# THE BIZARRO FIRST AMENDMENT

*Robert M. Black*[*]



## INTRODUCTION

Welcome to the Second Lochner Era.

It's been eons arriving, only faintly visible but creeping further and further into different fields of constitutional doctrine. But with the Supreme Court's decision in *Janus v. AFSCME*,[1] that time of stealth is over: the new age is here, proclaimed openly, and its herald is the First Amendment.[2] Once more the

[*] Robert M. Black received his JD from Yale Law School in 2016 and is currently a Ph.D. candidate in the New York University Wilf Family Department of Politics. The author is particularly indebted to Professor Amanda Shanor for her feedback and assistance.

[1] Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

[2] This Article is focused on the Free Speech Clause, and references throughout to "the First Amendment" should be taken as referring principally to that Clause. One might well make similar observations about the use of the Free Exercise Clause for Lochnerish ends, particularly in the context of using "religious liberty" as a battering ram against the nation's civil rights laws. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). But as the legal issues involved in the

High Court wields a great guarantee of liberty to nullify progressive governance. But this time its weapon is not some supposed "liberty of contract" protected by the Due Process Clause, but the freedom of speech itself.[3] Justice Elena Kagan sounded the alarm in her *Janus* dissent, accusing the majority of "wield[ing]" free speech as a "sword," warning of "black-robed rulers overriding citizens' choices" and declaring that "[t]he First Amendment was meant for better things."[4] She drew criticism for these remarks, with many observers feeling that she was trying to politicize the First Amendment, to make free speech something that protects only liberal speakers and not conservative ones.[5] But this is exactly backwards, and Justice Kagan is exactly right.

"Speech is everywhere,"[6] as Justice Kagan says, and therefore the freedom of speech, if not properly understood, could bring about anarchy. Of course, a satisfying view of the First Amendment must be able to trace its outer limits. Thus, the absolutist view once championed by Justices Hugo L. Black and William O. Douglas immediately confronts the need to identify a valid basis for regulating expressive activity, because all activity

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religious freedom cases are analytically quite distinct from those in the free speech cases, that issue lies beyond the scope of this Article.

[3] I am hardly the first to observe the Lochnerish streak in the Court's recent First Amendment jurisprudence. *See, e.g.*, Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (2016).

[4] *Janus*, 138 S. Ct. at 2501-02 (Kagan, J., dissenting).

[5] *See, e.g.*, George F. Will, Opinion: *The 'Janus' Ruling is a Welcome Blow to Coerced Speech*, WASH. POST (June 29, 2018, 3:45 PM), https://www.washingtonpost.com/opinions/the-janus-ruling-is-a-welcome-blow-to-coerced-speech/2018/06/29/62027492-7af8-11e8-93cc-6d3beccdd7a3_story.html [https://perma.cc/29CR-VKYX] ("How does Kagan err? Let us count the ways . . . . [J]udges are supposed to be unleashed to wield the First Amendment as a weapon against officials perpetrating such abuses."); Asma T. Uddin, *When the First Amendment is Not Weaponized, but Sharpened*, RELIGIOUS FREEDOM CTR. (Oct. 16, 2018), https://www.religiousfreedomcenter.org/when-the-first-amendment-is-not-weaponized-but-sharpened/ [https://perma.cc/DR7Q-GPUP] ("[T]he court is more likely to protect conservative speech than liberal speech. The law hasn't changed, but the winners have. And that shift has liberals worried."); Audrey Fahlberg, *The First Amendment Isn't a Weapon, So Stop Calling it One*, WASH. EXAMINER (June 4, 2019, 11:43 AM), https://www.washingtonexaminer.com/red-alert-politics/the-first-amendment-isnt-a-weapon-so-stop-calling-it-one [https://perma.cc/B8X2-UWRV].

[6] *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

is in some measure expressive. If "no law" really means *no* law, as Justice Black was fond of saying, then it might naïvely be thought that, because every law restricts activity, and all activity is expressive, then every law is unconstitutional. This is not the case, as Justice Douglas recognized, because the government may regulate "speech . . . brigaded with action."[7] So long as the government's purpose is not to suppress expression, it may regulate the action and its baleful consequences.

But the Court has never forthrightly adopted this absolutist view. Instead, it has followed the "low-value" speech model of *Chaplinsky v. New Hampshire*,[8] on which certain kinds of speech—classically including obscenity, libel, and fighting words—are considered "no essential part of any exposition of ideas" and therefore beyond the First Amendment's protections.[9] This model has no need to identify the valid basis for regulating expression, because it sees only certain kinds of speech as worthy of protection in the first place. But the Court has gradually abandoned the low-value speech model, such that now almost all expression is considered protected by the First Amendment. The result is a Court that—rightly—sees expression everywhere but has never fully thought through why expressive activities sometimes may be regulated and sometimes may not be.

And therein lies the danger of a "weaponized" First Amendment, as Justice Kagan warns. If everything is speech, then there is always a naïve *prima facie* case that any given law violates the freedom of speech. And it is a simple matter to forget, when convenient, the reasons why a law is actually perfectly inoffensive. This is how the Court's conservative majority has operated: by ignoring the reasons, often obvious, why a law restricting conduct with some expressive element does not violate the Constitution. The new *Lochner* thereby places itself on stronger ground than the old freedom-of-contract model.[10] Its

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[7] Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

[8] 315 U.S. 568 (1942).

[9] *Id.* at 572.

[10] *See* Haley Sweetland Edwards, *How the First Amendment Became a Tool for Deregulation*, TIME (July 19, 2018, 6:00 AM), https://time.com/5342749/first-amendment-deregulation/ [https://perma.cc/NR3H-KHWU] ("Ilya Shapiro, a senior fellow at the libertarian Cato Institute, says he now advises lawyers to find free-speech arguments whenever they can. If a judge overturns a regulation or precedent on the

defenders can say to their critics: do you oppose free speech? Are you denying that this is speech? Isn't speech protected?

All too often, those critics have been willing to play along, acknowledging decisions like *Janus* as the consequence of a broad reading of the First Amendment that sees all speech as inherently worthy of protection. Thus they *reject* the idea that the Amendment protects "speech as such,"[11] saying that such an interpretation would require us to "abandon the possibility of meaningful self-determination and turn back our democracy to the juristocracy that controlled society in the days of *Lochner*."[12] To avoid this, they propose something like a return to the *Chaplinsky* model, with judges deciding which kinds of speech have enough social value to attract the First Amendment's interest.[13] This failure of imagination, this inability to recognize even the *possibility* that an absolutist approach could generate a workable law of free speech, leads the Court's liberal critics to accept a

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grounds of government overreach, he explains, 'that's seen as controversial and partisan.' If a judge reaches the same conclusion on the grounds of protecting free speech, 'it's easier for people to accept.'").

[11] *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1279 (1995). *See also* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2171-72 (2015) (footnotes omitted) ("By creating (at least) two tiers of constitutional scrutiny for regulations that target or in some way limit what is recognized to be speech, the Court has attempted to reconcile the constitutional promise of expressive freedom with the practical need for governmental regulation. Indeed, absent the distinction between high- and low-value speech, it would be much more difficult for the government to justify its regulation of the commercial marketplace, its ability to impose criminal sanctions on speech that facilitates or is otherwise closely connected to criminal behavior, or its efforts to maintain basic standards of public conduct by prohibiting (for example) threatening and defamatory speech. The distinction between high- and low-value speech thus provides an important mechanism by which courts ensure the workability of the first Amendment by cabining, but only in limited circumstances, the libertarian breadth of its command."); Shanor, *supra* note 3, at 208 ("The new *Lochner*'s absolutist 'speech is speech' argument must be rejected both for its lack of limiting principle and for its failure to reflect social reality. It is indeed the new *Lochner*'s formal equation of 'speech is speech' that leads to its lack of a limiting principle and attendant institutional effects.").

[12] Post & Shanor, *supra* note 3, at 179.

[13] *See, e.g.*, Shanor, *supra* note 3, at 208 ("Only by bearing in mind the words of Justice Holmes that '[t]he life of the law has not been logic: it has been experience' and recognizing that *not all speech and expression are equal* can we ensure that the Constitution does not destroy the very representative governance it was meant to protect.") (emphasis added).

framing in which they are the enemies of robust freedom of expression, and the conservative Court its champion.

But a workable, absolutist First Amendment *is* possible. And if we do the work to understand how that kind of free speech law might operate, we can then see that *Janus* and other cases like it are not merely *wrong* but *fake*. Each one rests on rules of decision that, were they truly applied in a neutral and general fashion outside of a specific political context, everyone—including the conservative justices writing these very decisions!—would recognize as absurd. But when not seeing this absurdity is convenient for the conservative project, these justices have a tendency to miss the obvious, whether willfully or unconsciously. The problem, then, is not that these cases afford too much protection for speech but that they invoke the First Amendment in cases that, truly understood, have nothing to do with freedom of speech. They are impostors; they are what I term the "Bizarro First Amendment."[14]

Part I of this Article will focus on the absolutist approach of Justices Black and Douglas, showing how the basic commitments of that approach can be used to generate a workable theory for when the government may regulate expressive activities. Part II will trace the history of the "low-value speech" model and its gradual abandonment and will outline the theoretical problem that has greeted the Court in this "post-low-value-speech" era. Part III will examine several Bizarro First Amendment cases, including *Janus* itself, and show how the holdings from these cases cannot be, and are not, taken seriously. Finally, in the Conclusion, I offer suggestions for a future Supreme Court interested in eradicating the Bizarro First Amendment.

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[14] In the Superman comics, the villain Bizarro is a mirror-image of Superman who possesses all the same powers but an inverted moral compass. *See, e.g.*, Alvin Schwartz, *The Battle with Bizarro*, DC COMICS (Superman No. 6147-6242 (1958)). Thus, the Bizarro First Amendment has the appearance and the powers of true First Amendment jurisprudence but is not the genuine article.

## I. ABSOLUTISM AND ANARCHY

Congress, the First Amendment declares, "shall make no law . . . abridging the freedom of speech[.]"[15] Of all the interpretive questions this commandment poses, perhaps none has more defined the constitutional dialogue around free speech more than: is this prohibition truly absolute? When the Amendment says "no law," does it really mean that *no law* abridging speech can be valid, with no exceptions? Many think this an absurd proposition,[16] but Justices Hugo L. Black and William O. Douglas famously championed the absolutist view. Justice Douglas opened his opinion in *New York Times Co. v. United States*, the Pentagon Papers case, by declaring that the First Amendment "leaves, in my view, no room for governmental restraint on the press."[17] And Justice Black was particularly notorious for his stubborn

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[15] U.S. CONST. amend. I. Although this command is addressed specifically to Congress, it is universally understood as applying to the entire government. For instance, not one of the ten opinions in the Pentagon Papers case, which involved the application of the Free Speech Clause to restrain presidential action ostensibly pursuant to his inherent constitutional powers, rather than any authorization by Congress, so much as mentions the textual discrepancy. *See* New York Times Co. v. United States (*The Pentagon Papers Case*), 403 U.S. 713 (1971). *See also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 101 (1982). The Free Speech Clause was moreover the first provision of the Bill of Rights held incorporated into the Fourteenth Amendment's prohibition on state actions violating civil rights. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[16] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 84-98 (Yale Univ. Press 2d ed. 1986) (describing Black's position as an "illusion," and "very dangerous"); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 21 (1971) ("Any such [absolutist] reading is, of course, impossible."). As Bickel notes, even those more sympathetic to Justice Black's views, like Professor Charles Black, conceded that his "absolutes cannot really be deemed—how shall one say—absolute absolutes . . . ." BICKEL, *supra*, at 93; *see also* Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S MAG., Feb. 1961, at 63, *reprinted in* CHARLES L. BLACK, JR., THE OCCASIONS OF JUSTICE: ESSAYS MOSTLY ON LAW 89 (1963). As we have already seen, many modern First Amendment scholars agree with Bickel and Bork. *See* sources cited *supra* note 11.

[17] *The Pentagon Papers Case*, 403 U.S. at 720 (Douglas, J., concurring). Although he spoke of restraint of the press here, the absolutist approach applies equally to speech restraints, and many of the six prior opinions of his own and Justice Black's cited in the footnote after this sentence do not involve restraint of the press. *See id.* at 720 n.1.

insistence that "no law" really did mean "no law," as simple as that.[18]

If this is so, the next question becomes: what is speech? Does it only mean the literal use of human vocal cords to vibrate the air in a way that human listeners will parse as intelligible spoken language?[19] Justice Black may have taken something like this approach. *Street v. New York*[20] is instructive. There, the Court reversed the conviction of a man who had burned the American flag on the grounds that his conviction may have rested not on the act of flag-burning itself, but on his spoken condemnations of the flag.[21] This conclusion may have been tenuous; certainly, Justice Black and the other dissenters thought it untenable.[22]

More interesting is the significance Justice Black attributed to the distinction. Were the conviction truly for spoken words disparaging the flag, he wrote:

> I would firmly and automatically agree that the law is unconstitutional. I would not feel constrained, as the Court seems to be, to search my imagination to see if I could think of interests the State may have in suppressing this freedom of speech. I would not balance away the First Amendment mandate that speech not be abridged in any fashion whatsoever.[23]

Here we have a clear statement of Justice Black's absolutist view. But he went on:

> It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words

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[18] *See, e.g.*, *id.* at 717-18 (Black, J., concurring) (reciting an exchange at oral argument in which the Solicitor General referred to Justice Black's "well known" view that "no law means no law, and that should be obvious," while stating his own view that it is "equally obvious that 'no law' does not mean 'no law' . . . .").

[19] If so, then presumably written language would be protected only by the freedom of the press. Indeed a thoroughly literal approach might leave handwritten language entirely unprotected, as it is created using neither speech nor any sort of printing press.

[20] *See generally* Street v. New York, 394 U.S. 576 (1969).

[21] *See id.* at 588-90.

[22] *See id.* at 594-609 (Warren, C.J., dissenting); *id.* at 609-10 (Black, J., dissenting); *id.* at 610-15 (White, J., dissenting).

[23] *Id.* at 609-10 (Black, J., dissenting).

> are spoken in connection with the burning. It is the *burning* of the flag that the State has set its face against.[24]

Here, Justice Black appears to be committing himself to a clear distinction between literal, verbal speech and any other conduct, with the former absolutely protected and the latter absolutely unprotected. This would be a simple and administrable rule of law, although as we shall see it would not be a satisfying one.

But the Court has never endorsed this rigidly literal distinction between verbal speech and other means of expression. Nor should it. Vibrations in the air are but one way human beings communicate with one another. As Justice Robert Jackson wrote in the first great modern First Amendment case:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.[25]

Against the rich expressive power of symbol, the bare textual reference to "speech" is of little weight, except of course to a diehard textualist like Justice Black.[26] Of *course* symbolic speech

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[24] *Id.* at 610.

[25] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943).

[26] If it be thought necessary to refute Justice Black's reliance on the text here, the Ninth Amendment could be employed to disallow the inference that, because speech is expressly protected, other expressive conduct must not be. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). So too could Philip Bobbitt's techniques of

is "speech." Of *course* black armbands worn by students to protest the Vietnam war are speech.[27] Of *course* burning your draft card to protest the Vietnam war is speech.[28] And as the Court would ultimately conclude in *Texas v. Johnson*,[29] even burning the American flag is speech. Of *course* it is.[30]

But now we have a problem. Once we allow ourselves to recognize the expressive aspect of conduct generally, not just when spoken or written language are the medium, we cannot help but notice that speech is literally everywhere: every action expresses the intentions that motivated it. Buying bread at the store expresses that you like eating bread, and that you value the bread more than the relevant quantity of money. Getting on an airplane expresses that you want to be where the plane is going. Speeding expresses impatience. Going for a walk expresses restlessness, or the need for exercise. Kissing expresses love—or at least desire.

And our darker desires find expression in our actions as well. Murder expresses hatred. Theft expresses greed. Rape expresses the lust for power and domination. These acts are often deeply expressive, and indeed their expressive quality is why we are so outraged by them. The "expressive theory of punishment" holds that society marks as criminal specifically those harmful acts that convey some odious meaning.[31] Criminal acts "are ways a wrongdoer has of saying to us, 'I count but you do not,' 'I can use you for my purposes,' or 'I am here up high and you are there down below.'"[32] And if this general expressive theory of criminal justice were not enough, the federal criminal offense of terrorism

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ethical argument, which see provisions such as the First Amendment as expressions of broader constitutional principles. *See* BOBBITT, *supra* note 15, at 142-44 (noting that the clearest and simplest ethical arguments are those that operate by direct analogy to a specific piece of constitutional text).

[27] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[28] *See generally* United States v. O'Brien, 391 U.S. 367 (1968). Protesting the Vietnam War sure seems to have involved a lot of symbolic speech!

[29] *See generally* Texas v. Johnson, 491 U.S. 397 (1989).

[30] For discussion of the symbolic speech doctrine, see Columbia Law Review Ass'n, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968); James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1 (2008); Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844 (1997).

[31] *See, e.g.*, Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1, 10 (Wesley Cragg ed., 1992); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111-14 (Cambridge Univ. Press 1988).

[32] MURPHY & HAMPTON, *supra* note 31, at 25.

is specifically defined in expressive terms—and as a form of political expression no less![33]

Hence the conundrum. If we believe that the First Amendment is absolute, and we recognize that conduct other than literal speech can be expressive in ways that should trigger constitutional protections, then it appears that all laws regulating any form of conduct are unconstitutional. This may be why Justice Black favored the narrow, literal definition of "speech," despite his professed aversion to reasoning from consequences. Without resorting to that expediency, we need some way to justify government regulation of actions that do have real expressive content, while still preserving our commitment to an "absolute" freedom of speech.

This may sound impossible, but—unlike his comrade-at-arms—Justice Douglas was well aware of the solution: as he wrote in *Brandenburg v. Ohio*, "[t]he line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts."[34] Thus, where "speech is brigaded with action,"[35] the action component may be prosecuted. Now, this is somewhat too neat an account. Justice Douglas wrote in the context of *Brandenburg*, concerning a prosecution for seditious advocacy as such. It is therefore to be understood that he referred to instances where speech and action are "indeed inseparable" as "rare."[36] When we consider symbolic speech this is no longer true: it may be more the norm than the exception for speech and action to be inseparable, and we therefore need a more nuanced rule than simply allowing regulation in all cases, as Justice Douglas seems to suggest.

But while the precise boundaries of this doctrine may be difficult to discern in particular cases, the core idea is simple: because the state has the power to regulate actions but not ideas,

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[33] 18 U.S.C. § 2331(1)(B) defines "international terrorism" as violent criminal acts that "appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping." Domestic terrorism is similarly defined. *See* 18 U.S.C.A. § 2331(5)(B) (West, Westlaw through P.L. 116-259).

[34] Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

[35] *Id.*

[36] *Id.* at 456-57.

laws restricting expressive conduct are valid if their *purpose* is to regulate the act component, but *invalid* if their purpose is to regulate the speech component.[37] This view of things does not focus on the nature of the regulated conduct, and does not divide the world into "protected speech" and other, regulable conduct. It does not even divide the world into "speech" and "action," recognizing that the two are often commingled.[38] Instead it regards the nature of the government act under review and asks whether that act is one abridging the freedom of speech—which is to say, whether it is driven by an impulse to restrict expression as such.[39]

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[37] "Purpose" is meant here in the Model Penal Code sense: "A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist." MODEL PENAL CODE § 2.02(2)(a) (AM. LAW INST. 2019). This is to be distinguished from merely *knowing* that a given result will ensue or that a given circumstance exists. *Id.* § 2.02(2)(b). Thus, the government may *know* that its act will restrict expression, so long as that is truly not its purpose.

[38] Frederick Schauer has forcefully suggested that this distinction cannot be maintained. *See, e.g.*, Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427, 428 (2015). Schauer writes that "not only the First Amendment but also any coherent principle of freedom of speech presupposes a meaningful distinction between the activities encompassed by the principle [*i.e.* "speech"] and those that are not [*i.e.* "action"]." *Id.* at 427. But it is "by no means clear that such a distinction can be maintained." *Id.* at 428. Therefore, the First Amendment may "rest on a mistake." *Id.* at 427. This problem, Schauer suggests, proved fatal to Thomas Emerson's attempt to "work out a system of absolute but bounded speech . . . ." *Id.* at 434-35; *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 292-99, 328-35, 717-21 (1970); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 880-81 (1963). In Emerson's scheme, all speech is absolutely protected while all action—as well as all cases of speech brigaded with action—are wholly unprotected. This, Schauer notes, was "question-begging in the extreme," Schauer, *supra*, at 434-35, and Emerson's attempts to justify the dichotomy were theoretically unconvincing. *Id.* at 436-38.

The approach I am suggesting in this Part, however, does not depend on separating speech from action in the wild. Instead it only asks us to determine, in cases where speech and action are intertwined, which component the government sought to act upon.

[39] This approach is similar to the one outlined by then-Professor Elena Kagan in her 1996 article *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996), in one important way, but also different in two crucial ways. The two are alike in that they focus on the nature of the government's conduct rather than on the nature of the regulated act. *See id.* at 414 ("I argue . . . that First Amendment law, as developed by the Supreme Court over the

*United States v. O'Brien*[40] provides a perfect example. During the Vietnam War, federal law forbade the knowing destruction or mutilation of a Selective Service registration card, also known as a draft card.[41] David O'Brien violated this law—knowingly—by burning his draft card on the steps of the South Boston Courthouse in protest against the war.[42] O'Brien was arrested, tried, and convicted; on appeal, the Supreme Court ultimately upheld his conviction.[43] The Court assumed without deciding that "the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment,"[44] but noted that "it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity."[45] The Court went on to hold that "when 'speech' and 'nonspeech'

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past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."). This distinguishes both our approaches from what then-Professor Kagan calls the "speaker-based" and "audience-based" models of the First Amendment. *See id*. at 423-25.

They are quite different, however, first in that my approach, unlike Kagan's, would have courts *directly* assessing the government's purpose. Professor Kagan sees this as impracticable, owing to the "ease of legislatures' offering pretextual motives and the difficulty of courts' discovering the real ones." *Id.* at 414. For this reason, she concludes that a court interested in government motive would fashion a doctrinal framework that thoroughly eschewed any overt inquiry into motive. My approach would sidestep these difficulties by using a version of the *McCulloch* test, which instead of examining the subjective motives of the individual human beings who undertook a particular government action would simply ask toward what end that act seems plainly adapted. *See infra* note 49 and accompanying text.

Second, the focus of each approach is subtly different. Professor Kagan's model asks *why* the government wished to restrict speech, with certain answers permissible and others forbidden. Kagan, *supra*, at 425-26, 428-29 (offering as impermissible motives disagreement with, or disapproval of, "the ideas espoused by the speaker," as well as the fear that those ideas "threaten officials' own self-interest"). My approach, on the contrary, would ask not *why* the state sought to regulate speech but *whether* it sought to regulate speech—as opposed to the "act" component of the expressive conduct at issue. If the answer to that question is "yes," then the *reason* why the government sought to do this would be immaterial; the regulation would be unconstitutional regardless. This distinction is why I speak in terms of government "purpose," rather than Professor Kagan's term "motive." (It also helps reinforce the feasibility of ascertaining the purpose of the challenged act, *contra* Kagan.).

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

[41] *Id.* at 371.

[42] *Id.* at 370.

[43] *Id.* at 362.

[44] *Id.* at 376.

[45] *Id.*

elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[46] Thus:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[47]

This is, broadly speaking, the right approach. The Court's test focuses on the nature of the government interest, which is just another way to describe the law's purpose. It correctly observes that, if the government's interest is truly unrelated to suppressing speech, it will go no further in that direction than necessary. And it sensibly suggests that there may be some government interests too weak to justify incidental restrictions on speech.

There was, however, one major problem with the *O'Brien* case: its result, affirming O'Brien's conviction. As Justice Douglas would note one year later in *Brandenburg*, "O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried and convicted for burning the card."[48] The law's design and operation, in other words, betrayed that its true purpose was not merely to vindicate the government's interest in ensuring the smooth functioning of the Selective Service system but to prevent precisely the kind of dramatic protest O'Brien had engaged in. The Court's test is thus somewhat too formal, focusing on whether a legitimate government interest *could* support the statute rather than whether the true interest behind the law was a permissible one. Conversely, we can imagine that the test would be overly rigid for the government, imposing onerous tailoring requirements even on laws that are truly not designed to suppress speech.

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[46] *Id.*

[47] *Id.* at 377.

[48] Brandenburg v. Ohio, 395 U.S. 444, 455 (1969) (Douglas, J., concurring).

The better version of the *O'Brien* test, therefore, might ask instead toward what end the law under review seems plainly adapted.[49] Is it more like something a government interested in suppressing speech would do, or more like something a government that respected free expression and sought only to prevent the genuinely baleful consequences of expressive conduct would do? As Justice Douglas says, the answer in *O'Brien* is clear: O'Brien was prosecuted for his protest, not simply for mutilating a government-issued certificate. The same question provides a ready answer to the thorny disputes over flag burning. A law forbidding the public burning of any materials in a hazardous manner, if enforced in a general and even-handed fashion, might legitimately be brought to bear against a protester who burns the American flag. A law forbidding *specifically* burning the flag, however, can never be constitutional, because it is directly attuned to the expressive nature of the object being burned.

By focusing on the purpose of government action, we can resolve the seeming paradox of recognizing that "[s]peech is everywhere"[50] within an absolutist approach to the First Amendment. If this perspective does not answer every difficult question, at least it lets us ask the right question.[51] In general the cases will be easiest where the harm of the regulated action is entirely distinct from the message being expressed: driving over the speed limit, for instance, expresses being in a hurry, but this is no obstacle to punishing drivers who speed. The harm comes from the danger posed to other motorists. Pollution expresses indifference to the environment but is regulated because of the damage to the environment as such. And so on. Within this field

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[49] *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are Constitutional.").

[50] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

[51] *Cf.* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 48-49 (1969) ("opinions will differ on that, but at least they would be differing on exactly the right thing, and that is no small gain in law.").

the Court has displayed a relatively sophisticated understanding, as shown in *O'Brien* and also in *Texas v. Johnson*.[52]

The harder cases will be those where, although the harm to be regulated is not itself the communication of a disfavored idea, it does flow from the expressive nature of the regulated act. Counter-intuitively, terrorism is just such a case. To be sure, violent acts may be punished. But there are already laws against violence. The terrorism statute punishes violence as a form of political expression over and above the punishment doled out for ordinary violence. We punish terrorism as such because we think there is something uncommonly bad about violence that has a political purpose. But unlike the flag-burning laws, which protect and promote a certain notion of patriotism and suppress anti-war protest in particular, the terrorism statute privileges no *particular* message or idea. Anyone who uses violence to intimidate the population, or to influence the policy of the government, is a terrorist, regardless of their intentions or beliefs.

Perhaps the rule is that, among the category of expressive acts with harmful non-expressive consequences, we may distinguish on the basis of content but not of viewpoint.[53] I am not sure; I suspect, however, that this way of thinking will in the end provide the most satisfying basis for laws against terrorism, or hate crimes, or harassment. These are the cases where speech and action are the most closely intertwined. Harassment, for example, we may visualize as the use of words as the equivalent of a slap in the face. There is no harm whatsoever except that caused to the

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[52] *See* Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements.") (citations omitted).

[53] A law is content-based if it imposes a prohibition based on any characteristic of the speech itself; a law is viewpoint-based if it goes further and limits only the expression of certain ideas or beliefs and not others. Thus a law prohibiting all political speech in a certain location would be content-based; a law forbidding only speech favoring Republican politicians, or speech critical of the government, would be viewpoint-based. In *R.A.V. v. City of St. Paul, Minnesota*, the Court held that even though certain kinds of speech could be forbidden on the basis of their content, for instance because it is obscene or amounts to "fighting words" (this is the low-value speech model, to which the next section is devoted), the government may not regulate that speech "based on hostility—or favoritism—towards the underlying message expressed," *i.e.* based on viewpoint. 505 U.S. 377, 386 (1992).

listener by hearing what their harasser has to say. And yet, where those words are spoken with the specific intent to bully, harass, and intimidate a specific individual, it seems hard to say the government has no legitimate interest unrelated to the suppression of ideas.

The absolutist approach to free speech therefore helps unlock the most compelling account of the boundaries of free speech. Only when we both commit to the idea that, as Justice Black insisted, *no law* abridging the freedom of speech can be constitutional, and join with that commitment an awareness of symbolism as speech, do we confront the apparent paradox of expressive anarchy. We can resolve that conflict by shifting our focus away from whether the law restricts conduct with an expressive character (as all laws regulating individual behavior must) to whether its purpose was to restrict that expressive aspect. This in turn allows us to see that absolute enforcement of the Free Speech Clause need not be a frightening prospect. Expressive anarchy is not the inevitable consequence of taking the text at its word, and there is no need to "balance" other supposed practicalities against the interests protected by the First Amendment in order to craft a subtle and flexible law of free speech, one that can happily govern both literal and symbolic speech. Just as each can be a valid form of expression, so too can each have genuine non-expressive harms, and the government may justly seek to prevent those harms without offending the Constitution in the slightest. Conversely, when the government does aim to restrict expression as such, it can offer no justification or excuse strong enough to satisfy the First Amendment's demands.[54]

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[54] This insistence that absolutely no law restricting expression *qua* expression can be constitutional distinguishes the approach outlined in this Part from other more flexible alternatives to the Court's current doctrine advanced by other scholars. Professor Jud Campbell, for instance, has argued that at the Founding, freedom of speech was viewed as a broad natural right that in general could nevertheless be regulated in the public interest by representative institutions. The First Amendment's firm legal restrictions on state power were more limited: the government could not create a scheme of press licensing (what we today refer to as "prior restraint") and could not prohibit what Professor Campbell calls the "well-intentioned" expression of one's beliefs. *See generally* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017). This is generally consistent with Professor Lakier's sketch of free speech law in the states throughout the nineteenth century as "broad but shallow." *See* Lakier, *supra* note 11, at 2179-97.

But while the Supreme Court's approach to symbolic speech has been broadly sensible, as we shall see it has not applied those same insights when dealing with cases of literal speech.

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My theory accords with the original understanding as Campbell and Lakier present it in recognizing broad space for regulation of expression in the public interest. The difference lies in whether the conception of the public interest may include the view that certain kinds of expression are inherently undesirable. Thus, Professor Campbell notes that blasphemy and profanity were "thought to be harmful to society and were thus subject to governmental regulation," and that some states "even banned theater performances because of their morally corrupting influences." Campbell, *supra*, at 276-77; *see also* Lakier, *supra* note 11, at 2193-94. I would say that the state's purpose in these cases was clearly to restrict expression as such, and would therefore not hesitate to pronounce such measures unconstitutional. (A full account of why the far narrower original understanding should not control lies beyond the scope of this Article. There are any number of reasons why we might reject the original conception of free speech; my personal favorite is the idea that robust protection for freedom of speech inheres in the very structure of republican government. *See, e.g.*, BLACK, *supra* note 48, at 39-45.)

Similarly, my proposed approach should not be confused with the European-style "proportionality" review championed by, among others, Professor Jamal Greene. *See generally* Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018). Professor Greene would reorient American constitutional law away from the practice of identifying narrow categories of protected rights that are virtually immune from regulation—amusingly, he repeatedly refers to the Supreme Court's tiers-of-scrutiny approach as "absolutist." *See e.g.*, *id.* at 38 ("Our Absolutism," an appellation that would astound Justice Black). Instead, Greene would have us recognize an extremely broad category of "constitutionally protected liberty" that may nevertheless be regulated if the state has a good enough reason—particularly if the state is itself acting to protect someone else's rights. *Id.* at 104.

Professor Greene's proportionality review has much in common with the approach I have suggested in this Part. We share the desire to move away from the arid abstractions of current doctrine. And my "plainly adapted" test shares with proportionality a heavy reliance on the "legislative facts" that would allow courts to consider the truth of constitutional disputes in full social context. *See id.* at 116. The difference is that I do ultimately view the First Amendment question as one of "authority" rather than "justification." *See id.* at 64. I do not see "reason-giving as the ultimate source of government power" in our constitutional tradition. *See id.* at 65. Instead I would say that the legislature's power, within the scope of its legitimate authority, is self-authenticating: no more reason for acting is needed than that the People's representatives willed it so. Reason-giving by contrast is characteristic of the *judicial* power. *Cf.* THE FEDERALIST NO. 78, 393 ("[The judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment . . . ."). Thus my approach is interested, as already stated, not in *why* the state sought to restrict speech but *whether* it did so. Evidence as to "the state of the world to which the government purports to be responding, the availability of alternative means of achieving its ends that are less costly in rights terms, the law's policy benefits, and the marginal burden on the claimants and those similarly situated," is accordingly relevant only insofar as it informs our understanding of the government's purpose. Greene, *supra* note 51, at 116.

## II. LOW-VALUE SPEECH AND WHAT CAME AFTER

The Supreme Court has never adopted the absolutist model of free speech.[55] Its doctrine departs from that advocated by Justices Black and Douglas in two main ways. First, even within the confines of so-called "protected speech" it allows for the possibility that some sufficiently compelling government interest might override the First Amendment's protections. This conflict plays out in *Street*, for instance, where before expressing his own view that flag-burning is simply unprotected Justice Black castigates the majority for even bothering to ask whether a competing interest might prevail.[56]

The more interesting departure for our purposes is that the traditional approach sees only some speech as worthy of protection at all. The classic articulation of this "low-value speech" model comes from *Chaplinsky v. New Hampshire*:[57]

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[58]

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[55] This is one reason why the absolutist approach offered by Justices Black and Douglas never reached the degree of maturity and sophistication outlined in Part One.

[56] *Compare* Street v. New York, 394 U.S. 576, 591 (1969) ("In the circumstances of this case, we do not believe that any of these interests may constitutionally justify appellant's conviction . . . ."), *with id.* at 609-610 (Black, J., dissenting) ("I would not feel constrained, as the Court seems to be, to search my imagination to see if I could think of interests the State may have in suppressing this freedom of speech. I would not balance away the First Amendment mandate that speech not be abridged in any fashion whatsoever.").

[57] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[58] *Id.* at 571-72 (footnotes omitted).

Note the key difference with the basis for regulating speech articulated in Part One. Here, speech is deemed unprotected because it is *intrinsically unworthy*. It is "no essential part of any exposition of ideas." Implicitly, this theory adopts the view that the First Amendment is concerned with the search for "truth," borrowing on the "marketplace of ideas" theory earlier articulated by Justice Oliver Wendell Holmes.[59] Speech that does not contribute to this search for ideas, to the competition among different would-be truths, is unimportant. It is not what the Amendment is meant to protect. *Chaplinsky* enumerates several examples of low-value speech; other cases would add commercial speech to that list.[60]

Because the traditional approach draws a narrow circle around the First Amendment's protections, because it does not deem all speech worthy of protection, it has no need to confront the basic dilemma explored in Part One. Even once symbolic speech is recognized as a form of expression, it is easy to disregard the First Amendment issue in, say, the terrorism statute altogether. If obscenity or fighting words is "low-value," unprotected speech, surely the same is true of terrorism! In fact the *O'Brien* Court itself seems to have been skeptical of treating a wide range of expressive conduct as First Amendment-protected.[61]

The traditional approach therefore has an easy way to handle cases where we feel intuitively that expression should be regulated.

This in turn obviates the need to develop any sophisticated account of the grounds on which expression that does fall within

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[59] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.").

[60] *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.").

[61] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

the First Amendment's ambit may nevertheless be restricted. In keeping with the rest of the Supreme Court's jurisprudence, that question is simply relegated to the formal mechanics of "strict scrutiny." And of course, although much to Justice Black's chagrin this recognizes the possibility that free speech might yield to other concerns in an appropriate case, it is "the rare case in which" a law actually survives strict scrutiny.[62] They don't call it "strict in theory[,] fatal in fact" for nothing.[63]

The point is not that it is too difficult to restrict protected speech under the traditional model, but how the doctrine is framed. The traditional model asks two questions in any free speech case: is this speech important enough to warrant protecting? and if so, is some other interest more important than the freedom of speech in this case? In order to favor the government at either step of the analysis, a court must denigrate the importance of free expression, either by holding some speech inherently unworthy or by finding that some other value is more important. Under a sophisticated absolutist model, the government prevails only when it shows that its purpose was qualitatively inoffensive to the First Amendment. But the judge who upholds a restriction on speech under the Court's actual jurisprudence is inevitably cast as an enemy of speech.

It is not really surprising, then, that the low-value speech model has been in decline for half a century. All but one of the *Chaplinsky* categories has seen significant inroads by the forces of constitutional liberty. Obscenity still receives only a watered-down form of First Amendment protection, but its definition has been considerably narrowed by cases such as *Roth v. United States*,[64] *Jacobelis v. Ohio*,[65] and *Miller v. California*.[66] Lewd speech gained

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[62] *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015) (citation omitted); Burson v. Freeman, 504 U.S. 191, 211 (1992). *See also Williams-Yulee*, 135 S. Ct. at 1677-78 (Scalia, J., dissenting) (castigating the majority for engaging in "sleight of hand" rather than strict scrutiny).

[63] *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[64] Roth v. United States, 354 U.S. 476 (1957).

[65] Jacobellis v. Ohio, 378 U.S. 184 (1964).

[66] Miller v. California, 413 U.S. 15 (1973). Note that a key component of the *Miller* test is precisely concerned with the *social value* of the allegedly obscene work. *See id.* at 24 ("(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

protections in *Cohen v. California*,[67] the "Fuck the Draft" case. Libel actions by public figures were substantially restricted in *New York Times v. Sullivan*.[68] Only fighting words remain a stranger to the First Amendment, though many speculate the doctrine is not truly good law anymore, and that today's Court would overrule it if pressed.[69] In the meantime the Court also significantly limited the scope for incitement prosecutions in *Brandenburg*. And in the late 1970s the Court even began to rethink its commercial speech doctrine.[70] The notion of "low-value speech" has, bit by bit, been consigned to the dustbin of history.[71]

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[67] Cohen v. California, 403 U.S. 15 (1971).

[68] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[69] The Court recently passed up an opportunity to reexamine the "fighting words" doctrine. *See* Connecticut v. Baccala, 138 S. Ct. 510 (2017) (mem.) (denying certiorari). *See also* Edmund H. Mahony, *U.S. Supreme Court Passes on Profane Connecticut Tirade*, HARTFORD COURANT (Dec. 4, 2017, 2:55 PM), https://www.courant.com/news/connecticut/hc-fighting-words-1205-story.html [https://perma.cc/E3X3-RKRL].

[70] *See generally* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (striking down law banning the advertisement of alcohol prices); Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (striking down law forbidding advertising by electrical utilities); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (striking down law forbidding pharmacists from providing information as to prescription drug prices).

[71] Two broader doctrinal changes from the past twenty years also bear mentioning in this context. First, in *United States v. Stevens*, the Supreme Court expressly stated that the existing list of "low-value speech" categories was meant to be exhaustive, and that no new category would be recognized except on a strong showing that the exception had been recognized throughout our history. 559 U.S. 460, 468-69 (2010). As Genevieve Lakier has argued, this "inverted the tradition of low-value speech" and has "transformed the distinction between high- and low-value speech from a mechanism for limiting constitutional protection for speech into a mechanism for expanding it." Lakier, *supra* note 11, at 2170. Second, in *Reed v. Town of Gilbert*, the Court held that *all* content-based regulations of speech are subject to strict scrutiny. 576 U.S. 155, 163-74 (2015). Together, these cases exemplify how moribund the *Chaplinsky* model has become: the Court has very nearly disavowed it entirely. Although *Reed* is a hugely significant case doctrinally, and encapsulates much of the approach that I argue has given rise to the Bizarro First Amendment, it makes for a less interesting case study than the three cases I have chosen to explore in Part III because its result was unanimous. In other words, the fact pattern in *Reed* would likely fall within the First Amendment's ambit under any approach. That being said, the cases examined in Part III do demonstrate that the holding of *Reed* is part of the Bizarro First Amendment insofar as it would not be and has not been genuinely applied across the board.

This is generally a change to be celebrated, and yet it does raise the question: what comes next?[72] The central mechanism by which the Court's traditional First Amendment doctrine avoided the problem of expressive anarchy is gone. But the Court has never quite said that *all* expression is protected. It has never really had to think through the valid basis for restricting expressive activity. It has thus found itself in a world where, logically, protected speech is virtually everywhere, and the only doctrinal basis for regulating it is to overcome heightened scrutiny. Such a world is ripe for abuse. It will be an easy matter, in virtually any case, to demonstrate a First Amendment violation. After all, all conduct is expressive, and given our undeveloped legal vocabulary, restricting conduct that has expressive elements is inherently uncomfortable.

## III. ADVENTURES IN THE BIZARRE

We come, then, to the Bizarro First Amendment itself. This Part explores three recent cases that have exploited, deliberately or otherwise, this weakness in our free speech jurisprudence: *Sorrell v. IMS Health Inc.*, *Bennett v. Arizona Free Enterprise Club's Freedom PAC*, and *Janus*. These are not the only examples I could have chosen, but they are illustrative, and they have much in common. Each features broad paeans to the importance of speech, and a sneering contempt for the dissenters' willingness to trample this core pillar of freedom. Each relies on the formulaic "tiers of scrutiny" approach, first showing why the act under review receives heightened scrutiny and then why it cannot survive it. Each demonstrates the Court's application of the traditional model while at the same time increasingly rejecting the values undergirding that approach, *i.e.* the notion of "low-value speech." And each exhibits a complete failure to think through the consequences of applying its reasoning evenhandedly in every case. As a result, these cases cannot be taken seriously as principled explications of the boundaries of free speech in our society. They establish only that the language of our First

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[72] *Cf.* LIN-MANUEL MIRANDA, *What Comes Next?*, *on* HAMILTON: AN AMERICAN MUSICAL (Atlantic Records 2015).

Amendment law as it stands is a weapon that can easily be turned against almost any foe.

### *A.* Sorrell v. IMS Health Inc.

One feature of the American health care ecosystem is the practice of "detailing," wherein pharmaceutical companies send sales representatives to meet with individual doctors and regale them with the virtues of their employer's products. This is arguably a rather unhealthy practice, giving drug companies undue influence over prescription choices and, among other things, causing doctors to over-prescribe expensive name-brand drugs rather than cheaper, equally effective generics.[73] One of the most troubling aspects of the practice is the way that pharmaceutical companies will often use individualized information about specific physicians' prescribing practices when crafting their sales pitches. They do this by purchasing data from pharmacies, which are required by federal law to store information on each prescription they fill that identifies both the doctor and the patient.

In 2007, the state of Vermont took a stand against this practice by passing the Prescription Confidentiality Law. One of the act's core provisions forbade pharmacies from selling "records containing prescriber-identifiable information, [or] permit[ting] the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber consents . . . ."[74] It likewise forbade pharmaceutical companies themselves from using this information for marketing purposes, again unless the prescriber gave consent. A group of pharmaceutical manufacturers and data brokers (middleman entities that would buy data from pharmacies and sell it to drug companies) challenged these restrictions under the First Amendment; the Supreme Court eventually struck the law down in *Sorrell v. IMS Health Inc.*[75]

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[73] *See generally* Adriane Fugh-Berman & Shahram Ahari, *Following the Script: How Drug Reps Make Friends and Influence Doctors*, PLOS MEDICINE (2007), https://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.0040150&type=printable [https://perma.cc/DZC6-QZS9].

[74] VT. STAT. ANN. tit. 18, § 4631(d) (2007).

[75] Sorrell v. IMS Health Inc., 564 U.S. 552, 562-71 (2011).

Now under the traditional model of free speech, this would be an easy case. Whether we look at the pharmacists' sale of data or the pharmaceutical companies' use of the data for detailing, these acts are only a form of "commercial" speech, if they are expressive at all, and are therefore "low-value." Thus they would not be seen as protected under the First Amendment at all. Indeed, as Justice Breyer's dissent points out, even the "intermediate scrutiny" doctrine for dealing with commercial speech that was developed in the 1970s and '80s likely would have upheld the law.[76]

Justice Anthony Kennedy's majority opinion rejected that simple traditional approach, and his reasoning is interesting. He acknowledges the commercial context,[77] but concludes that the Vermont law could not be viewed as a mere "incidental" burden on speech because it "imposes a burden based on the content of the speech and the identity of the speaker."[78] Thus, although the law predominantly restrained the conduct of pharmacists, Justice Kennedy rested the decision on the free speech rights of the *pharmaceutical companies* themselves. Indeed he declined to consider whether the pharmacists are engaging in protected speech when they sell patient prescription information—although his nearly snide tone in doing so certainly suggests how he would answer the question.[79]

Instead he focused on the fact that the law distinguishes among potential buyers of this data—and in Justice Kennedy's view, it is discriminating on the basis of speech: "The State has imposed content- and speaker-based restrictions on the availability and use of prescriber-identifying information. So long as they do not engage in marketing, many speakers can obtain and use the information. But detailers cannot."[80] Kennedy therefore compares the law to one prohibiting certain magazines

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[76] *See id.* at 593-601 (Breyer, J., dissenting).

[77] *Id.* at 567 (majority opinion) ("It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

[78] *Id.*

[79] *Id.* at 571 ("The State asks for an exception to the rule that information is speech, but there is no need to consider that request in this case.").

[80] *Id.*

from purchasing or using ink.[81] Because "[t]he law on its face burdens disfavored speech by disfavored speakers[,]"[82] it receives "heightened judicial scrutiny[,]"[83] which of course it cannot survive. In fact, Justice Kennedy contends that the state's ostensible interests are positively improper: "[t]hat the State finds expression too persuasive does not permit it to quiet the speech or burden its messengers."[84]

There is a lot going on here; the case features cameos from practically every technique of Bizarro First Amendment jurisprudence. The result depends, for instance, on viewing restrictions on the means used for speech as burdens on speech, a principle that takes center stage in the Court's campaign finance cases.[85] It involves a particularly aggressive vision of the "content-based" doctrine that the Court later took to extremes in *Reed v. Town of Gilbert*.[86] And although the case did not turn on the speech rights of the pharmacists, Justice Kennedy's none-too-subtle implications that he would have been perfectly happy to decide the case on those grounds also suggests real limits on the government's ability to protect privacy by giving individuals control over information pertaining to them.

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[81] *Id.* (citing Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983)).

[82] *Id.* at 564.

[83] *Id.* at 565. Note Justice Kennedy's characteristic reluctance to specify the precise level of scrutiny he is employing. He says neither "strict" scrutiny nor "intermediate" scrutiny, merely "heightened."

[84] *Id.* at 578.

[85] *Citizens United v. FEC*, 558 U.S. 310 (2010), for example, is famously described as having held that "money is speech." The actual reasoning behind this slogan is that money is used to enable speech, and therefore restrictions on the use of money for this purpose are effectively restrictions on speech. This logic is clearly correct in some cases, such as the newspaper ink decision Justice Kennedy cites; on the other hand, the premise of the "time, place, and manner" doctrine is that the state may legitimately regulate the means by which people may express themselves if it does so in a sufficiently neutral and unoppressive fashion. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989). Whether the campaign finance cases are correct to treat restrictions on the use of money to disseminate political speech are effectively restrictions on speech itself can be questioned, but that is not my purpose in this Article. The next section, which does address a key campaign finance decision, focuses on other aspects of its reasoning.

[86] Reed v. Town of Gilbert, 576 U.S. 155 (2015) (holding that all content-based regulations of speech are subject to strict scrutiny).

But I submit that the unique contribution of *Sorrell* is this: it holds immaterial the fact that the speech in question is made solely for the purpose of selling a product and is regulated only because of its connection to that commercial activity. Justice Kennedy's core focus is the fact that the law singles out those who engage in pharmaceutical marketing for unfavorable treatment. He brushes aside any thought that this speech might be different somehow, that the state might have a valid interest in regulating marketing as such, by observing that "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression," citing *New York Times v. Sullivan* as one of his examples.[87] Thus one way to frame the holding of *Sorrell* is that the government may not disfavor those who engage in a particular form of commercial expression.

But this is not a rule of law we actually follow, or that anyone seriously argues we should. It cannot be, because actually following Justice Kennedy's reasoning would, so far as I can tell, undermine the constitutional basis to prohibit fraud.

Fraud, after all, is speech, and necessarily so: the elements of a common law fraud claim, after all, are a *misrepresentation of fact* made with intent to deceive, reliance, and damages.[88] Perhaps we could say that the unlawful act in a fraud case is not the speech itself but the subsequent transaction, as reliance is also an element. But this would still involve, per Justice Kennedy's thinking, discrimination on the basis of speech: among all those who engage in transactions, only those who had previously engaged in a certain form of speech are punished.

Moreover, we regulate fraud for a reason squarely rejected in *Sorrell*: it is "too persuasive."[89] Fraudulent marketing can be more effective than honesty because it presents the product as being more desirable than it really is. This is "in conflict with the goals of the state[,]"[90] specifically consumer protection, just as Vermont found detailing to be in conflict with its goals. Justice Kennedy

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[87] *Sorrell*, 564 U.S. at 567 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).

[88] *See* RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977) ("Liability for Fraudulent Misrepresentation").

[89] *Sorrell*, 564 U.S. at 580.

[90] *Id.* at 560-61.

found this especially troubling, stating at one point that the Vermont law was not only content-based but effectively viewpoint-based, as it was designed to promote the state's view (that generic drugs are preferable to expensive brand names) at the expense of the contrary position.[91] How does that not apply to fraud? The fraudster is precisely identified by the (fraudulent) view they espouse regarding the quality of their wares.

Perhaps the difference is that the fraudster's speech is *false*. Indeed at one point *Sorrell* notes expressly that "the 'fear that people would make bad decisions if given *truthful information*' cannot justify content-based burdens on speech."[92] But this merely begs the question: unless we are merely to fall back on a version of the "low-value speech" paradigm, we must ask *why* the government has a legitimate interest in regulating false speech.[93] And of course it does not, generally: the very same statement of fact that gives rise to fraud liability would be constitutionally protected if made in a newspaper editorial.[94]

And therein, I think, lies the rub. Fraud liability does not distinguish on the basis of speech, not exactly, because the same speech in a different context would not be fraud. It is only the *connection* between the speech and the commercial activity that renders it subject to government sanction. The point here is not that a commercial motive somehow renders speech impure and unprotected; Kennedy rightly rejects that argument. Rather the point is that *commercial activity is subject to government regulation*. And the fraud example strongly suggests that this power may be used to control speech made solely in connection with a commercial transaction. Thus, the government permits

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[91] *Id.* at 565.

[92] *Id.* at 577 (emphasis added) (quoting Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002)).

[93] Indeed, in another case, also written by Justice Kennedy, the Court has expressly rejected the idea that false statements of fact lie beyond the First Amendment's protections. *See* United States v. Alvarez, 567 U.S. 709 (2012) (striking down the Stolen Valor Act of 2005).

[94] In *Sullivan*, the Court was careful to emphasize that, although libel may be regulated to some degree, there is no general First Amendment "exception for any test of truth—whether administered by judges, juries, or administrative officials . . . ." New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

transactions generally, but prohibits those that were procured through a certain kind of speech—fraudulent misrepresentation.

We might describe this kind of speech as "subordinate" to commerce. As Justice Breyer's dissent makes clear, regulation of such subordinate speech is widespread, and reviewing those regulations to see if they are "content-based" simply does not make sense.[95] Nor does it make sense to ask whether they are "targeted" at particular speakers; the anti-trust laws, for instance, limiting the "truthful, nonmisleading speech of" monopolist firms, are "directly aimed at, and targeted at, monopolists."[96] Economic life involves enormous amounts of speech and expression—speech is everywhere. The flow of information through our economy shapes and structures our commercial activities, and commercial entities such as pharmaceutical companies go to great lengths to affect our economic choices by affecting these information flows.

*Sorrell* essentially holds that this is constitutionally protected, and that the government may not restrain efforts by private entities to control the commercial behavior of others by controlling information streams. Thus Justice Kennedy's repeated reference to the notion that consumers should be free to make their own choices about which medication they prefer, and therefore to receive all information relevant to that decision.[97] But of course, the government could regulate that choice directly! It could prohibit the prescription of expensive name brand drugs altogether where there are generic alternatives, or perhaps require some proof that the brand name is actually superior. Alternately it could—and did—tread more lightly, requiring only that the flow of information around the transactions adhere to a certain form.

Now, *Sorrell* is a complicated case, and I am by no means sure that Vermont's law was constitutional as written. It may be that, in order to protect speech and hold the line between regulation of speech only insofar as it is subordinate to commerce

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[95] *See Sorrell*, 564 U.S. at 589-91 (Breyer, J., dissenting). Note that the antitrust example cannot be defended on the ground that false or fraudulent speech is low-value—the point is simply that monopolists use their speech in service of a result the state is entitled to prevent.

[96] *Id.* at 591.

[97] *See id*. at 577-79 (majority opinion).

and restriction of speech *qua* speech, the government must include something like the reliance element of a fraud action. This maintains a close nexus between the speech at issue and some commercial activity that falls within the government's valid authority. The flow of information in detailing is complicated, because the sellers (pharmaceutical companies) are talking not directly to the consumers (patients) but to intermediaries (doctors). Perhaps that means the state simply cannot show an adequate nexus, or perhaps the complexity of detailing strengthens the case for regulation.[98]

Either way, if *Sorrell* had focused on the lack of a nexus between the speech at issue and any specific acts of regulable conduct it would have been a far less objectionable case. But that is not how it was written. Instead it seems to deny altogether the government's power over speech subordinate to commerce, and therefore to deny in significant part its power to regulate economic life in the public interest. If we actually adhered to the principles of *Sorrell*, all of the regulations Justice Breyer mentions would presumably be unconstitutional, as would the common law of fraud. Perhaps if the Second Lochner Era gets completely out of control the Court will eventually take things to that logical conclusion. So far it has not sought to try.

### *B.* Arizona Free Enterprise Club's Freedom Club PAC v. Bennett

Probably the highest-profile branch of the Court's recent First Amendment jurisprudence is the line of cases dealing with campaign finance laws, and specifically *Citizens United v. FEC*.[99] The campaign finance cases involve a number of concerns particular to that context—principally the idea that "money is speech" and the Court's treatment of the two government interests offered to support these laws, opposing corruption and promoting

[98] In the ordinary commercial context where Justice Kennedy emphasizes the need to permit the free flow of truthful and nonmisleading information, consumers can directly engage with and evaluate that information before making their own choices. With detailing, on the other hand, patients have extremely limited capacity to review the decisions their doctors have made on the basis of the information they obtain from pharmaceutical companies.

[99] Citizens United v. FEC, 558 U.S. 310 (2010).

equality—that lie beyond the scope of this Article. But one of the Court's lesser-known campaign finance cases is particularly troubling, even accepting the major premises of the doctrine: *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[100] in which the Court took the notion of "burdens" on speech to outlandish new heights.

The case involved Arizona's system for public financing of elections. Like most such systems, Arizona's offered candidates a certain amount of public money if they were willing to accept strict limits on their campaign expenditures from other sources.[101] The unique feature of Arizona's law was its matching funds provision. If a candidate who declined public financing spent on their campaign, or received in contributions, more than the initial allotment given to publicly financed candidates, the government would give those other candidates additional matching funds at approximately a 1:1 rate.[102] The same would happen if independent expenditures were made supporting a privately-financed candidate, or opposing a publicly-financed one.[103] These matching funds would continue until each publicly financed

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[100] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

[101] *Id.* at 728-29 ("Publicly funded candidates must agree, among other things, to limit their expenditure of personal funds to $500, participate in at least one public debate, adhere to an overall expenditure cap, and return all unspent public moneys to the State.") (citations omitted).

[102] Specifically, matching funds would be provided equal to 94% of the excess spending by private candidates and independent groups, reflecting a 6% discount for the expense of raising those excess funds. *See id.* at 730-32.

[103] The specific operation of the trigger mechanism was as follows:

> In a primary, matching funds are triggered when a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the primary election allotment of state funds to the publicly financed candidate. During the general election, matching funds are triggered when the amount of money a privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the general election allotment of state funds to the publicly financed candidate. A privately financed candidate's expenditures of his personal funds are counted as contributions for purposes of calculating matching funds during a general election.

*Id.* at 729 (citations omitted).

candidate in the race had received a total of two times their initial allotment of public funding.[104]

The Court held this matching-funds system unconstitutional, and in its view, there was only one real question in the case: whether this law counted as a "burden" on the speech of privately financed candidates and independent groups. Chief Justice John Roberts's majority opinion acknowledged that "the speech of the candidates and independent expenditure groups that brought this suit is not directly capped by" the matching funds provision.[105] But invoking *Davis v. FEC*,[106] the Court easily concluded that there was nonetheless a burden here. *Davis* had held unconstitutional the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002, under which a candidate for the federal House of Representatives whose opponent spent more than a certain amount of their own money on the election would be permitted to operate under relaxed contribution limits.[107] This "was unconstitutional because it forced a candidate 'to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.'"[108]

The Court held that the same applied to Arizona's matching funds law. The crux of its argument came in this remarkable passage:

> The State argues that the matching funds provision actually results in more speech by "increas[ing] debate about issues of public concern" in Arizona elections and "promot[ing] the free and open debate that the First Amendment was intended to foster." In the State's view, this promotion of First Amendment ideals offsets any burden the law might impose on some speakers.

Not so. *Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates.* The burden imposed on privately financed candidates

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[104] *Id.* at 730.
[105] *Id.* at 735.
[106] Davis v. FEC, 554 U.S. 724 (2008).
[107] *See Bennett*, 564 U.S. at 735-36.
[108] *Id.* at 736 (quoting *Davis*, 554 U.S. at 739).

and independent expenditure groups reduces their speech; "restriction[s] on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." Thus, even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups. This sort of "beggar thy neighbor" approach to free speech—"restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others"—is "wholly foreign to the First Amendment."[109]

This was not the end of the case—after holding that the law burdened political expression and was therefore subject to strict scrutiny, the Court went on to discuss the possible government interests supporting it, namely equality and anti-corruption, and found them wanting[110]—but this passage, this approach to the concept of a "burden" on speech, is what concerns me. The Court's view here appears to be that *any* time the state responds to an individual's speech by doing something that person does not like, it has burdened their speech. Thus the following remark: "[t]he direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival. That cash subsidy, conferred in response to political speech, penalizes speech . . . ."[111]

This cannot be right. Suppose a group of neo-Nazis wanted to put on a rally in a certain town. (These days this is hardly a hypothetical example.) We know, under venerable Supreme Court precedent, that this is constitutionally protected expression, despite its hateful nature.[112] But would the government violate the First Amendment if, around the time of the march, it put up posters around town expressing the government's commitment to equality, and opposition to the Nazis' hateful ideology? If it organized an event, openly sponsored by the town itself, featuring speakers from different groups targeted by the Nazis preaching

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[109] *Id.* at 740-41 (emphasis added) (citations omitted).

[110] *See id.* at 748-53.

[111] *Id.* at 742.

[112] *See generally* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

against hate? If I were feeling ambitious I might argue that the Constitution *requires* the government to engage in some measure of counter-speech to a Nazi rally, at least enough to make clear that it does not endorse their ideas.[113]

It is perhaps the central principle of the First Amendment that the state may not suppress expression simply because it disagrees with the ideas being expressed, no matter how strongly. But I do not think anyone would seriously argue that the government is forbidden from responding to the advocacy of ideas it finds noxious with counter-advocacy of its own.[114] Can the government not respond to an anti-war rally by broadcasting its arguments supporting the war? If protests erupt after racially charged police violence, cannot the government respond with explanations for why the officers' actions were justified? But if this is permissible, how is Arizona's matching funds law any different? It responds to some expression by promoting contrary views. In fact, in each of the examples mentioned the government is expressly waging an expressive war in support of one viewpoint and against another. The matching funds provision on the other hand is viewpoint neutral and open to all comers.

What these examples all have in common is that the government has tried to reduce or negate certain effects of speech. It does not want people to feel terrorized by the Nazis; it does not want public sentiment to turn against the war. Similarly, it does not want publicly financed candidates to be outgunned by their privately financed opponents or their allies. None of these concerns can justify suppressing the speech itself, so instead the government acts to shape the world in which this speech has occurred more to its liking. This might well also discourage the speaker, who is presumably motivated in part by a desire to create the very conditions the government wants to ameliorate. But the laws are not plainly adapted to that end, because they achieve their goals just as well in the world where the speaker is not

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[113] The source of this requirement would be the Equal Protection Clause, which could be seen as requiring the government to affirm its belief in universal equality. That argument, of course, lies far beyond the scope of this Article.

[114] *Cf.* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, *the remedy to be applied is more speech*, not enforced silence.") (emphasis added).

deterred. In fact, this is truer of the Arizona law than my other hypotheticals: the government would surely prefer a world with no Nazi rally, and thus no need of government counter-speech, while Arizona has equally ensured that publicly financed candidates are able to compete on an equal footing whether the matching funds are triggered or not.

If we take *Bennett* seriously, then, it implies a right to speak free not only of any government obstruction of your speech itself but also from any government response opposing your goals or agenda. Such a response will, after all, discourage you from speaking, at least on the margin, and therefore can easily be cast as a "burden" on your speech. Once this framing has been adopted and the machinery of "strict scrutiny" activated, the government's motives—essentially that it does not like what you are trying to accomplish through your speech—will naturally be deemed an inadequate justification for burdening speech. This framework centers the speaker's perception and motivations to determine whether the law restricts speech, and only looks to the government's purpose to determine whether that restriction is acceptable. With the low-value speech model moribund, the second step becomes almost trivial, and the focus becomes entirely whether the law will discourage some speech.

But all laws do that. As we know, speech is everywhere, all conduct is in some measure expressive, and so all laws regulating private conduct have some effect on expression. Even government acts that do not regulate conduct likely have these same effects. In fact, if we take the logic of equating discouraging speech with suppressing it seriously, why would we not also equate encouraging speech with compelling it, which is equally forbidden?[115] The Free Speech Clause simply cannot be principally concerned with the effect of state action on protected expression, because those effects are ubiquitous.

The key is to distinguish between everything that a law *will* do and the things it is *designed* to do. We are not in this habit, because in most major First Amendment cases the two run together. So much of the fight of First Amendment jurisprudence throughout our history has been the struggle to establish that, in

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[115] *See generally* W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

fact, government laws designed to suppress speech are unconstitutional, from the Alien and Sedition Acts through the Red Scare and continuing in modern fights about obscenity and the like. We are not, therefore, very familiar with the obvious fact that even laws that are not designed to suppress speech have meaningful effects on expression. This is in many ways the foundation of the Bizarro First Amendment: it is easy to present the impact of an entirely innocent law on expression as evidence of a free speech violation.

*Bennett* collapses the distinction between design and effects entirely, and thus takes us directly to a world of expressive anarchy—or rather, it would if the Court took its own words seriously. Of course it does not. Although it is always easy to frame any law in First Amendment terms, that framing will not always be taken seriously; most of the time we know a law that does not abridge the freedom of speech when we see one. Between this case and *Sorrell*, we can start to see a pattern emerging in when the Court chooses to recognize these bizarre free speech arguments.

### *C.* Janus v. AFSCME

That pattern becomes crystal clear in *Janus* itself, the culmination of a six-year campaign by the Court's conservative wing against public-sector unions.[116] The case concerned so-called "agency shop" or "union shop" arrangements in government workplaces.[117] A union shop, which would be adopted through collective bargaining as part of the union's contract with the employer, has two key components. First, the union is designated as the exclusive representative of the entire workforce: employees, whether members of the union or not, may not negotiate with the employer individually, or through any agent other than the designated union.[118]

Second, in addition to the dues it receives from its members, the union is permitted to collect "agency fees" from nonmember

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[116] *See, e.g.*, Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (mem.) (per curiam); Harris v. Quinn, 573 U.S. 616 (2014); Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012).

[117] *See* Janus v. AFSCME, 138 S. Ct. 2448, 2459-60 (2018).

[118] *See id.* at 2460.

employees. This compensates the union for the work it does representing those nonmembers and ensures that it has adequate funds for its activities. It also prevents a "free-rider" dynamic that could ensue if the union could only rely on its members for funding: because federal labor law requires the union to represent *all* employees, including nonmembers, workers who declined to join the union would receive all the benefits of membership but none of the costs.[119]

Under *Abood v. Detroit Board of Education*,[120] public-sector unions were allowed to collect these agency fees to pay for their collective bargaining activities but not for external political expression or ideological advocacy.[121] *Janus* overruled *Abood*, holding that charging agency fees to non-consenting nonmember government employees violates the First Amendment.[122] The bulk of the Court's analysis is, as usual, devoted to considering the different government interests offered to justify agency shops.[123] The majority also spent a lot of time explaining why, in its view, principles of *stare decisis* did not require leaving *Abood* in place.[124]

I am interested, however, in the Court's recitation of (ostensibly) bedrock free speech principles at the very start of its discussion. That is where the threshold work of bringing union fees within the ambit of the First Amendment is performed. Things start off innocently enough, with the Court stating that the First Amendment protects as well the right not to speak, and waxing eloquent about the harm wrought by compelled speech.[125] Such compulsion, Justice Alito suggests, may even be *worse* than

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[119] *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part) ("What is distinctive, however, about the 'free riders' who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others.").

[120] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. 2448.

[121] *Id.* at 235-36.

[122] *Janus*, 138 S. Ct. at 2478.

[123] *Id.* at 2465-78.

[124] *See id.* at 2478-86.

[125] *Id.* at 2463-64.

ordinary suppression of speech, as "individuals are coerced into betraying their convictions."[126] But of course agency fees are not like the forced recitation of the Pledge of Allegiance in *Barnette*; no one is being made to say anything, to "sign a document expressing support for a particular set of positions on controversial public issues"[127] or anything like that. Thus the Court goes on to proclaim that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns"[128] as compelling speech as such.

This is wrong. As William Baude and Eugene Volokh have argued, the freedom from being compelled to speak does not at all imply a freedom from being compelled to support others' speech; it cannot.[129] After proclaiming this principle, Justice Alito immediately invokes a statement by Thomas Jefferson that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."[130] But of course Jefferson was speaking on the question of *religious freedom*. He opposed the practice of compelling those who did not ascribe to an established faith nonetheless to support the church financially. Our Constitution forbids this practice, of course, in the Establishment Clause of the First Amendment.[131] And one of the plainest implications of the Establishment Clause is that the government may not give money to its favored sect.[132] That money, after all, comes from taxes assessed on the people, and is therefore the equivalent of requiring the people to pay the church directly. The only difference is the state's interposition as tithetaker.

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[126] *Id.* at 2464.

[127] *Id.*

[128] *Id.*

[129] *See generally* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018).

[130] *Janus*, 138 S. Ct. at 2464. (quoting A Bill for Establishing Religious Freedom, *in* 2 PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd ed. 1950)).

[131] U.S. CONST. amend. I.

[132] *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.").

The same cannot be true for speech generally, because while the government can easily refrain from supporting an established church it cannot refrain from speaking. Every time the state uses public monies to express itself in any way, it is "compelling" every taxpayer to "subsidize" that expression, whether or not they agree with it. This can, at times, have dire ideological or moral implications: government messaging designed to rally support for war is always paid for by the tax dollars of pacifists and conscientious objectors. This is not, to say the least, unconstitutional.[133] It simply would not do to grant everyone in America the right to itemize their tax bill to ensure they were not being "compelled" to support speech they find odious; that way lies madness. (The madness only worsens, to the point of almost literal anarchy, in light of our earlier insight that everything is expressive.)[134]

Now, Justice Alito artfully dodges this problem by stating only that compelled subsidies of *private* speech raise First Amendment concerns. But why? He doesn't say, and in fact so far as I can tell the Court itself has never explained why this distinction should matter, even as it has invoked this rule several times during the last few decades.[135] The only explicit discussion

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[133] *See* United States v. Lee, 455 U.S. 252, 260 (1982) ("If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

[134] My argument here largely tracks that of Baude and Volokh. *See* Baude & Volokh, *supra* note 129, at 180 ("Requiring people to pay money that can be used for speech with which they disagree is utterly commonplace.").

[135] The main cases that have cited this principle between *Abood* and *Janus*, outside the narrow context of policing the line *Abood* drew for unions as such, have been *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). *Glickman* and *United Foods* are an odd pair of cases about when and whether people in a certain agricultural sector (such as, in *Glickman*, California fruit growers) may be assessed mandatory fees to fund advertising on behalf of the sector. Like *Knox* and *Janus*, they invoked the rule against compelled subsidy of private speech, citing it to *Abood*, but did not discuss or justify the rule and the principal distinction that it draws. A later case in this genre, *Johanns v. Livestock Marketing Association*, held that the advertising in question was "government speech" and therefore not subject to the rule against compelled speech subsidies, but simply assumed that this conclusion followed and did not offer any justifications. 544 U.S. 550, 559 (2005) ("'Compelled support of

of this point came instead from Justice Powell's partial dissent in the case that first established a version of the principle—ironically enough, *Abood* itself![136] Justice Powell joined the Court in holding that unions may not force nonmembers to support their politicking activities, but like the *Janus* Court four decades later he found the majority's distinction between those activities and the collective bargaining process itself unpersuasive.[137]

After explaining why he thought compelled support for unions, regardless of the use to which the union put the money, raised First Amendment concerns, Justice Powell addressed the public/private distinction in a footnote:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

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government'—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position."). *Keller*, meanwhile, held that the California Bar Association could not use the mandatory fees it charged its members to fund ideological or political advocacy. *See* Keller, 496 U.S. at 7-17. Along the way the Court had to reject an argument that the Bar Association was a government entity, which would have freed it from these restraints. As it did in *Johanns*, the Court elaborated at some length why it would be absurd to subject the government to the *Abood* rule, but did not explain why the rule does make sense for subsidies of private speech, instead taking this as gospel from *Abood*. *See id.* at 12-13 ("Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.").

136 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 244-64 (1977) (Powell, J., concurring in part and dissenting in part), *overruled by Janus*, 138 S. Ct. 2448.

137 *See id.*

> The withholding of financial support is fully protected as speech in this context.[138]

This is not convincing. Justice Powell's reasoning suggests that being compelled to support the government's message is acceptable because the government represents the people. But the state's representative nature does not entitle it to compel speech directly; that is the holding of *Barnette*. (Interestingly, Justice Powell does not focus directly on government speech, noting only that the government can spend money on "controversial projects.").[139] Moreover, if the state decrees that individuals must support a given private entity, that is still a judgment from the People's representatives. If that judgment is legitimate when made in the context of the state's own undertakings, why should this be any different? How, indeed, *is* it any different from using tax dollars to support that same entity?[140,141]

The anomaly, then, goes back to the very beginning. The Court has assumed for generations now that compelled support for speech raises First Amendment concerns, but has never been able

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[138] *Id.* at 259-60 n.13.

[139] *See id.*

[140] A similar point arose in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). Chief Justice Roberts's opinion for the Court there held that a provision of the Patient Protection and Affordable Care Act of 2010 requiring all individuals to maintain minimum health insurance coverage or pay a fee to the federal government could not be sustained as an exercise of the power to regulate interstate commerce. *Id.* at 558. Essentially this rested on the notion that the power to regulate commerce does not include the power "to order individuals to engage in it" in the first place. *See id.* at 588. Justice Ginsburg, dissenting on this point, noted that Congress could easily have established a "tax-and-spend federal program" wherein the federal government would use tax revenues to pay for all Americans' medical care. *Id.* at 595 (Ginsburg, J., concurring in part and dissenting in part). There is little functional difference, if any, between this "single-payer" scheme and requiring individuals to purchase insurance from a private insurance company, which will then pay for their health care.

[141] Baude and Volokh agree that this distinction does not hold up to scrutiny, and they reject several arguments for it beyond Powell's. *See* Baude and Volokh, *supra* note 129, at 184-87. Compelled support for government speech may be inevitable, but they argue (and I agree) that this is simply a "clue" that compelled support of private speech is not unconstitutional either. *See id.* Agency fees could be viewed as making individuals complicit in a union's activities, but the same is true of general taxation. And on a purely mechanical level, agency fees and income taxes are both typically withheld from an employee's paycheck and then directed elsewhere. There is simply no difference that ought to have constitutional implications.

to give a satisfying reason why compelling support for private speech is somehow worse than using compulsory taxes to fund the government's own expression.[142] Was *Abood*'s second holding therefore every bit as nonsensical as *Janus*? Perhaps. We could see it as merely a pragmatic compromise, giving those who objected to agency shops a partial victory on unprincipled grounds. Indeed, *Abood* also cited the same remark from Jefferson, as well as a similar one by Madison, on the issue of religious establishment without recognizing why that logic cannot apply with full force in the general speech context.[143] Accordingly, Baude and Volokh see the error in *Janus* as springing from a "widely accepted premise"[144] rather than any radical innovation, and therefore reject arguments such as mine that *Janus* represents a new era of *Lochner* jurisprudence.[145]

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[142] The only other potential explanation I can find in the pages of the U.S. Reports comes from *United Foods*, where the Court states that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . ." United States v. United Foods, 533 U.S. 405, 411 (2001). Potentially, therefore, the true distinction between *Abood* or *Janus* on the one hand and general government speech at taxpayer expense on the other is not public versus private but general versus specific: everyone pays taxes but only certain people (members of the same bargaining unit) are required to fund the union's expression.

But although this thought might be an important difference as a matter of basic fairness, it does not connect to any relevant constitutional prohibition. If the act of compelling support for speech is not itself a First Amendment violation, then compelling such support only from a certain group would only violate the First Amendment if the basis for singling out that group were somehow related to speech or expression. Instead, in *Janus* the group is defined by employment status. And while the argument sounds to some extent in equal protection, the same objection applies there. The lines are drawn not on the basis of any protected class but for economic reasons, and such classification schemes receive only the most deferential of judicial scrutiny. *See generally* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

Nor does this argument make any sense at all if we return to the context of actual, literal compelled speech. It would not be better for the government to require every single American citizen to recite the Pledge of Allegiance each day than to require a handful of schoolchildren in West Virginia; it would obviously be far worse, though possibly only as a matter of degree.

[143] *See Abood*, 431 U.S. at 234 n.31.

[144] *See* Baude and Volokh, *supra* note 129, at 178.

[145] *Id.* at 179-80 ("The majority opinion in *Janus* has been and will be subjected to quite strong critiques, not just as to its merits but as to its methodological legitimacy . . . . We think *Janus* is wrong too, as we will explain, but this kind of criticism is both unfair and insufficiently ambitious. The majority's argument proceeds quite logically

But in order to understand what *Janus* did, we need to trace the rule against compelled speech subsidies back, not just to its origin in *Abood* but further: to *Elrod v. Burns*,[146] which held unconstitutional the practice of requiring public employees to support a certain political party—the venerable American tradition of "political patronage."[147] *Elrod* was (notionally) a First Amendment case but it was not mostly about the issue of compelled speech subsidies. The law under review there required county employees to support the Democratic Party in one of four ways: by pledging their allegiance to it, working for the campaigns of its candidates, contributing a portion of their wages, or obtaining sponsorship from a party member.[148] Thus, although the employees could satisfy their obligations simply by offering financial support to the party, there was a lot more going on, and the Court rightly treated the case as more one of compelled *association* than mere compelled support for another's speech.[149]

But there is even more going on in *Elrod* that's absent in the compelled subsidy cases. The Court recognized that "[i]t is not only belief and association which are restricted where political patronage is the practice" because "[t]he free functioning of the electoral process also suffers."[150] Patronage means the government using its awesome powers to promote and protect the party in power; that is anathema to a free and democratic in which elected officials are responsive to the electorate and the People are always at liberty to turn them out of office. *Elrod* is technically about the conditions that may be attached to public employment, but of course the state could not impose the same requirements on the public generally. It is obvious why that would be an unacceptable authoritarian tactic; mandating support for the Party is what Communist countries do. And although the result may not be quite as immediate, it seems likely that the government may not directly support a political party or its candidates, just as it may not support a religious institution.

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from a widely held and plausible premise about First Amendment compelled speech. The case for the agency fees was lost when that premise was accepted.").

146 *See generally* Elrod v. Burns, 427 U.S. 347 (1976).

147 *Id.* at 373.

148 *Id.* at 350-51.

149 *Id.* at 355.

150 *Id.* at 356.

The Court has gestured toward such a principle on several occasions,[151] and Baude and Volokh agree that if this is the case then it would imply that the government cannot compel individuals to support parties.[152] They are careful however to note that the principle must be carefully confined: it does not apply to all ideological advocacy, only to support of political parties and candidates as such.[153] This distinction would not make very much sense as a matter of First Amendment law: even if we accept that "political speech" should be especially privileged, advocacy regarding the appropriate wages and hours for government workers is no less political speech than direct advocacy for a party or candidate. Indeed, Justice Scalia suggested that the rule against government support of political parties does not have "anything to do with the First Amendment."[154]

Instead it is about, in short, a republican form of government.[155] Setting labor standards for public employees is something within the purview of the state, as the People's representative agent. The same is true of most public policy matters. It is therefore entirely appropriate that the government may not only legislate but also advocate on these matters (as, for example, in our earlier hypothetical about government speech designed to rally support for war). The selection of major public officials, on the other hand, is not confided to the government. Instead, this power is reserved to the People themselves.[156] And as the state may not choose the winners of elections, neither should

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[151] *See, e.g.*, Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 788 (1961) (Black, J., dissenting) ("Probably no one would suggest that Congress could, without violating [the First] Amendment, . . . create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes."); Lathrop v. Donohue, 367 U.S. 820, 853 (1961) (Harlan, J., concurring in judgment) (same); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 n.3 (1998) (Scalia, J., concurring in judgment).

[152] "[I]f the government can't itself speak in favor of or fund political parties or candidates, the government can't require people to give money that gets spent in support of those parties or candidates." Baude & Volokh, *supra* note 129, at 193. As they note, this rule applies only to direct government support of a single, favored party; public monies may flow to parties when made available on an even-handed basis, as in a public financing scheme for elections. *See id.* at 193 n.151.

[153] *See id.* at 192.

[154] *Finley*, 524 U.S. at 598 n.3 (Scalia, J., concurring in judgment).

[155] *Cf.* U.S. CONST. art. IV, § 4, cl. 1.

[156] *Cf.* U.S. CONST. amend. X.

it be allowed to advocate on behalf of certain candidates for public office.[157]

This explains something like the distinction drawn in *Abood*. Justice Powell (who dissented in *Elrod*) stated in another footnote that he was "at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of greater deference, when challenged on First Amendment grounds, than its decision to adhere to the tradition of political patronage."[158] His confusion is understandable, thinking solely in terms of free speech. But if *Elrod* is more a structural implication of democracy itself, then it is clear why patronage is unconstitutional but agency fees—unless given to parties or candidates—are fine. Unfortunately, *Abood* drew the line somewhat broader than the *Elrod* principle can support, probably because it did think in First Amendment terms rather than structural ones.

Then *Janus* unshackled the rule from *Abood*'s limits and let it run wild. True, those limits were unprincipled to begin with. *Abood* did not draw the line where it belonged, between support of parties-as-such and all other forms of compelled support for expression, and even that line would not have made sense as a First Amendment rule. Nor does that Amendment recognize any real distinction between the kinds of advocacy protected by *Abood* and the much broader universe of political expression. Thus, in a narrow doctrinal sense, Justice Alito may have been "right" to

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[157] This is not to say that the state's power to advocate is merely coextensive with its power to regulate. There are many zones of individual freedom where the government may not punish people for their behavior but can nonetheless attempt to persuade or dissuade them from certain courses of action. For example, the government can highlight and emphasize the benefits of having children but obviously cannot compel people to reproduce if they do not want to.

Citizens' decisions about how to exercise their political power, on the other hand, the government may not so much as seek to influence. Those decisions constitute the government on an ongoing basis, and therefore if the state could affect them in any way, it would create a causal feedback loop insulating the government from the will of the people. There may be no other area that lies beyond the government's power of advocacy to the same degree.

[158] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 260 n.14 (1977) (Powell, J., concurring in part and dissenting in part), *overruled by* Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

reject the limitations of *Abood*.[159] Those limits sounded in the old "low-value speech" model that the Court has rightly—if not quite entirely—abandoned.

But if *Abood* was unprincipled, it at least approximated a genuine constitutional precept. The rule of *Janus*, if taken seriously, has no such defensible analogue. It is *equally* unprincipled, because it depends utterly on drawing a distinction between compelled support for private and government speech that cannot be justified. And even if that distinction is observed, such that *Janus* does not stand for the proposition that taxation is unconstitutional, it seems to lack any kind of limiting principle within the private sphere. Recall that, before *Abood*, agency fees were not itemized. The problem was not that the nonmember employees were being asked specifically to support advocacy by the union, but that they were being asked to support the union itself, which would then use their money to express things contrary to their beliefs. Thus it would seem that, under *Janus*, any time the government requires one individual to support another, that individual is entitled to inquire how the recipient will use the funds and withhold them if they object to any of the messages being expressed. And speech is, of course, everywhere, in everything we do.

*Janus* is therefore a microcosm of the theoretical dilemmas that created the Bizarro First Amendment. Doctrine under the "low-value speech" model was not especially principled; instead it simulated more-or-less acceptable results essentially by fiat. But that allowed the Court to dodge the deep questions about when expression may properly be restricted. And so when the view that no speech is a stranger to the Constitution started to gain traction there was nothing left to build a law of free speech from.

*Abood* used two wrongs to approximate a right. *Janus* "righted" one of the wrongs, allowing the other to roam free. And public sector unions just happened to be in its path.

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[159] Baude and Volokh agree. *See* Baude & Volokh, *supra* note 129, at 180 ("*Janus* is more convincing than *Abood* in recognizing that collective bargaining—at least for government employee unions bargaining with government officials over public funds—is 'an ideological cause' that involves 'a political message' as well.") (citations omitted).

## CONCLUSION

We see, then, how the Bizarro First Amendment operates. Conservative or libertarian objections to progressive regulation are recast in free speech terms. This is easily accomplished, because speech is everywhere. And once the Court has found a burden on speech, it is simple enough to dispose of the justifications offered for that burden.[160] After all, what in our modern society is more important than freedom of expression?

Thus in *Janus*, the libertarian sensibility that the state may not take from one person only to give to another—a principle nowhere enshrined in American law but asserted as a rule of "natural law" from the Founding through the present day[161]—becomes a First Amendment matter so long as the beneficiary might use the property in question to express some ideas its original owner found unsavory. And once requiring employees to pay for the union that represents them in negotiations with their employer has been analogized to compulsory recitation of the Pledge of Allegiance, the need to prevent free-riding and ensure that the union is adequately funded is wholly inadequate to justify such a totalitarian tactic.

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[160] Indeed, the Bizarro First Amendment is by its terms far less forgiving of intrusions upon *laissez faire* liberty than was the original *Lochner* era. The substantive due process of that era asked only whether the law under review was "a fair, reasonable, and appropriate exercise of the police power of the [S]tate,"—loosely defined as the power to protect "safety, health, morals and general welfare of the public"— "or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty?" Lochner v. New York, 198 U.S. 45, 53, 56 (1905). But restrictions on speech are subject to strict scrutiny, which requires that laws be justified by a *compelling* governmental interest, and that they be narrowly tailored to that interest. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). In practice, the Bizarro First Amendment is not (yet) that much more restrictive than *Lochner* itself, precisely because the supposed principles on which its decisions rest cannot be and are not taken seriously or applied generally. This cannot be called a "limiting principle," for it is hardly principled, but then again neither was the *Lochner*-era Court's determination of which regulations were reasonable.

[161] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) ("An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. . . . a law that takes property from A. and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it."); Kelo v. City of New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (quoting *Calder*, 3 U.S. at 388).

In *Sorrell*, the objection was perhaps quintessentially Lochnerish: Vermont had limited the freedom of pharmacists and pharmaceutical companies to enter into voluntary transactions. But this instead became a matter of *discrimination on the basis of speech*, singling out pharmaceutical companies simply because they were going to use the personal data bought from pharmacies to manipulate doctors into prescribing unnecessarily expensive medication for their patients. How unfair! Against such an inequity paltry justifications such as privacy and consumer protection cannot hope to stand.

And in *Bennett* the objection is, if anything, even less principled or coherent. Having long since persuaded the Court to reject John Rawls's view that citizens in a democracy are entitled not just to equal political rights but to the fair value of those rights,[162] the rich and powerful asked the Court to hold that they are entitled under the Constitution to the *unfair* value of their political liberties. Not only must they be allowed to use their wealth for political advantages; they must specifically be allowed to spend more than those who have less. And the Court agreed, for if the rich are not guaranteed the ability to drown out other voices by financing electioneering, they might not do as much of it, and nothing could more be anathema to the First Amendment!

These are not the only Bizarro First Amendment cases; they are not necessarily the worst or the most consequential. They do however show how the Court's conservative majority has operated in recent decades. None of these decisions rest on principles of free speech that could possibly be taken seriously if given neutral or general application. But that doesn't matter. The Court has learned that it can frame its *laissez faire* objections in First Amendment terms and cast itself as a champion of free expression rather than of free markets. *Janus* marked the beginning of the Second Lochner Era, and it is fair to assume that we will not see the end of that age until the composition of the Court changes.

When that day does come, the question will be what to do about all of this. In one sense the answer is simple: stop issuing these decisions. As easy as it may be to frame any given case in

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[162] *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 149-50 (Erin Kelly ed., 2001).

spurious First Amendment terms, it is just as straightforward to reject such a bad-faith framing. The dissents in *Sorrell*, *Bennett*, and *Janus* each offer perfect examples of how to do this. In *Sorrell*, Justice Breyer explained how the Vermont law at issue was not so different from scores of other regulations, and how the majority's approach was at odds with the entire post-New Deal (*i.e.*, post-*Lochner*) framework of deference to laws governing commerce.[163] In *Bennett*, Justice Kagan explained how offering funds to one candidate in no way burdens or restricts the speech of other candidates, and how the majority went out of its way to treat equality as a forbidden, not merely insufficient, motive.[164] And in *Janus*, Justice Kagan again explained how the Court departed again and again from traditional First Amendment doctrine in order to advance its vendetta against public sector unions.[165] These responses will generally suffice to turn aside novel arguments for extending the Bizarro First Amendment, and even to overrule some of the existing decisions.

The deeper question, though, is how to prevent something like this happening again. This will require significantly rethinking and reworking the framework of our free speech law. I would suggest a two-part strategy for a Court interested in repudiating the Lochnerism of the current moment. First it must reject once and for all the concept of low-value speech. Fighting words, the last of the old *Chaplinsky* categories to go unaddressed, could provide the opportunity here, or perhaps obscenity law. Either way the Court must make clear that no expression is a stranger to the First Amendment, however much or little it might be thought to contribute to the eternal search for truth.

Second, the Court must directly confront the question of how the state may legitimately seek to regulate expressive activity when all such activity is deemed fully protected: namely, when its actions are not designed or plainly adapted to restrict expression as such but toward some other, legitimate purpose. Harassment law might provide a suitable occasion for this exposition, as it

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[163] Sorrell v. IMS Health Inc., 564 U.S. 552, 602-03 (2011) (Breyer, J. dissenting).

[164] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 783 (2011) (Kagan, J. dissenting).

[165] Janus v. AFSCME, Council 31, 138 S. Ct. 2487-2502 (2018) (Kagan, J. dissenting).

offers a prime example of people deliberately using words as weapons. This would shift the Court's focus away from the "balancing" approach of strict scrutiny and toward whether or not the government has qualitatively offended the First Amendment.

This would accomplish several goals. First, it would eliminate the first step of current doctrine: showing that there has been a "burden" on speech. That showing would become effectively trivial. Second, it would take courts away from the uncomfortable task of appraising the value of different kinds of speech.[166] Relatedly, it would avoid making every First Amendment case into a competition between free speech and whatever the other government interest might be to see which is more important. Instead we would focus on what the state may never do—seek to limit the People's ability to express themselves—while respecting that many laws that are necessary and proper for promoting the public welfare also restrict the means by which some individuals might wish to express their views. It would, in other words, force the Court and the nation to think about what is truly a First Amendment case and what is not.

Today that line has been blurred beyond comprehension. And it has been blurred only in a specific set of cases, where the confusion serves a particular agenda. Justice Kagan's warning of a "weaponized" First Amendment was not of a world where the legitimate speech interests of liberal or conservative speakers would be valued above others but of a world where every concern that certain litigants might have, whether truly relating to freedom of expression or not, is seen in First Amendment terms. This is an imperial First Amendment that marches beyond its borders conquering neighboring territory—the territory in which the government is *supposed* to have freedom to regulate the conditions of economic life in the public interest. To say that "[t]he First Amendment was meant for better things"[167] is not to denigrate the importance of free speech but to recognize that

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[166] In this regard my proposal is diametrically opposed to, for example, Professor Shanor's call for a "new form of First Amendment realism," Shanor, *supra* note 3, at 208, or Professor Post's view that "courts decide First Amendment cases by authorizing particular social practices." *See* Post, *supra* note 11, at 1279; Shanor, *supra* note 3, at 208.

[167] *Janus*, 138 S. Ct. at 2502 (2018) (Kagan, J. dissenting).

using "the freedom of speech" as an excuse to resurrect long-dead protections for *laissez faire* and free markets undermines both the functioning of our democracy and the freedom of speech itself.

*Janus* is not truly a First Amendment case. It is the Bizarro First Amendment.