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January 2020

## Escaping Doctrinal Lockboxes in First Amendment Jurisprudence: Workarounds for Strict Scrutiny for Low-Value Speech in the Face of Stevens and Reed

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### Recommended Citation

Clay Calvert, *Escaping Doctrinal Lockboxes in First Amendment Jurisprudence: Workarounds for Strict Scrutiny for Low-Value Speech in the Face of Stevens and Reed*, 73 SMU L. REV. 727 (2020)  
<https://scholar.smu.edu/smulr/vol73/iss4/2>

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# ESCAPING DOCTRINAL LOCKBOXES IN FIRST AMENDMENT JURISPRUDENCE: WORKAROUNDS FOR STRICT SCRUTINY FOR LOW-VALUE SPEECH IN THE FACE OF *STEVENS* AND *REED*

Clay Calvert\*

## ABSTRACT

*The United States Supreme Court's 2010 opinion in the crush-video case of United States v. Stevens made it extremely difficult to declare new varieties of low-value speech unprotected by the First Amendment. Five years later, the Court's sign-ordinance ruling in Reed v. Town of Gilbert made it exceedingly tough for facially content-based regulations imposed on presumptively protected speech to be analyzed by any standard of judicial review less rigorous than the demanding strict scrutiny test. This Article examines how some courts today, despite being hemmed in by the strictures of both Stevens and Reed, are creatively unearthing novel ways to apply more lenient levels of review to content-based laws targeting varieties of speech—in particular, revenge pornography and conversion therapy—that seemingly carry trifling value for furthering traditional First Amendment ideals. Those time-honored goals addressed in this Article include promoting democratic self-governance and facilitating truth discovery in the metaphorical marketplace of ideas. The Article asserts that rather than resorting to artful efforts to dodge both Reed and a rigid categorical approach to First Amendment analysis, lower courts should boldly embrace Justice Breyer's values-and-interests methodology for proportionate scrutiny in these cases. This, in turn, would tee up for possible Supreme Court reconsideration Reed and, conceivably, even Stevens. Significantly, as the Article explains, Justice Breyer advocated in 2019 for this approach in the low-value speech case of Iancu v. Brunetti involving the trademark "FUCT." This bolsters the argument for its applicability when it comes to analyzing laws barring the low-value expression of revenge pornography and conversion therapy.*

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## I. INTRODUCTION

IN October 2019, the Supreme Court of Illinois held in *People v. Austin*<sup>1</sup> that a state statute<sup>2</sup> criminalizing the nonconsensual dissemination of certain private, sexual images was a content-neutral law subject to constitutional analysis under the intermediate scrutiny standard.<sup>3</sup> This tier of review comports with the notion that, in recent decades, “some version of intermediate scrutiny has been consistently used in cases involving content-neutral time, manner, and place restrictions.”<sup>4</sup>

1. 2019 IL 123910, *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020).

2. 720 ILL. COMP. STAT. 5/11-23.5(b) (2020).

3. *Austin*, 2019 IL 123910, ¶ 43 (“We conclude that section 11-23.5(b) is subject to an intermediate level of scrutiny for two independent reasons. First, the statute is a content-neutral time, place, and manner restriction. Second, the statute regulates a purely private matter.”).

4. Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1813 (2014); see David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 368 (2015) (noting that the “default rule” is that “the intermediate scrutiny standard applie[s] to content-neutral speech restrictions”).

In the face of a First Amendment free speech challenge to the statute in *Austin*, Illinois's highest court ultimately upheld the statute under this generally deferential level of appraisal.<sup>5</sup>

There is, however, a glaring problem with this decision. It is that the Illinois statute discriminates on its face against a particular type of content; the Supreme Court of Illinois majority readily acknowledged this fact.<sup>6</sup> In particular, the law targets only images depicting a person “engaged in a sexual act or whose intimate parts are exposed.”<sup>7</sup> Visuals showing other subjects or topics, including people who are not participating in such deeds and whose intimate parts are covered, are not constrained by the measure.<sup>8</sup> This discrepancy between what content is and is not regulated by the statute is highly significant. It means that under the United States Supreme Court’s 2015 ruling in *Reed v. Town of Gilbert*,<sup>9</sup> the Illinois statute is facially content based because it “draws distinctions based on the message a speaker conveys”<sup>10</sup> and defines “regulated speech by [a] particular subject matter.”<sup>11</sup>

The ramifications, in turn, of this facial, content-based categorization are profound for dictating the applicable level of First Amendment scrutiny for statutory analysis.<sup>12</sup> Per *Reed*, the Illinois statute should have

5. See *Austin*, 2019 IL 123910, ¶ 86 (“We hold that section 11-23.5 satisfies intermediate scrutiny.”); see also DANIEL A. FARBER, *THE FIRST AMENDMENT* 194 (4th ed. 2014) (“[T]he Court’s review of time, place, and manner restrictions normally is not particularly vigorous.”); Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 *UCLA L. REV.* 1239, 1260 (2008) (asserting that the intermediate scrutiny test, as it has evolved over time, “often present[s] the government with only minor impediments—mere speed bumps along the path to suppression of even core political speech”).

The First Amendment to the U.S. Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety-five years ago through the Fourteenth Amendment’s Due Process Clause as fundamental liberties applicable for governing the actions of state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

6. *Austin*, 2019 IL 123910, ¶ 46 (“We recognize that section 11-23.5(b) on its face targets the dissemination of a specific category of speech—sexual images.”).

7. 720 *ILL. COMP. STAT.* 5/11-23.5(b)(1)(C) (2020). The statute defines a sexual act as “sexual penetration, masturbation, or sexual activity.” *Id.* § 11-23.5(a). It explicates intimate parts as “fully unclothed, partially unclothed or transparently clothed genitals, pubic area, anus, or if the person is female, a partially or fully exposed nipple, including exposure through transparent clothing.” *Id.*

8. As the two-justice dissent in *Austin* explained, the statute does not make it a crime “to disseminate a picture of a fully clothed adult man or woman,” no matter how unflattering the image might be. *Austin*, 2019 IL 123910, ¶ 127 (Garman, J., dissenting).

9. 576 U.S. 155, 159 (2015).

10. *Id.* at 163.

11. *Id.*

12. Whether a law is content based or content neutral is critical in First Amendment jurisprudence in terms of influencing the level of scrutiny to which it will be subjected by a court. As one professor explains the usual methodology:

After distinguishing content-based from content-neutral laws, the Court must give each its appropriate level of review. This is the *scrutiny analysis*. Content-based laws receive strict scrutiny, which nearly always proves fatal.

been examined under the more rigorous strict scrutiny standard—not intermediate scrutiny—regardless of any benign legislative motive or purpose underlying it.<sup>13</sup> As Justice Thomas bluntly explained in penning the Court’s opinion in *Reed*, “an innocuous justification cannot transform a facially content-based law into one that is content neutral.”<sup>14</sup> In other words, there simply is no need under *Reed* to examine the legislative motive once a statute is determined to be facially content based; facially content-based laws must clear strict scrutiny to be constitutional.<sup>15</sup>

The application of strict scrutiny to content-based laws, in turn, typically tolls the death knell for such legislative handiwork.<sup>16</sup> That is because strict scrutiny represents “the most searching form of judicial review in free speech cases.”<sup>17</sup> It requires the government to prove both that it has a compelling interest to justify the law in question and that the means

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Meanwhile, content-neutral laws receive what the Court calls “intermediate scrutiny,” in practice a highly deferential form of review which virtually all laws pass.

Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012) (footnote omitted).

13. *Reed*, 576 U.S. at 165 (“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993))); see also Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 233 (“For decades now, the Supreme Court has insisted that content-based laws—laws that restrict speech because of its ideas or messages or subject matter—are presumptively unconstitutional, and will be sustained only if they can satisfy strict scrutiny.”).

14. *Reed*, 576 U.S. at 166; see Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65, 67 (2017) (examining *Reed*’s analysis of the scrutiny issue and noting that, under it, “[e]ven a benign (or at least non-content-related) purpose cannot save a law that refers to content from the most rigorous constitutional standard of review”).

15. See R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 400 (2019) (“[T]he majority in *Reed* adopted a rigid rule that if a regulation is content-based ‘on its face,’ then strict scrutiny is automatically triggered.” (quoting *Reed*, 576 U.S. at 165)). There are a few exceptions to this general rule, perhaps the most notable of which involves laws targeting commercial speech. Such measures typically are analyzed under a variation of intermediate scrutiny. See Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1283 (2014) (“[T]he Supreme Court differentiates between commercial speech (such as advertising) and noncommercial speech, and subjects the former to intermediate scrutiny.”); David L. Hudson, Jr., *The Content-Discrimination Principle and the Impact of Reed v. Town of Gilbert*, 70 CASE W. RES. L. REV. 259, 272 (2019) (“[C]ommercial speech receives protection but it is still viewed as a stepchild in the First Amendment family. All regulations of commercial speech—both content-based and content-neutral—are evaluated under the so-called *Central Hudson* test, a variant of intermediate scrutiny developed by the U.S. Supreme Court in 1980.”).

16. See *Reed*, 576 U.S. at 176 (Breyer, J., concurring) (asserting that strict scrutiny leads “to almost certain legal condemnation”); *United States v. Alvarez*, 567 U.S. 709, 731 (2012) (Breyer, J., concurring) (declaring that strict scrutiny results in “near-automatic condemnation”); see also Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1428 (2017) (describing strict scrutiny as “essentially outcome determinative; in only one modern case has a majority of the Court unambiguously upheld a content-based law under strict scrutiny” (footnote omitted)).

17. Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM’N L. & POL’Y 349, 350 (2011).

serving that interest squelch no more speech than is absolutely necessary.<sup>18</sup> As Justice Souter once tidily encapsulated it, strict scrutiny “leaves few survivors.”<sup>19</sup>

Yet, the Supreme Court of Illinois in *Austin* ignored *Reed*’s admonition that a facially content-based law must surmount strict scrutiny irrespective of lawmakers’ noble motives.<sup>20</sup> Instead, Illinois’s highest court took a substantial leap backward in time to 1989, relying on the U.S. Supreme Court’s opinion from that year in *Ward v. Rock Against Racism*.<sup>21</sup> The Court there concluded that the legislative intent for adopting a law provided the pivotal key for deciding if it was content based or content neutral.<sup>22</sup> In short, in *Austin*, the Supreme Court of Illinois followed the outdated *Ward* ruling, not *Reed*, thus allowing it to focus on legislative motive even when confronted with a facially content-based statute.<sup>23</sup>

Writing for the five-member *Austin* majority, Justice Neville quoted *Ward* verbatim for dual propositions buttressing the position that intent controls whether a law is content based or content neutral: First, “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>24</sup> And second, “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”<sup>25</sup>

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18. See *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (providing that strict scrutiny requires a law to be “justified by a compelling government interest and . . . narrowly drawn to serve that interest,” and dubbing this “a demanding standard”); see also *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (providing that to pass strict scrutiny review under the narrow-tailoring prong, a statute “must be *the least restrictive means* of achieving a compelling state interest” (emphasis added)).

19. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

20. See *supra* note 14 and accompanying text (addressing how the Court in *Reed* held that a facially content-based statute cannot be converted into a content-neutral one by a good legislative purpose); see also Dan V. Kozlowski & Derigan Silver, *Measuring Reed’s Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After Reed v. Town of Gilbert*, 24 COMM’N L. & POL’Y 191, 192 (2019) (“Justice Thomas’s opinion in *Reed* held that facial content discrimination cannot be saved with a benign purpose. In previous cases, the Court had stated that an innocuous government purpose could save a facially content-based law from strict scrutiny. *Reed*, however, changed the calculus, stating that was not the case.” (footnote omitted)).

21. See *People v. Austin*, 2019 IL 123910, ¶¶ 45–46 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)), *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020).

22. See *Ward*, 491 U.S. at 791 (“The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government’s purpose is the controlling consideration.” (citation omitted)).

23. See *Austin*, 2019 IL 123910, ¶¶ 45–46 (citing *Ward* several times and relying on it for the proposition that a regulation may be content neutral, even if it is facially content based, if the government adopted it to serve a goal that is unrelated to a disagreement with the specific content being regulated).

24. *Id.* ¶ 45 (quoting *Ward*, 491 U.S. at 791).

25. *Id.* ¶ 46 (quoting *Ward*, 491 U.S. at 791).

Justice Neville cited *Reed*, but only for the principle that content-based laws must survive strict scrutiny to be constitutional.<sup>26</sup> He failed to mention *Reed*'s unambiguous holding that “[a] law that is content based on its face is subject to strict scrutiny *regardless* of the government’s benign motive, [or] content-neutral justification.”<sup>27</sup> In a nutshell, the *Austin* majority found that a facially content-based law should nonetheless be deemed content neutral and should therefore be subject to intermediate scrutiny review.<sup>28</sup>

As if *sub silentio* sensing that it needed some additional cover for flouting *Reed*, the Supreme Court of Illinois doubled down on veering off the beaten path of scrutiny. Specifically, it articulated a back-up, independent justification for applying intermediate scrutiny beyond content neutrality: the Illinois statute regulates only speech about matters of private concern, not public interest, and thus merits more deferential judicial review.<sup>29</sup> The U.S. Supreme Court certainly has embraced a dichotomy between matters of public and private concern, but it has done so only when addressing the speech rights of government employees,<sup>30</sup> as well as when deciding whether the First Amendment shields speakers from tort liability<sup>31</sup> and safeguards media entities that publish lawfully obtained,

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26. *See id.* ¶ 40 (“A content-based law is justified only if it survives strict scrutiny, which requires the government to demonstrate that the law is narrowly tailored to serve a compelling state interest.” (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015))).

27. *Reed*, 576 U.S. at 165 (emphasis added).

28. *See Austin*, 2019 IL 123910, ¶ 43 (holding that the statute was “subject to an intermediate level of scrutiny” in part because it was “a content-neutral time, place, and manner restriction”).

29. *See id.* ¶¶ 53–54 (concluding “that section 11-23.5(b) is subject to an intermediate level of scrutiny also because the statute regulates a purely private matter,” and asserting that “[F]irst [A]mendment protections are less rigorous where matters of purely private significance are at issue”).

30. *See Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) (“The Court’s decisions . . . have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of *public concern* and to respect the needs of government employers attempting to perform their important public functions.” (emphasis added)); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (“The Court has recognized the right of employees to speak on matters of *public concern*, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment.” (emphasis added)); *see also* Carmen Maye, *Public-College Student-Athletes and Game-Time Anthem Protests: Is There a Need for a Constitutional-Analytical Audible?*, 24 *COMMUN. L. & POL’Y* 55, 79 (2019) (“In public-employee speech cases, the primary consideration is whether an employee utters the speech in connection with his or her job—as a public employee—or is speaking ‘as a citizen upon matters of public concern.’” (quoting *Garcetti*, 547 U.S. at 416)).

31. *See Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (holding that whether the First Amendment shielded members of the Westboro Baptist Church from tort liability based on their offensive speech near a funeral for a U.S. soldier killed in Iraq “turn[ed] largely on whether that speech [wa]s of public or private concern, as determined by all the circumstances of the case” and noting that “where matters of purely private significance are at issue, First Amendment protections are often less rigorous”); *see also* Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 *CARDOZO L. REV.* 2163, 2169 (2018) (“[T]he public concern test dominates much of First Amendment analysis in the speech-torts context.”).

truthful information.<sup>32</sup> It has never, however, invoked this on–off switch of public-versus-private matters when determining whether intermediate or strict scrutiny applies to analyze a statute.<sup>33</sup>

The elephant-in-the-room question that thus arises—the one animating this Article—is why the Supreme Court of Illinois ignored *Reed*'s bright-line rule and, instead, latched on to *Ward*, which focused on legislative intent. This Article hypothesizes that the Illinois Supreme Court, like some other courts in 2019 confronting similar issues,<sup>34</sup> might have done so because: (1) the statute at issue regulated decidedly low-value speech,<sup>35</sup> and (2) the court needed to find an escape hatch from the strictures of both *Reed* and the Court's 2010 decision in *United States v. Stevens*<sup>36</sup> in order to increase the odds of the statute passing constitutional muster.

*Stevens* made it much more challenging for courts to hold that a new variety of speech—known as nonconsensual, or revenge, pornography<sup>37</sup>

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32. See *Bartnicki v. Vopper*, 532 U.S. 514, 533–34 (2001) (holding that enforcement of a federal statute banning the dissemination of the contents of a conversation that was illegally intercepted was not justified on the facts of the case because “enforcement of that provision . . . implicate[d] the core purposes of the First Amendment because it impose[d] sanctions on the publication of truthful information of *public concern*” (emphasis added)); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (“[I]f a newspaper lawfully obtains truthful information about a matter of *public significance* then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.” (emphasis added)); see also Adam Candeub, *Nakedness and Publicity*, 104 IOWA L. REV. 1747, 1767 (2019) (“*Bartnicki* ruled the First Amendment prohibits laws outlawing dissemination of speech—acquired by a third-party wiretapper—if of public concern.”).

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

Lakier, *supra* note 13, at 233 (footnote omitted).

34. See *infra* Section IV.B (addressing two cases where courts avoided the application of strict scrutiny when confronted with seemingly content-based laws regulating the low-value speech of sexual orientation change efforts).

35. See *infra* notes 76–86 and accompanying text (addressing the concept of low-value speech and the U.S. Supreme Court's articulation of that concept in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), as a rationale for holding that the regulation of some types of speech “have never been thought to raise any Constitutional problem”).

36. 559 U.S. 460, 468 (2010).

37. See *People v. Austin*, 2019 IL 123910, ¶ 17 (observing that the Illinois statute “addresses the problem of nonconsensual dissemination of private sexual images, which is colloquially referred to as ‘revenge porn’”), *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020); see also Mary Anne Franks, “*Revenge Porn*” *Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1258 (2017) (defining nonconsensual pornography as “sexually explicit images and video disclosed without consent and for no legitimate purpose,” and noting that “[m]any victim advocates” prefer to use the term nonconsensual pornography instead of “revenge porn”); Jessica A. Magaldi, Jonathan S. Sales & John Paul, *Revenge Porn: The Name Doesn't Do Nonconsensual Pornography Justice and the Remedies Don't Offer the Victims Enough Justice*, 98 OR. L. REV. 197, 199, 203 (2020) (defining



(this Article uses the terms interchangeably), which was targeted in *Austin*—falls outside the bounds of First Amendment protection.<sup>38</sup> Specifically, *Stevens* flatly rejected the government’s position that novel categories of unguarded speech are identifiable “on the basis of a simple cost-benefit analysis”<sup>39</sup> that balances the “relative social costs and benefits”<sup>40</sup> of protecting the speech in question and deems some speech utterly valueless or not worth protecting.<sup>41</sup> Writing for the *Stevens* majority, Chief Justice Roberts did not, however, slam the door shut on recognizing new varieties of unprotected expression.<sup>42</sup> He determined that a history-and-tradition methodology must be applied in order to identify possible new categories, reasoning that “[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”<sup>43</sup>

This approach, as former American Civil Liberties Union President Nadine Strossen encapsulates it, “is essentially backward-looking, treating the finite exceptions that had been generally accepted since the First Amendment’s adoption as a closed, fixed set of all such exceptions.”<sup>44</sup> This thwarts “the possibility of carving out from First Amendment protection any expression that had been protected historically.”<sup>45</sup> Similarly, Professor Genevieve Lakier notes that under the accepted view of *Stevens*, “historical evidence of a ‘long-settled tradition of subjecting that

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nonconsensual pornography as “a user-generated image of a person in a state of nudity or engaged in sexually explicit conduct in a state of nudity that is distributed to third parties without the consent of the person depicted in the photograph or video and without a legitimate purpose,” and characterizing revenge porn as a “category of nonconsensual pornography” in which “a previous romantic partner distributes the offending material”).

38. The U.S. Supreme Court has concluded that multiple varieties of speech generally are unprotected by the First Amendment. See *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (listing unprotected brands of expression as including incitement to violence, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats and “speech presenting some grave and imminent threat the government has the power to prevent”). The Court’s “plurality opinion in *Alvarez* represents [its] most recent effort to catalog categories of unprotected speech.” G. Edward White, *Falsity and the First Amendment*, 72 SMU L. REV. 513, 517 (2019). Before *Alvarez*, the Court had enumerated unprotected categories of speech in other opinions. See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (“As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does *not* embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.” (emphasis added)).

39. *Stevens*, 559 U.S. at 471.

40. *Id.* at 470.

41. See *id.* (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”).

42. See *id.* at 472 (“We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.”).

43. *Id.*

44. Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67, 81.

45. *Id.* at 82.

speech to regulation’ is required to establish the existence of a novel category of low-value speech.”<sup>46</sup> As applied in *Stevens*, this approach led the Court to refuse to adopt images of animal cruelty as a new category of unprotected expression.<sup>47</sup>

The next year, in *Brown v. Entertainment Merchants Ass’n*,<sup>48</sup> the Court applied the same *Stevens* approach for ferreting out niches of unprotected speech when it considered the constitutionality of a California statute limiting minors’ access to violent video games.<sup>49</sup> The Court found that there was no historical tradition in the United States of banning minors’ access to speech describing or depicting violence.<sup>50</sup> The California statute thus “impose[d] a restriction on the content of protected speech,” and it had to overcome the strict scrutiny test in order to be constitutional.<sup>51</sup> This was a high hurdle that the statute could not clear.<sup>52</sup> The Court again reaffirmed the *Stevens* methodology in 2012 in *United States v. Alvarez*.<sup>53</sup> Viewed collectively, the *Stevens*, *Brown*, and *Alvarez* approach for fashioning new categories of unprotected speech represents what Professor Chad Flanders calls “a sort of ‘back to the future’ in First Amendment law.”<sup>54</sup>

The Supreme Court of Illinois in *Austin*, in fact, was hemmed in by both *Stevens* and *Reed*. In particular, the Prairie State’s high court cited *Stevens* when noting that the U.S. Supreme Court “has permitted content-based restrictions where [the restrictions are] confined to the few historic, traditional, and long-familiar categories of expression.”<sup>55</sup> It declined, however, “to identify a new categorical [F]irst [A]mendment exception when the United States Supreme Court has not yet addressed the question” of constitutional protection (or lack thereof) for the nonconsensual dissemination of private, sexual images.<sup>56</sup> In doing so, it noted that earlier in 2019, the Supreme Court of Vermont had also refused to carve out a new category of unprotected expression under *Stevens* for such speech when considering the constitutionality of that state’s statute

46. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2169 (2015) (quoting *Stevens*, 559 U.S. at 469).

47. *Stevens*, 559 U.S. at 472.

48. 564 U.S. 786 (2011).

49. *See id.* at 788–89. The *Brown* majority deemed *Stevens* controlling precedent. *Id.* at 792.

50. *See id.* at 795 (“California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none.”).

51. *Id.* at 799.

52. *See id.* (“California cannot meet that standard.”).

53. 567 U.S. 709, 717 (2012) (plurality opinion). The Court in *Alvarez* cited approvingly *Stevens*’s history-and-tradition test. *See id.* at 717 (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)). It then refused to carve out an unprotected category of expression for false speech. *See id.* at 722 (rejecting “the notion that false speech should be in a general category that is presumptively unprotected”).

54. Chad Flanders, *A Half-Hearted Defense of the Categorical Approach*, 95 WASH. U. L. REV. 1389, 1402 (2018).

55. *People v. Austin*, 2019 IL 123910, ¶ 34 (citing *Alvarez*, 567 U.S. at 717; *Stevens*, 559 U.S. at 468, 470), *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020).

56. *Id.* ¶ 36.

targeting nonconsensual pornography.<sup>57</sup>

In short, the Supreme Court of Illinois was reticent under *Stevens*—and without additional guidance from the nation’s highest court—to fashion a novel class of unprotected expression for nonconsensual pornography. In turn, because such speech was presumptively protected, the court had to apply a standard of review to analyze the constitutional validity of the statute before it and, as noted earlier, the court adopted intermediate scrutiny as the proper test.<sup>58</sup> This flatly contradicted *Reed*’s command that facially content-based laws must survive strict scrutiny.<sup>59</sup>

Pulling the analytical camera back from a tight focus on *Austin*, the big picture revealed is this: *Stevens* and *Reed* pack a profoundly powerful one–two categorical punch in First Amendment jurisprudence. *Stevens* strikes the first blow, making it difficult for courts to carve out new categories of unprotected expression, especially when the speech only recently—not traditionally and historically—has been targeted by lawmakers for regulation and criminalization. *Reed* then follows up and lands the second wallop, rendering it tough for courts to apply a standard of review less burdensome than strict scrutiny once a statute is categorized as facially content based. Legislation banishing or restricting low-value speech thus can be knocked out, left lying on the canvas, unless it surmounts strict scrutiny or a wily court invents a way to elude the doctrinal lockboxes of *Stevens* and *Reed*.

This Article, focusing on *Austin* as well as two 2019 opinions addressing the First Amendment implications of laws banning conversion therapy—also called sexual orientation change efforts (SOCE)<sup>60</sup>—on minors, explores how some courts are shrewdly finding ways to apply standards of

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57. *Id.* (citing *State v. VanBuren*, 2018 VT 95 ¶ 46, 210 Vt. 293, 214 A.3d 791, 807 (2019)). In *State v. VanBuren*, Vermont’s highest appellate court “[le]ft it to the Supreme Court in the first instance to designate nonconsensual pornography as a new category of speech that falls outside the First Amendment’s full protections.” 2018 VT 95, ¶ 46, 210 Vt. 293, 214 A.3d at 807. The Supreme Court of Vermont also cited the test from *Stevens*, noting that the U.S. Supreme Court there “focused particularly on the absence of any history of regulating such depictions, rather than the policy arguments for and against embracing the proposed new category.” *Id.* ¶ 30, 210 Vt. 293, 214 A.3d at 802 (citing *Stevens*, 559 U.S. at 469). Ultimately, it held “that ‘revenge porn’ does not fall within an established categorical exception to full First Amendment protection, and . . . decline[d] to predict that the U.S. Supreme Court would recognize a new category.” *Id.* ¶ 22, 210 Vt. 293, 214 A.3d at 800.

58. See *supra* note 3 and accompanying text.

59. See *supra* notes 6–15 and accompanying text (addressing how the law at issue in *Austin* was content based on its face and how, per *Reed*, such laws must survive strict scrutiny to pass First Amendment muster).

60. As a June 2019 report prepared by the Williams Institute at UCLA Law School encapsulates it:

Conversion therapy, also known as sexual orientation or gender identity change efforts, is a practice grounded in the belief that being LGBT is abnormal. It is intended to change the sexual orientation, gender identity, or gender expression of LGBT people. Conversion therapy is practiced by some licensed professionals in the context of providing health care and by some clergy or other spiritual advisors in the context of religious practice. Efforts to change someone’s sexual orientation or gender identity are associated with poor mental health, including suicidality. As of June 2019, 18 states, the

review less arduous than strict scrutiny when analyzing statutes targeting such decidedly low-value speech. Indeed, revenge pornography is not only generally low value but also, in fact, often extremely harmful. As Professors Danielle Keats Citron and Mary Anne Franks explain, victims of revenge pornography suffer “grave harms” such as “stalking, loss of professional and educational opportunities, and psychological damage.”<sup>61</sup> Furthermore, as Citron recently pointed out, the nonconsensual dissemination of such images “invades sexual privacy by preventing victims from determining for themselves who sees them naked.”<sup>62</sup> She asserts that “[n]ude photos, posted for the public to see, reduce people to their genitalia and breasts. When nonconsensual pornography is perpetrated by an ex-intimate, the betrayal of trust is profound.”<sup>63</sup>

In terms of value, or lack thereof, speech efforts to change the sexual orientation of minors might well be similarly considered. Specifically, and according to some studies and learned organizations, conversion therapy not only lacks any value but also may harm those who undergo it.<sup>64</sup> In November 2018, the American Psychiatric Association (APA) “reiterate[d] its long-standing opposition to the practice.”<sup>65</sup> In doing so, the APA called conversion therapy a “harmful and discriminatory practice.”<sup>66</sup> In a 2019 issue brief, the American Medical Association (AMA) pointed out that conversion therapy may “increase suicidal behaviors in a population where suicide is prevalent,” namely LGBTQ young adults.<sup>67</sup> The AMA added that “[a]ll leading professional medical and mental health associations reject ‘conversion therapy’ as a legitimate medical

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District of Columbia, and a number of localities have banned health care professionals from using conversion therapy on youth.

Christy Mallory, Taylor N.T. Brown & Kerith J. Conron, *Conversion Therapy and LGBT Youth*, WILLIAMS INST. 1 (June 2019) (footnotes omitted) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-Update-Jun-2019.pdf> [<https://perma.cc/NY89-KW4D>]. This Article uses the terms conversion therapy and SOCE interchangeably.

61. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 347 (2014); see also Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 710 (2017) (“[Nonconsensual pornography] can have devastating effects: Victims experience severe anxiety and depression and they are often placed in physical danger. They lose their jobs and have difficulty finding new ones.”).

62. Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1918 (2019).

63. *Id.*

64. See Clay Calvert, *Testing the First Amendment Validity of Laws Banning Sexual Orientation Change Efforts on Minors: What Level of Scrutiny Applies After Becerra and Does a Proportionality Approach Provide a Solution?*, 47 PEPP. L. REV. 1, 5–6 (2019) (summarizing research regarding the lack of efficacy and alleged dangers of conversion therapy).

65. Press Release, Am. Psychiatric Ass’n, APA Reiterates Strong Opposition to Conversion Therapy (Nov. 15, 2018), <https://www.psychiatry.org/newsroom/news-releases/apa-reiterates-strong-opposition-to-conversion-therapy> [<https://perma.cc/PYP4-3ZA6>].

66. *Id.*

67. AM. MED. ASS’N, LGBTQ CHANGE EFFORTS (SO-CALLED “CONVERSION THERAPY”) 2 (2019), <https://www.ama-assn.org/system/files/2019-12/conversion-therapy-issue-brief.pdf> [<https://perma.cc/B7XF-6ZP6>].

treatment.”<sup>68</sup>

Part II of this Article initially reviews the concept of low-value speech and the U.S. Supreme Court’s decision in *Chaplinsky v. New Hampshire*, which suggested in dictum that such expression falls completely outside the wall of First Amendment protection.<sup>69</sup> It also describes how *United States v. Stevens*, as addressed earlier,<sup>70</sup> revamped the calculus for identifying categories of speech that are unsheltered by the First Amendment. Part III then provides a brief primer on two well-established justifications for protecting free expression—namely, fostering informed, democratic self-governance and discovering (or, at least, testing notions of) the truth in the marketplace of ideas. Additionally, it suggests how—generally speaking—speech in the form of nonconsensual pornography and SOCE do not advance these values.

Next, Part IV delves deeper into the Supreme Court of Illinois’s avoidance of strict scrutiny in *Austin* and exposes multiple flaws with that court’s analysis. Part IV also reveals how two courts in 2019 deployed tests less rigorous than strict scrutiny when examining laws barring SOCE on minors. Part V then argues that courts addressing the question of scrutiny in these matters are better off embracing Justice Breyer’s preferred scrutiny analysis of proportionality rather than inventing other, highly suspect workarounds for *Reed*. The level of scrutiny, under Justice Breyer’s approach, fluctuates based on an evaluation of whether protecting the speech in question would further traditional First Amendment values and objectives, including those addressed in Part III of this Article. Finally, Part VI concludes that, in light of the issues raised by the low-value speech of nonconsensual pornography and SOCE, the U.S. Supreme Court should revisit both *Reed* and *Stevens* in order to facilitate the analysis of such expression under Justice Breyer’s methodology.

## II. LOW-VALUE SPEECH AND EXCLUSIONS FROM FIRST AMENDMENT PROTECTION: FROM *CHAPLINSKY* TO *STEVENS*

Despite its unequivocal “no law” terminology that seemingly affords absolute protection to speech from government censorship—“Congress shall make *no law* . . . abridging the freedom of speech”<sup>71</sup>—the U.S. Supreme Court never has interpreted that language literally.<sup>72</sup> As one re-

68. *Id.* at 3.

69. 315 U.S. 568, 571–72 (1942).

70. See *supra* notes 36–47 (addressing *Stevens* and how scholars have interpreted it).

71. U.S. CONST. amend. I (emphasis added).

72. See Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1731 (2007) (“The First Amendment may say that Congress shall make no law abridging the freedom of speech, but of course it doesn’t really mean that. Whole categories of expression are carved out of protectable speech.” (footnote omitted)); J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 292 (2010) (“[T]he First Amendment does not protect all forms of expression, although one would never guess it from the rhetoric. The Court has excluded some categories of speech from First Amendment protection altogether . . .”).

cent article sums it up, “American jurisprudence has rejected an absolutist interpretation of the Amendment.”<sup>73</sup> Justice Holmes famously suggested this more than a century ago, writing that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”<sup>74</sup> The Supreme Court today, in fact, has held that multiple varieties of speech generally receive no First Amendment protection.<sup>75</sup>

A momentous Supreme Court ruling affecting when speech falls outside the First Amendment’s coverage is *Chaplinsky v. New Hampshire*.<sup>76</sup> The Court there identified for the first time so-called fighting words as a category of speech that could be punished without raising First Amendment problems.<sup>77</sup> The case, however, did much more than that. As Professor Ronald Turner comments, *Chaplinsky* deployed a methodology “of extreme categorization, with the Court indicating that certain types of expression, such as fighting words, the lewd and obscene, the profane, and the libelous, are wholly outside the coverage and protection of the First Amendment.”<sup>78</sup>

The *Chaplinsky* Court embraced this “categorical approach to setting the First Amendment’s boundaries”<sup>79</sup> by engaging in what today is dubbed “famous dictum.”<sup>80</sup> Specifically, Justice Murphy wrote for a

73. Louis W. Tompros, Richard A. Crudo, Alexis Pfeiffer & Rahel Boghossian, *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvarez, Social Media-Obsessed World*, 31 HARV. J.L. & TECH. 65, 87 (2017). A person who embraces an absolutist view of the First Amendment “would treat freedom of speech as an utterly impregnable right.” RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 23 (1992).

74. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Holmes’s “theater analogy is the most enduring analogy in the constitutional canon” and is “shorthand for why rights are not unlimited.” Carlton F.W. Larson, “Shouting ‘Fire’ in a Theater”: *The Life and Times of Constitutional Law’s Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181, 184 (2015). It represents “a perfect retort to the frivolous argument that all speech, regardless of context or consequences, is immunized from governmental regulation.” *Id.* at 183.

75. *See supra* note 38 (identifying categories of expression that the Court had held generally are not safeguarded by the First Amendment).

76. 315 U.S. 568 (1942).

77. *See id.* at 571–72 (holding that fighting words are among the “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem” and defining fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”); *see also* Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1527 (1993) (“*Chaplinsky* has generally been read as placing fighting words outside the coverage of the First Amendment on a per se basis. According to this approach, there is a category of ‘fighting words’ that, because of their *content*, do not constitute speech at all.” (footnote omitted)).

78. Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court’s R.A.V. Decision*, 61 TENN. L. REV. 197, 205 (1993); *see* Burton Caine, *The Trouble With “Fighting Words”*: *Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 456 (2004) (“*Chaplinsky* invented the theory that entire *categories* of speech are denied First Amendment protection.”).

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

80. Wayne Batchis, *On the Categorical Approach to Free Speech—And the Protracted Failure to Delimit the True Threats Exception to the First Amendment*, 37 PACE L. REV. 1, 11 (2016).

unanimous Court that the above-noted brands of expression serve “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>81</sup> Dean Rodney Smolla identifies Justice Murphy’s logic as part “of the single most powerful and oft-cited passages in all of American free speech law.”<sup>82</sup> That largely is because this dictum, as Professor Jeffrey Shaman asserts, marked the beginning of the low-value theory of free expression.<sup>83</sup>

Professor Ronald Collins explains that this approach to First Amendment law pivots “on the value of the expression in question,” whereby if it fails to serve “normative values” such as elucidating ideas or furthering the quest for truth, “then it could easily be added to any list of unprotected speech.”<sup>84</sup> In other words, categorizing speech as low value under *Chaplinsky* renders it “removed from the ordinary suite of First Amendment protections.”<sup>85</sup> In making this determination, “judges identified unprotected categories of speech by their inclusion or exclusion from core free speech values of self-expression, political participation, or informative content.”<sup>86</sup>

Nearly seventy years after *Chaplinsky*, however, the Court severely modified, if not completely abandoned, this approach in *United States v. Stevens*.<sup>87</sup> The *Stevens* Court explained that “[w]hen we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis”<sup>88</sup> that entails “an ad hoc balancing of [the] relative social costs and benefits”<sup>89</sup> of protecting the speech. There must be something *in addition* to the con-

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81. *Chaplinsky*, 315 U.S. at 572.

82. Rodney A. Smolla, *Free Speech in an Era of Terrorism: Words “Which by Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 318 (2009).

83. See Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 301 (1995) (“The low-value speech theory traces its genesis to a bit of Supreme Court dictum in the 1942 case of *Chaplinsky v. New Hampshire*.”); see also Joseph Russomanno, *Facebook Threats: The Missed Opportunities of *Elonis v. United States**, 21 COMM’N L. & POL’Y 1, 26 (2016) (asserting that the “doctrine of low-value-speech . . . be[gan] with the Court’s 1942 ruling in *Chaplinsky v. New Hampshire*”).

84. Ronald K.L. Collins, Foreword, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 422 (2012).

85. Kyle Langvardt, *A Model of First Amendment Decision-Making at a Divided Court*, 84 TENN. L. REV. 833, 839 (2017).

86. Alexander Tsesis, *Categorizing Student Speech*, 102 MINN. L. REV. 1147, 1166 (2018); see also Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 394 (2009) (describing *Chaplinsky* as involving a balancing methodology that “is informed by First Amendment values” and that produces “a categorical result” by excluding some forms of speech from First Amendment coverage).

87. 559 U.S. 460, 471–72 (2010); see MARC A. FRANKLIN, DAVID A. ANDERSON, LYRISSA C. BARNETT LIDSKY & AMY GAJDA, *MEDIA LAW: CASES AND MATERIALS* 109 (9th ed. 2016) (asserting that the Court in *Stevens* seemed to reject “the premise articulated by *Chaplinsky*”).

88. *Stevens*, 559 U.S. at 471.

89. *Id.* at 470.

sideration of the value of the speech.<sup>90</sup> As described earlier, that additional something is a long history of the speech being considered unprotected in the United States, even if the Supreme Court has not directly considered whether the First Amendment shelters it.<sup>91</sup> For example, the Court in *Stevens* pointed out that when it held in 1982 that child pornography was not protected by the First Amendment, it “grounded its analysis in a previously recognized, long-established category of unprotected speech.”<sup>92</sup> The Court in *Stevens* rejected the government’s view “that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation.”<sup>93</sup> Putting this in slightly different terms one year later in *Brown v. Entertainment Merchants Ass’n*, the Court stressed that there must be “a long (if heretofore unrecognized) tradition of proscription” of the speech for it to fall outside the ambit of First Amendment coverage.<sup>94</sup>

This test makes it extraordinarily difficult to declare that nonconsensual pornography and speech-based conversion therapy on minors is unprotected by the First Amendment. That is because the regulation of such speech is relatively new. Regarding the former brand of expression, Professor Mary Anne Franks notes that “[b]efore 2003, no law in the United States explicitly criminalized the unauthorized disclosure of sexually explicit images of another adult person.”<sup>95</sup> In fact, she adds that

before 2013 there were few laws in the United States explicitly addressing this invasion of sexual privacy, even as concerns over almost every other form of privacy (financial, medical, data) have captured legal and social imagination. While some existing voyeurism, surveillance, and computer hacking laws may prohibit the nonconsensual observation and recording of individuals in states of undress or engaged in sexual activity, the nonconsensual *disclosure* of intimate images has been, until very recently, largely unregulated by the law.<sup>96</sup>

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90. See *id.* at 471 (describing the Court’s recognition in *New York v. Ferber*, 458 U.S. 747 (1982), of child pornography as an unprotected category of speech, and remarking that its *Ferber* “decision did not rest on this ‘balance of competing interests’ *alone*” (emphasis added) (quoting *Ferber*, 458 U.S. at 764)).

91. See *supra* notes 36–47 (addressing *Stevens* and how it has been interpreted by some scholars). This is not to say, however, that the Court in *Chaplinsky* found a history of non-protection totally irrelevant. The use of the word “never” in the following statement from *Chaplinsky* intimates that history is, in fact, a consideration: “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.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Professor Mark Tushnet explains that this language represents a “historical” theme in the *Chaplinsky* analysis. Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073, 1078 (2017).

92. *Stevens*, 559 U.S. at 471.

93. *Id.* at 469.

94. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011).

95. Franks, *supra* note 37, at 1255.

96. *Id.* at 1261.



A similar recency-of-prohibition predicament holds true for statutes targeting speech-based conversion therapy or SOCE on minors. Professor Melissa Ballengee Alexander remarks that in 2012, “California made national headlines as the first state to ban state-licensed mental health providers from engaging minors in conversion therapy. New Jersey followed suit a year later, and the District of Columbia the year after that.”<sup>97</sup> And while by late 2019 eighteen states and dozens of local municipalities had laws restricting conversion therapy in some way, a few of those measures still permit the practice on minors if done within the context of religious counseling.<sup>98</sup>

In a nutshell, there is only an extremely brief history of laws in the United States regulating or banning both nonconsensual pornography and conversion therapy. This, in turn, strongly signals that under the approach for identifying new varieties of unprotected speech embraced in *Stevens*, neither nonconsensual pornography nor speech-based conversion therapy on minors would go without at least some modicum of First Amendment shelter from government censorship were the Supreme Court to face that issue. In other words, despite the apparently toxic nature of both nonconsensual pornography and conversion therapy that might have rendered them outside the ambit of First Amendment protection under *Chaplinsky*’s low-value approach, they seemingly are covered as protected forms of expression under *Stevens*.<sup>99</sup> This comports with Professor Andrew Koppelman’s observation that, under *Stevens*, the Court “will craft no *new* exceptions to free speech protection.”<sup>100</sup>

The next Part addresses two traditional rationales for protecting expression under the First Amendment—truth discovery in the public marketplace of ideas and the promotion of democratic self-governance. These rationales are examined both to reveal that neither nonconsensual pornography nor SOCE furthers these interests in any significant way—in other words, they are truly low-value brands of speech under the *Chaplinsky* approach—and to set the stage for Part V’s call for applying Justice Breyer’s proportionality approach to scrutiny that readily accounts for such First Amendment interests.

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97. Melissa Ballengee Alexander, *Autonomy and Accountability: Why Informed Consent, Consumer Protection, and Defunding May Beat Conversion Therapy Bans*, 55 U. LOUISVILLE L. REV. 283, 289 (2017) (footnote omitted); see Alena Allen, *Dense Women*, 76 OHIO ST. L.J. 847, 890 (2015) (“[I]n 2012, California became the first state in the nation to prohibit licensed psychotherapists from engaging in sexual orientation change efforts, such as conversion therapy, for patients under eighteen years of age. In 2013, New Jersey passed a similar statute.” (footnote omitted)).

98. Tiffany C. Graham, *Conversion Therapy: A Brief Reflection on the History of the Practice and Contemporary Regulatory Efforts*, 52 CREIGHTON L. REV. 419, 423–25 (2019).

99. See *supra* notes 61–68 and accompanying text (addressing the low-value, harmful nature of both nonconsensual pornography and conversion therapy on minors).

100. Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 Nw. U. L. REV. 1125, 1145 (2016) (emphasis added).

### III. A POWERFUL PAIR OF FIRST AMENDMENT SPEECH INTERESTS: DISCOVERING AND TESTING THE TRUTH AND PROMOTING DEMOCRATIC SELF-GOVERNANCE

In *Chaplinsky v. New Hampshire*, the Supreme Court reasoned that punishing and preventing speech such as fighting words and obscenity has “never been thought to raise any Constitutional problem” because, in key part, such messages “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.”<sup>101</sup> The emphasized portion of that quotation taps directly into the First Amendment principle that a diverse, wide-open marketplace of ideas should be privileged in order to facilitate a search for truth. As Justice Holmes wrote in his 1919 dissent in *Abrams v. United States*:

[W]hen 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.<sup>102</sup>

With this “elegant defense,”<sup>103</sup> Justice Holmes ushered into First Amendment law the marketplace of ideas theory of free speech.<sup>104</sup> More than 100 years later, the Justice’s “paean to truth and free speech”<sup>105</sup> has “assumed the status of seminal secular scripture, becoming to First Amendment law what Genesis is to the Bible.”<sup>106</sup> Under this theory, as Professor Frederick Schauer synthesized it, “truth will most likely surface when all opinions may freely be expressed, [and] when there is an open and unregulated market for the trade in ideas” in which opinions are tested.<sup>107</sup> Accepted truths, in turn, must be constantly tested, given that they often turn out to be wrong in the long run.<sup>108</sup> In other words, the

101. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis added).

102. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

103. Rodney A. Smolla, *Content and Context: The Contributions of William Van Alstyne to First Amendment Interpretation*, 54 DUKE L.J. 1623, 1637 (2005).

104. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2–3 (1984). The theory predates Holmes, of course, with John Milton contending in the 1600s that governments, rather than engaging in censorship and licensing the press in order to protect the truth, should “[l]et [Truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?” JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* 45 (H.B. Cotterill ed., Macmillan & Co. 1904) (1644).

105. Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 448 (2019).

106. Rodney A. Smolla, *The Meaning of the “Marketplace of Ideas” in First Amendment Law*, 24 COMM’N L. & POL’Y 437, 437 (2019).

107. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 16 (1982).

108. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

process of testing opinions is itself both privileged and valuable under the marketplace theory, even if there is no objective, ultimate truth.<sup>109</sup> Indeed, Justice Holmes “displayed an instinctive aversion to assertions of ‘absolute’ truth.”<sup>110</sup> Additionally, the process of testing accepted truths helps to revitalize and reinvigorate their meaning, as well as enhance how people understand them.<sup>111</sup>

As former Yale Law School Dean Robert Post summarized it, the marketplace theory does not require protecting any and all speech that communicates ideas, but only speech that “communicates ideas *and* that is embedded in the kinds of social practices that produce truth.”<sup>112</sup> Thus, under *Chaplinsky*’s approach for precluding certain varieties of expression from constitutional protection, speech that is “of such slight social value as a step to truth”<sup>113</sup> can more easily be jettisoned from the fortress of First Amendment shelter, particularly when “the social interest in order and morality”<sup>114</sup> outweighs the speech’s truth-seeking value. And while the *Stevens* history-and-tradition methodology for establishing unprotected classes of speech may have rejected such a pure, ad hoc balancing approach that percolated through *Chaplinsky*’s dictum, the Court nonetheless continues to favorably invoke the marketplace of ideas metaphor subsequent to *Stevens*.<sup>115</sup>

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109. SMOLLA, *supra* note 73, at 8; see Enrique Armijo, *The “Ample Alternative Channels” Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657, 1696, 1698 (2016) (noting that “[m]arketplace theory defines the First Amendment’s primary function as *facilitating a process* by which truth can be reached,” and adding that “[a] *process-based definition* of marketplace theory predominates in First Amendment scholarship” (emphasis added)).

110. Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 14.

111. See JOHN STUART MILL, ON LIBERTY 116 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859) (contending that “unless [a received opinion] is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds”). Mill often is associated with the marketplace of ideas theory. See, e.g., MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 3 (Jennings Bryant & Dolf Zillmann eds., 2001) (“Marketplace theory grew in sophistication as a result of British philosopher John Stuart Mill’s 1859 defense of free speech in ‘On Liberty.’”).

112. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 153, 164 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (emphasis added).

113. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

114. *Id.*

115. See, e.g., Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2374–75 (2018) (referencing the marketplace of ideas and citing favorably Justice Holmes’s assertion in *Abrams* that “[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market” (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))); *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (asserting that the viewpoint-based nature of the statute at issue in the case “might silence dissent and distort the marketplace of ideas”); *Reed v. Town of Gilbert*, 576 U.S. 155, 176–77 (2015) (Breyer, J., concurring) (“[W]henver government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas . . . .”); *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion) (“[T]he Court has stated ‘[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas . . . .’”

Interestingly, *Austin* actually may be the exceedingly rare case in which the nonconsensual dissemination of sexual imagery was directly intended to serve a truth-proving purpose, albeit on a very small scale. In particular, while defendant Bethany Austin was engaged to be married, a female neighbor—identified in the case as the victim—texted nude photographs of herself to Austin’s fiancé, Matthew.<sup>116</sup> Bethany Austin discovered the images because she and Matthew shared an iCloud account.<sup>117</sup> Bethany Austin and Matthew then cancelled their wedding and broke up.<sup>118</sup> Matthew proceeded to blame Bethany for the breakup, “telling family and friends that their relationship had ended because defendant [Bethany Austin] was crazy and no longer cooked or did household chores.”<sup>119</sup> Engaging in what First Amendment scholars might consider a classic instance of the self-help remedy of counterspeech in order to prove what really transpired in their relationship,<sup>120</sup> Bethany Austin “wrote a letter detailing her version of events. As support, she attached to the letter four of the naked pictures of the victim and copies of the text messages between the victim and Matthew.”<sup>121</sup> As Bethany Austin’s attorneys put it in their unsuccessful petition for a writ of certiorari to the U.S. Supreme Court, she disseminated the photos “to contradict her fiancé’s false account of why their engagement ended”<sup>122</sup> and to “reveal[ ] the true reason for the breakup.”<sup>123</sup> In other words, Bethany Austin used the images to expose the truth. After Matthew discovered her actions from his cousin, however, he contacted the police and Bethany Austin was subsequently prosecuted under Illinois’s revenge pornography statute.<sup>124</sup>

Of course, the analogy in *Austin* to the marketplace metaphor is somewhat strained. First, the marketplace within which the nude photos circulated was a minuscule one involving only those to whom Bethany Austin

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(second and third alteration in original) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988)).

116. *People v. Austin*, 2019 IL 123910, ¶¶ 3–4, *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020).

117. *Id.*

118. *Id.* ¶ 5.

119. *Id.*

120. Justice Brandeis famously articulated the counterspeech doctrine more than ninety years ago, asserting that “[i]f 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.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see also Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1526 (2019) (“The remedy for harmful ideas in this marketplace [of ideas] is not censorship but counterspeech, which works by allowing those who are exposed to bad speech to be exposed to good speech as a counterweight.”); Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 387 (2004) (referencing “the Brandeisian concept of counter-speech” under which “counter-speech is the imperative response to any thought, opinion, idea, or point of view”).

121. *Austin*, 2019 IL 123910, ¶ 6.

122. *Petition for Writ of Certiorari at ii, Austin*, 2019 IL 123910, (No. 19-1029) (U.S. Feb. 14, 2020). Due to delays caused by the COVID-19 pandemic, the U.S. Supreme Court denied the petition more than seven months after it was filed. *Austin v. Illinois*, No. 19-1029, 2020 WL 5882221 (Oct. 5, 2020).

123. *Petition for Writ of Certiorari, supra* note 122, at 10.

124. *Austin*, 2019 IL 123910, ¶¶ 7–8.

sent the images. Second, the images themselves were irrefutable *facts*, not the kind of debatable *ideas*, *opinions*, or *thoughts* that underlie the marketplace of ideas theory.<sup>125</sup> In brief, the photographs at issue in *Austin* may have exposed the truth about a particular individual's reason for breaking up with someone else, but there was no larger, societal-level search for truth served by their dissemination.

In addition to referencing the truth-seeking value of speech, the Court in *Chaplinsky* reasoned that messages that serve “no essential part of any exposition of ideas” may also fall outside the scope of First Amendment protection.<sup>126</sup> Professor James Weinstein asserts that this largely represents “an attempt to draw a line between public discourse and other types of speech . . . that have little or no connection with democratic self-governance.”<sup>127</sup> To the extent that the “exposition of ideas” the *Chaplinsky* Court privileges and protects are, indeed, political ones that facilitate democratic self-governance, another paramount First Amendment value comes into play when deciding if speech merits constitutional coverage.<sup>128</sup>

The free speech theory of democratic self-governance is rooted in the principle that free expression is required for the government and democracy to function properly.<sup>129</sup> The theory holds that “the essential objective of the First Amendment is to promote a rich and valuable public debate.”<sup>130</sup> A core facet of the theory is that it rests upon the “enlightenment of society and its elected representatives.”<sup>131</sup>

The democratic self-governance theory often is associated with Alexander Meiklejohn.<sup>132</sup> He asserted that “[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”<sup>133</sup> More specifically, Meiklejohn averred that the dual points of ultimate interest in safeguarding political speech are “the

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125. See generally Clay Calvert, Stephanie McNeff, Austin Vining & Sebastian Zarate, *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 125–28 (2018) (addressing how the marketplace of ideas focuses on the value of protecting competition among opinions and ideas).

126. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

127. James Weinstein, *Database Protection and the First Amendment*, 28 U. DAYTON L. REV. 305, 317 n.69 (2002).

128. See Han, *supra* note 4, at 364 (asserting that protecting speech because it “is a necessary component of democratic self-governance” ranks among the leading “rationales [that] have generally dominated debates regarding First Amendment theory”).

129. See Robert Post, *Meiklejohn's Mistake: Individual Autonomy and Reform of the Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993).

130. *Id.*

131. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971).

132. See Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 916 (“Alexander Meiklejohn forcefully articulated the primary alternative account of the First Amendment. In his view, the free speech guarantee of the First Amendment exists principally to facilitate democratic self-governance.” (footnote omitted)).

133. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

minds of the hearers”<sup>134</sup> and “the voting of wise decisions.”<sup>135</sup> Meiklejohn’s view, as summed up by Professor Joseph Russomanno, is that “[t]he Constitution’s commitment to freedom of speech is a commitment to the concept of self-government.”<sup>136</sup>

The theory is deeply engrained in First Amendment jurisprudence. As Professor Ashutosh Bhagwat notes, “the Supreme Court has repeatedly taken the position that the primary—albeit not necessarily the only—reason why the First Amendment protects freedom of speech is to advance democratic self-governance.”<sup>137</sup> As described immediately below, the Court has tapped into the theory on multiple occasions.

For example, the Court has emphasized “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”<sup>138</sup> and that “[s]peech by citizens on matters of public concern lies at the heart of the First Amendment.”<sup>139</sup> Additionally, the Justices have explained that “[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>140</sup> Furthermore, as Justice Kennedy reasoned for the majority a decade ago, “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”<sup>141</sup> He added, as if channeling his inner Meiklejohn, that “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>142</sup>

It is hard to fathom how either the nonconsensual dissemination of sexual images or the speech-based practice of conversion therapy on minors serves societal-level goals of truth discovery in the marketplace of ideas (*Austin*, as noted above, perhaps being a rare exception for revenge pornography and, even then, within a miniature marketplace of ideas) or promotes democratic self-governance.<sup>143</sup> In fact, as addressed earlier,

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

135. *Id.*

136. Joseph Russomanno, *The “Central Meaning” and Path Dependence: The Madison-Meiklejohn-Brennan Nexus*, 20 *COMM’N L. & POL’Y* 117, 129–130 (2015).

137. Ashutosh Bhagwat, *The Democratic First Amendment*, 110 *Nw. U. L. REV.* 1097, 1098 (2016).

138. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

139. *Lane v. Franks*, 573 U.S. 228, 235 (2014).

140. *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also* *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

141. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

142. *Id.* at 339.

143. Whether or not it is true, as it were, that conversion therapy harms minors is a different issue from the one here of whether conversion helps society discover some larger truth in the marketplace of ideas. *Cf.* Clay Calvert, Kara Carnley, Brittany Link & Linda Riedemann, *Conversion Therapy and Free Speech: A Doctrinal and Theoretical First Amendment Analysis*, 20 *WM. & MARY J. WOMEN & L.* 525, 562 (2014) (querying whether it is “the truth that SOCE not only do not work, but also cause harm to minors? What is the truth about SOCE?”).

both forms of speech may be quite harmful to individuals.<sup>144</sup>

There are, of course, other theories and rationales for protecting free expression beyond seeking or testing truth in the marketplace of ideas and facilitating democratic self-governance.<sup>145</sup> The two identified here, however, both relate, as explained above, to *Chaplinsky's* logic regarding when speech may be precluded from First Amendment protection—namely, when its value in serving truth and elucidating ideas that assist democratic self-governance are *de minimis* in comparison to the harm they wreak to society's interests in order and morality.<sup>146</sup> The Article returns to the marketplace of ideas theory in Part IV's discussion of the federal district court's 2019 ruling in the conversion therapy case of *Otto v. City of Boca Raton*.<sup>147</sup> Additionally, the Article circles back to the First Amendment interests in both truth-seeking and democratic self-governance in Part V when addressing Justice Breyer's proportionality approach to scrutiny.

#### IV. CHARTING COURSES AROUND STRICT SCRUTINY WHEN CONFRONTED WITH CONTENT-BASED LAWS: SOME LESSONS FROM *AUSTIN* AND RECENT ANTI-SOCE LAW LITIGATION

This Part examines how some courts, despite *Reed's* admonition that facially content-based statutes generally must overcome strict scrutiny, are finding methods to circumvent that mandate and apply a less stringent level of analysis. Initially, Section A delves more deeply into the Supreme Court of Illinois's efforts to sidestep strict scrutiny when confronted with a law targeting the low-value speech of nonconsensual pornography in *People v. Austin*.<sup>148</sup> Section B then addresses a federal district court's decision in September 2019 in *Doyle v. Hogan*<sup>149</sup> to apply intermediate scrutiny when faced with a free speech claim targeting a Maryland statute banning conversion therapy on minors.<sup>150</sup> After examining *Doyle*, Section B then turns to U.S. District Judge Rosenberg's decision in *Otto v. City of Boca Raton*<sup>151</sup> in February 2019 considering a free speech challenge to two local ordinances banning conversion therapy on

144. *See supra* notes 61–68 and accompanying text (addressing the harms purportedly caused by these two varieties of speech).

145. *See generally* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878–79 (1963) (identifying other rationales for protecting free speech, including “assuring individual self-fulfillment” and “maintaining the balance between stability and change in the society”).

146. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

147. 353 F. Supp. 3d 1237, 1270 (S.D. Fla. 2019), *appeal filed*, No. 19-10604 (11th Cir. Feb. 14, 2019).

148. 2019 IL 123910, *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020).

149. 411 F. Supp. 3d 337, 348 (D. Md. 2019).

150. *See MD. CODE ANN., HEALTH OCC. § 1-212.1(b)* (LexisNexis 2020) (“A mental health or child care practitioner may not engage in conversion therapy with an individual who is a minor.”).

151. 353 F. Supp. 3d at 1270.

minors.<sup>152</sup> Judge Rosenberg found that intermediate scrutiny was most likely the correct standard of review to apply to such measures,<sup>153</sup> although she ultimately noted that it was unclear what test should be used.<sup>154</sup>

#### A. *PEOPLE V. AUSTIN*

As described in the Introduction, in *Austin*, the Supreme Court of Illinois readily admitted that the nonconsensual pornography statute under consideration was facially content based, yet it nonetheless applied intermediate scrutiny to measure its validity and to uphold it in the face of First Amendment speech concerns.<sup>155</sup> How it reached that scrutiny determination—how it finagled its way around *Reed*'s reach—is the focus of this Section.

Before analyzing how the Supreme Court of Illinois sidestepped *Reed* and strict scrutiny, however, it is essential to examine key provisions of the statute at issue in *Austin*. In particular, the law provides that:

A person commits non-consensual dissemination of private sexual images when he or she:

- (1) intentionally disseminates an image of another person:
  - (A) who is at least 18 years of age; and
  - (B) who is identifiable from the image itself or information displayed in connection with the image; and
  - (C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and
- (2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
- (3) knows or should have known that the person in the image has not consented to the dissemination.<sup>156</sup>

152. See BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2020) (“It shall be unlawful for any provider to practice conversion therapy on any individual who is a minor regardless of whether the provider receives monetary compensation in exchange for such services.”); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-125 (2020) (“It shall be unlawful for any Provider to engage in conversion therapy on any minor regardless of whether the Provider receives monetary compensation in exchange for such services.”).

153. See *Otto*, 353 F. Supp. 3d at 1256 (“[A]pplying intermediate scrutiny to medical treatments that are effectuated through speech would strike the appropriate balance between recognizing that doctors maintain some freedom of speech within their offices, and acknowledging that *treatments* may be subject to significant regulation under the government’s police powers.”).

154. See *id.* at 1258 (“The Court concludes that it is unclear what standard of review should apply to this case. It seems likely that the ordinances are subject to more than rational basis review, but beyond that determination, it is unclear whether intermediate or strict scrutiny should apply.”).

155. 2019 IL 123910, ¶ 43, *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020) (“We conclude that section 11-23.5(b) is subject to an intermediate level of scrutiny for two independent reasons. First, the statute is a content-neutral time, place, and manner restriction. Second, the statute regulates a purely private matter.”); *id.* ¶ 46 (“We recognize that section 11-23.5(b) on its face targets the dissemination of a specific category of speech—sexual images.”).

156. 720 ILL. COMP. STAT. 5/11-23.5(b) (2020).



Unpacking this language, there are two distinct sets of terms: (1) terms that focus on the content involved—namely, images in which a person is “engaged in a sexual act or whose intimate parts are exposed”<sup>157</sup> and (2) terms that address the defendant’s understanding (knowledge or what reasonably should be known) regarding the privacy expectations of the individual pictured and that individual’s desire not to have the image disseminated.<sup>158</sup> It was the Supreme Court of Illinois’s focus on the latter set of terms—those addressing what a defendant knew or reasonably should have known regarding the images obtained and disseminated—that partially paved the path for it to decide that the law was a content-neutral time, place, and manner regulation.<sup>159</sup> That is because, at least in the court’s view and as described immediately below, it is “[t]he *manner* of the image’s acquisition and publication” by the defendant that determines criminal liability.<sup>160</sup> In other words, there is no criminal culpability under the statute for a defendant who disseminates the exact same content if the defendant either would not have reasonably known that the person depicted expected the image to remain private or if the defendant did not know or should not have known that individual did not want it to be disseminated.<sup>161</sup>

The five-justice majority of Illinois’s highest appellate court ultimately offered two independent reasons for applying intermediate scrutiny.<sup>162</sup> Those grounds are addressed separately in the subsections below.

### 1. *Interpreting the Statute as a Content-Neutral Time, Place, and Manner Regulation*

The Illinois Supreme Court first held the statute was subject to intermediate scrutiny because it deemed the law content neutral. The court reached this conclusion by reasoning that the statute’s underlying purpose is to protect privacy—not to censor speech—and that, when it comes to serving the government’s interest in privacy, criminal liability (as noted above) hinges squarely on the manner in which a sexual image is both obtained and disseminated, not on the content itself.<sup>163</sup> As such, it

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157. *Id.* § 11-23.5(b)(1)(C).

158. *Id.* § 11-23.5(b)(2)–(3).

159. See generally Judith Welch Wegner & Matthew Norchi, *Regulating Panhandling: Reed and Beyond*, 63 S.D. L. REV. 579, 596 (2019) (describing how content-neutral content, place, and manner regulations affecting speech in public forums typically are subject to “an intermediate level of review” rather than the “strict scrutiny [standard that is] applicable to content-based speech” regulations); Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223, 231 (2018) (observing that in both traditional and designated public forums, “the government can impose content-neutral restrictions on the time, place, and manner of expression so long as those restrictions suppress no more speech than is necessary to serve its significant interests”).

160. *Austin*, 2019 IL 123910, ¶ 49.

161. See *id.* (“There is no criminal liability for the dissemination of the very same image obtained and distributed with consent. The *manner* of the image’s acquisition and publication, and not its *content*, is thus crucial to the illegality of its dissemination.”).

162. *Id.* ¶ 43.

163. *Id.* ¶ 49.

found the law “[was] a content-neutral time, place, and manner restriction.”<sup>164</sup>

To support this line of logic, the court made multiple maneuvers. Initially, it relied on the U.S. Supreme Court’s pre-*Reed* decision in *Ward v. Rock Against Racism*<sup>165</sup> for the proposition that the government’s rationale or reason for adopting a statute dictates whether it is content neutral or content based.<sup>166</sup> In particular, the Court in *Ward* held that “[t]he government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”<sup>167</sup> The *Ward* Court added that justifying a law with a reason that is unrelated to legislative disagreement with the content in question renders the law content neutral.<sup>168</sup>

Conspicuous in its absence from the Supreme Court of Illinois’s opinion in *Austin*, however, is any mention whatsoever of the superseding admonition in *Reed* that “[a] law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”<sup>169</sup> Reinforcing this principle in even simpler and starker terms, Justice Thomas added for the *Reed* majority that “an innocuous justification cannot transform a facially content-based law into one that is content neutral.”<sup>170</sup> Yet these key aspects of *Reed* simply went missing, as it were, in *Austin*.

With *Reed* ignored—or, put more charitably, overlooked—*Ward* thus ostensibly gave the greenlight to the Supreme Court of Illinois to focus on the purpose of Illinois’s nonconsensual pornography statute. The court, in turn, had no problem concluding that the statute’s purpose was to protect privacy, not to squelch all distribution of the sexual imagery in question.<sup>171</sup> In particular, the same images are freely distributable if the depicted individual authorizes or consents to such transmission.<sup>172</sup> In other words, the law does not completely *ban* dissemination of a particular type of content; it merely *regulates* the manner of dissemination—in particular, nonconsensual dissemination—in the name of privacy.<sup>173</sup> That, at least, is the heart of the logic of the Supreme Court of Illinois in *Austin*.

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164. *Id.* ¶ 43.

165. 491 U.S. 781, 803 (1989).

166. *Austin*, 2019 IL 123910, ¶ 46.

167. *Ward*, 491 U.S. at 791.

168. *Id.*

169. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

170. *Id.* at 166.

171. *See Austin*, 2019 IL 123910, ¶ 49 (“In the case at bar, section 11-23.5(b) is justified on the grounds of protecting privacy.”).

172. *See* 720 ILL. COMP. STAT. 5/11-23.5(b)(3) (2020).

173. *See Austin*, 2019 IL 123910, ¶ 50 (“Section 11-23.5 does not prohibit but, rather, regulates the dissemination of a certain type of private information.”).

The court's understanding of "manner" here, when considering content-neutral time, place, and manner restrictions, is itself novel and troubling. In particular, First Amendment scholars Russell Weaver and Donald Lively note that "[a] primary example of manner governance is a noise restriction that may protect environmental and privacy interests."<sup>174</sup> Indeed, the *Ward* case, upon which the Supreme Court of Illinois leaned heavily, readily provides such an instance of a manner regulation. The local ordinance at issue in *Ward* required musical acts and other performers at the Naumberg Acoustic Bandshell in New York City's Central Park "to use sound-amplification equipment and a sound technician provided by the city."<sup>175</sup> This measure was adopted to control the volume of music.<sup>176</sup> It simply allowed the government to dictate the *manner* through which sound was conveyed at the bandshell—namely, via government equipment operated by government-selected individuals. This manner-of-sound-amplification regulation was content neutral, even under *Reed*'s approach to content neutrality, because it applied evenhandedly on its face to "all performances at the bandshell"<sup>177</sup> and had "no effect on the quantity or content of [the] expression beyond regulating the extent of amplification."<sup>178</sup>

Similarly, the Court held in *Clark v. Community for Creative Non-Violence*<sup>179</sup> that a ban on sleeping in certain public parks implicated only the manner in which a symbolic-speech protest regarding homelessness could occur.<sup>180</sup> This manner regulation was constitutional, in part, because it served "a substantial Government interest in conserving park property"—an interest the Court deemed content neutral, as it was "unrelated to suppression of expression."<sup>181</sup>

Another example of a manner regulation is the Los Angeles municipal ordinance that banned posting signs on public property; this regulation

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174. RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 116 (2d ed. 2006); see also Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1501 (1995) (identifying "sound volume" as "the paradigm of 'manner' in time, place, and manner jurisprudence").

175. *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989).

176. See *id.* at 792 ("The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park."). New York City rejected a fixed-decibel measure to serve this same interest "because the impact on listeners of a single decibel level is not constant, but varies in response to changes in air temperature, foliage, audience size, and like factors." *Id.* at 786.

177. *Id.* at 787.

178. *Id.* at 802.

179. 468 U.S. 288 (1984).

180. *Id.* at 294. The Court explained in *Clark*:

If the Government has a legitimate interest in ensuring that the National Parks are adequately protected . . . and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a *reasonable regulation of the manner* in which a demonstration may be carried out.

*Id.* at 297 (emphasis added).

181. *Id.* at 299.

was declared constitutional by the Court in *Members of City Council v. Taxpayers for Vincent*.<sup>182</sup> Adopted to serve Los Angeles's esthetic interest "in eliminating visual clutter,"<sup>183</sup> the ordinance simply regulated one "tangible medium of expressing [a] message."<sup>184</sup> Other methods for conveying messages on public property, such as speaking to individuals or handing them literature, were not restricted.<sup>185</sup> In other words, only the medium through which speech could permissibly occur was affected by the ordinance.

Under this conception of *manner*, a law that bans leafleting in a particular location but not other methods of communicating in that same venue, is also a manner regulation.<sup>186</sup> Similarly, a manner regulation exists when a law "bars sound trucks from broadcasting in a loud and raucous manner on the streets" but does not impede speech on those same streets when conveyed "by the human voice, by newspapers, by pamphlets, [or] by dodgers."<sup>187</sup>

In brief, the manner regulations in cases such as *Ward*, *Clark*, and *Taxpayers for Vincent* target the physical methods or mediums through which speech is conveyed.<sup>188</sup> In *Ward*, the permissible method for conveying bandshell sound was by government-controlled and government-operated equipment. In *Clark*, the banned method for protesting homelessness in a park was sleeping, while in *Taxpayers for Vincent* the barred medium for communicating ideas was signs.

The Supreme Court of Illinois's interpretation of a "manner" restriction in *Austin*, however, is far afield from the understanding of manner as a method, vehicle, or medium for transmitting messages. The Illinois court's interpretation of manner instead relates to what a disseminator of a sexual image knew or should have known about the wants and desires of the person depicted in that image regarding his or her privacy expectations and consent to its distribution.<sup>189</sup> In *Austin*, the manner of obtaining

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182. 466 U.S. 789, 817 (1984).

183. *Id.* at 808.

184. *Id.* at 810.

185. *See id.* at 812 ("The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited.").

186. *See Zanna v. Mohave County*, No. CV-10-8149-PCT-GMS, 2012 U.S. Dist. LEXIS 126602, at \*15 (D. Ariz. Sept. 6, 2012) ("In short, the County restricted a particular manner of speech at the meeting—namely leafleting—but did not target Plaintiffs' particular viewpoint. A manner regulation, without more, does not constitute viewpoint discrimination.").

187. *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949).

188. *Cf.* Alan Howard, *The Mode in the Middle: Recognizing a New Category of Speech Regulations for Modes of Expression*, 14 UCLA ENT. L. REV. 47, 58 (2007) ("Generally, cases regarding a 'time, place and manner restriction' involve government regulation of the methods by which speakers distribute their speech to others . . .").

189. The Illinois Supreme Court reasoned here that the statute at issue distinguishes the dissemination of a sexual image not based on the content of the image itself but, rather, based on whether the disseminator obtained the image under circumstances in which a reasonable person would know that the image was to remain private and knows or should have known that the person in the image has not consented to the dissemination. There is no criminal liability for the dissemination of the very same image obtained and dis-

an image therefore had nothing to do with whether the image was received by a method or medium such as hand delivery, in hardcopy form (an old-school Polaroid photo, for instance), or by an electronic method (such as texting in a digital format). Manner, in the Supreme Court of Illinois's view, instead focuses on what a defendant's state of mind should have been upon receiving an image—should the defendant have known or understood it “was to remain private”<sup>190</sup>—and whether the defendant knew “or should have known that the person in the image ha[d] not consented to the dissemination”<sup>191</sup> by the defendant. Manner, in short, is a matter of a defendant's understanding (or what the defendant's understanding reasonably should have been) about the depicted person's privacy and dissemination expectations.

The only support that the Supreme Court of Illinois in *Austin* could muster for this odd understanding of a manner restriction was to cite parts of two sentences from the U.S. Supreme Court's 1994 decision in *Turner Broadcasting System, Inc. v. FCC*.<sup>192</sup> Specifically, the Supreme Court of Illinois wrote that the Court in *Turner* “acknowledge[ed] that the statutory ‘provisions [at issue in *Turner*] distinguish between speakers in the television programming market. But they do so based only upon the *manner* in which speakers transmit their messages to viewers, and not upon the messages they carry.’”<sup>193</sup>

This analogy to *Turner*, however, is decidedly dubious. That is because the manner distinction to which the U.S. Supreme Court referred had nothing to do with a defendant's state of mind about another person's privacy expectations regarding an image. Instead, *Turner* involved a classic manner distinction: one based upon physical differences in the nature of the mediums for transmitting speech. In particular, *Turner* hinged on the division between whether speech was transmitted by broadcast-medium stations, on the one hand, or by cable-medium channels or cable system operators, on the other. As the *Turner* Court explained regarding the obligations imposed by the must-carry statute at issue there, “Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored. Cable operators, too, are burdened by the carriage obligations, but only because they control access to the cable conduit.”<sup>194</sup> In other words, it was the physical manner of transmitting speech—by broadcast or by cable—that was pivotal in *Turner*.

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tributed with consent. The *manner* of the image's acquisition and publication, and not its *content*, is thus crucial to the illegality of its dissemination.

People v. Austin, 2019 IL 123910, ¶ 49 (citation omitted), *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020).

190. 720 ILL. COMP. STAT. 5/11-23.5(b)(2) (2020).

191. *Id.* § 11-23.5(b)(3).

192. 512 U.S. 622 (1994).

193. *Austin*, 2019 IL 123910, ¶ 49 (emphasis added) (quoting *Turner*, 512 U.S. at 645).

194. *Turner*, 512 U.S. at 645. The must-carry statute at issue in *Turner* “require[d] cable television systems to devote a portion of their channels to the transmission of local broadcast television stations.” *Id.* at 626.

The Supreme Court of Illinois's second maneuver to escape *Reed* was to turn to another older U.S. Supreme Court ruling—namely, its 1986 decision in *City of Renton v. Playtime Theatres, Inc.*<sup>195</sup> The Court in *Renton* held that a municipal zoning ordinance targeting the location of adult movie theaters was content neutral and therefore subject to intermediate scrutiny because the government's primary justification for the measure—ameliorating the negative “secondary effects of such theaters on the surrounding community,”<sup>196</sup> such as an increase in crime and a decrease in property values<sup>197</sup>—was not aimed at the content of the movies themselves.<sup>198</sup> The secondary effects doctrine that animates *Renton* provides a mechanism for turning what seemingly are content-based laws into content-neutral ones and, in turn, subjecting them to intermediate analysis rather than strict scrutiny.<sup>199</sup> As Professor Leslie Gielow Jacobs encapsulates it, “The determination that a regulation is aimed at reducing the negative secondary effects of erotic entertainment is crucial to moving a facially content-based regulation out of strict scrutiny.”<sup>200</sup>

To the extent that the secondary effects doctrine might survive *Reed v. Town of Gilbert*<sup>201</sup> and, in turn, might be broadly interpreted, as one scholar recently alleged, to have “subsumed traditional strict scrutiny

195. 475 U.S. 41 (1986); see *Austin*, 2019 IL 123910, ¶ 47 (calling *Renton* “instructive”).

196. *Renton*, 475 U.S. at 47.

197. *Id.* at 48; see *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) (“[T]he *Renton* ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely, at crime rates, property values, and the quality of the city’s neighborhoods.”).

198. See *Renton*, 475 U.S. at 48 (“In short, the *Renton* ordinance is completely consistent with our definition of ‘content-neutral’ speech regulations as those that ‘are justified without reference to the content of the regulated speech.’” (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976))); see also Ned Snow, *Denying Trademark for Scandalous Speech*, 51 U.C. DAVIS L. REV. 2331, 2359 (2018) (noting that in *Renton*, “because the ordinance targeted secondary effects of the content, rather than the content itself, the Court held that the restriction should be treated as though it were content neutral”).

199. Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 287, 295–96 (2004).

200. Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 SANTA CLARA L. REV. 385, 450 (2017).

201. Whether, in fact, the secondary effects doctrine endures after *Reed* is unclear. The U.S. Supreme Court’s rulings in its secondary effects line of cases “raise unmistakable tensions with *Reed*” and, in particular, *Reed*’s admonition that a benign justification for an otherwise content-based law cannot transform it into a content-neutral one. Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1566 (2017); see also Hudson, Jr., *supra* note 15, at 276 (“*Reed v. Town of Gilbert*’s emphasis on content-discrimination . . . appears to call into question the continued validity of the secondary-effects doctrine, a disturbing legal fiction of sorts which allows for content-based restrictions on businesses conveying ‘adult’ expression to be classified as content-neutral.”); Kyle Langvardt, *Remarks on 3D Printing, Free Speech, and Lochner*, 17 MINN. J.L. SCI. & TECH. 779, 800 (2016) (“The secondary effects idea is generally regarded as a corner-cutting measure to be applied only in cases involving marginal sexual expression such as nude dancing, and in 2015’s *Reed v. Town of Gilbert*, the Supreme Court signaled clearly that it is no longer good law.”).

analysis for content-based laws in the realm of sexual expression,”<sup>202</sup> the Supreme Court of Illinois was indeed wise to analogize to it. That is because it lowers the bar for a statute passing constitutional muster.

On the other hand, the U.S. Supreme Court has applied the secondary effects doctrine only to the zoning of sexually oriented businesses and to the regulation of the speech-based conduct—namely, nude or nearly nude dancing<sup>203</sup>—that may go on inside them.<sup>204</sup> In other words, deployment of the doctrine has been closely cabined and confined by the Court; it is used only when regulating places of public accommodation that trade in sexual content, either by zoning them or restricting what occurs within them.<sup>205</sup>

Furthermore, the secondary effects doctrine is dubbed illegitimate by some scholars.<sup>206</sup> It is criticized, among other reasons, for “provid[ing] the mechanism by which government officials receive judicial approval for running roughshod over the First Amendment rights of those who provide adult-oriented expression for consenting adults”<sup>207</sup> by “lower[ing] the level of applicable judicial scrutiny for regulations that appear to target unfavorable expression.”<sup>208</sup> In *Austin*, the Supreme Court of Illinois essentially hijacked this disputed doctrine and took it for a ride well beyond the regulation of sexually oriented businesses and the activities they afford consenting adults.

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202. Jason M. Shepard, *The First Amendment and Mandatory Condom Laws: Rethinking the “Porn Exception” in Strict Scrutiny, Content Neutrality and Secondary Effects Analysis*, 19 NEV. L.J. 85, 119 (2018).

203. The Supreme Court has held that nude dancing constitutes symbolic expression and thus falls within the coverage of the First Amendment. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 285, 289 (2000) (observing that nude dancing “is expressive conduct that is entitled to some quantum of protection under the First Amendment,” and adding that it “falls only within the outer ambit of the First Amendment’s protection”); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (concluding that nude dancing “is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so”).

204. See Daniel R. Aaronson, Gary S. Edinger & James S. Benjamin, *The First Amendment in Chaos: How the Law of Secondary Effects Is Applied and Misapplied by the Circuit Courts*, 63 U. MIA. L. REV. 741, 743–44 (2009) (observing that “prohibitions against nude dancing have been upheld by some Justices on several occasions based on a perceived or potential link to secondary effects,” and noting that those cases are *Barnes* and *City of Erie*).

205. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 804 (noting problems spawned by lower courts that have applied the secondary effects “beyond the arena of regulations of sexually oriented businesses to which the Supreme Court has confined it”); see also Lisa Crooms-Robinson, *Stripped: Speech, Sex, Race, and Secondary Effects*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 5, 22 (2019) (noting that “[w]ith *Barnes v. Glen Theatre, Inc.* and *City of Erie v. Pap’s A.M.*, the Secondary Effects Doctrine turns inward to enforce public nudity laws inside strip clubs to ban nude dancing” and becomes “an alternate path [for obscenity law] to reach strippers and strip clubs”).

206. See John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 337–38 (2009) (noting that some scholars “see the doctrine as illegitimate, as it appears on the surface to conflict with basic First Amendment principles disfavoring content discrimination”).

207. David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL’Y REV. 19, 19–20 (2012).

208. *Id.* at 19.

In summary, both *Ward* and *Renton* played pivotal roles for the *Austin* court in reaching its conclusion that Illinois's revenge pornography statute was a content-neutral measure subject to intermediate scrutiny. First, *Ward* permitted the court to focus on legislative intent to determine whether the law was content neutral. Second, *Renton* provided an example, within the realm of regulating sexual expression, where a content-neutral legislative motive—reducing the deleterious secondary effects of sexually oriented businesses—was sufficient to transform a facially content-based law into a content-neutral one. As the next subsection illustrates, however, the Supreme Court of Illinois added a second justification for applying intermediate scrutiny.

## 2. *The Public vs. Private Speech Dichotomy*

As noted in the Introduction, Illinois's highest court held that the state's revenge pornography statute was subject to intermediate scrutiny because the speech it regulates is of a purely private nature, rather than of a kind that addresses a matter of public concern.<sup>209</sup> Put bluntly, the court created a private-speech exception or carveout from *Reed*'s guiding rule that facially content-based laws undergo strict scrutiny review. As the Supreme Court of Illinois would have it, a facially content-based law evades strict scrutiny and instead faces only intermediate inspection if the speech it regulates is of private—not public—concern.

From where did the court in *Austin* draw support for its new rule? It cited and relied heavily upon the U.S. Supreme Court's decisions in *Snyder v. Phelps*<sup>210</sup> and *Dun & Bradstreet, Inc. v. Greenmoss Builders*.<sup>211</sup> Neither of those cases, however, involved judicial analysis of a statute under a tier of review such as strict or intermediate scrutiny. Instead, *Snyder* was a speech-based tort case. The Court there tackled the question of whether the First Amendment shielded members of the Westboro Baptist Church (WBC), including its leader Reverend Fred Phelps, from liability to plaintiff Albert Snyder under theories including intentional infliction of emotional distress and intrusion into seclusion.<sup>212</sup> The case arose after WBC members hoisted signs with messages such as "Thank God for Dead Soldiers," "Pope in Hell," and "God Hates Fags" while standing about 1,000 feet away from a church where a funeral was being held for Albert Snyder's son Matthew, a U.S. Marine killed while on duty in

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209. See *supra* notes 29–33 and accompanying text (addressing the Illinois Supreme Court's invocation of this private-versus-public dichotomy, as well as when the U.S. Supreme Court has deployed it).

210. 562 U.S. 443 (2011).

211. 472 U.S. 749 (1985); see *People v. Austin*, 2019 IL 123910, ¶¶ 53–55 (citing and quoting both *Snyder* and *Dun & Bradstreet*), *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020).

212. See *Snyder*, 562 U.S. at 450 ("A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages.").



Iraq.<sup>213</sup> The WBC members held the signs to express their belief “that God hates and punishes the United States for its tolerance of homosexuality, particularly in America’s military.”<sup>214</sup>

Writing for the eight-Justice majority, Chief Justice Roberts reasoned that “[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.”<sup>215</sup> In other words, if WBC’s messages dealt with matters of public concern, then tort liability would be precluded.<sup>216</sup> The *Snyder* Court fashioned a two-part test for determining whether speech is about a matter of public concern.<sup>217</sup> It then concluded that WBC’s signs addressed “matters of public import,”<sup>218</sup> such as “the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy.”<sup>219</sup> The Court thus ruled in WBC’s favor.<sup>220</sup> Lower tribunals have since followed in *Snyder*’s footsteps, embracing a public-versus-private speech dichotomy to determine if the First Amendment thwarts tort liability when speech allegedly causes harm.<sup>221</sup> Again, however, *Snyder* was not in any way a case in which the Court had to either adopt or deploy a level of scrutiny to ana-

213. *Id.* at 448–49.

214. *Id.* at 448.

215. *Id.* at 451.

216. See Joseph Russomanno, “Freedom for the Thought That We Hate”: Why Westboro Had to Win, 17 COMM’N L. & POL’Y 133, 148 (2012) (“[T]he Court took it upon itself to determine whether the speech at issue in *Snyder v. Phelps* was on matters of public concern. If so, First Amendment protection would be more likely to overcome a tort liability claim.”).

217. Under this test, speech regards a matter of public concern either “when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’” *Snyder*, 562 U.S. at 453 (citation omitted) (first quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983); then quoting *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)). The Court noted that three variables—the content, form, and context of speech—must be examined in the public-concern determination. *Id.* It added that “[i]n considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.” *Id.* at 454.

218. *Id.* at 454.

219. *Id.*

220. See *id.* at 461 (“As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”).

221. For example, a federal appellate court recently held that whether negative commentary by a radio sports program and its employees about the performance of a college basketball referee was presumptively protected by the First Amendment from tort liability for seven causes of action, including theories such as intentional infliction of emotional distress, invasion of privacy and negligence, “turn[ed] on whether the speech involve[d] a ‘public or private concern.’” *Higgins v. Ky. Sports Radio, LLC*, 951 F.3d 728, 734 (6th Cir. 2020) (quoting *Snyder*, 562 U.S. at 451); see also *Gersh v. Anglin*, 353 F. Supp. 3d 958, 964 (D. Mont. 2018) (“[I]n cases brought under state tort law, where the cause of action is not itself subject to a facial challenge, the first question is ‘whether [the] speech is of public or private concern, as determined by all the circumstances of the case.’” (alteration in original) (quoting *Snyder*, 562 U.S. at 451)).

lyze the constitutionality of a statute barring or otherwise limiting speech. It was a tort case.

The court in *Austin*, as noted above, also relied on the U.S. Supreme Court's decision in *Dun & Bradstreet* to support its conclusion that intermediate scrutiny applied because the speech barred by Illinois's revenge pornography statute was of private concern.<sup>222</sup> *Dun & Bradstreet*, however, was a defamation action—not a statutory analysis—that examined the standard of fault a plaintiff must prove in order to recover presumed and punitive damages when the defamatory speech is about a matter of private concern.<sup>223</sup> The Court concluded that “permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”<sup>224</sup>

In brief, both *Snyder* and *Dun & Bradstreet* were tort cases in which the Supreme Court drew distinctions between speech about matters of public concern and speech about matters of private concern. The Court also made it clear in this pair of opinions that restricting or punishing speech about matters of public concern is more problematic, at least from a First Amendment perspective, than is restricting or punishing speech regarding a purely private matter.<sup>225</sup> For instance, the Court in *Snyder* opined that “where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”<sup>226</sup> Neither case, however, involved the Court venturing a decision about the level of scrutiny to apply to examine the validity of a statute under the First Amendment.

Nonetheless, the Illinois Supreme Court used the two cases for precisely that scrutiny-determining purpose. It concluded that intermediate scrutiny was appropriate because “the nonconsensual dissemination of the victim’s private sexual images was not an issue of public concern.”<sup>227</sup>

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222. See *People v. Austin*, 2019 IL 123910, ¶ 54, *petition for cert. filed*, No. 19-1029 (U.S. Feb. 14, 2020).

223. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (“In light of the reduced constitutional value of *speech involving no matters of public concern*, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’” (emphasis added)). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), the Court held that public officials suing for libel based upon speech regarding their official conduct must prove that the defamatory statement at issue “was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

224. *Dun & Bradstreet*, 472 U.S. at 763.

225. See *Snyder*, 562 U.S. at 458 (“Given that Westboro’s speech was at a public place *on a matter of public concern*, that speech is entitled to ‘special protection’ under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.” (emphasis added)); *Dun & Bradstreet*, 472 U.S. at 758–59 (“We have long recognized that not all speech is of equal First Amendment importance. It is speech on ‘*matters of public concern*’ that is ‘at the heart of the First Amendment’s protection.’” (emphasis added) (footnote omitted) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978))).

226. *Snyder*, 562 U.S. at 452.

227. *Austin*, 2019 IL 123910, ¶ 56.

The court reasoned, in key part, that the sexual images Bethany Austin forwarded to prove what happened to her relationship with Matthew did “not relate to any broad issue of interest to society at large” and that “the public has no legitimate interest in the private sexual activities of the victim or in the embarrassing facts revealed about her life.”<sup>228</sup> Intermediate scrutiny, not strict scrutiny, was thus appropriate.<sup>229</sup> The Supreme Court of Illinois, in turn, upheld the revenge pornography statute under that level of review.<sup>230</sup>

In summary, when confronted with a facially content-based statute criminalizing the low-value yet—in light of *United States v. Stevens*—likely First Amendment-protected speech known as revenge pornography, the Supreme Court of Illinois cleverly found two workarounds for *Reed v. Town of Gilbert*'s admonition that strict scrutiny should apply to test the measure's validity. First, the court turned to *Ward v. Rock Against Racism* for the pre-*Reed* rule that the government's purpose controls whether a law is content based or content neutral. It then leaned on *City of Renton v. Playtime Theatres, Inc.*—particularly its contested secondary effects doctrine—for an example of a case in which the U.S. Supreme Court held that a law affecting sexual expression was deemed content neutral and thus subject to intermediate scrutiny because the predominate legislative concern underlying the law was not censoring speech, but rather reducing the adverse secondary effects that businesses that traffic in sexual content ostensibly cause. Next, the Supreme Court of Illinois invented a new rule that statutes regulating speech about private matters are subject to review under intermediate scrutiny. It did so citing only the tort cases of *Snyder v. Phelps* and *Dun & Bradstreet v. Greenmoss Builders, Inc.*, neither of which involved a statutory analysis under a tier of First Amendment scrutiny.

These innovative and dubious efforts to avoid strict scrutiny under *Reed* are, of course, controversial. In February 2020, Bethany Austin filed a petition for a writ of certiorari in the U.S. Supreme Court.<sup>231</sup> The brief asked the Court to “settle what level of scrutiny should govern review of such [revenge pornography] laws to ensure they are consistent with the First Amendment.”<sup>232</sup> Among other items, the brief slammed the Supreme Court of Illinois's decision to declare the law content neutral and to apply intermediate scrutiny, contending that decision “flatly contradicts the holding in *Reed* and a host of other decisions by this Court.”<sup>233</sup> Unfortunately, the U.S. Supreme Court declined to hear the case in

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228. *Id.*

229. *Id.* ¶ 57.

230. *See id.* ¶ 86 (“We hold that section 11-23.5 satisfies intermediate scrutiny.”).

231. *See* Petition for Writ of Certiorari, *Austin v. Illinois*, No. 19-1029 (U.S. Feb. 14, 2020).

232. *Id.* at 3.

233. *Id.* at 14.

October 2020, thus leaving intact the Supreme Court of Illinois's rather inventive ruling.<sup>234</sup>

The next Section examines how two other courts in 2019 also found workarounds for the lockboxes of *Stevens* and *Reed* when faced with statutes regulating another variety of low-value speech—namely, SOCE on minors.

## B. EVADING STRICT SCRUTINY WHEN ANALYZING LAWS BANNING SOCE ON MINORS

This Section features two subsections, each of which examines a different 2019 ruling regarding the level of scrutiny that applies when analyzing the validity of a statute banning SOCE on minors. Specifically, Subsection 1 addresses U.S. District Judge Chasanow's decision considering Maryland's anti-SOCE statute in the face of a First Amendment free speech challenge in *Doyle v. Hogan*.<sup>235</sup> Subsection 2 then reviews U.S. District Judge Rosenberg's opinion evaluating the constitutionality of two local South Florida ordinances banning SOCE on minors in *Otto v. City of Boca Raton*.<sup>236</sup>

### 1. *Doyle v. Hogan*

In September 2019, Judge Chasanow concluded that a Maryland statute banning mental-health and childcare practitioners from performing SOCE on minors was subject to review under intermediate scrutiny when determining if it violated the First Amendment speech rights of such practitioners.<sup>237</sup> The judge then upheld the statute under this relaxed form of review and dismissed plaintiff Christopher Doyle's free speech claim in the process.<sup>238</sup>

Doyle's free speech theory hinged on the logic that, "because he primarily uses speech to provide counseling to his minor clients, the act of counseling must be construed as speech for purposes of First Amendment review."<sup>239</sup> He argued that the statute was a content-based regulation subject to strict scrutiny.<sup>240</sup>

Judge Chasanow readily acknowledged that Maryland's anti-SOCE statute "regulates speech by prohibiting the use of language employed in

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234. *Austin v. Illinois*, No. 19-1029, 2020 WL 5882221 (Oct. 5, 2020).

235. 411 F. Supp. 3d 337 (D. Md. 2019).

236. 353 F. Supp. 3d 1237 (S.D. Fla. 2019), *appeal filed*, No. 19-10604 (11th Cir. filed Feb. 14, 2019).

237. *See Doyle*, 411 F. Supp. 3d at 346 (concluding that "intermediate scrutiny is the appropriate standard of review"); *see also* MD. CODE ANN., HEALTH OCC. § 1-212.1(b) (LexisNexis 2020) ("A mental health or child care practitioner may not engage in conversion therapy with an individual who is a minor.").

238. *See Doyle*, 411 F. Supp. 3d at 348 ("[Doyle] failed to state a free speech claim upon which relief can be granted because [the statute] would survive a constitutional challenge under intermediate scrutiny.").

239. *Id.* at 344.

240. *See id.* at 343–44.

the process of conducting conversion therapy on minor clients.”<sup>241</sup> Yet, for Judge Chasanow, conversion therapy—at least as Maryland regulates it—is much more akin to conduct than to speech.<sup>242</sup> That seems to be the case for Judge Chasanow largely due to two reasons. First, practitioners such as Christopher Doyle remain completely free to espouse their own views and beliefs about SOCE and its merits.<sup>243</sup> Second, the statute regulates only speech that is part of a course of therapy and is thus “inherently not expressive because the speech involved does not seek to communicate Plaintiff’s views.”<sup>244</sup>

This latter observation is critical. It suggests that only when an individual is attempting to deliver his or her own personal opinions, beliefs, or ideas on a particular topic are the full panoply of First Amendment protections for speech triggered to shield such expression from government censorship. In contrast, as in *Doyle*, when the speech merely follows a therapeutic script and is implemented as a form of treatment, then First Amendment concerns are dramatically diminished, thereby making possible the application of a lower standard of judicial review such as intermediate scrutiny. As Judge Chasanow put it, Christopher Doyle’s “free speech claim turns on ‘whether verbal communications become “conduct” when they are used as a vehicle for mental health treatment.’”<sup>245</sup>

In brief, Judge Chasanow exploited the traditional dichotomy between speech and conduct in First Amendment jurisprudence.<sup>246</sup> Under this distinction, regulations of conduct generally do not trigger First Amendment concerns unless the conduct is deemed symbolic expression, such as burning the American flag as a form of political protest.<sup>247</sup> Judge Chasanow took advantage of this dichotomy by moving Christopher Doyle’s SOCE

241. *Id.* at 345.

242. *See id.* at 344–45 (stating that “[d]etermining the proper level of review first requires distinguishing whether [the statute] regulates speech, conduct, or something in between,” and then later concluding that the statute “lands on the conduct end of the sliding scale”).

243. *See id.* at 345 (“Most importantly, [the statute] does not prohibit practitioners from engaging in any form of personal expression; they remain free to discuss, endorse, criticize, or recommend conversion therapy to their minor clients.”).

244. *Id.*

245. *Id.* at 344 (quoting *King v. Governor*, 767 F.3d 216, 224 (3d Cir. 2014), *abrogated by Nat’l Inst. of Fam & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018)).

246. For example, Justice Thomas recently explained that “[w]hile drawing the line between speech and conduct can be difficult, this Court’s precedents have long drawn it.” *Becerra*, 138 S. Ct. at 2373; *see also* Diahann Dasilva, Note, *Playing a “Labeling Game”: Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 769–70 (2015) (noting “the speech versus conduct dichotomy” and examining the “distinction between speech and conduct, the implications of that distinction, and how courts have classified various activities as speech or conduct”).

247. *See* R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 356 (2019) (noting that “[g]overnmental regulations of conduct . . . are outside of the ambit of the First Amendment,” but pointing out that “the Court has noted that ‘symbolic speech’ is fully protected by the First Amendment,” such as “burning a draft card or cross . . . to convey a particular message”); *see also* *Texas v. Johnson*, 491 U.S. 397, 399, 404–06 (1989) (concluding that Gregory Lee Johnson’s burning of the American flag outside of the Republican National Convention in Dallas, Texas, in 1984 constituted expressive conduct and thus implicated First Amendment coverage).

speech (as regulated by the statute) closer to the conduct end of the continuum. The lynchpin logic for this maneuver was the judge's assertion that "conduct is *not* confined merely to physical action."<sup>248</sup> If conduct is not limited to physical action, then this opens the door for conduct to expansively encompass the spoken word.

Judge Chasanow, however, is not alone in exploiting the speech-versus-conduct dichotomy in order to apply a deferential level of judicial review to a law barring speech-based SOCE on minors. Perhaps most notably, the U.S. Court of Appeals for the Ninth Circuit held in 2014 that California's anti-SOCE statute "regulates conduct. It bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients."<sup>249</sup> In other words, the therapists can talk about SOCE with patients, but they just cannot use speech as the vehicle for treatment.<sup>250</sup> Thus, the Ninth Circuit in *Pickup v. Brown* was able to find that "the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone."<sup>251</sup> California's anti-SOCE statute, therefore, was "subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest."<sup>252</sup> The Ninth Circuit concluded that California's statute passed muster under this test.<sup>253</sup>

Rational basis review is a very deferential level of scrutiny.<sup>254</sup> It does not, in fact, generally apply in First Amendment cases, but rather applies in disputes involving non-fundamental rights where the government adopts social and economic regulations.<sup>255</sup> As Justice Alito recently

248. *Doyle*, 411 F. Supp. 3d at 345 (emphasis added).

249. *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014).

250. See Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 879 (2019) ("[T]he Ninth Circuit's decision in *Pickup* . . . distinguished between laws interfering with communications about medical treatment and laws regulating medical treatment carried out through the mechanism of speech.").

251. *Pickup*, 740 F.3d at 1230.

252. *Id.* at 1231; see also Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681, 683 (2016) ("In the view of the Ninth Circuit, California's talk therapy restriction did not violate the First Amendment because talk therapy is not protected by the First Amendment. In short, the Ninth Circuit held in *Pickup v. Brown* that such therapy is conduct not speech." (footnote omitted)).

253. See *Pickup*, 740 F.3d at 1232 ("[W]e hold that [California's anti-SOCE law] is rationally related to the legitimate government interest of protecting the well-being of minors.").

254. See Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 64 (2017) ("[R]ational basis review ostensibly asks judges to deferentially review reasonable government decisions . . .").

255. Nearly eighty years ago, the Supreme Court explained the principle that rational basis review generally does not apply in First Amendment cases, writing:

The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.

*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); see R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness"* *Balancing*, 8 ELON L. REV. 291, 291 (2016) ("Because free speech doctrine involves the 'fundamental' right of speech, modern free speech doctrine does not use mini-

wrote, rational basis review constitutes a “form of minimal scrutiny [that] is foreign to our free-speech jurisprudence.”<sup>256</sup> Only “[l]ow-value speech triggers rational basis review,”<sup>257</sup> with a “strong presumption of constitutional validity”<sup>258</sup> for such regulation.

Ultimately, Judge Chasanow’s 2019 decision to adopt intermediate scrutiny in *Doyle* illustrates another workaround for applying strict scrutiny when a statute seemingly is content based on its face—namely, by contending that the law primarily regulates conduct, with speech being swept up only incidentally.<sup>259</sup> Her decision, however, is highly problematic to the extent that she partly relied on the fact that the statute regulated the speech of professionals speaking in their professional capacities.<sup>260</sup> In the 2018 decision of *National Institute of Family & Life Advocates v. Becerra*,<sup>261</sup> a five-Justice majority of the U.S. Supreme Court rejected the notion that the speech of professionals—what the Court called “professional speech”<sup>262</sup>—is generally exempt from *Reed*’s “rule that content-based regulations of speech are subject to strict scrutiny.”<sup>263</sup> In writing for the majority, Justice Thomas cited the Ninth Cir-

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num rationality review, applicable to cases of social or economic regulation not involving fundamental rights under the Equal Protection or Due Process Clauses.” (footnote omitted)); see also Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 403 (2016) (“[T]he Court has basically gotten it right about when to apply the rational basis test—using it to analyze government economic regulations and social welfare legislation when there is no discrimination based on a suspect classification or infringement of a fundamental right.”).

256. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2465 (2018).

257. Wynter K. Miller & Benjamin E. Berkman, *The Future of Physicians’ First Amendment Freedom: Professional Speech in an Era of Radically Expanded Prenatal Genetic Testing*, 76 WASH. & LEE L. REV. 577, 607 (2019).

258. *Id.*

259. See *Doyle v. Hogan*, 411 F. Supp. 3d 337, 346 (D. Md. 2019) (“According to the Fourth Circuit, ‘intermediate scrutiny strikes the appropriate balance between the states’ police powers and individual rights[ ]’ when evaluating ‘conduct regulations that incidentally impact speech.’ Consequently, intermediate scrutiny is the appropriate standard of review.” (alteration in original) (citation omitted) (quoting *Cap. Associated Indus. v. Stein*, 922 F.3d 198, 209 (4th Cir. 2019))).

260. See *id.* at 344 (contending that “government regulations of professional practices that entail and incidentally burden speech receive deferential review,” and pointing out that Maryland’s anti-SOCE statute “obviously regulates professionals”).

261. 138 S. Ct. 2361 (2018).

262. *Id.* at 2371.

263. *Id.* In *Becerra*, the majority cited *Reed* for the principle that content-based laws, “[a]s a general matter,” are subject to the “stringent standard” that is strict scrutiny. *Id.* Justice Thomas concluded for the majority that “neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.” *Id.* at 2375.

Justice Thomas, however, indicated that there are two narrow situations where the speech of professionals is subject to lesser review than strict scrutiny. The first is where professionals, in their advertising or commercial speech, are required to disclose purely factual, noncontroversial information related to the services they provide. *Id.* at 2372. These situations, Justice Thomas noted, are controlled by the Court’s ruling in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). *Becerra*, 138 S. Ct. at 2372. The second situation is when the government regulates professional conduct and such “conduct incidentally involves speech.” *Id.* The primary example of this situation cited by Justice Thomas was the informed-consent mandate imposed on doctors before they could perform abortions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833

cuit's decision in *Pickup v. Brown*, the California anti-SOCE statute case of *Pickup v. Brown*, which was addressed earlier in this Subsection, as an example of a court that “recognized ‘professional speech’ as a separate category of speech that is subject to different rules.”<sup>264</sup> Indeed, as Robert McNamara and Paul Sherman, senior attorneys at the Institute for Justice point out, the Ninth Circuit in *Pickup* had relied on this conception of professional speech to hold that the statute there only regulated conduct, not speech.<sup>265</sup> *Becerra* thus casts considerable doubt on the continued viability of *Pickup*'s professional-speech workaround for strict scrutiny in anti-SOCE law cases.<sup>266</sup> As Dean Rodney Smolla bluntly puts it, “[t]he professional speech doctrine crashed and burned in” in *Becerra*.<sup>267</sup>

This is not to say that anti-SOCE statutes would fail to survive strict scrutiny were it to be applied; indeed, these laws might well pass muster under that test.<sup>268</sup> Rather, it is to say that the court's ruling in *Doyle v. Hogan* represents another workaround—one pivoting on the distinction between speech and conduct, and deeming speech to be regulated only incidental to conduct—from strict scrutiny in the face of *Reed* that greatly enhances the likelihood such regulations of low-value speech will pass constitutional muster.

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(1992). *Becerra*, 138 S. Ct. at 2373; see Clay Calvert, *Wither Zauderer, Blossom Heightened Scrutiny? How the Supreme Court's 2018 Rulings in Becerra and Janus Exacerbate Problems with Compelled-Speech Jurisprudence*, 76 WASH. & LEE L. REV. 1395, 1409–11 (2019) (addressing Justice Thomas's analysis in *Becerra* of these two exceptions from the general rule that laws regulating professional speech are subject to strict scrutiny).

264. *Becerra*, 138 S. Ct. at 2371.

265. See Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 210 (“The panel in *Pickup*, applying the professional-speech doctrine, had concluded that talk therapy was simply a form of professional conduct, entitled to no First Amendment protection.”).

266. See Calvert, *supra* note 64, at 29–30 (contending that “[t]he Supreme Court's 2018 ruling in *Becerra*, with its attack on a nascent professional speech doctrine, casts serious doubt on whether any lesser standard [than strict scrutiny] should apply” when reviewing anti-SOCE statutes).

267. Rodney A. Smolla, *The Tensions Between Regulation of the Legal Profession and Protection of the First Amendment Rights of Lawyers and Judges: A Tribute to Ronald Rotunda*, 22 CHAP. L. REV. 285, 291 (2019). Dean Smolla's assertion might be viewed as somewhat of an overstatement, at least to the extent that the Court did not completely preclude the prospect that professional speech might, under some situations, be subject to different rules as its own category of expression. See *Becerra*, 138 S. Ct. at 2375 (“In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists.”).

268. Professor Mark Strasser recently contended that anti-SOCE statutes at issue in cases such as *Pickup* might have been deemed constitutional “even had a higher level of scrutiny been employed. States have a compelling interest in protecting the health of the populace, and prohibitions on treatments that are not only ineffective but also pose a risk of significant harm are closely tailored to promoting that state interest.” Mark Strasser, *Deception, Professional Speech, and CPCs: On Becerra, Abortion, and the First Amendment*, 67 BUFF. L. REV. 311, 336–37 (2019) (footnote omitted).



## 2. *Otto v. City of Boca Raton*

In *Otto v. City of Boca Raton*,<sup>269</sup> Judge Rosenberg considered a First Amendment free speech attack on ordinances in the City of Boca Raton and Palm Beach County, Florida, banning SOCE on minors.<sup>270</sup> She reviewed the challenge in February 2019 within the context of a motion for a preliminary injunction to block the ordinances' enforcement against two licensed therapists who sought to perform SOCE via talk therapy.<sup>271</sup>

In determining the applicable degree of First Amendment scrutiny—which directly affected the likelihood of success of the therapists' case on its merits and, therefore, their ability to garner injunctive relief<sup>272</sup>—Judge Rosenberg observed that the Supreme Court's decisions in both *Reed* and *Becerra* “raise[d] questions as to the validity of the” Ninth Circuit's ruling in *Pickup*, described above in Subsection 1.<sup>273</sup> This, however, was not the only problem she faced in fathoming the relevant standard of review. In fact, she deemed it “unsettled” whether strict scrutiny, intermediate scrutiny, or rational basis review should apply,<sup>274</sup> and she pointed out that the parties “vigorously contest[ed]” the scrutiny issue.<sup>275</sup> Indeed, the judge flatly rejected the notion that following a categorical methodology or formula for classifying the anti-SOCE ordinances as either content based or content neutral would necessarily resolve the scrutiny determination.<sup>276</sup>

Disappointingly, however, for legal scholars and practitioners seeking exactitude, Judge Rosenberg ultimately hedged her bets on scrutiny at the preliminary injunction stage. Specifically, she concluded it was “unclear what standard of review should apply to this case”<sup>277</sup> and “decline[d] to announce a standard of review.”<sup>278</sup> Instead of picking one standard, she analyzed the two ordinances through the prisms of all three tests, holding that they would pass constitutional muster under both rational basis review and intermediate scrutiny.<sup>279</sup> While the judge dubbed it a “closer call” as to whether the measures would survive strict scrutiny,

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269. 353 F. Supp. 3d 1237 (S.D. Fla. 2019), *appeal filed*, No. 19-10604 (11th Cir. filed Feb. 14, 2019).

270. See BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2020) (“It shall be unlawful for any provider to practice conversion therapy on any individual who is a minor regardless of whether the provider receives monetary compensation in exchange for such services.”); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-125 (2020) (“It shall be unlawful for any Provider to engage in conversion therapy on any minor regardless of whether the Provider receives monetary compensation in exchange for such services.”).

271. *Otto*, 353 F. Supp. 3d at 1241.

272. To obtain a preliminary injunction, one factor Judge Rosenberg considered was whether the plaintiffs had “demonstrate[d] that they have a substantial likelihood of success on the merits.” *Id.*

273. *Id.* at 1249.

274. *Id.* at 1242.

275. *Id.* at 1248.

276. See *id.* at 1256 (“[T]his case demonstrates why an unbending, categorical approach to the First Amendment proves unwieldy to the point of unworkable.”).

277. *Id.* at 1258.

278. *Id.* at 1270.

279. *Id.*

she nonetheless ruled against the plaintiffs' motion for a preliminary injunction because, under all three tiers of analysis, she was not persuaded that the plaintiffs had a substantial likelihood of winning on the merits.<sup>280</sup>

Most importantly for purposes of this Article, however, Judge Rosenberg offered a possible workaround for *Reed's* mandate that facially content-based laws must presumptively surmount strict scrutiny. Unpacking Rosenberg's analysis on a step-by-step basis reveals why she personally believed—albeit without definitively adopting it—that “intermediate review may be the correct standard to apply.”<sup>281</sup>

Initially, Judge Rosenberg rejected the notion that the ordinances merely regulated conduct (i.e., therapy) or affected speech only incidentally to such conduct.<sup>282</sup> Because she found that speech was at issue—unlike the Ninth Circuit when considering California's anti-SOCE statute in *Pickup*—Rosenberg concluded that rational basis review was likely inappropriate and that, instead, the pair of South Florida ordinances “must be reviewed under intermediate or strict scrutiny.”<sup>283</sup>

Second, she acknowledged that, under *Reed*, the ordinances seemingly were content-based measures that would need to face strict scrutiny.<sup>284</sup> Yet, she pushed back against *Reed's* presumption that strict scrutiny should apply. Specifically, she reasoned that the case before her did not implicate what she called “a heartland content-based speech regulation.”<sup>285</sup> By that, she apparently meant that the ordinances:

1. did not regulate or otherwise discriminate against the content of speech occurring in a public forum, such as a park or a street, where it would have been especially problematic under the First Amendment;<sup>286</sup> and
2. only barred the content of speech within the narrow context of therapy, not outside of it, thus leaving SOCE advocates and adversaries free to hold either private or public conversations about its merits or drawbacks.<sup>287</sup>

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280. *Id.*

281. *Id.* at 1258.

282. *Id.* at 1251–52.

283. *Id.* at 1252.

284. *See id.* at 1253 (“The ordinances identify certain speech—speech aimed at changing minor patients' sexual orientation—for prohibition because the speech constitutes conversion therapy. The ordinances target *what* Plaintiffs say to their minor patients.”); *see also id.* at 1242 (“The ordinances also arguably are content-based, as they apply ‘to particular speech because of the topics discussed or the idea or message expressed.’”).

285. *Id.* at 1242.

286. *See id.* (“No public forum restrictions exist in the ordinances.”); *see also* *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (“In particular, the guiding First Amendment principle that the ‘government has no power to restrict expression because of its message, its ideas, its subject matter, or its content’ applies with full force in a traditional public forum.” (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972))).

287. *See Otto*, 353 F. Supp. 3d at 1242 (noting that “[t]he ordinances define the reach of their prohibitions by topic or subject matter, but they do so only to identify the type of therapy covered, not the content of communications outside of the therapy itself,” and adding that they “do not prohibit or limit proponents or opponents of conversion therapy to speak about gender or sexual orientation conversion publicly and privately, including to their minor clients in forms other than therapy”).

Closely tied to this second reason for Judge Rosenberg in suggesting that intermediate scrutiny was appropriate were the dual facts that the speakers who were regulated under the ordinances were “licensed medical professional[s]”<sup>288</sup> and that their speech was regulated only to the extent that it is the actual method for delivering medical treatment.<sup>289</sup> Citing *Becerra*, however, she was careful not to rely on the notion that professional speech constitutes a separate category of expression subject to something less rigorous than strict scrutiny when it is regulated.<sup>290</sup> Instead, she leaned on the Supreme Court’s 1992 ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>291</sup> The Court there held that physicians, as licensed professionals, could be compelled by the government to provide information to patients about the risks of abortion without violating the physicians’ First Amendment freedom of speech—in particular, an unenumerated right not to speak—because that right was implicated “only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”<sup>292</sup> This use of “reasonable” in upholding this informed-consent requirement suggests a standard far less rigorous than strict scrutiny was applied in *Casey*.<sup>293</sup> Importantly, the Supreme Court in *Becerra* cited *Casey* approvingly in holding that “regulations of professional conduct that incidentally burden speech”<sup>294</sup> constitute one of two narrow circumstances where the “Court has afforded less protection for professional speech.”<sup>295</sup> Judge Rosenberg reasoned in *Otto* that the treatment regulated by the two anti-SOCE ordinances was “both speech and conduct—directed at minors—administered by a licensed medical professional, as part of ‘the practice of

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288. *Id.* at 1256.

289. *See id.* (“The speech not only is directly related to the treatment, it is *the manner of delivering* the treatment. Plaintiffs are essentially writing a prescription for a treatment that will be carried out verbally.”).

290. *See id.* (noting that *Becerra* “disparaged the use of ‘professional speech’ as a separate category of speech” and concluding that “[i]t is not clear that a separate category for professional speech is required to recognize this case’s unique features”).

291. 505 U.S. 833 (1992).

292. *Id.* at 884 (plurality opinion). The Court in *Casey* concluded that the compelled-speech mandate imposed on physicians was “a reasonable means to ensure that the woman’s consent is informed.” *Id.* at 885.

The Supreme Court long has recognized the existence of a First Amendment right not to be forced by the government to speak. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and *the right to refrain from speaking at all.*” (emphasis added)).

293. *See* Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 851 (2019) (“[The Court’s] use of the word ‘reasonable’ might mean that such laws are permissible as long as they have a rational basis, given that the word ‘reasonable’ is often used as a synonym for ‘rational.’”); B. Jessie Hill, *Sex, Lies, and Ultrasound*, 89 U. COLO. L. REV. 421, 432 (2018) (“The Court’s language of reasonableness, along with its dismissive treatment of the claim, suggest something like rational basis review was applied to the physician’s free speech claim.”).

294. Nat’l Inst. of Fam. & Life Advoc. v. *Becerra*, 138 S. Ct. 2361, 2373 (2018).

295. *Id.* at 2372.

medicine,’ as in *Casey*.”<sup>296</sup> This allowed her to conclude that intermediate scrutiny was appropriate.<sup>297</sup> In brief, the judge both recognized that *Becerra* cast serious doubt upon the professional speech doctrine and attempted to chart a way around that obstacle by turning to *Casey*, which the Court in *Becerra* had reaffirmed.

Judge Rosenberg, however, did not stop her scrutiny-selection analysis there. Citing Justice Breyer<sup>298</sup> and taking a page out of his playbook (addressed later in Part V), she delved into what she called “the historic understandings of the First Amendment and its purpose.”<sup>299</sup> At the top of the list for Judge Rosenberg was the goal—one described earlier in Part III of this Article<sup>300</sup>—of safeguarding an uninhibited marketplace of ideas in order to produce and test conceptions of the truth.<sup>301</sup> She also cited the principle that individual self-expression should be free from government control, as well as the notion that political speech is “highly protected,” especially when it arises “in the metaphoric or literal ‘public square.’”<sup>302</sup>

Judge Rosenberg concluded that deploying intermediate scrutiny in the case before her was “entirely consistent” with these core First Amendment goals and policies.<sup>303</sup> That was the situation, she reasoned, largely because the anti-SOCE statutes neither restricted the public marketplace of ideas about SOCE nor targeted political speech about it in public venues.<sup>304</sup> The only function served by the restricted speech, in turn, was simply as a means of individual therapy, while the only context in which it was restricted was within the confines of a private therapist–patient relationship.<sup>305</sup> In other words, the ordinances in *Otto* did not in any way stifle public debate about SOCE or hinder a marketplace-like quest for the truth about whether SOCE are effective or harmful. As Judge Rosenberg bluntly put it, “In the context of the relationship between a minor and his or her therapist, there is *no* competitive marketplace of ideas to infringe upon.”<sup>306</sup> Proponents of SOCE remain free under the ordinances to lobby and advocate in various marketplaces of ideas, including in the political-idea marketplaces that are state and local legislative bodies, for

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296. *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237, 1256 (S.D. Fla. 2019), *appeal filed*, No. 19-10604 (11th Cir. filed Feb. 14, 2019).

297. *See id.* (“Accordingly, applying intermediate scrutiny to medical treatments that are effectuated through speech would strike the appropriate balance between recognizing that doctors maintain some freedom of speech within their offices, and acknowledging that *treatments* may be subject to significant regulation under the government’s police powers.”).

298. *Id.* at 1256–57.

299. *Id.* at 1257.

300. *See supra* notes 101–115 and accompanying text (addressing the marketplace of ideas and its truth-seeking goal).

301. *Otto*, 353 F. Supp. 3d at 1257.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 1257–58.

306. *Id.* at 1258.

laws permitting the adoption and use of SOCE.<sup>307</sup>

Judge Rosenberg's decision to consider traditional First Amendment interests and principles—most significantly, the marketplace of ideas—readily distinguishes her workaround for strict scrutiny in *Otto* from Judge Chasanow's workaround in her September 2019 decision in *Doyle* addressed in Subsection 1. Judge Chasanow, as noted above, focused almost exclusively in her scrutiny determination on where speech-based SOCE, uttered by professionals, is situated on a continuum between speech, on one end, and conduct, on the other.<sup>308</sup> Rosenberg's evaluation of the historical rationales for protecting speech not only gave her additional legal cover in suggesting that intermediate scrutiny was appropriate in the face of *Reed* but also echoed Justice Breyer's logic in applying his proportionality framework for scrutiny, which is examined immediately below.

#### V. A BETTER WORKAROUND FOR *REED* IN LOW-VALUE SPEECH CASES INVOLVING REVENGE PORNOGRAPHY AND CONVERSION THERAPY? EVALUATING THE FIRST AMENDMENT VALUES AND INTERESTS AT STAKE TO DETERMINE THE LEVEL OF SCRUTINY

In 2019, the U.S. Supreme Court in *Iancu v. Brunetti* held that part of a federal statute granting the U.S. Patent and Trademark Office (USPTO) authority to deny registration for immoral or scandalous trademarks violated the First Amendment.<sup>309</sup> The majority concluded that both facets of this provision—the term “immoral,” as well as the term “scandalous”—were unconstitutional because they authorized the government to engage in impermissible viewpoint-based discrimination against speech.<sup>310</sup> That conclusion, in turn, allowed Erik Brunetti, who challenged the immoral or scandalous provision, to register the trademark “FUCT” with the USPTO for branding a line of clothing.<sup>311</sup> The USPTO earlier had used

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307. *See id.* at 1257 (“The ordinances do not limit or change in any way advocacy for SOCE. Plaintiffs retain their right and prerogative to seek greater acceptance of SOCE, to lobby Defendants to repeal the ordinances, and to lobby the State of Florida to explicitly preempt the ordinances.”).

308. *See supra* notes 237–248 and accompanying text.

309. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019); *see* 15 U.S.C. § 1052(a) (allowing the PTO to deny registration for a trademark that “[c]onsists of or comprises immoral . . . or scandalous matter”).

310. *Brunetti*, 139 S. Ct. at 2299; *see also* Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 11–12 (“Viewpoint-discriminatory laws are uniquely violative of the First Amendment because they directly empower one side of a debate with weapons that are denied to the proponents of the other side. This distorts the ability of the participants to fairly compete on the merits of their ideas.” (quoting Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553, 591 (1996))).

311. *See Brunetti*, 139 S. Ct. at 2297 (“Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT. According to Brunetti, the mark (which functions as the clothing’s brand name) is pronounced as four letters, one after the other: F-U-C-T.”).

the measure to block his registration, finding that “FUCT”: (1) had sexual connotations, (2) was offensive and vulgar, and (3) was used by Brunetti in marketing contexts that were violent, nihilistic, and misogynistic.<sup>312</sup>

Several Justices, however, fretted that the outcome in Brunetti would give the greenlight for registering all types of offensive marks that are seemingly of low value—perhaps, even no value—when it comes to serving traditional First Amendment interests and goals. For instance, Justice Alito urged Congress to craft

a more carefully focused statute that precludes the registration of marks containing vulgar terms that *play no real part in the expression of ideas*. The particular mark in question in this case could be denied registration under such a statute. The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary.<sup>313</sup>

A close reading of this passage reveals that it parallels the Court’s language from *Chaplinsky v. New Hampshire*,<sup>314</sup> the seminal low-value speech case addressed earlier in Part III, explaining when speech can be restricted without raising any First Amendment concerns.<sup>315</sup> Specifically, the Court in *Chaplinsky* reasoned that unprotected speech plays “no essential part of any exposition of ideas.”<sup>316</sup> Justice Alito in *Brunetti* neatly paraphrased this sentiment in the italicized part of his quotation above, as he simply substituted “real” for “essential” and “expression” for “exposition.”

Justice Breyer also agreed the speech regulated in *Brunetti* was of low value and, indeed, might even be harmful.<sup>317</sup> Justice Breyer, in fact, took Justice Alito’s focus on the low-value nature of the speech to another level, as it were, by arguing that the “scandalous” provision (although not the “immoral” terminology) did not violate the First Amendment.<sup>318</sup> In reaching this conclusion, he rejected the application of an inflexible categorical approach to First Amendment review under which categorizing a

312. *Id.* at 2298.

313. *Id.* at 2303 (Alito, J., concurring) (emphasis added).

314. 315 U.S. 568 (1942).

315. *See id.* at 571–72.

316. *Id.* at 572.

317. As Justice Breyer explained, highly vulgar trademarks do not typically convey any viewpoints, but instead traffic only in emotions. *Brunetti*, 139 S. Ct. at 2306 (Breyer, J., concurring in part, dissenting in part). He pointed to harms that protecting them through federal registration might cause, reasoning:

These attention-grabbing words, though financially valuable to some businesses that seek to attract interest in their products, threaten to distract consumers and disrupt commerce. And they may lead to the creation of public spaces that many will find repellant, perhaps on occasion creating the risk of verbal altercations or even physical confrontations.

*Id.* at 2307. He also noted the harm to children that might occur from being exposed to them. *See id.*

318. *Id.* at 2308.

statute as discriminating against content would necessarily lead to the application of strict scrutiny.<sup>319</sup> Instead of following that formula, Justice Breyer averred that the Court should resolve First Amendment questions by “appeal[ing] more often and more directly to the values the First Amendment seeks to protect”<sup>320</sup> and, in particular, asking whether the harm worked to those values by a statute is disproportionate to the justifications underlying the statute.<sup>321</sup> This, in a nutshell, is what Justice Breyer calls a “proportionality analysis.”<sup>322</sup>

It was not the first time he promoted this methodology.<sup>323</sup> For example, in *Reed v. Town of Gilbert*, Justice Breyer advocated for a proportionality approach to scrutiny, pushing back directly against the Court’s conclusion that, as described in this Article’s Introduction, facially content-based laws are subject to strict scrutiny.<sup>324</sup> Justice Breyer reasoned in *Reed* that “content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny.”<sup>325</sup> Instead, focus must be directed to “the [First] Amendment’s expressive objectives,”<sup>326</sup> and determining a statute’s validity requires analysis of “the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive

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319. *Id.* at 2304–05; see also Kent Greenfield, *Trademarks, Hate Speech, and Solving a Puzzle of Viewpoint Bias*, 2019 SUP. CT. REV. 183, 215 (noting that in *Brunetti*, Justice Breyer “set out his broader critique of the Court’s free speech jurisprudence as too formalistic and categorically rigid”). Justice Breyer reinforced his stance against a rigid categorical approach to scrutiny in 2020. See *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2359 (2020) (Breyer, J., concurring in judgment regarding severability and dissenting in part) (“To reflexively treat all content-based distinctions as subject to strict scrutiny regardless of context or practical effect is to engage in an analysis untethered from the First Amendment’s objectives.”).

320. See *Brunetti*, 139 S. Ct. at 2305 (Breyer, J., concurring in part, dissenting in part).

321. See *id.* Justice Breyer reiterated this point later in *Brunetti*, writing that “[r]ather than puzzling over categorization, I believe we should focus on the interests the First Amendment protects and ask a more basic proportionality question: Does ‘the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives?’” *Id.* at 2306 (alteration in original) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 179 (2015) (Breyer, J., concurring)).

322. *Id.* at 2306.

323. See Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 55 (2018) (“Proportionality and balancing approaches to rights have long found favor with Justice Breyer.”).

324. See *supra* notes 9–15 and accompanying text (addressing *Reed*’s principle that facially content-based laws trigger strict scrutiny, regardless of legislative motive).

325. *Reed v. Town of Gilbert*, 576 U.S. 155, 176 (2015) (Breyer, J., concurring). Justice Breyer emphasized in *Reed* his stance that “the category ‘content discrimination’ is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic ‘strict scrutiny’ trigger, leading to almost certain legal condemnation.” *Id.*

326. *Id.* at 175.

ways of doing so.”<sup>327</sup> This, ultimately, is a balancing approach.<sup>328</sup> It is widely embraced in Europe, but not in the United States.<sup>329</sup>

Focusing on values is critical for Justice Breyer in this balancing approach because values constitute “the constitutional analogue of statutory purposes.”<sup>330</sup> Put differently, constitutional purposes (i.e., First Amendment values) for protecting speech are weighed against legislative (i.e., statutory) purposes for restricting speech, with courts asking “whether the restriction on speech is proportionate to, or properly balances, the need.”<sup>331</sup>

Under this methodology for scrutiny, Justice Breyer has made it clear that “interests close to the First Amendment’s protective core”—the values that necessitate analyzing a statute “with great care” when they are placed in jeopardy—are “the processes through which political discourse or public opinion is formed or expressed.”<sup>332</sup> In brief, as Justice Breyer put it, “[T]he First Amendment imposes tight constraints upon government efforts to restrict . . . ‘core’ political speech.”<sup>333</sup> For Justice Breyer, “the constitutional importance of maintaining a free marketplace of ideas” rests on the ability of the public to have access to a wide variety of ideas that allow it to “freely choose a government pledged to implement policies that reflect the people’s informed will.”<sup>334</sup> Justice Breyer’s proportionality approach thus involves, as it did in *United States v. Alvarez*,<sup>335</sup> consideration of whether the regulation in question risks suppressing ideas that may “make a valuable contribution to the marketplace of ideas.”<sup>336</sup>

327. *Id.* at 179. Justice Breyer reiterated this analytical framework in 2020. *See Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2362 (2020) (Breyer, J., concurring in judgment regarding severability and dissenting in part) (“A proper inquiry should examine the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so.”).

328. Donald L. Beschle, *Fake News, Deliberate Lies, and the First Amendment*, 44 U. DAYTON L. REV. 209, 221 (2019) (“Proportionality, as Justice Breyer explains, is a balancing test.”).

329. *See* Floyd Abrams, Free Speech Under Fire: The Future of the First Amendment, Keynote Remarks, in 25 J.L. & POL’Y 47, 58 (2016) (noting that Justice Breyer’s opinions “repeatedly seek to apply the concept of proportionality” and are “closer to those adopted in European nations in interpreting their more limited free speech protections under the European Convention on Human Rights”); Mark S. Kende, *The Unmasking of Balancing and Proportionality Review in U.S. Constitutional Law*, 25 CARDOZO J. INT’L & COMPAR. L. 417, 424 (2017) (“[P]roportionality review took the world by storm after World War II with many nations having a key case, except the U.S.”).

330. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 162 (2010).

331. *Id.* at 164.

332. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring); *see Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2358 (2020) (Breyer, J., concurring in judgment regarding severability and dissenting in part) (“For our government to remain a *democratic* republic, the people must be free to generate, debate, and discuss both general and specific ideas, hopes, and experiences.”).

333. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 582 (2011) (Breyer, J., dissenting).

334. *Id.* at 583.

335. 567 U.S. 709 (2012).

336. *Id.* at 732 (Breyer, J., concurring).



This, of course, ties directly back to Part III of this Article and the two core First Amendment values addressed there—promoting a diverse public marketplace of ideas, with truth-seeking and truth-testing goals, and facilitating wise and informed decision-making and participation by citizens in democratic self-governance.<sup>337</sup> When such objectives are threatened by a law, Justice Breyer’s approach would call for, as noted above, analyzing a statute “with great care.”<sup>338</sup> This seemingly means strict scrutiny.

When such core constitutional values and interests do not rest in the balance, however, lesser standards of scrutiny should apply. For example, Justice Breyer noted that regulations of commercial speech are subject to review under intermediate scrutiny—what he called a “‘lesser’ (but still elevated) form of scrutiny”—as compared to laws targeting political speech and speech that either forms or expresses public opinion.<sup>339</sup> Furthermore, when ordinary economic and social legislation that only incidentally involves speech is under review, any form of heightened scrutiny—strict or intermediate—is generally inappropriate, and instead, a version of rational basis review is warranted.<sup>340</sup> As Justice Breyer explained in his dissent on behalf of the four liberal-leaning Justices in *Becerra*, “suggesting that heightened scrutiny applies to much economic and social legislation” does a “serious disservice” to core First Amendment values such as protecting an unfettered marketplace of ideas and its truth-seeking function.<sup>341</sup>

The bottom line is that Justice Breyer’s framework for determining how closely (or, conversely, how loosely and deferentially) courts should scrutinize statutes implicating speech—an approach that hinges on evaluating whether core First Amendment values are endangered by legislation—provides a possible workaround for *Reed*’s mandate that strict scrutiny should apply in cases such as *Austin*, *Doyle*, and *Otto* where seemingly no harm to core First Amendment values is wrought. If courts considering the constitutionality of laws barring revenge pornography and SOCE on minors were to adopt Justice Breyer’s framework, then they would at least have a viable path for applying a lesser standard of

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337. See *supra* Part III.

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

339. *Id.* Justice Breyer cited the Supreme Court’s ruling in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), in making this assertion in *Expressions Hair Design*. See *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring). The test created by the Supreme Court in *Central Hudson* for evaluating the validity of laws regulating truthful commercial speech about lawful goods and services is often said to be a form of intermediate scrutiny. See Corbin, *supra* note 15, at 1283 (“[T]he Supreme Court differentiates between commercial speech (such as advertising) and non-commercial speech, and subjects the former to intermediate scrutiny.”); Lili Levi, *A “Faustian Pact”? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 680 n.172 (2015) (observing that in *Central Hudson*, the Court fashioned “a four-pronged standard of intermediate scrutiny for commercial speech”).

340. See *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2381–83 (2018) (Breyer, J., dissenting).

341. *Id.* at 2382–83.

review that has been embraced by a current Supreme Court Justice and courts in Europe. In turn, they would not need to engage in an approach like that in *Austin*, where the court both ignored precedent and fashioned its own novel approaches to bypass strict scrutiny. Courts embracing Justice Breyer's values-and-interests approach would simply explain, and then conclude, that fundamental First Amendment values such as safeguarding political speech and promoting truth seeking in the public marketplace of ideas are not endangered by revenge pornography and anti-SOCE measures. As noted earlier, Judge Rosenberg in *Otto*, in fact, took into account whether core First Amendment values were threatened by the anti-SOCE ordinances at issue in concluding that intermediate scrutiny might be the best standard to apply.<sup>342</sup> This represents a small, encouraging step toward lower court adoption of Justice Breyer's approach in low-value speech cases.

## VI. CONCLUSION

There is little doubt that these are turbulent times when it comes to selecting scrutiny standards in First Amendment jurisprudence, with U.S. Supreme Court Justices disagreeing along perceived political lines in high-profile cases about when heightened inquiry is warranted.<sup>343</sup> To wit, Justice Kagan in 2018 lamented the Court's conservative Justices "weaponizing the First Amendment" and turning it "into a sword" by using heightened scrutiny to strike down "workaday economic and regulatory policy."<sup>344</sup> In that case, *Janus v. American Federation of State, County, and Municipal Employees*, the conservatives used heightened scrutiny to deal a potentially severe financial blow to public-sector labor unions.<sup>345</sup>

That same year, Justice Breyer criticized the Court's conservative members for "suggesting that heightened scrutiny applies to much economic and social legislation."<sup>346</sup> Justice Breyer derided their scrutiny methodology for paying "a serious disservice" to traditional First Amend-

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342. See *supra* notes 298–307 and accompanying text.

343. See generally Clay Calvert, *Certifying Questions in First Amendment Cases: Free Speech, Statutory Ambiguity, and Definitive Interpretations*, 60 B.C. L. REV. 1349, 1371, 1173 (2019) (referencing "[t]he rift over scrutiny separating conservative from liberal [J]ustices," and noting the "fracturing along political lines on such a fundamental issue as the appropriate level of scrutiny to apply in any given First Amendment case").

344. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018) (Sotomayor, J., dissenting); see Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 693 (2019) (noting that the *Janus* majority applied "heightened scrutiny" and that the fair-share fee requirement at issue in the case, which helped to financially sustain public-sector labor unions, could not surmount that standard).

345. See Erwin Chemerinsky & Catherine L. Fisk, *Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42, 42 (2018) ("*Janus* invalidated thousands of public sector labor-management contracts involving millions of government employees, and may have a substantial adverse effect on union membership and union revenues in the twenty-two states that allowed government employers to collect fair-share fees from union-represented employees who chose not to join the union." (footnote omitted)).

346. *Becerra*, 138 S. Ct. at 2382 (Breyer, J., dissenting).

ment goals, such as protecting unpopular opinions from censorship and promoting a robust marketplace of ideas and its truth-seeking telos.<sup>347</sup> The conservative Justices' decision in *National Institute of Family & Life Advocates v. Becerra* to apply heightened scrutiny and enjoin a law that helped women learn about government-sponsored abortion options is consistent with Kagan's weaponization thesis in *Janus*.<sup>348</sup> Many scholars, in turn, fret about what has been called "the deregulatory use of the First Amendment in pursuit of a laissez faire, *Lochner*-style market"<sup>349</sup> and "the cynical use of the First Amendment to circumvent economic regulation."<sup>350</sup>

Yet, as this Article makes clear, lower courts in the 2019 cases of *People v. Austin*, *Doyle v. Hogan*, and *Otto v. City of Boca Raton* actually defanged—or, at least, weakened—the First Amendment's power when it is deployed to challenge laws regulating the seemingly low-value speech of both revenge pornography and SOCE. In doing so, these courts greased the legal skids for upholding the measures by ratcheting down the level of review.

Notably, the courts in these disputes navigated routes that bypassed *Reed v. Town of Gilbert*'s mandate that facially content-based laws must clear strict scrutiny to be constitutional, regardless of a benign legislative motive.<sup>351</sup> In *Austin*, the Supreme Court of Illinois determined that intermediate scrutiny controlled by ignoring *Reed* and, in its place, turned to: (1) *Ward v. Rock Against Racism* for the pre-*Reed* rule that the governmental purpose and intent underlying a law determines if it is content

347. *Id.* at 2383.

348. As Dean Erwin Chemerinsky and Professor Michele Goodwin explain:

In *Janus v. American Federation*, Justice Elena Kagan in dissent spoke of the Court "weaponizing the First Amendment." She was referring to conservatives turning to the First Amendment to strike down economic and social regulations that they don't like. That is exactly what happened in *NIFLA v. Becerra*: A Court majority that is hostile to reproductive rights used the First Amendment to invalidate a law that clearly should have been upheld.

Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 124 (2019) (footnote omitted).

349. Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 504 (2019); see *Lochner v. New York*, 198 U.S. 45, 61 (1905) (concluding that an individual's liberty and freedom of contract trumped the government's police power to enforce, in the interest of public health, a labor law limiting the number of hours per week that bakers could work); see also Richard Blum, *Labor Picketing, the Right to Protest, and the Neoliberal First Amendment*, 42 N.Y.U. REV. L. & SOC. CHANGE 595, 600 (2019) (noting under *Lochner*'s "discredited approach[,] . . . the government was generally prohibited from regulating commercial activity"); Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1331 (2019) ("[T]he *Lochner* era is conventionally (and sometimes nostalgically) associated with notions of limited government and laissez-faire . . . ." (footnote omitted)).

350. Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. CIN. L. REV. 959, 962 (2019). This approach is also sometimes referred to as First Amendment libertarianism, under which attorneys "seek to use the First Amendment as a deregulatory tool to invalidate various compulsory laws such as label requirements, antidiscrimination restrictions, or healthcare mandates." Nikolas Bowie, *The Government-Could-Not-Work Doctrine*, 105 VA. L. REV. 1, 6 (2019).

351. See *supra* notes 13–15 and accompanying text (describing this aspect of the holding in *Reed*).

based or content neutral, (2) the secondary effects doctrine, which the U.S. Supreme Court has narrowly limited to laws regulating the location of and activities inside of sexually oriented businesses, and (3) a dichotomy separating laws that regulate private speech from those that restrict expression on matters of public concern.<sup>352</sup> This Article exposed problems with the high court of Illinois's approach to scrutiny under all three of these gambits.<sup>353</sup>

In *Doyle*, a federal district court in Maryland held that intermediate scrutiny was appropriate for measuring the validity of a statewide anti-SOCE statute, while in *Otto*, a federal district court in Florida also suggested—albeit, without definitively resolving—that intermediate scrutiny was applicable for analyzing two local anti-SOCE ordinances.<sup>354</sup> The workarounds for *Reed* in these cases pivoted on several variables. They included: (1) the fact that the laws regulated speech only in a limited context where it took on the form of a treatment, thereby pushing it closer to the conduct end of the continuum between expression and action; (2) the notion that the laws regulated the speech of licensed professionals speaking within their professional capacities; (3) reliance in *Otto* on the Supreme Court's ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*; and (4) consideration in *Otto* of whether the ordinances negatively affected the traditional First Amendment goal of safeguarding a diverse public marketplace of ideas.

Finally, the Article contended that rather than engage in such questionable machinations as the courts did in *Austin*, *Doyle*, and *Otto*, judges confronting content-based laws that regulate new categories of speech—ones lacking a long history of regulation and punishment in the United States and therefore ones that cannot easily be positioned outside the ambit of First Amendment protection under the Supreme Court's logic in *United States v. Stevens*<sup>355</sup>—that appear to be of negligible value in serving traditional First Amendment interests should embrace Justice Breyer's proportionality approach to scrutiny. Justice Breyer's approach, as described in Part V, takes into account the First Amendment values and interests served by protecting the speech in question, with the level of scrutiny fluctuating depending on whether core First Amendment interests are imperiled by the legislation.<sup>356</sup> It weighs the harms, if any, wrought to those fundamental values and interests by censoring the speech against the benefits to society reaped by suppressing it.

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352. See *supra* Section IV.A (addressing and critiquing the Supreme Court of Illinois's analysis of the scrutiny issue in *People v. Austin*).

353. See *supra* Section IV.A (addressing and critiquing the Supreme Court of Illinois's analysis of the scrutiny issue in *People v. Austin*).

354. See *supra* Section IV.B.1–2 (addressing and critiquing the federal district court decisions in both *Doyle v. Hogan* and *Otto v. City of Boca Raton*).

355. See *supra* notes 36–47 and accompanying text (addressing *Stevens* and how it has been interpreted by scholars).

356. See *supra* Part V.

Ultimately, lower-court embracement of Justice Breyer's proportionality approach to judicial review as a mechanism for evading strict scrutiny—especially in a dispute implicating a hot-button topic such as revenge pornography or SOCE—when the speech both lacks historical regulation and is of low value in serving core First Amendment interests might well tee up for possible Supreme Court reconsideration *Reed*'s mandate that facially content-based laws must overcome strict scrutiny. Justice Breyer's long-standing endorsement of proportionality, when coupled with the concerns in *Janus* and *Becerra* of the Court's two other remaining liberal Justices that heightened scrutiny is being unnecessarily deployed by the Court's conservative members to attack economic and social legislation, indicates that mustering the requisite four votes to hear such a case may be feasible if just one conservative justice agrees to join them.<sup>357</sup> Granting a petition for a writ of certiorari in such a case would not only afford the Court an opportunity to reexamine *Reed* but also present it with the chance to address a larger, more profound question. That macro-level question is whether the Court's current categorical, tiers-of-scrutiny formula in First Amendment speech cases should be scrapped and supplanted by the more fluid, proportionality methodology for which Justice Breyer long has advocated.

Until the Court revisits *Reed* and its categorial approach, however, one might reasonably expect to see more courts follow in the footsteps of the Supreme Court of Illinois in *People v. Austin* and create their own precedent-flouting workarounds for strict scrutiny in low-value speech cases. The path for escaping the doctrinal lockboxes of *Stevens* and *Reed* in order to ease the constitutional burden on regulating low-value speech better rests in Justice Breyer's values-and-interests approach than in inventing questionable mechanisms in cases such as *Austin*.

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357. Justice Ginsburg's death in September 2020 left Justices Breyer, Sotomayor, and Kagan as the remaining liberals on the Court as of late 2020. Four justices must agree to hear a case for a petition for a writ of certiorari to be granted. See Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1073 (1988) (“[T]he Rule of Four means that the Court will grant certiorari whenever four Justices vote to do so . . . .”); Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?*, 36 SUFFOLK U. L. REV. 1, 12 (2002) (“When four Justices vote to review a case, all nine of the Justices are required to consider its merits absent any intervening factors that were not known or appreciated at the time the petition was granted.”).