of visual blight, privacy, safety, the preservation of real estate values—which were unrelated to the content of the speech on the signs.").

[84] *See Gilleo*, 512 U.S. at 53 ("In examining the propriety of Ladue's near total prohibition of residential signs, we will assume, *arguendo*, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination.").

sively decide if the law was content-based or content-neutral.[85] In what was then an unusual and unorthodox move, the Court simply assumed the law was content-neutral without deciding whether that was, in fact, the case.[86] The Court thus considered the law under the intermediate scrutiny standard applicable for content-neutral time, place, and manner regulations.[87] It concluded the ordinance collapsed under the weight of that more lenient test because it failed to leave open sufficient alternative means for residents to convey their views.[88] In so holding, the Court stressed the importance of residential signs as a medium of communication that is inexpensive, convenient, important, and closely identified with the speaker.[89]

Why might the *Gilleo* majority have sidestepped the scrutiny determination issue? One commentator writes that this decision "arguably reflects the unsatisfactory nature of classifying some common 'utilitarian' sign ordinance exemptions as either content-based or content-neutral."[90] In other words, the entire workability of the formulaic, dichotomous framework that largely guides First Amendment scrutiny determinations is thrown into serious doubt by sign ordinances if one must pigeonhole such measures into a category (content-based or content-neutral) that largely controls their fate. Rather than jeopardize the integrity of "one of the hardiest and most reliable doctrines in First Amendment jurisprudence," the easy way out was to punt on the content-neutrality issue.[91]

---

[85] *See* Alan Howard, City of Ladue v. Gilleo*: Content Discrimination and the Right to Participate in Public Debate*, 14 ST. LOUIS U. PUB. L. REV. 349, 352 (1995) ("*Ladue* is . . . both important and surprising for the Court's decision not to review the issue of whether Ladue's ordinance should be viewed as a suspect, content-based law subject to strict scrutiny review.").

[86] *See* Gerald P. Greiman, City of Ladue v. Gilleo*: Free Speech for Signs, a Good Sign for Free Speech*, 14 ST. LOUIS U. PUB. L. REV. 439, 458 (1995) ("It is both unusual and significant that the Supreme Court invalidated Ladue's ordinance while assuming, without deciding, that it was content-neutral."); *see also* Mark Cordes, *Sign Regulation After* Ladue*: Examining the Evolving Limits of First Amendment Protection*, 74 NEB. L. REV. 36, 57 (1995) (calling the Court's decision "unorthodox" in not "examining the content-distinctions, which is usually the first step in analysis").

[87] In particular, the Court in *Gilleo* cited the case of *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) as supplying the correct rule. *Gilleo*, 512 U.S. at 56. The Court in *Clark* explained that time, place, and manner regulations "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293.

[88] *See Gilleo*, 512 U.S. at 56 ("In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.").

[89] *Id.* at 54–58.

[90] Marc Rohr, *De Minimis Content Discrimination: The Vexing Matter of Sign-Ordinance Exemptions*, 7 ELON L. REV. 327, 330 (2015).

[91] Alan Howard, *The Mode in the Middle: Recognizing a New Category of Speech Regulations for Modes of Expression*, 14 UCLA ENT. L. REV. 47, 50 (2007) ("Since the 1970s, the distinction between content-based and content-neutral laws has been one of the hardiest and most reliable doctrines in First Amendment jurisprudence.").

Related to this point and of special importance for this Article, Justice Sandra Day O'Connor penned a concurrence in *Gilleo* agreeing with the outcome but questioning the Court's decision to assume arguendo that intermediate scrutiny applied rather than explicitly adopting strict scrutiny when faced with a content-based law.[92] Calling the Court's embracement of this option "unusual,"[93] O'Connor explained that "[t]he normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny."[94] Acknowledging criticism of the Court's First Amendment regime pivoting on whether a law is content-based or content-neutral, O'Connor nonetheless would have stuck with this traditional methodology for deciding if strict scrutiny applied.[95] Why? Because, as she wrote, it might

> have forced us to confront some of the difficulties with the existing doctrine; perhaps it would have shown weaknesses in the rule, and led us to modify it to take into account the special factors this case presents. But such reexamination is part of the process by which our rules evolve and improve.[96]

Viewed bluntly, O'Connor suggested that the Court should not have taken the effortless way out by assuming the law was content-neutral and thereby dodging the application of strict scrutiny. Instead, it should have confronted head-on the question of whether the law was content-based. In doing so, if it deemed the law was content-based, then it might have considered whether strict scrutiny was truly appropriate to deploy. If, in turn, the Court reasoned that strict scrutiny was inappropriate, then perhaps the Court might have modified and finetuned its scrutiny jurisprudence to account for situations like those in *Gilleo*. In other words, directly tackling knotty issues is how doctrine progresses and enriches; steering clear from those problems stifles doctrinal growth. In brief, the Court's evasive "assuming arguendo" tactic in *Gilleo* left it for another day—twenty-one years later, in fact—to resolve the problems with sign regulations that arose again in 2015 in *Reed v. Town of Gilbert* and left Justice Kagan thoroughly disenchanted with the Court's application of strict scrutiny there.[97]

Reed and *Gilleo* thus illustrate two contrasting philosophies when it comes to scrutiny-determination avoidance. Justice Kagan in *Reed* called for the Court to adopt *Gilleo*'s approach of avoiding strict scrutiny out of her fear that this

---

[92] *Gilleo*, 512 U.S. at 59 (O'Connor, J., concurring).
[93] *Id.*
[94] *Id.*
[95] *See id.* at 60 ("I would have preferred to apply our normal analytical structure in this case, which may well have required us to examine this law with the scrutiny appropriate to content-based regulations.").
[96] *Id.*
[97] *See* Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After* Reed*: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW. 569, 570 (2015) ("*Reed* is the first U.S. Supreme Court case to address local sign regulations since *City of Ladue v. Gilleo*, decided in 1994.").

demanding test would jeopardize the constitutionality of all manners of sign ordinances that make content-based distinctions.[98] Conversely, Justice O'Connor in *Gilleo* would have squarely confronted and wrestled with the distinct possibility that strict scrutiny was applicable to Ladue's sign ordinance and then would have examined how the Court's content-neutrality doctrine might have required refinement.[99] There are, in short, both pros and cons to scrutiny-determination avoidance.

D. *Scrutiny-Determination Avoidance to Evade Definitive Conclusions in Cases Featuring Politically and Socially Polarizing Issues, and Scrutiny-Determination Avoidance in the Interest of Stare Decisis*

Another reason for evading scrutiny determination—namely, that the Court should dodge unnecessary questions when other contentious political and social issues, not simply the First Amendment freedom of speech, are in play—reverberates through the late Justice Antonin Scalia's concurrence in the Court's 2014 decision in *McCullen v. Coakley*.[100] The Court there addressed a First Amendment free speech challenge to a Massachusetts law that imposed a thirty-five-foot buffer zone around reproductive health care facilities that perform abortions.[101] The law, which limited access to sidewalks and public ways within that space, applied only during business hours.[102] It also exempted from its reach people entering and exiting those facilities, the facilities' employees and agents, police and others working near the facilities, and individuals who happened to be walking or driving by such venues on their way to other destinations.[103]

The law was contested by multiple individuals, including Eleanor McCullen, who wanted to engage peacefully in so-called sidewalk counseling with women entering the facilities and to dissuade them from having abortions.[104] The Court's opinion stressed that McCullen and her colleagues were not ag-

---

[98] *See* Reed v. Town of Gilbert, 576 U.S. 155, 184 (2015) (Kagan, J., concurring) (contending that the majority in *Reed* should have adopted the Court's tack on scrutiny that it took in *City of Ladue v. Gilleo*).

[99] *See Gilleo*, 512 U.S. at 60 (O'Connor, J., concurring) (asserting that she "would have preferred to apply our normal analytical structure in this case, which may well have required us to examine this law with the scrutiny appropriate to content-based regulations" and contending that this normal tack might "have forced us to confront some of the difficulties with the existing doctrine . . . and led us to modify it to take into account the special factors this case presents. But such reexamination is part of the process by which our rules evolve and improve.").

[100] McCullen v. Coakley, 573 U.S. 464, 498–501(2014).

[101] *Id.* at 470–72.

[102] *Id.* at 471–72.

[103] *Id.* at 463, 484.

[104] *Id.* at 472–73.

gressive protestors, but rather were counselors engaged in non-confrontational speech.[105] They claimed the law impeded their speech-based activities.[106]

In ruling in *McCullen*, the Justices unanimously concluded that the law violated the First Amendment, yet they fractured badly over both whether the law was content-based or content-neutral and the proper level of scrutiny to apply.[107] In delivering the Court's opinion, Chief Justice John Roberts, who was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, applied the intermediate scrutiny test for time, place, and manner regulations that the Court created in *Ward v. Rock Against Racism*.[108] That test allows the government to impose content-neutral restrictions on speech that are narrowly tailored to serve significant interests and that leave open ample alternative ways for individuals to convey information.[109]

In applying the *Ward* test, Chief Justice Roberts began by analyzing whether Massachusetts's buffer-zone law was content-neutral.[110] He concluded it was content-neutral, and therefore, strict scrutiny, which generally applies only when laws are content-based, was irrelevant.[111] After resolving *Ward*'s content-neutrality prong, Chief Justice Roberts continued on to the other facets of the test. He next reasoned that Massachusetts possessed significant interests in protecting public safety, ensuring patient access to the facilities, and promoting the unimpeded flow of pedestrian and vehicular traffic near the facilities.[112]

Massachusetts's statute, however, was not yet out of the legal woods, as Chief Justice Roberts and the majority then turned to the narrow-tailoring prong.[113] The Chief Justice determined the measure flunked this facet of the *Ward* standard because the restrictions imposed on the sidewalk counselors

---

[105] *Id.* at 472.
[106] *Id.* at 474.
[107] Chief Justice John Roberts and the five-Justice majority in *McCullen* concluded the law was content-neutral and applied intermediate scrutiny to strike it down. *Infra* notes 108–119. In contrast, Justice Antonin Scalia, joined by Justices Anthony Kennedy and Clarence Thomas, authored a concurrence concluding that the Massachusetts law "should be reviewed under the strict-scrutiny standard applicable to content-based legislation." *Id.* at 509 (Scalia, J., concurring). Justice Samuel Alito penned a concurrence contending the law not only was content-based, but also permitted "blatant viewpoint discrimination." *Id.* at 512 (Alito, J., concurring).
[108] *Id.* at 477–78. *See* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 293 (2012) (referring to the standard of review adopted in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) as a variety of the intermediate scrutiny test).
[109] *Ward*, 491 U.S. at 791–802.
[110] *See McCullen*, 573 U.S. at 478 ("The content-neutrality prong of the *Ward* test is logically antecedent to the narrow tailoring prong, because it determines the appropriate level of scrutiny. It is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive.").
[111] *See id.* at 485 ("We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.").
[112] *Id.* at 486–87.
[113] *See id.* at 486 (describing the narrow-tailoring prong and what is required to satisfy it).

"burden[ed] substantially more speech than [was] necessary to achieve the Commonwealth's asserted interests."[114] Massachusetts, he pointed out, had failed to examine less speech-restrictive means of serving its interests.[115] In fact, Chief Justice Roberts gave significant teeth to intermediate scrutiny's narrow-tailoring component, making it clear that the government must seriously undertake less speech-intrusive measures before it may permissibly conclude that those alternative means are unproductive in serving the asserted interest.[116] In other words, the government must do more than just say that alternative means will not be effective; it must try them out and produce evidence that they are, in fact, ineffective.[117] Furthermore, the government must consider alternative means that other governmental entities have found effective in serving the asserted interest.[118] The Court thus reversed an earlier decision by the U.S. Court of Appeals for the First Circuit that had upheld the statute.[119]

The majority's analysis of the narrow-tailoring issue in *McCullen* unsurprisingly has been described by another federal appellate court as "rigorous and fact-intensive."[120] It is a point to which this Article returns in the Conclusion, as this approach lessens the gap between strict and intermediate scrutiny in the real-world application of their respective tailoring prongs and, in turn, makes it somewhat easier for courts to engage in scrutiny-determination avoidance and to pass on whether strict or intermediate scrutiny is more appropriate.[121]

Of particular relevance for this Article, Justice Scalia authored a concurrence criticizing the Roberts majority for concluding the statute was content-neutral and thus that it did not need to survive strict scrutiny.[122] Joined by Justices Anthony Kennedy and Clarence Thomas, Justice Scalia wrote that "there [was] no principled reason for the majority to decide whether the statute [was] subject to strict scrutiny."[123] Justice Scalia blasted the majority's resolution of that question as "eight pages of the purest dicta"[124] that was "plainly unnecessary."[125]

---

[114] *Id.* at 490.
[115] *See id.* at 492 ("The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. . . . That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances." (internal citations omitted)).
[116] *See id.* at 494 ("In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it.").
[117] *See id.* at 496 ("Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.").
[118] *See id.* at 494 (noting that Massachusetts failed to show "that it considered different methods that other jurisdictions have found effective").
[119] *Id.* at 497.
[120] Bruni v. City of Pittsburgh, 824 F.3d 353, 372 (3rd Cir. 2016).
[121] *Infra* notes 314–33 and accompanying text.
[122] *McCullen*, 573 U.S. at 497–500 (Scalia, J., concurring).
[123] *Id.* at 498.
[124] *Id.*
[125] *Id.* at 510.

Why was it allegedly unnecessary? Because the Court could have just assumed, for the sake of argument, that the lesser intermediate scrutiny standard applied and then struck down the law, exactly as it did, under that lesser standard for not being narrowly tailored.[126] If a law cannot pass muster under intermediate scrutiny's narrow-tailoring prong—a prong that does *not* require that the means be the least restrictive way of serving the government's interest, but only that the means not burden substantially more speech than is needed[127]—then it also cannot survive strict scrutiny's more demanding narrow-tailoring prong.[128] In brief, in Justice Scalia's view, there was no reason for the Court to "eagerly volunteer[] to take on the level-of-scrutiny question"[129] and, in turn, to definitively conclude that strict scrutiny did not apply when the Massachusetts law failed under the lesser intermediate scrutiny standard; adopting an "assuming arguendo" approach in which intermediate scrutiny was applied would have been sufficient to resolve the case.

Delving deeper into Justice Scalia's embracement of scrutiny-determination avoidance in *McCullen*, one readily understands—as explained below—that his underlying concern regarded the validity of other statutes negatively impacting the ability of those holding anti-abortion viewpoints to express them near facilities performing that procedure.[130] In short, engaging in scrutiny-determination avoidance in First Amendment cases involving politically polarizing and morally divisive issues may be sensible for (1) promoting esprit de corps and keeping the peace, as it were, among the Justices; and (2) fostering

[126] Zachary J. Phillipps, Note, *The Unavoidable Implication of* McCullen v. Coakley*: Protection Against Unwelcome Speech Is Not a Sufficient Justification for Restricting Speech in Traditional Public Fora*, 47 CONN. L. REV. 937, 962 (2015) ("Justice Scalia criticized the majority's discussion of content-neutrality, calling it '[eight] pages of the purest dicta,' because the majority's ultimate conclusion—that the Act could not survive the lesser level of scrutiny associated with content-neutral regulations—made it unnecessary to determine content-neutrality.").

[127] *See* Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989) ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.").

[128] Under strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." United States v. Playboy Ent. Grp., 529 U.S. 803, 813 (2000). *See* Connolly & Weinstein, *supra* note 97, at 608 ("As the Court made clear in *Ward*, narrow tailoring as applied under strict scrutiny is far more demanding than when applied under intermediate scrutiny, requiring that the regulation be the 'least restrictive means' for achieving the compelling governmental interest.").

[129] *See McCullen*, 573 U.S. at 500 (Scalia, J., concurring).

[130] Scalia did not believe that the U.S. Constitution protected a woman's right to choose to have an abortion. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting) (concluding the right to choose to have an abortion was not a fundamental liberty protected by the Constitution "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed").

judicial legitimacy in the public's eyes by reducing perceptions of ideological bias by the Justices in their decision making.[131]

The danger of ideological bias driving decisions is particularly acute because, as attorney Minch Minchin points out, "the murky definition and uneven application of the content-neutrality doctrine have given [J]ustices ample wiggle room to make decisions based on their political proclivities rather than doctrinal duties."[132] Indeed, Justice Scalia's concurrence in *McCullen* essentially accused the majority, by definitively resolving that the law was content-neutral, of reaching a result driven by "its own bias against anti-abortion speakers and speech."[133] Scrutiny-determination avoidance provides a mechanism for reducing this possibility when larger political and moral controversies underlie First Amendment issues. Professor Leslie Kendrick explains that "[g]iven that the context in *McCullen* was abortion, matters became controversial indeed."[134] In fact, with the exception of Chief Justice Roberts, the other members of the Court cleaved neatly along perceived political lines in *McCullen* when it came to pinpointing the level of scrutiny.[135] Justice Scalia, in turn, was left rather bitterly condemning the decision-making of Chief Justice Roberts and the Court's perceived liberals.[136]

Specifically, Justices Ginsburg, Breyer, Sotomayor, and Kagan—each nominated to the nation's highest court by a Democratic president—joined Chief Justice Roberts in deeming Massachusetts's law content-neutral, thereby subjecting a measure that detrimentally affected the expressive rights of anti-abortion counselors to the more deferential intermediate scrutiny standard.[137]

---

[131] Judicial legitimacy refers to "the overall product of the public's confidence in the lawfulness, impartiality, and propriety of the judiciary." Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1098 (2007). Maintaining judicial legitimacy is vital because "[p]ositive public perception of the judiciary's role in American political life is indispensable to the effectiveness of the judicial branch." *Id.* at 1102.

[132] Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post-*Reed *Landscape*, 22 COMMC'N L. & POL'Y 123, 138 (2017).

[133] Timothy Zick, *Justice Scalia and Abortion Speech*, 15 FIRST AMEND. L. REV. 288, 289 (2017).

[134] Kendrick, *supra* note 18, at 216.

[135] *See supra* notes 107–08; *infra* notes 137, 145–46 and accompanying text (addressing the clustering of the Justices in *McCullen*).

[136] *See infra* notes 138–40, 143 and accompanying text (providing Justice Scalia's remarks denouncing the Court's decision on the scrutiny issue and reproving the majority for harming the speech rights of individuals holding anti-abortion viewpoints).

[137] *See* McCullen v. Coakley, 573 U.S. 464, 468 (2014) (noting that Chief Justice Roberts was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan); *see also Current Members*, SUPREME CT. OF THE U.S., [hereinafter *Current Justices*] https://www.supremecourt.gov/about/biographies.aspx [perma.cc/3BZP-R9D5] (identifying Justice Stephen Breyer as having been nominated by President Bill Clinton and Justices Sotomayor and Kagan as having been nominated by President Barack Obama); *Justices 1789 to Present*, SUPREME CT. OF THE U.S., [hereinafter *Past Justices*] https://www.supremecourt.gov/about/members_text.aspx

The majority's adoption of this lenient test was a boon for other municipalities attempting to restrain speech near abortion clinics because, as Justice Scalia wrote, it "preserve[s] the ability of jurisdictions across the country to restrict antiabortion speech without fear of rigorous constitutional review. With a dart here and a pleat there, such regulations are sure to satisfy the tailoring standards applied in . . . the majority's opinion."[138] He lambasted the majority's conclusion "that a statute of this sort is not content based and hence not subject to so-called strict scrutiny"[139] for accelerating what he called the Court's "onward march of abortion-speech-only jurisprudence."[140]

In other words, Justice Scalia perceived the long-term effect of the majority's scrutiny-selection decision as a pro-choice victory and a pro-life defeat for speech regarding abortion.[141] Although Massachusetts lawmakers lost the battle when their statute failed intermediate scrutiny for not being narrowly tailored, lawmakers elsewhere won the war because they now had a roadmap from the Chief Justice for how to better draft buffer-zone laws to pass constitutional muster.[142] In Justice Scalia's frank words, the majority's decision to definitively adopt intermediate scrutiny, rather than just assuming arguendo that it applied in this instance, handed "abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents."[143]

As noted earlier,[144] Justice Scalia was joined by fellow conservative-tilting Justices Kennedy and Thomas, each nominated by a Republican president, in his concurrence in which they would have applied strict scrutiny when evaluating Massachusetts's statute.[145] Furthermore, conservative-leaning Justice Samuel Alito, a nominee of President George W. Bush, wrote a separate concurrence in which he held that the law went beyond content discrimination to actually discriminate against a viewpoint and thus was unconstitutional.[146] Alt-

---

[perma.cc/H4WE-87BU] (identifying Justice Ginsburg as having been nominated by President Bill Clinton).

[138] *McCullen*, 573 U.S. at 498–99 (Scalia, J., concurring).

[139] *Id.* at 497.

[140] *Id.*

[141] *See* Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1, 20 (2014) (remarking that under Justice Scalia's concurrence, "the Court stands accused of allowing the state to alter abortion rights discourse by discriminating against *pro-life* advocacy").

[142] As Chief Justice Roberts wrote, "In discussing whether the Act is narrowly tailored, . . . we identify a number of less-restrictive alternative measures that the Massachusetts Legislature might have adopted." *McCullen*, 573 U.S. at 479.

[143] *Id.* at 497 (Scalia, J., concurring).

[144] *See supra* note 123 and accompanying text (noting that Justice Scalia was joined by Justices Kennedy and Thomas).

[145] *See McCullen*, 573 U.S. at 509 (Scalia, J., concurring) ("In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation."); *see also Current Justices*, *supra* note 137 (identifying Justice Kennedy as having been nominated by President Ronald Reagan and Justice Thomas as having been nominated by President George H.W. Bush); *Past Justices*, *supra* note 137 (identifying Justice Scalia as having been nominated by President Ronald Reagan).

[146] *McCullen*, 573 U.S. at 511–12 (Alito, J., concurring).

hough Justice Alito did not state that he was applying strict scrutiny, laws that discriminate based upon a viewpoint are "subject to rigorous constitutional scrutiny"[147] because they represent "an egregious form of content discrimination."[148] The conservative Justices, by embracing strict scrutiny, thus would have made it much tougher for future buffer-zone laws such as Massachusetts's statute to clear First Amendment scrutiny than their liberal colleagues did by deploying intermediate scrutiny. In sum, by selecting different scrutiny standards, the liberal Justices (joined by Chief Justice Roberts) in *McCullen* issued a decision favorable to municipalities attempting to restrict the speech of anti-abortion advocates, while the Court's four other conservatives rendered opinions much more friendly to anti-abortion expressive activities.

Importantly, Chief Justice Roberts pushed back at Justice Scalia's attack on the majority's decision to definitively resolve that intermediate scrutiny was, indeed, the correct standard and that strict scrutiny was inapplicable. Chief Justice Roberts readily acknowledged that "[t]he Court does sometimes assume, without deciding, that a law is subject to a less stringent level of scrutiny."[149] He also noted that the Court had recently done so in *McCutcheon v. Federal Election Commission*,[150] a case decided less than three months before *McCullen*.[151]

The Justices in *McCutcheon* split five to four along perceived political lines in declaring that a federal law capping the aggregate sum of money a donor could give to all candidates or committees violated the First Amendment freedom of speech.[152] In delivering the Court's opinion, Chief Justice Roberts confronted the question of whether strict scrutiny or a less rigorous standard that the Court had created in *Buckley v. Valeo*[153] for campaign contributions—a test featuring a closely-drawn means requirement—should be applied to measure the constitutionality of the aggregate monetary cap.[154] *Buckley*'s closely-

---

[147] Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring).
[148] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).
[149] *McCullen*, 573 U.S. at 478.
[150] McCutcheon v. FEC, 572 U.S.185 (2014).
[151] *See McCullen*, 573 U.S. at 478 (citing *McCutcheon*, 572 U.S. at 199).
[152] *McCutcheon*, 572 U.S. at 192–93. Chief Justice Roberts wrote the opinion of the Court in *McCutcheon* and was joined by fellow conservative Justices Scalia, Kennedy, and Alito. *Id.* at 190. Additionally, conservative Justice Clarence Thomas penned a separate opinion concurring in the judgment. *Id.* at 228 (Thomas, J., concurring). In contrast, Justice Stephen Breyer authored a dissent that was joined by fellow liberal Justices Ginsburg, Sotomayor, and Kagan. *Id.* at 232 (Breyer, J., dissenting).
[153] Buckley v. Valeo, 424 U.S. 1 (1976).
[154] *McCutcheon*, 572 U.S. at 199. In articulating the standard of scrutiny for contribution limits in *Buckley*, the Court wrote that "[e]ven a ' "significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs *means closely drawn* to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25 (emphasis added) (quoting Cousins v. Wigoda, 419 U.S. 477, 488 (1975)). In *McConnell v. Federal Election Commission*, 540 U.S. 93

drawn test sometimes is referred to as intermediate scrutiny.[155] Chief Justice Roberts concluded in *McCutcheon* that the statute, due to being improperly tailored in scope, would flunk the more relaxed *Buckley* test, thus rendering it unnecessary to definitively choose whether it or strict scrutiny was more appropriate.[156]

Reflecting back on the Court's decision to engage in scrutiny-determination avoidance in *McCutcheon*, the Chief Justice explained in *McCullen* that applying any standard of review other than intermediate scrutiny, which the Court assumed applied, "would have required overruling a precedent."[157] This is important not only because Chief Justice Roberts equated the closely-drawn test from *Buckley* with intermediate scrutiny, but also because it suggests yet another reason for the Supreme Court to dodge on scrutiny: stare decisis.[158]

Stare decisis, as Justice Neil Gorsuch recently encapsulated it, advances "the goals of predictability and reliance."[159] In other words, following precedent allows decisions to be predictable and consistent, permitting the legal system and the public to rely on prior rulings.[160] Following precedent also supposedly builds, in the eyes of the public, the Court's legitimacy.[161]

(1973), the Court called the *Buckley* closely drawn standard "less rigorous" than strict scrutiny. *Id.* at 137.

[155] *See* Ivet A. Bell, *The Constitutionality of the SEC Pay to Play Rule: Why 206(4)-5 Survives the Deregulatory Trend in Campaign Finance*, 49 COLUM. J.L. & SOC. PROBS. 1, 16–17 (2015) (noting that the level of scrutiny for campaign contributions established in *Buckley* "has been variably referred to as the 'closely drawn test' or 'intermediate scrutiny' ").

[156] *See McCutcheon*, 572 U.S. at 199. ("Because we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the 'closely drawn' test. We therefore need not parse the differences between the two standards in this case.").

[157] McCullen v. Coakley, 573 U.S. 464, 478 (2014).

[158] Stare decisis entails "[f]idelity to precedent." Citizens United v. FEC, 558 U.S. 310, 377 (2010). *See* Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 126 ("[T]he expectation embodied in the idea of stare decisis is that judges of a court will, presumptively even if not conclusively, follow the previous decisions of that court . . . even if and when they think the previous decisions are mistaken.").

[159] Ramos v. Louisiana, 140 S. Ct. 1390, 1403 (2020).

[160] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

[161] *See* Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law:* Bush v. Gore *and the Emerging Jurisprudence of* Oprah!, 90 GEO. L.J. 2087, 2105 (2002) ("Stare decisis bears an important relationship to judicial legitimacy."); Derigan Silver & Dan V. Kozlowski, *Preserving the Law's Coherence:* Citizens United v. FEC *and Stare Decisis*, 21 COMMC'N L. & POL'Y 39, 48 (2016) ("A recurring argument in the literature is that overruling precedent jeopardizes public support for the Court and the institution's legitimacy.").

While the Court is not bound to follow its prior decisions,[162] overruling precedent—abrogating the principle of stare decisis—requires "strong grounds for doing so," as Justice Samuel Alito wrote in 2018.[163] One such strong ground is when a prior decision "wrongly denied First Amendment rights."[164] While Justice Clarence Thomas has called for overruling *Buckley*—the case that supplied the scrutiny test that Chief Justice Roberts assumed applied in *McCutcheon*—the case now has been relied on for more than four decades since it was decided in 1976.[165] As Justice Scalia wrote in 2007, "Buckley set forth a now-familiar framework for evaluating the constitutionality of campaign-finance regulations."[166] Additionally, the majority in 2010 in *Citizens United v. Federal Election Commission*[167] leaned heavily on certain propositions from *Buckley*.[168]

In summary, engaging in scrutiny-determination avoidance in *McCutcheon* by merely assuming that *Buckley*'s standard applied and, in turn, striking down the law under that test permitted the Court to avoid both overruling precedent and violating the principle of stare decisis.[169] *McCullen*, by way of contrast as Chief Justice Roberts contended, held no such danger of overruling precedent by conclusively resolving that intermediate scrutiny was the more appropriate test.[170]

---

162 *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (noting that stare decisis "is not . . . an inexorable command").

163 Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018).

164 *Id.*

165 In *McCutcheon*, Justice Thomas wrote that he "adhere[s] to the view that this Court's decision in *Buckley v. Valeo* . . . denigrates core First Amendment speech and should be overruled." McCutcheon v. FEC, 572 U.S. 185, 228 (2014) (Thomas, J., concurring) (internal citation omitted). In 2006, Justice Thomas explained that:

> I continue to believe that *Buckley* provides insufficient protection to political speech, the core of the First Amendment. The illegitimacy of *Buckley* is further underscored by the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion. As a result, *stare decisis* should pose no bar to overruling *Buckley* and replacing it with a standard faithful to the First Amendment.

Randall v. Sorrell, 548 US 230, 266 (2006) (Thomas, J., concurring).

166 FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 486 (2007) (Scalia, J., concurring).

167 Citizens United v. FEC, 558 U.S. 310 (2010).

168 *See id.* at 345–60 (addressing the relevance of *Buckley*).

169 McCullen v. Coakley, 573 U.S. 464, 478 (2014).

170 *See id.* at 478–79 ("Applying any standard of review other than intermediate scrutiny in *McCutcheon*—the standard that was assumed to apply—would have required overruling a precedent. There is no similar reason to forgo the ordinary order of operations in this case.").

E. Scrutiny-Determination Avoidance in Emerging Doctrinal Areas of First Amendment Law

In *National Institute of Family and Life Advocates (NIFLA) v. Becerra*,[171] a five-Justice, conservative-leaning majority of the Court held that part of a California law compelling pro-life crisis pregnancy centers to provide truthful information to patients about the availability of state-sponsored free and low-cost abortion services likely violated the centers' First Amendment right of free speech.[172] More specifically, the free speech interest likely violated was the unenumerated right not to speak—a right not to be compelled to communicate a government-scripted message.[173] In delivering the Court's opinion, Justice Clarence Thomas deemed the law content-based because it forced the centers to utter a California-sponsored message, thereby altering and diluting the centers' own pro-life message.[174]

Concluding that a law is content-based normally triggers strict scrutiny, as addressed earlier.[175] Yet the majority engaged in scrutiny-determination avoidance and did not apply strict scrutiny, reasoning instead that the law "cannot survive even intermediate scrutiny."[176] In applying that more relaxed standard, the majority initially assumed California possessed a substantial interest in notifying low-income women about state-sponsored pregnancy and abortion services.[177] The law, however, failed to pass muster under the tailoring prong of

---

[171] Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, 138 S. Ct. 2361 (2018). Justice Clarence Thomas wrote the majority opinion and was joined by Chief Justice John Roberts and Justices Anthony Kennedy, Samuel Alito, and Neil Gorsuch. *Id.* at 2367. Justice Stephen Breyer authored a dissenting opinion that was joined Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. *Id.* at 2379 (Breyer, J., dissenting); *see* Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 91 (2019) (noting that the Court in *NIFLA* "split along ideological lines" in a five-to-four decision).

[172] *See NIFLA*, 138 S. Ct. at 2376 ("[P]etitioners are likely to succeed on the merits of their challenge to the licensed notice."); *see also id.* at 2368 ("Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call.").

[173] *See* Erica Goldberg, *"Good Orthodoxy" and the Legacy of* Barnette, 13 FIU L. REV. 639, 643 (2019) (describing *NIFLA* as "a compelled speech case" in which the Court held "that requiring anti-abortion crisis pregnancy centers to alert patrons to the fact that the state can provide low cost abortions violated the centers' First Amendment rights against compelled speech"); Genevieve Lakier, *Not Such a Fixed Star After All:* West Virginia State Board of Education v. Barnette*, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 763 (2019) (describing the Court's ruling in *NIFLA* as embracing an "expansive, autonomy-focused conception of the First Amendment right not to speak" that prioritizes protection of the autonomy interests of those being compelled to speak over the right of listeners to receive factual information).

[174] *NIFLA*, 138 S. Ct. at 2371.

[175] *See supra* note 13 and accompanying text.

[176] *NIFLA*, 138 S. Ct. at 2375.

[177] *Id.*

intermediate scrutiny.[178] Specifically, Justice Thomas called it "wildly underinclusive"[179] in serving its goal because its compelled-notice provision failed to apply to numerous other community and federal clinics that also could educate low-income women about state-provided abortion services.[180] In other words, by exempting multiple other clinics from its reach, the law simply did too little—it was too narrowly tailored—to address the educational interest it was supposed to serve.[181] This gaping gulf between California's stated purpose and the law's miniscule scope doomed it, at least in the majority's eyes.[182]

Justice Thomas's critique of the law's problematic tailoring, however, did not end with the measure's underinclusivity. He also pointed to the existence of alternative ways California might inform women about state-sponsored abortion services without infringing the speech rights of crisis pregnancy centers.[183] To wit, Justice Thomas wrote that California could "inform the women itself with a public-information campaign"[184] and "post the information on public property near crisis pregnancy centers."[185]

The state alleged that it had, in fact, used an advertising campaign and that "many women who are eligible for publicly-funded healthcare have not enrolled."[186] This, however, failed to quell Justice Thomas's concerns. He asserted that a lukewarm response by women did not by itself prove that an ad campaign was an inadequate alternative means of serving the state's interest.[187] Justice Thomas advanced other reasons why the response might have been tepid, including women simply not wanting the services offered and California failing to invest enough resources into its campaign to be effective.[188] As addressed later in this Article's Conclusion, the *NIFLA* majority's analysis here is important: it suggests that the gap separating strict scrutiny's narrow-tailoring component from intermediate scrutiny's narrow-tailoring facet—in terms of their practical application—may be very slim.[189] If that is the case, then a negligible difference between the two tailoring components may mean that default-

---

[178] *Id.*

[179] *Id.* (quoting Brown v. Ent. Merchs. Ass'n., 564 U.S. 786, 802 (2011)).

[180] *Id.* at 2375–76. Specifically, the measure exempted from its reach "several categories of clinics that would otherwise qualify as licensed covered facilities." *Id.* at 2369.

[181] *See* Calvert, *supra* note 78, at 528 (noting that "a law may be fatally underinclusive" when "the government regulates too little speech to prevent or mitigate a particular type of harm" that may arise from unregulated speech).

[182] *See* Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, 138 S. Ct. 2361, 2376 (2018) (asserting that the law's "exemption for these clinics, which serve many women who are pregnant or could become pregnant in the future, demonstrates the disconnect between its stated purpose and its actual scope").

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Infra* notes 315–19 and accompanying text.

ing to intermediate review via scrutiny-determination avoidance, rather than conclusively selecting strict scrutiny, is more of a symbolic gesture than a substantively meaningful maneuver.

Why did Justice Thomas and the majority fail to adopt strict scrutiny when they were confronted with a content-based law? After all, Justice Thomas wrote the Court's opinion in *Reed v. Town of Gilbert*[190] just three years earlier. *Reed* made it clear that laws that are content-based, either on their face or because of an illicit government purpose, must surmount strict scrutiny.[191] The answer may be this: because the Court in *NIFLA* addressed a statute's constitutionality within the macro-level context of evaluating the viability of a nascent First Amendment doctrine—namely, professional speech—it was reticent to render a definitive ruling on scrutiny that would bind and constrict that inchoate doctrine's future.[192]

Specifically, prior to *NIFLA* reaching the Supreme Court, the U.S. Court of Appeals for the Ninth Circuit had chosen not to apply strict scrutiny because it concluded the law regulated the speech of professionals—those working in the state-licensed crisis pregnancy centers—and that, in turn, such professional speech could be more easily regulated by the government under intermediate scrutiny.[193] The Ninth Circuit, in fact, upheld the law under that standard, concluding it was narrowly tailored[194] to serve California's "substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion."[195]

Justice Thomas and majority, however, rejected the Ninth Circuit's stance that a distinct category of expression known as professional speech exists that is always exempt from the Court's normal scrutiny rules.[196] Thomas noted that under current First Amendment principles, laws regulating the speech of professionals face lesser standards of judicial review in only two situations: (1)

---

[190] Reed v. Town of Gilbert, 576 U.S. 155 (2015).

[191] *Id.* at 163–64.

[192] *See* Mark Strasser, *Deception, Professional Speech, and CPCs: On* Becerra*, Abortion, and the First Amendment*, 67 BUFFALO L. REV. 311 (2019) (providing an overview of the regulation of professional speech, including the Supreme Court's analysis of the professional speech issue in *NIFLA*); John G. Wrench & Arif Panju, *A Counter-Majoritarian Bulwark: The First Amendment and Professional Speech in the Wake of* NIFLA v. Becerra, 24 TEX. REV. L. & POL. 453 (2020) (addressing the regulation of professional speech and the Supreme Court's analysis of it in *NIFLA*).

[193] *See* Nat'l Inst. of Fam. & Life Advocs. v. Harris, 839 F.3d 823, 839–40 (9th Cir. 2016), *rev'd*, 138 S. Ct. 2361 (2018) (finding that "the Licensed Notice regulates professional speech" and that "intermediate scrutiny applies").

[194] *Id.* at 842. The Ninth Circuit remarked that "[t]he Notice informs the reader only of the existence of publicly-funded family-planning services. It does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use those state-funded services." *Id.*

[195] *Id.* at 841.

[196] *NIFLA*, 138 S. Ct. at 2371–72.

when statutes require professionals to disclose certain factual information in advertisements for their services[197] and (2) when laws regulating professional conduct incidentally burden speech, such as informed-consent mandates imposed on doctors attendant to procedures they perform.[198] The majority found that California's law targeting licensed crisis pregnancy centers fit within neither of these exceptions to the general rule that content-based laws, including those governing professional speech, must survive strict scrutiny.[199]

The majority, however, did not slam the door completely shut on the possibility that professional speech might be subject to review under something less stringent than strict scrutiny in other situations. As Justice Thomas explained:

> [N]either 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.[200]

In brief, the majority held open the prospect that a unique, strict-scrutiny immune category of expression called professional speech might exist, concluding only that California and the Ninth Circuit failed to prove that it does exist.[201] Applying strict scrutiny to California's law, in turn, might have signaled to lower courts that such a carveout from the general rules of scrutiny was an impossibility. That would have put to rest, once and for all time, the possibility of professional speech becoming a special niche of First Amendment law—one akin to commercial speech, which is subject to intermediate

---

[197] *Id.* at 1372. *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985) (holding that a state permissibly may compel attorneys to disclose "purely factual and uncontroversial information" in their advertisements "as long as [the] disclosure requirements are reasonably related to the State's interest in preventing deception of consumers" and the regulations are not "unduly burdensome"); *see also* Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 505 (2018) ("Many courts and commentators have treated the *Zauderer* 'reasonable relationship' test as a highly deferential test similar to rational basis review.").

[198] *NIFLA*, 138 S. Ct. at 2373; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884–85 (1992) (holding that a rule compelling doctors to provide factual information to patients "about the risks of abortion, and childbirth" as part of an informed-consent mandate incidental to performing abortions was "a reasonable means to ensure that the woman's consent is informed" and noting that physicians are "subject to reasonable licensing and regulation by the State" when they are speaking "as part of the practice of medicine"); *see also* B. Jessie Hill, *Sex, Lies, and Ultrasound*, 89 U. COLO. L. REV. 421, 432 (2018) ("The Court's language of reasonableness, along with its dismissive treatment of the claim, suggest something like rational basis review was applied to the physician's free speech claim.").

[199] *NIFLA*, 138 S. Ct. at 2372–74.

[200] *Id.* at 2375 (emphasis added).

[201] *Cf.* William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 BYU L. REV. 875, 891 (2019) (describing how the *NIFLA* majority rebuffed the notion "that the professional-speech context of the California law constituted 'a unique category [of speech] that is exempt from ordinary First Amendment principles.' 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." (alteration in original) (internal citations omitted)).

scrutiny despite it constituting a specific variety of content.[202] There was no need to reach that scrutiny determination in *NIFLA*, however, because California's law would not, at least in the majority's view, surmount the lesser intermediate scrutiny standard. In short, the majority's decision to punt on scrutiny—to apply intermediate scrutiny, even in the face of a content-based law, because it would not have made any difference if either that test or strict scrutiny were applied—left open the opportunity for a new First Amendment doctrine (professional speech) to emerge if better reasons are later brought to the legal table.[203]

Viewed in this light, *NIFLA* embodies judicial minimalism because the majority leaves for another day, via scrutiny-determination avoidance, the possibility of "treating professional speech as a unique category that is exempt from ordinary First Amendment principles."[204] It was, as Dean Rodney Smolla succinctly encapsulated it, a "modest hedge" against unforeseen circumstances.[205] The Court's dodge on scrutiny in *NIFLA* means, in other words, that it "has yet to settle on its First Amendment approach to professional speech."[206]

It therefore is too early when it comes to professional speech to conclude that the *NIFLA* majority, as some have contended, "put this runaway doctrine to rest."[207] Instead, after *NIFLA*, it perhaps is better to conclude that "there might be such a thing as professional speech—sometimes."[208] At least one lower court, in fact, has understood *NIFLA* as standing for a maybe-it-exists proposition.[209]

---

[202] Although commercial speech is a particular type of content, laws regulating it are subject to review not under strict scrutiny, but under a test more akin to intermediate scrutiny. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (noting that the Supreme Court has held "that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny"); *see also* Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, 41 LOY. L.A. L. REV. 181, 182 (2007) ("[T]he commercial speech doctrine creates a category of speech subject to intermediate scrutiny under the First Amendment.").

[203] *See* Rodney A. Smolla, *The Tensions Between Regulation of the Legal Profession and Protection of the First Amendment Rights of Lawyers and Judges: A Tribute to Ronald Rotunda*, 22 CHAP. L. REV. 285, 294 (2019) (observing that in *NIFLA*, the Court "did not foreclose the slim possibility that in some future scenario there might be a case for reduced scrutiny of the regulation of professionals").

[204] *NIFLA*, 138 S. Ct. at 2375.

[205] Smolla, *supra* note 203, at 294.

[206] Helen Norton, *Powerful Speakers and Their Listeners*, 90 UNIV. COLO. L. REV. 441, 460 (2019).

[207] Wrench & Panju, *supra* note 192, at 480.

[208] Miller & Berkman, *supra* note 15, at 623.

[209] *See* Otto v. City of Boca Raton, 353 F. Supp. 3d 1237, 1256 (S.D. Fla. 2019) ("While *NIFLA* disparaged the use of 'professional speech' as a separate category of speech, it did not foreclose the possibility that reasons might exist for treating professional speech as a separate category.").

Of course, *NIFLA* still is highly problematic because assigning an appropriate level of scrutiny in future professional speech cases "remains elusive."[210] For example, Professor Carl Coleman points out in light of *NIFLA* that "unless and until the Supreme Court expressly rules otherwise, there is no reason for courts reviewing regulations of physician-patient communications to assume that strict scrutiny necessarily applies."[211] In brief, punting on scrutiny leaves lower courts in limbo.

There is a possible alternative reason why the *NIFLA* majority opted to not apply strict scrutiny when faced with a content-based law. It relates to Justice Breyer's dissent, joined by Justices Ginsburg, Sotomayor, and Kagan, that bluntly criticized the Court's entire formulaic approach for selecting scrutiny based on whether a law is content-based or content-neutral.[212] Specifically, the dissenting bloc of liberal Justices worried that deploying this methodology on all laws that compel speech would jeopardize all manners of seemingly innocuous regulations:

> 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. Virtually every disclosure law could be considered "content based," for virtually every disclosure law requires individuals "to speak a particular message."[213]

Justice Breyer built here from his similar criticism of this categorical approach to scrutiny determination in *Reed v. Town of Gilbert*.[214] He wrote there that "[r]egulatory 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."[215] Additionally, and as noted earlier, Justice Breyer long has advocated for a proportionality approach to scrutiny that focuses more on the First Amendment interests at stake and the harm a statute might cause them.[216]

---

210 Miller & Berkman, *supra* note 15, at 623–24.

211 Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 874 (2019).

212 *See* Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) ("This constitutional approach threatens to create serious problems.").

213 *Id.* (quoting Justice Thomas's use of the phrase "to speak a particular message" in the majority opinion).

214 *See* Reed v. Town of Gilbert, 576 U.S. 155, 176 (Breyer, J., concurring) ("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.").

215 *Id.* at 177.

216 *Supra* notes 42–46 and accompanying text; *see also* Clay Calvert, *Testing the First Amendment Validity of Laws Banning Sexual Orientation Change Efforts on Minors: What Level of Scrutiny Applies After* Becerra *and Does a Proportionality Approach Provide a Solution?*, 47 PEPP. L. REV. 1, 31–34 (2019) (summarizing Justice Breyer's proportionality approach to scrutiny).

The dissenters in *NIFLA*, in contrast to the majority, would not have applied heightened scrutiny—be it strict or intermediate—when evaluating the constitutionality of California's law compelling licensed crisis pregnancy centers to disclose the availability of state-funded abortion services.[217] Instead, they would have adopted either of the two more deferential standards the *NIFLA* majority deemed inapt—namely, the rules that govern when the government compels professionals to disclose factual information in their advertisements and when doctors are forced to disclose facts to patients under informed-consent mandates.[218] In brief, the dissent would have embraced either the rule for compelling speech in professionals' advertisements from *Zauderer v. Office of Disciplinary Counsel*[219] or the standard for compelling physicians to speak in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[220]

Perhaps, then, the conservative *NIFLA* majority—although openly hostile to abortion, as Dean Erwin Chemerinsky emphasizes[221]—did not want to further exacerbate the friction over scrutiny selection in compelled-speech cases that definitively choosing strict scrutiny might have fueled. Specifically, adopting strict security, rather than using intermediate scrutiny, would have created a wider gap between the majority's preferred test (strict scrutiny) and the dissent's desired standard of something akin to rational basis review.[222] Charitably viewed in this light, the majority, rather than rigidly applying strict scrutiny, particularly in a case involving the politically and morally polarizing issue that is abortion, held open the possibility that *Reed v. Town of Gilbert*'s scrutiny logic does not inevitably demand that content-based laws face strict scrutiny.[223]

---

[217] *See NIFLA*, 138 S. Ct. at 2387 (Breyer, J., dissenting) ("There is no reason to subject such laws to heightened scrutiny.").

[218] *See supra* notes 197–98 (addressing these two exceptions from the general rule that strict scrutiny applies when professional speech is regulated); *see also NIFLA*, 138 S. Ct. at 2384–88 (Breyer, J., dissenting) (addressing the relevance and applicability of these standards in *NIFLA*).

[219] *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985); *NIFLA*, 138 S. Ct. at 2386–88 (Breyer, J., dissenting) (addressing the relevancy of *Zauderer*).

[220] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); *NIFLA*, 138 S. Ct. at 2384–86 (Breyer, J., dissenting) (addressing the relevancy of *Casey*).

[221] *See* Chemerinsky & Goodwin, *supra* note 171, at 66 ("*Becerra* is only secondarily about speech. Instead, we believe this case is primarily about five conservative Justices' hostility to abortion rights. The Court ignored legal precedent, failed to weigh the interests at stake in its decision, and applied a more demanding standard based on content of speech.").

[222] The test from *Zauderer* that the *NIFLA* dissent found applicable has been equated with rational basis review. *See* Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say about the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 974 (2010). Indeed, former Yale Law School Dean Robert Post refers to *Zauderer* as establishing "an extraordinarily lenient test for the review of compelled commercial speech." Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods*,* Zauderer*, and* Abood, 40 VAL. U. L. REV. 555, 560 (2006).

[223] *See supra* Section I.D (addressing the use of scrutiny-determination avoidance to evade definitive conclusions in cases featuring politically and socially polarizing issues).

This, of course, is an altruistic interpretation of the majority's approach to scrutiny-determination avoidance in *NIFLA*. As described earlier in this Section, an alternative explanation is that the majority did not want to wholly preclude the development of a nascent professional speech doctrine, just in case more persuasive reasons for cultivating it were to come down the legal pike than those proffered by California and the Ninth Circuit.

With this review in mind of multiple reasons why the Supreme Court might engage in scrutiny-determination avoidance, as well as criticisms of that tactic offered by Justice O'Connor in *Gilleo*, the Article next returns to the trio of 2020 federal appellate court decisions mentioned in the Introduction. In particular, Part II addresses the doctrinal problems these cases illustrate about formulaically relying on the difference between content-based and content-neutral laws to determine the level of scrutiny.

II. SCRUTINY-DETERMINATION AVOIDANCE IN THE FEDERAL APPELLATE COURTS IN 2020: EXPOSING PROBLEMS WITH SELECTING A STANDARD OF REVIEW

This Part analyzes problems with the First Amendment scrutiny selection process that are revealed by the three federal appellate court opinions described in the Introduction in which courts engaged in scrutiny-determination avoidance. Those cases are addressed separately in the order raised in the Introduction.

A. *Billups v. City of Charleston*[224]

The U.S. Court of Appeals for the Fourth Circuit in *Billups* engaged in scrutiny-determination avoidance when it considered whether Charleston, South Carolina's examination and licensing requirement imposed on individuals seeking to lead paid tours of that city violated the First Amendment right of free speech.[225] As discussed in the Introduction, the Fourth Circuit found the ordinance merited First Amendment scrutiny because it implicated protected speech.[226] The appellate court, however, then declined to decide whether the ordinance was content-neutral or content-based and, in turn, passed on determining whether strict or intermediate scrutiny was more appropriate.[227]

---

[224] Billups v. City of Charleston, 961 F.3d 673 (4th Cir. 2020).

[225] *See id.* at 676 ("[B]efore leading a paid tour through Charleston's historic districts, a prospective guide must obtain a license. And to obtain that license, a prospective guide must pass a 200-question written examination that focuses on Charleston's history, architecture, and historic preservation efforts.").

[226] *See id.* at 684 ("In short, the business of leading tours depends on the expression of ideas. And the Ordinance forbids unlicensed tour guides for hire from expressing those ideas on public thoroughfares. Such a restriction burdens protected speech and thus implicates the First Amendment.").

[227] *Id.* at 684–85.

In doing so, the Fourth Circuit reasoned there was no "hard-and-fast rule requiring that courts confront the content-neutrality question in every case."[228] It rejected the idea that the Supreme Court's choice to resolve the scrutiny issue in *McCullen v. Coakley* when it did not need to do so created such a must-choose rule.[229] As discussed earlier, Justice Scalia authored a concurrence that vehemently criticized the majority in *McCullen* for definitively concluding that intermediate scrutiny was more appropriate than strict scrutiny.[230] The Fourth Circuit in *Billups* took note of Justice Scalia's denunciation, using it to support the contention that conclusively resolving the level of scrutiny when it is unnecessary is "not uncontroversial."[231] In short, Justice Scalia's adamant pushback on scrutiny selection in *McCullen* provided cover for the Fourth Circuit's decision to embrace scrutiny-determination avoidance.

The Fourth Circuit, in fact, was also following the lead of U.S. District Judge David Norton in his earlier ruling in *Billups*.[232] Judge Norton had concluded there was "no need to answer [the] question"[233] of whether the ordinance was content-based or content-neutral because it "fail[ed] to pass constitutional muster even under the more lenient intermediate scrutiny standard applied to content-neutral laws."[234] Applying intermediate scrutiny, Judge Norton found that while Charleston possessed a significant interest in safeguarding tourists and the city's tourism industry, the ordinance was not narrowly tailored because Charleston failed to show that it actually had attempted to use less speech-restrictive means to serve that interest and that those means were ineffective.[235] As Judge Norton straightforwardly put it, Charleston "presented no evidence that it ever investigated much less 'tried' any less restrictive alternative."[236] This requirement for narrow tailoring tracks *McCullen*'s mandate, described earlier, that governmental entities must do more than just assert, without supporting evidence, that alternative measures will be unsuccessful in serving the alleged interest.[237]

The Fourth Circuit agreed with Judge Norton's analysis. It found that while the ordinance served a significant interest, it was not narrowly tailored in doing so.[238] As with Judge Norton's conclusion, the appellate court also found that

---

[228] *Id.* at 685.
[229] *Id.* at 684–85.
[230] *See supra* notes 122–29 (addressing Justice Scalia's concurrence in *McCullen*).
[231] *Billups*, 961 F.3d at 685.
[232] Billups v. City of Charleston, 331 F. Supp. 3d 500 (D.S.C. 2018), *aff'd*, 961 F.3d 673 (4th Cir. 2020).
[233] *Id.* at 512.
[234] *Id.*
[235] *Id.* at 512–13.
[236] *Id.* at 517.
[237] *See supra* notes 115–17 and accompanying text (addressing this facet of the Supreme Court's interpretation of narrow tailoring in *McCullen*).
[238] *See* Billups v. City of Charleston, 961 F.3d 673, 685 (4th Cir. 2020) ("Like the district court's, our analysis begins and ends with the conclusion that—although the Ordinance

Charleston had failed to offer evidence that it had tried to use "less intrusive tools [that were] readily available to it."[239]

Beyond following the principle of judicial minimalism, why else might the Fourth Circuit in *Billups* have decided to pass on picking a definitive level of scrutiny? The answer likely is that *Billups* is part of a rising tide of cases involving First Amendment challenges to licensing schemes—a tide into which the U.S. Supreme Court has yet to wade and offer guidance, but which has produced splits among the lower courts.[240] These cases pit the ability of governmental entities, legislating in the name of public and consumer health and safety and welfare concerns, to license individuals before they can engage in certain professions against the First Amendment speech rights of individuals who want to be in those professions.[241] Tour-guide cases such as *Billups*, in turn, raise clear First Amendment issues because they involve a "speaking occupation"—a profession where people must speak as a key part of their job.[242] But deciding whether heightened scrutiny applies and, if so, what level—strict or intermediate—of heightened scrutiny applies is not always so clear.[243]

These disputes, as Professor Claudia Haupt points out, arise "against the larger jurisprudential backdrop that is the current debate over the deregulatory use of the First Amendment in pursuit of a laissez faire, *Lochner*-style market."[244] This worry about First Amendment Lochnerism[245] is the same concern

---

serves the City's significant interest in protecting Charleston's tourism industry—the Ordinance is not narrowly tailored.").

[239] *Id.* at 690.

[240] *See* Amanda Shanor, *Business Licensing and Constitutional Liberty*, 126 YALE L.J.F. 314, 318 (2016) ("Recent occupational licensing cases have provoked considerable disagreement and created several circuit splits. The Fifth Circuit and District of Columbia Circuit have diverged, for instance, over whether a requirement that tour guides acquire a business license violates the First Amendment.").

[241] *See* Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 511 (2019) ("Licensing requirements are based on the states' police powers to protect the health, safety, and welfare of their citizens, and they are routinely justified by invoking protection of the public as the underlying rationale.").

[242] Shanor, *supra* note 240, at 320.

[243] For example, the U.S. Court of Appeals for the Ninth Circuit recently considered a First Amendment challenge to a California statute that requires certain individuals to pass an examination before they can gain admission to study at a private postsecondary school in order to become professional farriers (i.e., horseshoers). Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer, 961 F.3d 1062, 1065–66 (9th Cir. 2020). The Ninth Circuit concluded that the measure implicated First Amendment speech concerns but left "it to the district court on remand to determine whether this case involves commercial or non-commercial speech, whether California must satisfy strict or intermediate scrutiny, . . . and whether it can carry its burden under either standard." *Id.* at 1074 (internal citation omitted).

[244] Haupt, *supra* note 241, at 504; *see* Lochner v. New York, 198 U.S. 45, 57 (1905) (declaring unconstitutional, as an interference with the right to contract under the Due Process Clause of the Fourteenth Amendment, a state statute limiting the number of hours that a baker could work); *see also* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 407 (2016) (noting that in the so-called *Lochner* era, the Court declared invalid many laws "for infringing freedom of contract").

that largely animated both Justice Breyer's rationale for not applying heightened scrutiny in *NIFLA*[246] and Justice Kagan's decrial of the weaponization of the First Amendment, via the application of heightened scrutiny, to attack workaday economic regulations.[247] In brief, both liberal-leaning Justices and leading scholars are concerned that "the First Amendment has become a blunt tool of deregulation."[248] The argument against the application of heightened First Amendment scrutiny in cases such as *Billups* is that the licensing ordinances amount to economic regulations intended to protect consumers and clients under the government's police powers and thus should be subject to mere rational basis review.[249]

On the other hand, some contend that such measures must face strict scrutiny. Paul Sherman, a senior attorney for the Institute of Justice, an organization that frequently challenges licensing schemes on First Amendment grounds,[250] asserts that "where an occupational-licensing law burdens speech and the government can neither satisfy strict scrutiny nor provide evidence that the narrowly defined category of regulated speech has been considered historically unprotected, the law violates the First Amendment."[251]

---

[245] *See* Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1380 (2020) (defining First Amendment Lochnerism as "the claim that the Court's conservative majority, at the urging of commercial and other powerful interests and following its own antiregulatory agenda, has turned the constitutional protection for free speech into a tool with which to blow holes in the regulatory state").

[246] *See supra* notes 212–13 and accompanying text (addressing Justice Breyer's concern here in *NIFLA*).

[247] *See supra* note 76 and accompanying text (addressing Justice Kagan's concern here in *Janus*).

[248] Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 172 (2017); *see also* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 337 (2017) (describing how some scholars perceive "a new free speech *Lochner*ism—an exploitation of the First Amendment to promote a broad deregulatory agenda, regardless of popular democratic will").

[249] *See* Chemerinsky, *supra* note 244, at 403 ("[T]he Court has basically gotten it right about when to apply the rational basis test—using it to analyze government economic regulations and social welfare legislation when there is no discrimination based on a suspect classification or infringement of a fundamental right."); Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 79 (2018) (remarking that rational basis scrutiny "typically [is] applied to review of economic and social regulations"); *see also* Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185, 190 (2018) ("Licensing regimes are state laws enacted under the states' police powers.").

[250] *See Paul Sherman*, INST. FOR JUST., https://ij.org/staff/psherman/ [perma.cc/Y5NC-9NDR] ("Paul [Sherman] has extensive experience litigating First Amendment cases and has helped to develop IJ's occupational-speech practice, which seeks to create greater constitutional protection against occupational-licensing laws that burden speech.").

[251] Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 193 (2015). The language in Sherman's quotation regarding historically unprotected categories of speech refers to the fact that the U.S. Supreme Court has held that some varieties of speech fall outside the scope of First Amendment protection. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and

Billups and similar cases are also problematic because they involve the regulation of professional speech, at least to the extent that requiring a person to take an examination and to obtain a government-issued license makes one a professional. After *NIFLA*, as Professor Haupt explains, "[w]hether the requirement of content neutrality applies in the area of professional licensing or professional speech regulation is an unresolved question of First Amendment doctrine."[252] The *NIFLA* majority suggested that imposing a license scheme on people to engage in a profession is problematic because it vests the government with vast power to quash the First Amendment speech rights of that profession's members.[253]

Viewed in light of this tumultuous state of First Amendment affairs regarding both licensing schemes and professional speech, the Fourth Circuit's decision to engage in scrutiny-determination avoidance in *Billups* undoubtedly serves an interest in judicial economy and efficiency.[254] Without clear guidance from the U.S. Supreme Court in licensing cases regarding the level of scrutiny, and with the future of the professional speech doctrine left dangling tenuously by the Supreme Court's own use of scrutiny-determination avoidance in *NIFLA*, the Fourth Circuit was wise to simply assume that intermediate scrutiny applied if the three-judge panel knew the ordinance would not pass that test. Moving to a macro level, *Billups* ultimately illustrates the need for the Supreme Court to hear a First Amendment challenge to a licensing scheme and, in turn, to provide clear guidance to lower courts regarding the relevant level of scrutiny in such cases.

B. *Harbourside Place, LLC v. Town of Jupiter*[255]

As addressed in the Introduction, the U.S. Court of Appeals for the Eleventh Circuit in *Harbourside Place* deployed scrutiny-determination avoidance when facing a First Amendment challenge to a local ordinance that required

pornography produced with real children."); *see also* Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 967–68 (2016) ("The unprotected classes of speech are often identified as incitement to illegal activity, fighting words, obscenity, defamation, fraud, and speech integral to criminal conduct, although the exact contours of this list vary among incantations and have changed over time.").

[252] Haupt, *supra* note 241, at 527–28.

[253] As Justice Thomas wrote for the majority:

> All that is required to make something a "profession," according to these courts, is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose "invidious discrimination of disfavored subjects."

Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, 138 S. Ct. 2361, 2375 (2018) (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423–24, n.19 (1993)).

[254] *See supra* Section I.B (addressing the use of scrutiny-determination avoidance in the interest of judicial economy.)

[255] Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308 (11th Cir. 2020).

non-residential establishments hosting outside live musical performances either to comply with certain sound-amplification requirements imposed on locations classified as outdoor venues or to obtain a special permit from the Town of Jupiter.[256] The Eleventh Circuit dubbed the task of sorting out whether this ordinance was content-based or content-neutral—the key determinate for scrutiny selection—"a very tricky matter."[257] In passing on making this determination,[258] the appellate court cited the posture of the proceedings (the preliminary injunction stage), the interest of judicial minimalism, an undeveloped factual record, and the parties' failure to brief and address the impact of the U.S. Supreme Court's 1994 ruling in *Turner Broadcasting System v. Federal Communication Commission*[259] on scrutiny selection.[260] The Eleventh Circuit held only that the district court did not abuse its discretion when it refused to grant a preliminary injunction stopping the ordinance's enforcement.[261]

A closer examination of the Eleventh Circuit's scrutiny-determination avoidance rationale reveals two important and related tasks regarding scrutiny selection that the Supreme Court must soon take up. Those chores are:

(1) embracing a more nuanced approach to scrutiny selection that not only accounts for, but also clearly explicates and delineates among, a trio of critical concepts: (a) message content, (b) medium of expression, and (c) mode of expression, and

(2) clarifying the meaning, in contexts other than sign-ordinance disputes, of its statement in *Reed v. Town of Gilbert*[262] that a statute may be facially content-based by "defining regulated speech by its function or purpose."[263]

Turning to how *Harbourside Place* illustrates the significance of the first of these two tasks, the Eleventh Circuit deployed *Reed*'s 2015 definition of when a law is content-based—namely, when it "applies to particular speech because of the topic discussed or the idea or *message* expressed."[264] Citing *McCullen v. Coakley*,[265] which was addressed earlier[266] and was decided one year before *Reed*, the Eleventh Circuit opined that the test for determining if a statute is content-based is whether the governmental authorities who enforce it

---

[256] *Id.* at 1317; *see supra* notes 23–30 and accompanying text (addressing scrutiny-determination avoidance in *Harbourside Place*).
[257] *Harbourside Place*, 958 F.3d at 1318.
[258] *See id.* at 1322 ("We . . . do not definitively decide whether [the statute] is on its face a content-based or content-neutral regulation of speech.").
[259] Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).
[260] *Harbourside Place*, 958 F.3d at 1322.
[261] *See id.* ("We hold only that the district court did not abuse its discretion in denying injunctive relief due to Harbourside's failure to show a substantial likelihood of success on the merits.").
[262] Reed v. Town of Gilbert, 576 U.S. 155 (2015).
[263] *Id.* at 163.
[264] *Harbourside Place*, 958 F.3d at 1318 (quoting *Reed*, 576 U.S. at 163) (emphasis added).
[265] McCullen v. Coakley, 573 U.S. 464 (2014).
[266] *Supra* Section I.D.

must review the content of a message being communicated in order to know if the statute was violated.[267] This is a "need-to-read" test.[268] Under this message-centric approach to resolving the content-neutrality issue, the Eleventh Circuit suggested the ordinance was more likely content-neutral because it applied evenhandedly to all live musical performances, regardless of the specific messages conveyed by the music or the genres of the music.[269]

The Eleventh Circuit, however, focused on more than simply message content when ferreting out whether the ordinance was content-neutral. It also concentrated on the concept of medium. As the court explained, the statute "applies to one medium, and one medium only—that of live musical performances—while allowing other live events that produce sound (e.g., a political speech, a religious sermon, an educational presentation, an aerobics class, or a poetry reading)."[270] This language suggests the ordinance is content-based because live musical performances are restricted while live political speeches and other live speech-based events are left unscathed.

The problem here, however, is that the Eleventh Circuit's quotation immediately above conflates message content—political, religious, and educational content—with not only the medium of expression, but also with the mode of expression. Specifically, the medium of expression, in this Article's view, is better defined as the physical means through which message content is conveyed. For instance, sound amplification devices are a medium through which content might be conveyed to an audience. Similarly, in *Reed v. Town of Gilbert*, signs were the physical medium through which the regulated messages were communicated.[271]

Music, on the other hand, is not a physical medium of expression. It is, this Article avers, better understood as a mode of expression. Mode of expression, in this light, is the *manner* in which message content is conveyed—it is *how* a message, irrespective of the physical medium *through* which it is communicated and regardless of the substantive *idea* in the content, is expressed. The Supreme Court, in fact, recently wrestled with this conception of mode of expression in *Iancu v. Brunetti*.[272] In considering the constitutionality of a federal statute permitting the U.S. Patent and Trademark Office to block the registration of scandalous marks, Chief Justice Roberts wrote that "[s]tanding alone,

---

[267] *Harbourside Place*, 958 F.3d at 1318 (citing *McCullen*, 573 U.S. at 479). The Supreme Court in *McCullen* explained that the law at issue there "would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen*, 573 U.S. at 479 (quoting FCC v. League of Women Voters, 468 U.S. 364, 383 (1984)).

[268] Trevarthen & Hapner, *supra* note 6, at 521–27.

[269] *Harbourside Place*, 958 F.3d at 1318.

[270] *Id.*

[271] *See* Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015) ("The town of Gilbert, Arizona . . . has adopted a comprehensive code governing the manner in which people may display outdoor signs.").

[272] Iancu v. Brunetti, 139 S. Ct. 2294, 2298 (2019).

the term 'scandalous' need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their *mode of expression*—marks that are obscene, vulgar, or profane."[273] Furthermore, the fighting words doctrine prohibits speech because of the mode of expressing an idea, not because of the idea itself.[274]

Consider an example that illustrates the sometimes-slippery distinctions here among message content, medium of expression, and mode of expression. Start with a printed statement that reads: "The pandemic is terrible. It must be stopped. Wear a mask. That's a task." That statement is the message content. If the message content is then sung in a melodic way or is accompanied by instrumentation such as drums and piano, then the mode of expressing the content of the message is musical. Furthermore, if the musical mode of expressing the message content to the public occurs through the use of sound amplification equipment, then that equipment represents the physical medium of expression. Alternatively, if the message content were to be printed on paper and distributed to people, then the medium of expression would be paper.

In summary, *Harbourside Place* illustrates the need for the Supreme Court to better elucidate the differences between three core concepts—message, medium, and mode—as they affect the scrutiny selection process and the weight each should be accorded in that decision. Improved semantic hygiene must be embraced by the high court to help guide lower ones that confront ordinances such as that in *Harbourside Place* in which message content, medium of expression, and mode of expression are triangulated. Without such clarity, engagement in scrutiny-determination avoidance such as that used by the Eleventh Circuit seems likely to continue.

The second task the Supreme Court should take on, in light of the appellate court's analysis of the scrutiny issue in *Harbourside Place*, is to flesh out the meaning of its assertion in *Reed* that a "more subtle" way that a law might be deemed facially content-based—a way less obvious, that is, than by checking to see if a law "defin[es] regulated speech by particular subject matter"—is to determine if it "defin[es] regulated speech by its function or purpose."[275] In the context of sign-based cases, the meaning of "function or purpose" appears clear, such as measures that only regulate signs that function to convey direc-

---

[273] *Id*. at 2303 (Roberts, C.J., concurring in part, dissenting in part) (emphasis added). *See also* Clay Calvert, Iancu v. Brunetti*'s Impact on First Amendment Law: Viewpoint Discrimination, Modes of Offensive Expression, Proportionality and Profanity*, 43 COLUM. J.L. & ARTS 37, 55–63 (2019) (addressing the mode-of-expression by the various Justices in *Brunetti*).

[274] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992) ("[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.").

[275] *Reed*, 576 U.S. at 163.

tions or signs that function to convey residential addresses.[276] But what does this language mean outside of this context?

The Eleventh Circuit in *Harbourside Place* quoted *Reed*'s function-or-purpose language regarding this more subtle way of classifying a law as facially content-based.[277] In doing so, the appellate court seemingly was concerned that regulating *live* musical performances—the ones to which the ordinance applied—might function to impact musical content in ways different from regulating *recorded* music.[278] This fret about the law, by its terms, treating live music differently than recorded music relates back to the discussion of the medium of expression noted above.[279] In brief, the Eleventh Circuit appeared bothered that a *live medium* of expression was being handled differently than a taped or electronically *recorded medium* of expression and that this distinction unfairly impacted and discriminated against content conveyed by live performers.[280] Perhaps, then, live music serves a different function or purpose—for the establishments that play it, for the performers who engage in it, and for the audiences that listen to it—than recorded music.

Is this what the Supreme Court in *Reed* meant by a more subtle way in which a law might be deemed facially content-based by defining regulated speech based on its function or purpose? Alternatively, could *Reed*'s function-or-purpose language mean that the law in *Harbourside Place* is content-based because music—as a regulated mode of expressing content and regardless of whether it is conveyed through a live or recorded medium—serves a different function and purpose for listeners than does, to use the Eleventh Circuit's example, the unregulated mode of poetry?[281] In other words, does the determination of facial content-neutrality partly hinge on the Town of Jupiter's regulatory distinction between live and recorded music, or does it turn on the distinction between music as a regulated mode of expression and other non-regulated modes of expression that may serve purposes different from listening to music, be it live or recorded?

Ultimately, the Eleventh Circuit in *Harbourside Place* threw up its hands on such questions, which blur the lines separating content from medium from mode. It remarked that *Reed*'s function-or-purpose language was merely "dic-

---

[276] *See* Reagan Nat'l Adver. of Austin, Inc. v. City of Austin, 972 F.3d 696, 706 (5th Cir. 2020) ("*Reed* reasoned that a distinction can be facially content based if it defines regulated speech by its function or purpose. Here, the Sign Code defines 'off-premises' signs by their purpose: advertising or directing attention to a business, product, activity, institution, etc., not located at the same location as the sign.").

[277] Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1319 (11th Cir. 2020).

[278] *See id.* ("As Harbourside points out, '[l]ive musical performance, as opposed to commercially available recorded music, may . . . contain improvisation of musical notes, lyrics, and vocalization, as well as physical and vocal expression.' " (citation omitted)).

[279] *See supra* notes 270–71 and accompanying text (addressing the medium of expression).

[280] *Harbourside Place*, 958 F.3d at 1319.

[281] *See id.* at 1318.

ta . . . because the Supreme Court did not apply it" there.[282] This anticlimactic conclusion illustrates the need for the Court either to jettison this dicta in contexts other than sign-ordinance cases or to fully flesh out what is meant by this facet of the test for determining when a law is facially content-based and thus must surmount strict scrutiny to be constitutional.[283] More bluntly put, this "more subtle"[284] method of detecting a facially content-based law must be made *less* subtle in its meaning and application for it to prove truly useful in lower courts' analyses of scrutiny selection. *Reed*'s dicta may be too subtle for its own good.

In summary, the Eleventh Circuit's engagement in scrutiny-determination avoidance in *Harbourside Place* suggests (1) definitional problems in scrutiny selection regarding the difference in meaning among message content, medium of expression, and mode of expression; (2) applicational issues for the roles that both medium of expression and mode of expression play in scrutiny selection after *Reed* when they interact with message content; and (3) doctrinal problems regarding *Reed*'s function-or-purpose test for resolving questions of facial content-neutrality.

C. *McCraw v. City of Oklahoma City*[285]

The U.S. Court of Appeals for the Tenth Circuit's decision in *McCraw* illustrates a reason for engaging in scrutiny-determination avoidance not yet addressed in this Article: to avoid getting bogged down in the mire that may well be the cloudy legislative history behind a facially content-neutral statute and trying to decipher if the legislative intent was, in fact, nefarious.[286] Per the Supreme Court's ruling in *Reed v. Town of Gilbert*,[287] a statute that is content-neutral on its face will nonetheless be deemed content-based and thus must face strict scrutiny if the government's purpose in adopting it was to discriminate

---

[282] *Id*. at 1319.

[283] Indeed, laws deemed facially content-based under this "function or purpose" test must also face strict scrutiny. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015) ("Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. *Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny*." (emphasis added)).

[284] *Id*. at 163.

[285] McCraw v. City of Okla. City, 973 F.3d 1057, 1057 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 1738 (2021).

[286] *See* Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, 72 (1997) (noting "the subjective, speculative endeavors by individual justices into the often murky realm of legislative intent" when ferreting out scrutiny in First Amendment cases (emphasis omitted)). *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621–88 (1990) (providing an excellent review of the relationship among text, legislative history, and legislative intent when attempting to give meaning to statutes).

[287] *Reed*, 576 U.S. 155.

against a particular type of expression.[288] In brief, *Reed* created a two-step test for resolving the content-neutrality issue, with the first step focusing on whether a law, by its terms, is facially content-neutral and the second step then addressing whether a facially content-neutral law was adopted for an illicit objective that would transform it into a content-based one.[289] The first step, in other words, privileges a textualist approach to scrutiny—is the law content-neutral based on its terms?—while the second delves into legislative intent and purpose.

In *McCraw*, the Tenth Circuit deemed it unnecessary to decide if an Oklahoma City ordinance that banned sitting and standing on medians in public roadways was content-based because the ordinance would fail the less rigorous intermediate scrutiny test that applies to content-neutral laws, meaning it would necessarily fail the more stringent strict scrutiny standard.[290] The version of the ordinance considered by the Tenth Circuit and adopted in 2017 banned people from "stand[ing], sit[ting], or stay[ing] for any purpose on any portion of a median located within a street or highway open for use by vehicular traffic if the posted speed limit for such street or highway is 40 mph or greater."[291] It also included a legislative intent section providing that it was "not intended to impermissibly limit an individual's right to exercise free speech."[292] Instead, its stated purpose was "to protect pedestrians and drivers alike by imposing a specific place and manner restrictions for certain places where substantial threats of grievous bodily injury or death exist due to vehicular traffic traveling at high speeds."[293]

The Tenth Circuit, however, noted that the author of the original version of the ordinance, which was adopted in 2015, "cited complaints she had received from citizens and businesses regarding panhandling and repeatedly described

---

[288] *See id*. at 164 (holding that "facially content neutral" laws "will be considered content-based regulations of speech" if they "were adopted by the government 'because of disagreement with the message [the speech] conveys' ") (alteration in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[289] *See* Armijo, *supra* note 71, at 67 (describing *Reed*'s two-step approach to resolving the content-neutrality issue and noting that the second step "appl[ies] to facially content-*neutral* laws; a reviewing court can also subject those laws to strict scrutiny if the government adopted the law under review because of disagreement with the message expressed by the speech the law infringes upon").

[290] The appellate court explained in *McCraw* that

> [p]laintiffs argue that we should apply strict scrutiny because the Revised Ordinance discriminates based on content. We need not reach this argument. As discussed below, we ultimately conclude the Revised Ordinance fails even intermediate scrutiny. Because it would necessarily also fail strict scrutiny, we assume for the purposes of our analysis that the Revised Ordinance is content-neutral.

McCraw, 973 F.3d at 1070.

[291] OKLA. CITY, OKLA., CODE § 32-458 (d) (2019).

[292] *Id.* § 32-458 (b).

[293] *Id.*

the Original Ordinance as addressing panhandling."[294] Additionally, "city officials and others pointed to panhandlers as the impetus for the Original Ordinance."[295] This suggests the true motivation underlying the ordinance was to discriminate against a particular form of speech—solicitations for money—rather than to safeguard pedestrians and drivers from injury or death. Further problematic for Oklahoma City was that it could not muster any evidence of pedestrians having been struck on medians in that metropolis during an extended period of time.[296] In brief, while the revised version of the law did not target panhandlers by its terms, the history beneath it suggested a discriminatory motive aiming at the First Amendment-protected form of speech that is soliciting charitable contributions.[297]

Rather than wade into this quagmire of legislative purpose and intent, the Tenth Circuit's engagement in scrutiny-determination avoidance afforded an efficient means of resolving the case. Specifically, it saved the court substantial time and effort in having to sort out whether the measure, although seemingly content-neutral on its face, was adopted for the illicit purpose of discriminating against the speech of panhandlers and thus needed to face strict scrutiny.[298] As the Tenth Circuit explained in *McCraw*:

> Our independent examination of the record reveals troubling evidence of animus against panhandlers in the passage of the Original and Revised Ordinances. But because we conclude that the City's Revised Ordinance fails even intermediate scrutiny, we are not required to delve into whether its ostensible content-neutrality is instead camouflage for the City's desire to sacrifice speech in order to ban unpopular panhandling.[299]

In brief, assuming that a law is content-neutral and letting it fail under intermediate scrutiny eliminates, in time-saving fashion, the need to wrestle with

---

[294] *McCraw*, 973 F.3d at 1062.

[295] *Id.*

[296] *Id.* at 1064. The appellate court noted:

> In response to a request from plaintiffs for all accident reports involving medians or pedestrians, the City produced 504 reports dating from 2012 to 2017. No report involved a pedestrian struck on any median. Out of 39,833 accidents reported from 2010 to 2015, none involved pedestrians on medians. Further, at trial, the City could not identify anyone injured on a median in Oklahoma City or any accident caused by pedestrian activity on a median.

Id.

[297] *See, e.g.*, Rodgers v. Bryant, 942 F.3d 451, 456 (8th Cir. 2019) ("[A]sking for charity or gifts, whether 'on the street or door to door,' is protected First Amendment speech." (quoting Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980))); Vigue v. Shoar, 494 F. Supp. 3d 1204, 1218 (M.D. Fla. 2020) ("Soliciting charity is constitutionally protected expression."); Thayer v. City of Worcester, 144 F. Supp. 3d 218, 232 (D. Mass. 2015) ("Soliciting contributions is expressive activity that is protected by the First Amendment.").

[298] *See* Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (holding that "facially content neutral" laws "will be considered content-based regulations of speech" if they "were adopted by the government 'because of disagreement with the message [the speech] conveys' " (alteration in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))).

[299] *McCraw*, 973 F.3d at 1070, n.8.

legislative intent under the second step of *Reed*'s test for content-neutrality. *McCraw* thus constitutes an example of judicial minimalism in service of judicial economy.

With this analysis in mind of scrutiny-determination avoidance in three 2020 federal appellate court rulings, each illustrating different problems with a scrutiny selection process that largely pivots on categorizing a law as content-based or content-neutral, the Conclusion provides some overarching observations about scrutiny-determination avoidance. It also suggests that *McCullen*'s rigorous approach to the narrow-tailoring prong of intermediate scrutiny makes it easier to evade definitive scrutiny selection, as the gulf between strict and intermediate scrutiny narrows in their practical applications.[300]

CONCLUSION

This Article explored more than a half-dozen reasons why the U.S. Supreme Court might engage in scrutiny-determination avoidance in cases involving the First Amendment right of free speech. Rationales for doing so, which may overlap in any particular case, include

• embracing a minimalistic judicial philosophy,[301]

• attempting to bring more Justices together in a single opinion,[302]

• promoting judicial economy,[303]

• evading strict scrutiny as binding precedent in all future cases involving a particular medium or variety of expression,[304]

• keeping the peace among the Justices and avoiding public perceptions of ideological bias that might erode the Court's legitimacy when addressing politically and morally contentious and polarizing issues,[305]

• dodging the need to overrule precedent and violate the principle of stare decisis,[306] and

• preserving the opportunity for the development of a new or emerging First Amendment doctrine subject to something less demanding than strict scrutiny.[307]

In the process of examining these reasons, Part I offered possible explanations for the decision to embrace this methodology in *Packingham v. North Carolina*, *City of Ladue v. Gilleo*, and *National Institute of Family and Life Ad-*

---

[300] *See supra* notes 113–120 and accompanying text (addressing *McCullen*'s analysis of narrow tailoring under intermediate scrutiny).
[301] *Supra* Section I.A.
[302] *Supra* Section I.A.
[303] *Supra* Section I.B.
[304] *Supra* Section I.C.
[305] *Supra* Section I.D.
[306] *Supra* Section I.D.
[307] *Supra* Section I.E.

vocates (NIFLA) v. Becerra.[308] Additionally, Part I analyzed Justice Scalia's rather withering criticism of the Court's decision in *McCullen v. Coakley* not to engage in scrutiny-determination avoidance when the hot-button topic of abortion underpinned the case.[309] Furthermore, Part I addressed Justice O'Connor's discussion in *Gilleo* of the doctrinal problems that are pushed to the backburner when the Court punts on scrutiny selection.[310] In other words, passing on hard questions regarding standards of scrutiny thwarts doctrinal development. It just kicks the can of doctrinal worms down the judicial road. Confronting difficult questions, instead, may add much needed nuance to the scrutiny selection process that a rigid and reductionist categorical approach—one that pigeonholes laws into the categories of content-based and content-neutral—lacks.[311]

The Tenth Circuit's decision in *McCraw v. City of Oklahoma City* adds another incentive for engaging in scrutiny-determination avoidance by assuming that intermediate scrutiny applies.[312] Namely, it allows courts to steer clear of having to ferret out the precise legislative intent behind a facially content-neutral law, thereby allowing courts to dodge the second and possibly time-consuming step of *Reed*'s analysis.[313]

A final point regarding scrutiny-determination avoidance merits both consideration and concern. It is this: the more rigorous the Supreme Court makes the narrow-tailoring prong of intermediate scrutiny as it did in *McCullen*, the less of a difference there is between that standard of review and strict scrutiny.[314] Furthermore, the Court added teeth to this facet of intermediate scrutiny in *NIFLA*, with one article noting that the *NIFLA* majority's application of intermediate scrutiny "looks more like the narrow tailoring requirement of strict scrutiny."[315] That is because, under the *NIFLA* majority's tack, a government-sponsored advertising or public information campaign would always seem to provide a less restrictive alternative method of serving the governmental interest in educating the public, when compared to mandating a private entity to

---

[308] *See supra* Sections I.B, I.C, I.E (addressing, respectively, *Packingham*, *Gilleo*, and *NIFLA*).

[309] *See supra* Section I.D.

[310] *See supra* notes 92–96 and accompanying text (addressing Justice O'Connor's concerns in *Gilleo*).

[311] *Cf.* Iancu v. Brunetti, 139 S. Ct. 2294, 2305 (2019) (Breyer, J., concurring in part, dissenting in part) (lamenting the Court's process of "deducing the answers to First Amendment [scrutiny] questions strictly from categories," and addressing "the limits of relying on rigid First Amendment categories").

[312] *See supra* Section II.C (addressing *McCraw*).

[313] *Cf.* Lakier, *supra* note 13, at 235 ("The [*Reed*] Court thus construed the test of content neutrality as a two-step inquiry in which courts first determine whether a law makes facial content distinctions, and second, if—but only if—it doesn't, do they look at the purposes that justify the law.").

[314] *See supra* notes 113–120 and accompanying text (addressing *McCullen*'s analysis of narrow tailoring under intermediate scrutiny).

[315] Recent Case, National Institute of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018), 132 HARV. L. REV. 347, 354 (2018).

convey the government's message.[316] The space separating strict scrutiny's demand that the means of serving an interest be the least speech-restrictive method possible[317] and intermediate scrutiny's requirement that there be "a close fit"[318] between the means and the ends such that the means do not burden substantially more speech than is necessary[319] is closing.

The big-picture implication of the collapsing gap between intermediate and strict scrutiny on their respective narrow-tailoring elements is that it makes it easier for courts to assume, for the sake of argument, that a law is subject to intermediate scrutiny and to apply that test to strike it down. In other words, it is less problematic to engage in scrutiny-determination avoidance because intermediate scrutiny becomes a more difficult standard for a law to pass than it was in the past. The more rigorous intermediate scrutiny becomes, the more likely a statute is to be declared unconstitutional when a court defaults to—rather than definitively adopts—intermediate scrutiny via scrutiny-determination avoidance.

In fact, in looking back at the First Amendment cases analyzed in this Article in which the Supreme Court engaged in scrutiny-determination avoidance and assumed that intermediate scrutiny applied, the laws in question all failed under the narrow-tailoring prong, not the government-interest prong. To wit, the majority in 2018 in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*[320] assumed that California possessed the requisite substantial interest necessary to survive intermediate scrutiny—namely, "providing low-income women with information about state-sponsored services."[321] The law compelling licensed crisis pregnancy centers to communicate such information to their patients, however, failed the tailoring prong because the measure was underinclusive and because there were less restrictive alternative means of serving California's interest.[322]

Similarly, the Court in 2017 in *Packingham v. North Carolina*[323] assumed that the Tar Heel State had a significant interest in protecting minors from sex-

---

[316] *See id.* at 354–55 (contending that the *NIFLA* majority's "rationale would undercut any asserted government interest in regulating through compelled speech—no disclosure requirements can survive even intermediate scrutiny if the government always has the option to create an advertising campaign rather than mandate disclosure").

[317] *See* McCullen v. Coakley, 573 U.S. 464, 478 (2014) ("If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest.").

[318] *Id.* at 485.

[319] Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

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

[321] *Id.* at 2375.

[322] *Id.* at 2375–76.

[323] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

ual abuse.[324] The problem, however, was that the statute was not narrowly tailored to serve that interest because it was "unprecedented in the scope of First Amendment speech it burden[ed]."[325] By "foreclose[ing] access to social media altogether,"[326] the law was simply too "sweeping"[327] to serve North Carolina's interest.

In *City of Ladue v. Gilleo*,[328] another case in which the Court assumed, for the sake of argument, that a statute was content-neutral and thus only needed to pass intermediate scrutiny,[329] the sign ordinance was not sufficiently tailored because it banned "almost all residential signs."[330] The Court explained that "[a]lthough prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can *suppress too much speech*."[331] The remedy for Ladue thus was to go back to the legislative drafting board and to adopt "more temperate measures"[332] in serving its interests in aesthetics, property values, and safety.[333]

In sum, if the Court already uses intermediate scrutiny's narrow-tailoring prong to strike down laws when it engages in scrutiny-determination avoidance and if, in turn, that prong is becoming more demanding in its nature in light of *McCullen* and *NIFLA*, then this added rigor incentivizes the expanded use of scrutiny-determination avoidance because the difference between the strict and intermediate scrutiny standards in their practical application is diminished. Put differently, the odds of a statute being struck down under intermediate scrutiny are enhanced because of this more stringent tailoring requirement, thereby making it easier for the Court to pass on applying strict scrutiny when declaring a law unconstitutional. To some extent, then, assuming intermediate scrutiny applies becomes more of a symbolic move rather than one making a practical, as-applied doctrinal difference when compared to strict scrutiny.

Ultimately, while scrutiny-determination avoidance may be invoked for any one of the multiple reasons articulated in this Article,[334] its deployment hinders doctrinal development. Justice O'Connor's words more than a quarter-

---

[324] *See id.* at 1736 ("And it is clear that a legislature 'may pass valid laws to protect children' and other victims of sexual assault 'from abuse.' " (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002))).

[325] *Id.* at 1737.

[326] *Id.*

[327] *Id.*

[328] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[329] *See id.* at 53 ("In examining the propriety of Ladue's near total prohibition of residential signs, we will assume, *arguendo*, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination.").

[330] *Id.* at 58.

[331] *Id.* at 55 (emphasis added).

[332] *Id.* at 58.

[333] *See id.* at 47 (identifying the interests and concerns underlying Ladue's ordinance).

[334] *Supra* notes 301–07, 313.

century ago in *Gilleo* about the virtues of directly tackling the scrutiny selection question in difficult cases and thereby allowing the Court's "rules [to] evolve and improve"[335] through reexamination thus should not be forgotten the next time the Court considers punting on scrutiny. The line separating laudable judicial minimalism from condemnable doctrinal evasion is a very fine one.

[335] *Gilleo*, 512 U.S. at 60 (O'Connor, J., concurring).

[THIS PAGE INTENTIONALLY LEFT BLANK]