

# Duquesne Law Review

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Volume 59  
Number 1 *A Century Since Suffrage: How Did  
We Get Here? Where Will We Go? How Will We  
Get There?*

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Article 5

2021

## Protecting Women's Rights by Keeping Religious Liberty in Its Lane

Leslie Gielow Jacobs

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# Protecting Women’s Rights by Keeping Religious Liberty in Its Lane

*Leslie Gielow Jacobs\**

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## INTRODUCTION

Women have acquired substantial rights under the Constitution interpreted by the federal courts.<sup>1</sup> These include the right to be

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1. I delivered the talk, which became this paper, on a panel focused on women’s rights. Most of what I have to say about existing doctrine, and the impact of doctrinal changes on women’s rights, applies more generally to the rights of historically disadvantaged minorities and other groups with less power than others in the private ordering.

treated the same as men under the Equal Protection Clause<sup>2</sup> and the right to make certain intimate and reproductive choices under the Due Process Clause.<sup>3</sup> But the federal courts are no longer a hospitable environment in which to argue to expand women's rights.<sup>4</sup> The Court has always limited the scope of the equal protection guarantee to prohibit only purposefully equal treatment by the government.<sup>5</sup> Now, the Court may be inclined to contract its interpretation of Congress's power to choose to implement a broader equality right for women, or for other historically disadvantaged minorities.<sup>6</sup> Existing interpretations of the scope of intimate and reproductive rights guaranteed by the Constitution are in danger.<sup>7</sup> Recent statutory interpretations expand the rights of employers to

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2. See *United States v. Virginia*, 518 U.S. 515 (1996) (holding that women must be admitted to Virginia Military Institute according to the same qualification criteria that apply to men); *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (holding that sex-based classifications are subject to heightened, intermediate scrutiny).

3. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (re-affirming a constitutional right to choose abortion prior to viability); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a state may not criminalize abortion prior to viability); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a state may not criminalize use of contraceptives by married women).

4. Many women choose to align their lives and identities according to religious beliefs and to structure their conduct according to what those beliefs require. Many other women, however, do not choose religious beliefs as their source of meaning and identity or as their guide to what roles they should occupy, in private or in public, or to how they should otherwise behave. Women's rights protect the abilities of all women to believe what they choose and to structure their conduct to fulfill those beliefs. Because women choose to believe and behave in many different ways, religious beliefs, and the conduct they mandate or forbid, when enacted into law or interpreted to define the scope of a constitutional rights guarantee, restrict the rights of women as a class.

5. See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 271–73 (1979) (upholding a Massachusetts statute preferring veterans against an equal protection claim that the statute discriminated against the female plaintiffs based on their sex); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (rejecting “the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact”).

6. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015) (upholding authority of Congress to create disparate impact liability in housing law, with Justice Kennedy, who has now been replaced by Justice Kavanaugh, providing the fifth vote); *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (warning of a coming “war between disparate impact and equal protection”); *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urb. Dev.*, 639 F.3d 1078 (D.C. Cir. 2011) (rejecting disparate impact liability, with Judge Kavanaugh joining the majority opinion).

7. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring) (joining the majority holding that the abortion restrictions are invalid, but rejecting the balancing test set out by the Court in *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)); see also *June Med. Servs. L.L.C.*, 140 S. Ct. at 2142 (Thomas, Alito, Gorsuch, and Kavanaugh, J., dissenting) (arguing, inter alia, that abortion providers lack standing to assert women's rights).

avoid complying with laws expanding their employees' reproductive rights.<sup>8</sup>

Now, the Court's interpretations are expanding the scopes of the First Amendment speech and religious liberty rights.<sup>9</sup> The Constitution's individual rights guarantees are not absolute. In its determination of the scope of an individual right, the Court must necessarily interpret a balance between the individual's right to assert it and the power of democratically elected officials and bodies to implement policy choices, which balance the many individual and public rights impacted in an interaction differently. As the scope of individual rights expand, the authority of democratically elected officials and entities to regulate the individual conduct protected by the rights guarantee contracts. With respect to the First Amendment rights of speech and religious liberty specifically, the Court's expanding interpretations of their scopes contract the power of democratically elected entities at all government levels to enact and administer laws that adjust private market power relations for the purpose of implementing various forms of civil rights guarantees.<sup>10</sup>

The shift in interpretation threatens women's ability to retain and expand democratically enacted rights.<sup>11</sup> But a direct assault on the changing doctrine is unlikely to succeed. No Archimedean point exists from which to argue the fundamental soundness of the

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8. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (holding that the Affordable Care Act authorized the Health Resources and Services Administration to grant exemptions to employers with religious or moral objections to providing no-cost contraceptive coverage to their employees); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that the federal Religious Freedom Restoration Act exempted "closely held" for-profit corporations from the obligation to provide employees with contraceptive coverage under the Affordable Care Act).

9. See Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 197–98 (2018) (describing the Court's decision in *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018), as "cement[ing] the Roberts Court as the most libertarian in our nation's history on free-speech issues"); Linda Greenhouse, *The Many Dimensions of the Chief Justice's Triumphant Term*, N.Y. TIMES (July 16, 2020), <https://nyti.ms/32nTaML> (observing Chief Justice Roberts' "project" of expanding religious liberty rights and commenting, as to three religion cases in the 2019 Term, that they "went considerably further than they needed to, each one taking and running with one of the [C]ourt's recent applicable precedents").

10. See Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) ("It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation."); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1453–55 (2015) (comparing Free Exercise doctrine to the "ideal of private ordering and the resistance to redistribution" found in the "widely criticized use of freedom of contract to strike down economic regulation at the turn of the last century").

11. Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2230 (2018) (observing that victims of the free speech expansion include "proponents of campaign finance reform, opponents of cigarette addiction, the LGBTQ community, labor unions, animal-rights advocates, environmentalists, targets of hate speech, and abortion providers").

balance between the exercise of democratic power and individuals' power to avoid it that the Court interprets into the expanding rights, or the specific methods of interpretation it employs. For many of us, the pedigree of Court composition, conferred by neutral rules of procedure, consistently applied, no longer exists either.<sup>12</sup> Still, the Court must be concerned about some version of legitimacy, which distinguishes its interpretations from political decision making.<sup>13</sup> What remains, in the interpretation of the expanding First Amendment rights, is the legitimacy that may be obtained by consistent application of core methodologies for articulating and applying rules and for evaluating evidence.<sup>14</sup>

The longstanding doctrine of women's rights under the Equal Protection Clause reveals these methodologies.<sup>15</sup> Courts of changing compositions over decades have articulated and embraced the doctrine of women's equal protection rights.<sup>16</sup> Its core methodologies transcend the particular choices of weight between individual rights and government authority, and among interpretive methodologies. One element of the core methodology stems from the struggle to change the Court's interpretation of the scope of women's right to equal protection from what it was according to tradition and history, and what it had to be to implement the enduring constitutional principle in altered social and economic circumstances.<sup>17</sup> This is that religious belief, and the conduct it requires or condemns, does not determine the scope of individual conduct protected by a rights guarantee not aimed explicitly at protecting religious liberty.

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12. The rules do not state whether a President's nominee should receive a hearing and be confirmed during an election year, but whatever the rule is, the Senate must apply it consistently. See U.S. CONST. art. II, § 2, cl. 2 (entrusting the Senate with the duty to confirm Supreme Court nominees); U.S. CONST. art. I, § 5, cl. 2 (conferring discretion on the Senate to make its own rules, subject to the unwritten norm that the rules be consistently applied). *But see* Carl Hulse, *For McConnell, Ginsburg's Death Prompts Stark Turnabout from 2016 Stance*, N.Y. TIMES, <https://www.nytimes.com/2020/09/18/us/mitch-mcconnell-rbg-trump.html> (Nov. 3, 2020) (comparing approaches to the nominations of Chief Judge Merrick Garland and Justice Amy Coney Barrett).

13. *Obergefell v. Hodges*, 576 U.S. 644, 708 (2015) (Roberts, C.J., dissenting) ("The legitimacy of th[e] Court ultimately rests 'upon the respect accorded to its judgments.' . . . [which] flows from the perception—and reality—that [the Court] exercise[s] humility and restraint in deciding cases according to the Constitution and law.") (citation omitted).

14. See *infra* Part II (examining the Court's consistency in expanding interpretations of the First Amendment rights).

15. See *Reed v. Reed*, 404 U.S. 71 (1971) (initiating a change in doctrine in the early 1970s by holding that the equal protection guarantee prohibited a state from using sex as a classification to qualify estate administrators).

16. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017); *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

17. *Morales-Santana*, 137 S. Ct. at 1693 (holding that laws that allocate benefits according to "stereotypes about women's domestic roles" violate the equal protection principle).

The second element is evidentiary. By the Court's interpretation, equal protection of the laws means equal treatment by the government according to protected traits. A developed methodology exists for evaluating evidence to determine whether government actions disadvantage women because they are women, or because of an overlapping characteristic, which dissolves an inference of discriminatory purpose. A finding of discriminatory purpose to disadvantage individuals because they exhibit a protected trait plays the same critical role of shifting the balance between individual rights and government authority in particular applications under the free speech and religious liberty guarantees.

We can use both of these elements of methodology to examine the consistency of the Court's expanding interpretations of the First Amendment rights with the structure that defines the scope of women's constitutional rights. Part I provides brief background. Section I.A. describes the evolution of women's equal protection rights and the core methodologies embedded in the Court's reasoning and evaluations of evidence. Section I.B. sets out the doctrine that defines the expanding scope of the free speech and religious liberty rights. Part II uses the example of the Court's recent decision in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*)<sup>18</sup> to examine the consistency of the Court's expanding interpretations of the First Amendment rights with the structure that defines the scope of women's constitutional rights. Section II.A. describes the doctrinal dilemma posed by the facts and the Court's resolution. Section II.B. examines the reasons offered by the Court for its critical doctrinal distinction between licensed professional client counseling at pregnancy centers and other types of speech that the government may regulate more extensively and identifies the creep of religious belief into the definition of the scope of the free speech right. Section II.C. identifies inconsistencies in the Court's evaluation of evidence of discriminatory purpose when religiously motivated speakers challenge official action with the methodology that limits the scope of women's equal protection rights. These seemingly skewed evaluations of official motivations not only advantage the claims of individuals asserting the expanding rights, but threaten to chill criticism by official decision makers of religiously motivated conduct, which harms women or others and for that reason violates public policies, by presenting or construing statements criticizing the conduct and its harmful consequences as expressions to discriminate because of the religious motivation.

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18. 138 S. Ct. 2361 (2018).

## I. THE METHODOLOGY AND DOCTRINE OF CONSTITUTIONAL RIGHTS

The Court uses a common methodology to interpret the scope of individual rights. The guarantees within the Constitution's rights can appear absolute. But they cannot possibly be. Government actions abridge individuals' liberty to act in countless ways, which implicate the constitutional rights guarantees. The primary realm established by the Constitution for balancing individual interests is the political process. The Court's interpretation of the scope of an individual right necessarily balances the individual interest in absolute freedom of action with democratic government's authority and responsibility to balance the many rights held by members of its electorate differently. By means of distinctions among circumstances where an individual's exercise of a right and a government action conflict, the Court determines levels of the rigor of judicial review of the justification for the government's action. These distinctions and the levels of judicial review they invoke form the doctrine, which defines the scope of the right. Circumstances that pose a high danger that the government's action violates the core protection of a rights guarantee provoke strict judicial scrutiny of the government's explanation for its action, while circumstances that do not provoke a lower level of review. The Court must find the distinctions among circumstances that it interprets into doctrine by tracing them to implementing the core principles that underpin the rights guarantee. When the Court changes the distinctions that mark the balance between the scope of the rights-holder and the government's authority to regulate, it must do so according to this same methodology that legitimates the newly found distinction as an act of interpretation rather than of judicial will.

### A. *Equal Protection*

The development of the doctrine of women's equal protection rights illustrates and adds nuance to the common methodology of interpreting the scope of individual rights. The first nuance exists when the Court interprets the key distinctions that determine the level of judicial review into doctrine. The Equal Protection Clause demands "equal protection" of all "persons" within a jurisdiction, but the doctrine has always hinged on distinctions among groups according to their characteristics. The Court cannot carefully review all the many classifications in law, and should not, because the Constitution commits those policy decisions to the democratic

process. So, by means of levels of review, the Court has segregated the classifications into those that presumptively violate the core principles of the Equal Protection Clause and those that do not. The history of the Equal Protection Clause shows an intent by those who wrote and ratified it to protect former slaves, so from the beginning of its interpretation, the Court distinguished legal classifications that disadvantaged that group from other types of classifications.<sup>19</sup> The Court quickly generalized this protection to all types of racial classifications and reviews them under strict scrutiny.<sup>20</sup>

It took a century after the Equal Protection Clause became a part of the Constitution, and fifty years after women got the right to vote, for the Court to interpret it to require equal treatment of men and women.<sup>21</sup> Sex classifications did not appear as presumptively violating Equal Protection Clause principles at the time the amendment became a part of the Constitution.<sup>22</sup> Instead, these classifications reflected widespread attitudes about the different roles of women and men in society, differences that the Court viewed as normal and natural, and so within the discretion of democratically elected governments to implement through law.<sup>23</sup> The Court changed the doctrine of the Equal Protection Clause, raising the level of review of sex-based classifications, when it came to view these classifications as “arbitrary,” rather than grounded in differences that relate sufficiently to fulfilling public purposes.<sup>24</sup>

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19. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (stating that the aim of the Equal Protection Clause was “against discrimination because of race or color,” not against distinctions based on such attributes as sex, land ownership, age, or educational qualifications).

20. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese race and ancestry); *see also Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying “the most rigid scrutiny” to a classification based on Japanese ancestry, although upholding it).

21. The Fourteenth Amendment, which contains the Equal Protection Clause, was ratified in 1868. U.S. CONST. amend. XIV. The Nineteenth Amendment, which granted women the right to vote, was ratified in 1920. U.S. CONST. amend. XIX. The Court began its interpretation of a right to equal treatment for women into the Equal Protection Clause in *Reed v. Reed*, 404 U.S. 71 (1971).

22. *See The Originalist*, CAL. LAW. (Jan. 2011), [https://podcast.uctv.tv/webdocuments/legally-speaking/11\\_01LegallySpeaking\\_Scalia.pdf](https://podcast.uctv.tv/webdocuments/legally-speaking/11_01LegallySpeaking_Scalia.pdf) (quoting Justice Scalia as remarking: “Nobody ever thought that [prohibiting sex discrimination is what the Equal Protection Clause] meant. Nobody ever voted for that.”).

23. *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (upholding a state law requiring women to opt in to jury service, observing that a “woman is still regarded as the center of home and family life”).

24. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”).



In changing the significance of the sex distinction in doctrine from what it had been, the Court followed the common methodology of tracing the newly located distinction to implementing the core equal protection right. Distinctions based on sex, a four-justice plurality explained, in many relevant ways resembled the race distinctions, which the clause was clearly intended to eliminate.<sup>25</sup> To make this change, the Court had to reject “archaic and overbroad” generalizations about the relative economic situations of men and women, and “outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas’” as determinative of the relevance of the sex trait to implementing the equal protection guarantee.<sup>26</sup> In a long series of opinions, the Court reiterated that stereotypes, old notions, and traditional ways of understanding the socially appropriate roles of men and women<sup>27</sup> do not determine the scope of the constitutional right when the circumstances to which the Court must apply the core principle that drives the right have changed.<sup>28</sup>

These traditional ideas about the appropriate role and conduct of women very often stem from, and mirror, religious beliefs.<sup>29</sup> So, the rejection of old ideas as guides to the scope of application of the equal protection guarantee is a rejection of religious beliefs about appropriate individual conduct as determinative when interpreting the scope of the constitutional right. This recognition that religious beliefs and practices do not determine the scope of individual

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25. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (comparing sex to race as “an immutable characteristic determined solely by the accident of birth,” and noting that neither slaves nor women could hold office, serve on juries, or bring suits in their own name for much of the nineteenth century).

26. *Craig*, 429 U.S. at 198–99 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)) (first citing *Frontiero*, 411 U.S. at 689 n.23; and then citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975)).

27. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (noting that the law before it “date[s] from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are”); *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (rejecting laws based on “[s]tereotypes about women’s domestic roles”).

28. *Morales-Santana*, 137 S. Ct. at 1690 (“[N]ew insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.”) (alteration in original).

29. *See Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (reasoning that a restriction of public gatherings to ten people “might operate to exclude all women, considering [ten] men are necessary to establish a *minyán*, or a quorum” in the Orthodox Jewish community); *Stanton v. Stanton*, 421 U.S. 7 (1975) (invalidating a Utah law requiring parents to support men, but not women, past age eighteen); David Crary, *Women Strive for Larger Roles in Male-Dominated Religions*, ASSOCIATED PRESS (Jan. 14, 2019), <https://apnews.com/article/3dc6b0999bf04614b1de21863cbfdd66>; Tanya Riches & Mark Jennings, *Explainer: Why Some Churches Teach That Women Are ‘Separate but Equal’*, THE CONVERSATION, <https://theconversation.com/explainer-why-some-churches-teach-that-women-are-separate-but-equal-64305> (Dec. 21, 2016, 7:41 PM).

conduct protected by a rights guarantee other than religious liberty is apparent in the doctrine of the Due Process Clause as well.<sup>30</sup>

The second nuance of methodology that stems from interpretation of the equal protection guarantee involves the evidence sufficient to show that a government entity acted with a purpose to distinguish individuals according to protected traits in a particular case such that the Court presumes a constitutional violation and raises the level of scrutiny. The equality right that women and other minorities have achieved by means of dynamic interpretation of the equal protection guarantee is substantial. However, it is also substantially limited by the Court's doctrinal decision that the equal protection right refers to freedom from purposeful government action and does not include freedom from disproportionate harms imposed by laws on members of a protected class.<sup>31</sup> So, even an extraordinarily strong showing that a law disproportionately disadvantages a protected class, like women, is not enough, by itself, to cause the Court to review the law according to the standard that applies to explicit sex-based classifications.<sup>32</sup> Mere awareness by a government decision maker that a law's disadvantageous effect will fall dramatically disproportionately,<sup>33</sup> or even exclusively,<sup>34</sup> on women does not show a sufficient purpose if a valid public policy objective can explain the government's choice.<sup>35</sup> Sufficient evidence from the circumstances of the impact or of other types must show that the government "selected or reaffirmed a particular course of

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30. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (acknowledging that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises" but holding that "sincere, personal [beliefs]" violate the rights of other people when "enacted [into] law and public policy"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (acknowledging "beliefs" about the consequences of abortion "for the life . . . that is aborted" and the "vision" of woman as noble mother, which has been "dominant . . . in the course of our history and our culture," even as it distinguishes these determinants of difference from the norm appropriate to guide its interpretation of the scope of the constitutional liberty right, which is that government actions must preserve the same right for men and women to shape their destinies according to their own "conception[s] of [their] spiritual imperatives and [their] place[s] in society"); *Roe v. Wade*, 410 U.S. 113 (1973) (rejecting an interpretation that would find a fetus is a "person" with a constitutional life or liberty right); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating state ban on distribution of contraceptives to unmarried people); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state ban on the use of contraceptives).

31. See *Washington v. Davis*, 426 U.S. 229 (1976).

32. See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (refraining from applying heightened review to the exclusion of pregnancy from California's disability compensation program despite disadvantaging only women).

33. See *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979).

34. See *Aiello*, 417 U.S. 484 (1974) (exclusion of pregnancy from California's disability compensation program).

35. See *Feeney*, 442 U.S. 256 (rewarding veterans for their service); *Aiello*, 417 U.S. 484 (limiting disability payments to limit the amount of required contributions by employees and employers).

action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group” whose members exhibit a protected trait.<sup>36</sup> In rare instances, where no valid public purpose could explain a strong statistical showing of adverse impact, the Court has found administrative decisions targeting, or electoral districts drawn for the purpose to discriminate on the basis of, race.<sup>37</sup> But where a plausible purpose other than disadvantaging a protected class exists, a purpose to disadvantage individuals according to a protected trait, is very difficult to prove.<sup>38</sup> Seemingly, a showing based on impact alone must demonstrate that both the class benefited by the law and burdened by it are grouped according to the protected trait. So, a showing that the benefits of a law accrue almost exclusively to one class, like men, is not enough, if both men and women are in the disadvantaged class.<sup>39</sup> Similarly, a showing that the burdens of a law fall exclusively on one class, like women, is not enough, if not all women fall within the class that experiences the burden.<sup>40</sup> This very high evidentiary threshold for showing an unconstitutional purpose to discriminate on the basis of a protected trait substantially limits the scope of women’s equal protection right.

### *B. Free Speech*

Like the equal protection guarantee, the Court has qualified, by interpretation, the First Amendment’s seemingly absolute mandate that the government “make no law . . . abridging the freedom of speech . . . .”<sup>41</sup> The core distinction that identifies the meaning of the right stems from the Equal Protection Clause and segregates laws according to whether they depend for their application on the

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36. *Feeney*, 442 U.S. at 279.

37. *See* *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding a local act altering the shape of a city from a square to a twenty-eight-sided figure that removed all but a few of the 400 Black voters and no white voters constituted unconstitutional discrimination); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

38. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 465 (1996) (noting that to raise a prima facie case of race-based prosecution, it was not sufficient to show that all the defendants in crack cocaine cases were Black, defendant needed to provide evidence “that similarly situated individuals of a different race were not prosecuted”); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that a defendant must show that his decision maker acted with discriminatory purpose and so a detailed and inclusive statistical study showing Georgia jurors across a series of years consider race in imposing the death penalty was not sufficient to show that the jury that imposed defendant’s death sentence acted with this purpose).

39. *See Feeney*, 442 U.S. 256.

40. *See Aiello*, 417 U.S. 484.

41. U.S. CONST. amend. I.

content of the speech.<sup>42</sup> The content distinction identifies apparent government censorship of ideas, and thereby implements the core Free Speech Clause's purposes, which include facilitating citizen participation in the democratic process; ensuring an uninhibited marketplace in which speakers and listeners may exchange information, ideas, and opinions about the whole range of human activities; and promoting individual self-development.<sup>43</sup> The determination of whether a law is content-based or content-neutral determines the level of scrutiny the Court applies.<sup>44</sup> Content-based restrictions are "presumptively unconstitutional" and subject to strict scrutiny.<sup>45</sup> But the Court has interpreted many exceptions to this rule, when the circumstances of the individual speech and government regulation trace differently to implementing the core principles that explain the existence of the right.<sup>46</sup>

And the Court's interpretation of the identity and location of these distinctions has changed. In recent years, the Court has expanded the scope of laws it deems to discriminate according to content,<sup>47</sup> and viewpoint,<sup>48</sup> and are therefore subject to the most rigorous judicial scrutiny. The Court identified viewpoint discrimination as "an egregious form of content discrimination" in the circumstances of a public university, which excluded publications proselytizing religion from distribution from a student activities fund otherwise generally available to publications by student groups.<sup>49</sup> "The government must abstain from regulating speech when the

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42. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (holding a sign ordinance limiting size, duration, and location of temporary signs directing the public toward events loosely defined as a meeting of a nonprofit group violated free speech rights); *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (holding that a city ordinance prohibiting all picketing within 150 feet of a school made an unconstitutional exemption for peaceful labor picketing but not all forms of peaceful picketing).

43. See *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534–35 (1980); C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

44. *Gilbert*, 576 U.S. at 163.

45. *Id.* The Court continues to apply a lower level of scrutiny to some scope of commercial speech. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744 (2017).

46. See *Tam*, 137 S. Ct. at 1765 (Kennedy, J., concurring in part and concurring in the judgment) ("Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition."); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (setting out the types of forums and the different rules that apply to regulations of speech in them).

47. *Gilbert*, 576 U.S. at 162 (holding that a law that distinguishes according to the content of directional signs is subject to strict scrutiny).

48. *Tam*, 137 S. Ct. 1744 (holding that a law prohibiting issuing a trademark to content that disparages individuals or groups according to certain traits is viewpoint-based).

49. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 825, 829 (1995) (university excluded funding for "religious activit[ies]" defined as those that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality") (alteration in original).

specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction,” the Court explained.<sup>50</sup> The Court has interpreted laws penalizing speech critical of religious beliefs, institutions, and practices as viewpoint-based and subject to strict scrutiny as well.<sup>51</sup>

The Court has expanded its interpretations of the constitutional protection for commercial speech and other speech by corporations and actors in the commercial marketplace. It has held, and expanded upon holdings, that payment of money to produce speech is fully protected as speech;<sup>52</sup> that corporations have the same speech rights as individuals;<sup>53</sup> and that commercial speech should, in increasing types of instances, receive the same level of constitutional protection as public issue speech.<sup>54</sup> These latter expansions build on a changed interpretation of the level of constitutional protection for commercial speech articulated by the Court in the mid-1970s.<sup>55</sup> At that time, the Court distinguished regulation of commercial speech from regulation of other types of speech, which provokes strict scrutiny.<sup>56</sup> The value of commercial and corporate speech, the Court explained back then, stems primarily from its value to listeners.<sup>57</sup> More recently, the Court has merged the interests of listeners with full protection of corporate speakers when linking its

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50. *Id.* at 829.

51. *Snyder v. Phelps*, 562 U.S. 443 (2011) (invalidating intentional infliction of emotional distress conviction for speakers criticizing, among other things, the conduct of officials within the Catholic Church); *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940) (holding breach of the peace conviction unconstitutional applied to speaker attacking “all organized religious systems as instruments of Satan,” and “singl[ing] out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows”).

52. *Buckley v. Valeo*, 424 U.S. 1 (1976).

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

54. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 158 (2010) (“[C]orporate speakers soon became the principal beneficiaries of [the Court’s holding that the Constitution protects commercial speech].”).

55. *Va. State Bd. of Pharmacy*, 425 U.S. 748 (1976) (finding a strong interest in the “free flow of commercial information”).

56. *Id.* at 771 n.24 (finding “commonsense differences” between commercial speech and other types, which “suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired”).

57. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”); *Va. State Bd. of Pharmacy*, 425 U.S. at 766 (listing the “substantial individual and societal interests” that support constitutional protection for commercial speech).

expanding interpretations of the right to implementing constitutional principles.<sup>58</sup>

The same strict scrutiny that applies to content-based speech restrictions applies to content-based compulsions that individuals include messages mandated by the government in their speech. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,” the Court emphasized as it invalidated a flag salute imposed on a school child whose parents’ religious beliefs forbade the conduct.<sup>59</sup> A “Live Free or Die” license plate motto forced upon a driver who found the message “morally, ethically, religiously and politically abhorrent” fared no better.<sup>60</sup> “A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts,” the Court explained, and the difference between an active flag salute, and passive display of the motto, was merely “one of degree.”<sup>61</sup> The license plate-display requirement, like the salute, “forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”<sup>62</sup> The Court has invalidated other government mandates that individuals deliver or affirm ideological messages.<sup>63</sup>

The Court has, however, distinguished certain types of information-delivery requirements imposed on product and service providers, holding that a lower level of judicial review applies and, therefore, that democratically elected bodies have greater constitutional authority to impose them for the purpose of achieving public purposes. Soon after raising the constitutional protection for commercial speech, the Court in *Zauderer v. Office of Disciplinary*

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58. *Citizens United*, 558 U.S. at 340–41 (“[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”).

59. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

60. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

61. *Id.* at 714–15.

62. *Id.* at 715.

63. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013) (statement of opposition to prostitution); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995) (including a gay contingent in a privately organized parade); *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (speech opposing newspaper editors’ viewpoints); *W. Va. State Bd. of Educ.*, 319 U.S. 624 (child in school required to salute the flag).

*Counsel* upheld the constitutionality of a state disciplinary rule requiring any attorney advertisement that mentioned contingent fee rates to disclose that clients might still be required to pay litigation costs.<sup>64</sup> It interpreted a distinction between speech compulsions imposed on public issue and commercial speech,<sup>65</sup> and between regulations that restrict commercial speech and those that require disclosure of additional information.<sup>66</sup> The Court described the state rule as requiring that advertisements include “purely factual and uncontroversial information about the terms under which . . . services will be available.”<sup>67</sup> Linking the distinction to constitutional principle, the Court noted “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [so] appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”<sup>68</sup> In recent years, and in tandem with the Court’s interpretations applying “heightened scrutiny” to an expanding scope of commercial speech restrictions,<sup>69</sup> corporate litigants have aggressively—and frequently successfully—litigated to narrow application of the *Zauderer* exception.<sup>70</sup> But still, the exception remains, along with the reality that legislative bodies and government agencies impose a wide variety of information-delivery requirements on product and service vendors.<sup>71</sup>

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64. 471 U.S. 626 (1985).

65. *Id.* at 637 (observing that “commercial speech’ is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded ‘noncommercial speech’”).

66. *Id.* at 650–53 (rejecting the attorney’s argument that “precisely the same inquiry as determining the validity of . . . restrictions on advertising content” should apply to determine the constitutionality of the disclosure requirement).

67. *Id.* at 651.

68. *Id.* (citation omitted). The Court also noted that “because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, ‘warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.” *Id.* (alterations in original). Without clearly identifying a level of review, the Court noted that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech,” but that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.” *Id.*

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

70. Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://nyti.ms/2ID0Wov> (“[B]usinesses mount[ed] First Amendment challenges to gun control laws, securities regulations, country-of-origin labels, graphic cigarette warnings and limits on off-label drug marketing.”).

71. Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2376 (2018) (“[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”); Fredrik Gronkvist,

A plurality of the Court articulated the other exception, somewhat offhandedly, in the context of state-mandated information disclosure to clients by abortion providers. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality addressed the constitutionality of a state requirement that abortion providers inform their patients of “the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child,’” as well as the availability of printed material prepared by the State, which provided information about the fetus and assistance available to support raising a child.<sup>72</sup> The plurality addressed two claims with respect to the information-delivery requirement. The first was whether it violated the new “undue burden” standard the plurality interpreted as marking a violation of the woman’s right to choose the procedure. In determining that the disclosure requirements at issue did not do so, the plurality explicitly rejected prior Court holdings that only a purpose to protect women’s health could support required disclosure. It held that states may select information and mandate disclosure for the purpose of protecting fetal life and “to persuade her to choose childbirth over abortion,” at least so long as the information required to be presented is “truthful and not misleading.”<sup>73</sup>

The *Casey* plurality only briefly addressed the abortion providers’ claim that the mandated disclosures violated their Free Speech Clause rights. “[T]he physician’s First Amendment rights not to speak are implicated,” it reasoned, “but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . .”<sup>74</sup> The reference to states’ power to license and regulate medical professionals, although conclusory, identifies the same type of doctrinal distinction as more fully explicated in *Zauderer* between circumstances in which the Constitution commands that speakers’ rights to speak without restraint prevail and those where the Constitution permits democratically elected bodies to choose to implement a different balance of interests between speakers and listeners for the purpose of protecting the health, safety, and welfare of their citizenry, as determined through their political processes. For decades, states with democratically elected majorities that oppose abortion have relied on the discretion the *Casey* exception interprets to enforce many different types of information-

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*United States Product Labeling Requirements: An Overview*, COMPLIANCEGATE (Dec. 16, 2020), <https://www.compliancegate.com/united-states-product-labeling-requirements/>.

72. 505 U.S. 833, 881 (1992).

73. *Id.* at 877–79, 882.

74. *Id.* at 884 (citation omitted).



disclosure requirements for the purpose of persuading women not to choose abortion, which makes women's access to the procedure more time-consuming, cumbersome, and expensive.<sup>75</sup>

### C. *Religious Liberty*

The Constitution contains two religious liberty guarantees. The government may “make no law” either “respecting the establishment of religion” or “prohibiting the free exercise thereof . . . .”<sup>76</sup> The Establishment Clause limits the assistance governments may provide to religious entities generally or to particular religious sects. The Free Exercise Clause limits the extent to which laws may restrict religious practice. As with the other provisions, “no law” does not mean that governments must avoid assisting or disadvantaging religion or those who practice it. Instead, reflecting the common methodology, the Court has interpreted key distinctions into the doctrine. These distinctions implement the balance between rights-holders and government authority by separating circumstances of aid and burden to religion into those that presumptively violate core principles and those that do not, and thereby establishing levels of judicial review. The doctrine of the two clauses is complex and in flux.<sup>77</sup> Over the past few decades, and at an accelerating pace, the Court has expanded religious liberty rights by means of changing interpretations of the scope of both clauses. At this time, the core distinction between equal, or “neutral,” treatment and unequal, or discriminatory, treatment of religion by the government when distributing benefits and burdens unites the two sides of the doctrine.

By application of the equal treatment distinction, the Court has contracted the scope of acts of government assistance that violate the Establishment Clause. Increasingly, the equal treatment distinction hinges on a showing that the government acted with a purpose to aid religion akin to the “‘because of,’ not merely ‘in spite of’” showing required under the Equal Protection

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75. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> (Feb. 1, 2021).

76. U.S. CONST. amend. I.

77. See *Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020) (mem.) (presenting the question of whether to overrule *Emp’t Div. v. Smith*, 494 U.S. 872 (1990)); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (abandoning the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Am. Humanist Ass’n*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring) (identifying five paradigms of Establishment Clause cases unexplained by *Lemon*); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (overlapping both clauses when applying the “ministerial exception”).

Clause.<sup>78</sup> It used to be that the government could violate the anti-establishment mandate by providing various types of aid to religious entities, particularly religious schools.<sup>79</sup> Now, the apparent neutrality of the government assistance toward religious and non-religious entities determines its consistency with the anti-establishment mandate.<sup>80</sup> With monetary aid to religious groups, neither the amount, either absolute or by percentage, or the reality that some of it will fund religious proselytizing signal unconstitutionality.<sup>81</sup> A law may list religious entities specifically as recipients of largesse, so long as a secular purpose is evident from a list of beneficiaries, which includes more than exclusively religious entities.<sup>82</sup> Government use of religious symbols is increasingly permissible so long as the Court determines that the government does not act with a purpose to proselytize religion.<sup>83</sup>

Neutrality guides the Free Exercise Clause inquiry as well, rather than the weight of the burden on religious practice.<sup>84</sup> In *Employment Division v. Smith*, the Court articulated this reinterpretation of free exercise doctrine.<sup>85</sup> Laws that are neutral on their face, such as the drug law before it, do not threaten the principle of religious liberty contained within the clause, and so do not raise the

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78. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (describing the methodology for finding discriminatory purpose under the Free Exercise Clause, and quoting Justice Harlan, speaking in “the related context of the Establishment Clause,” to say that “[n]eutrality in its application requires an equal protection mode of analysis”) (alteration in original) (first citing *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979) (articulating the “because of,” not merely “in spite of” standard) and then citing *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

79. *E.g., Lemon*, 403 U.S. 602 (invalidating state salary supplements to teachers of secular subjects in religious schools).

80. *See, e.g., Am. Humanist Ass’n*, 139 S. Ct. at 2086–87; *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

81. *See, e.g., Zelman*, 536 U.S. 639 (upholding vouchers despite ninety-six percent of participants being enrolled in private religious schools); *Id.* at 665 (O’Connor, J., concurring) (noting that the absolute amount of aid provided by the school voucher program paled in comparison to the billions of dollars of aid that flow from the government to religious organizations through tax exemptions and other programs). *Compare Lemon*, 403 U.S. 602 (finding unconstitutional state salary supplements to teachers of secular subjects in private religious schools), *with Zelman*, 536 U.S. 639.

82. *Walz*, 397 U.S. at 666–67 (upholding state tax exemption for “property used exclusively for religious, educational or charitable purposes”). *But see Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (invalidating sales tax exemption exclusively for books and periodicals proselytizing religion).

83. *See Am. Humanist Ass’n*, 139 S. Ct. 2067 (upholding permanent display of thirty-two-foot high Latin cross memorializing World War I soldiers); *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

84. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993); *Emp’t Div. v. Smith*, 494 U.S. 872, 879–80 (1990).

85. 494 U.S. 872, 881 (1990) (distinguishing, rather than overruling, prior cases in which the Court had held that the Free Exercise Clause “bars application of a neutral, generally applicable law to religiously motivated action”).

level of judicial review.<sup>86</sup> A showing of purpose to regulate the conduct of individuals “only when they are engaged in [it] for religious reasons,” once again mirroring the Equal Protection Clause showing, is required.<sup>87</sup>

This distinction initially seemed to contract the scope of application of the Free Exercise Clause from prior doctrine under which a substantial burden on religious practice would raise the level of review.<sup>88</sup> Soon after *Smith*, however, the Court decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>89</sup> In that case, the Court held that a combination of several ordinances enacted by the City of Hialeah, which outlawed animal sacrifice, violated the free exercise rights of a Santeria church, which had recently moved into the area.<sup>90</sup> The ordinance, as enacted, prohibited animal “sacrifice,” but did not specifically mention religion.<sup>91</sup> Relying specifically on the equal protection definition of when a discriminatory purpose sufficient to lift the level of review exists, the Court examined the structure of the facially neutral ordinance, and other evidence, and found a purpose, on the part of the City of Hialeah, “to target animal sacrifice by Santeria worshippers because of its religious motivation.”<sup>92</sup> In so doing, the Court cautioned against “subtle departures from neutrality,’ . . . and ‘covert suppression of particular religious beliefs’”<sup>93</sup> and expressed a resolve to “survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”<sup>94</sup>

Increasingly, the rule of discriminatory purpose, which had seemed to contract the scope of the Free Exercise Clause, has become a tool of expansion as the Court locates an official purpose to target conduct because of its religious motivation in new circumstances. With respect to free exercise, it used to be that states could

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86. *Id.* at 886 (rejecting the “private right to ignore generally applicable laws,” which strict scrutiny based on only a substantial burden on religious practice would create, as “a constitutional anomaly”).

87. *Id.* at 877–78.

88. *Hobbie v. Unemployment Appeal Comm’n*, 480 U.S. 136 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

89. 508 U.S. 520.

90. *Id.* at 547.

91. *Id.* at 527.

92. *Id.* at 542; *see id.* at 540 (quoting *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979)) (“That the ordinances were enacted ‘because of,’ not merely ‘in spite of,’ their suppression of Santeria religious practice, . . . is revealed by the events preceding their enactment.”) (citation omitted); *see also id.* (finding guidance in equal protection cases to conduct the analysis into whether the city acted with discriminatory purpose and noting Establishment Clause analysis is a “related context”).

93. *Id.* at 534 (citation omitted) (first quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971); and then quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)).

94. *Id.* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

choose not to include tax dollar payments to promote religious activities.<sup>95</sup> Now, the Court has changed its interpretation to find the failure to include religious entities in a general aid program to show a purpose to discriminate.<sup>96</sup> It has found the failure to include religious schools in generally available aid programs to evidence a purpose to discriminate in violation of the Free Exercise Clause.<sup>97</sup>

Most recently, the Court has reviewed requests for emergency orders prohibiting application of restrictions imposed by state governors on religious exercise in response to the COVID-19 pandemic. Transmission of the virus at places of worship had proven to be a significant source of COVID-19 outbreaks.<sup>98</sup> The Court initially denied the requests in divided decisions<sup>99</sup> and then, in a similarly split decision, granted a request, finding that a set of New York restrictions were not “neutral because they single[d] out houses of worship for especially harsh treatment.”<sup>100</sup> The opinions in these cases show that four justices—and now the Court, after its composition has changed—would find a purpose to discriminate sufficient to invoke strict scrutiny and invalidate a particular restriction of religious practice based on a lesser evidentiary showing than the Court requires under the other rights guarantees.

Pandemic restrictions mention the activity of religious worship explicitly, but they group it with other secular activities. States explain the groupings as identifying categories of activities that pose similar risks of transmission of the disease. New York, for example, argued that religious gatherings posed a “super-spreader” potential greater than activities subject to lesser restrictions because of the distinct conduct that tends to characterize them.<sup>101</sup> The

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95. See *Locke v. Davey*, 540 U.S. 712 (2004) (holding that state refusal to fund a devotional theology instruction did not violate Free Exercise Clause).

96. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (determining that denial of church’s application for grant to purchase rubber playground surface violated the Free Exercise Clause).

97. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020).

98. Kate Conger et al., *Churches Were Eager to Reopen. Now They Are Confronting Coronavirus Cases.*, N.Y. TIMES, <https://nyti.ms/3iG8GJw> (July 10, 2020); Ryan Lizza & Renuka Rayasam, *Pence and the Power of Positive Thinking*, POLITICO (June 26, 2020, 7:00 PM), <https://www.politico.com/newsletters/politico-nightly-coronavirus-special-edition/2020/06/26/pence-and-the-power-of-positive-thinking-489656>.

99. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.).

100. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 66 (2020) (finding that, apart from direct evidence of motivation, the restrictions are not “neutral because they single out houses of worship for especially harsh treatment,” without distinguishing the conduct that occurs in the houses of worship from the religious motivation).

101. *Id.*; *Opposition to Application for Writ of Injunction at 22, Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020) (No. 20A87) (they “tend to involve large numbers of people from different households arriving simultaneously; congregating as an audience for an extended

states' explanations that their restrictions of places of worship are based upon the conduct that tends to occur at them, rather than the religious motivation for it, is at least plausible.<sup>102</sup> And a plausible explanation based in conduct for a disproportionate disadvantage placed by law on groups that exhibit protected traits<sup>103</sup>—or for explicit mention of such groups when receiving the benefit of legislation<sup>104</sup>—is all that is required to dispel an inference of an unconstitutional discriminatory purpose under the doctrine of the Equal Protection and Establishment Clauses, which is supposed to guide the Free Exercise determination as well. Instead, the justices second-guess the explanations for the differences in treatment of activities and interpret states' explicit choices to restrict religious worship services as a choice to aim at the religious motivation, rather than worshippers' conduct. Both of these moves are inconsistent with established methodology<sup>105</sup> and expand the scope of the Free Exercise Clause right. It may well be that the inconsistent labeling signals a change of interpretation of the core meaning of the free exercise guarantee from freedom from laws targeting conduct because of its religious motivation to freedom from laws placing a substantial burden on religious practice.<sup>106</sup> But until the Court changes the rule explicitly, it is important to recognize the inconsistency in locating a purpose to discriminate on the basis of a protected trait across the rights guarantees.

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period of time to talk, sing, or chant; and then leaving simultaneously—as well as the possibility that participants will mingle in close proximity throughout. . . . Particularly because COVID-19 may be spread by infected individuals who are not yet, or may never become, symptomatic, the aforementioned features combine to generate an unusually high likelihood that infected persons will be present, that they will expel respiratory droplets and aerosols in close proximity to others and infect them, and that those newly-infected persons will further spread the virus after they disperse and go their separate ways”).

102. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (finding California's restrictions consistent with the Free Exercise Clause of the First Amendment despite placing restrictions on places of worship, “[s]imilar or more severe restrictions apply to comparable secular gatherings, . . . [a]nd the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.”).

103. *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

104. *See Walz v. Tax Comm'n.*, 397 U.S. 664 (1970).

105. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1615 (Kavanaugh, J., joined by Thomas, J., and Gorsuch, J., dissenting) (arguing the state “may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship”); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (mem.) (Alito, J., dissenting from denial of application for injunctive relief) (describing Nevada Governor Sisolak's directive to prevent the spread of COVID as “discriminatory treatment of houses of worship [and] violat[ing] the First Amendment”).

106. *See Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020) (mem.) (presenting the question of whether to reconsider *Smith*).

## II. ANALYZING A RECENT EXPANSION

In *NIFLA*, the Court held that a requirement, enacted by the California Legislature, that licensed medical facilities that provide limited pregnancy services post a notice informing clients that the state provides full services, including abortion, unconstitutionally compelled the facilities, which were primarily religiously affiliated and ideologically opposed to abortion, to speak.<sup>107</sup> This recent expansion shifts the balance between rights-holders and the authority of democratically elected bodies to regulate in ways that will contract the abilities of those democratically elected bodies to choose to provide consumers more information to aid their decision making in all sorts of contexts where speakers communicate with clients or potential clients about products or services.<sup>108</sup> Additionally, however, the recent result, and its reasoning, expands the rights of speakers motivated by religious belief and contracts the ability of democratically elected governments to implement a different policy choice as to the appropriate balance of power between speaker and listener, one crafted specifically, in the case before the Court, to protect women's rights. The overlap of free speech, religious liberty, and women's rights provides an opportunity to identify the strands of each in the decision, and to examine how they do, and should or should not, intersect. The Court identified and changed key distinctions in doctrine and also suggested strongly that the evidence was sufficient to show a government purpose to discriminate against the speakers because of their viewpoints. The opinion thus provides a vehicle to analyze the consistency of its methodology for identifying and changing key distinctions in doctrine and its evaluation of evidence sufficient to show a purpose to discriminate with the methodologies applied to make similar determinations regarding other constitutional rights, and to identify the possible creep of priority protection for religiously motivated conduct, which characterizes the free exercise right, into the interpretation of the scope of the free speech guarantee.

A. *National Institute of Family & Life Advocates v. Becerra*<sup>109</sup>

Crisis pregnancy centers, or, according to more recent terminology, pregnancy centers, exist as part of the overall anti-abortion

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107. 138 S. Ct. 2361 (2018) (invalidating a notice provision applied to unlicensed facilities as well).

108. See McNamara & Sherman, *supra* note 9, at 197 (noting that the *NIFLA* decision "significantly expand[s] protection for speech in the commercial marketplace").

109. 138 S. Ct. 2361 (2018).

movement.<sup>110</sup> They came into being as states began to decriminalize abortion, and the Court interpreted the constitutional right to choose abortion in *Roe v. Wade*.<sup>111</sup> Up to 4,000 currently operate across the United States, mostly under the auspices of several large, faith-based organizations, which provide advice and financial support.<sup>112</sup> The National Institute for Family and Life Advocates (NIFLA), the lead plaintiff in the lawsuit, is one such umbrella organization.<sup>113</sup> The centers actively advertise to attract women experiencing an unplanned pregnancy and at risk of choosing abortion, and often locate near clinics that provide abortions.<sup>114</sup> Their avowed purpose is to persuade these women to choose childbirth. They do so by offering free counseling, products, and services to support the choice.<sup>115</sup> Initially mostly unlicensed, the centers are increasingly acquiring licenses to operate as medical facilities, which gives them access to government funding and allows them to

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110. See Olivia Aveni Briscoe, *Pregnancy Centers in Virginia and Nationwide Deserve Recognition, Respect*, NAT'L INST. FAM. & LIFE ADVOCS., <https://nifla.org/pregnancy-centers-in-virginia-and-nationwide-deserve-recognition-respect/> (last visited Jan. 2, 2021) ("The pregnancy center community is one of the most essential aspects of the pro-life movement in our society today.").

111. 410 U.S. 113 (1973); see Vitoria Lin & Cynthia Dailard, *Crisis Pregnancy Centers Seek to Increase Political Clout, Secure Government Subsidy*, 2 GUTTMACHER REP. ON PUB. POL'Y (2002), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/tgr/05/2/gr050204.pdf>.

112. *Id.*

113. NIFLA, <https://nifla.org/> (last visited Jan. 6, 2021) ("Founded in 1993, the National Institute of Family and Life Advocates provides pro-life pregnancy centers and medical clinics with legal counsel, education, and training. While supplying legal support needed to protect the work of these life-affirming centers and better equipping them to serve in their communities, NIFLA continues to grow and now represents more than 1,500 member centers across the country.").

114. See Pam Belluck, *Pregnancy Centers Gain Influence in Anti-Abortion Area*, N.Y. TIMES (Jan. 4, 2013), <https://nyti.ms/X7ppVE> ("As [pregnancy centers] expand, they are adding on-call or on-site medical personnel and employing sophisticated strategies to attract women, including Internet search optimization and mobile units near Planned Parenthood clinics."); Joanne D. Rosen, *The Public Health Risk of Crisis Pregnancy Centers*, GUTTMACHER INST. (Sept. 10, 2012), <https://www.guttmacher.org/journals/psrh/2012/09/public-health-risks-crisis-pregnancy-centers> ("Many [pregnancy centers] advertise their services on their Web sites, in high school and college newspapers, on buses and subways, and on billboards.").

115. See Belluck, *supra* note 114 ("With free pregnancy tests and ultrasounds, along with diapers, parenting classes and even temporary housing, pregnancy centers are playing an increasingly influential role in the anti-abortion movement."); Briscoe, *supra* note 110 ("Pregnancy centers provide women and their families with medical exams and ultrasounds, prenatal care, STI testing and treatment, fertility awareness methods, caring consultation, parenting education programs, material assistance to families, after-abortion support and recovery, and more."); Margaret H. Hartshorn, *The History of Pregnancy Help Centers in the United States*, HEARTBEAT INT'L (Mar. 13, 2007), [https://www.heartbeatinternational.org/pdf/History\\_of\\_Centers.pdf](https://www.heartbeatinternational.org/pdf/History_of_Centers.pdf) ("Approximately [two] million Americans are served yearly, by professional staff and thousands of trained volunteers, providing confidential medical services, education, material aid, and a wide variety of care and support services, all at no cost to clients.").

provide services such as medical exams and ultrasounds.<sup>116</sup> Many different types of licensed medical professionals may staff the centers.<sup>117</sup> The centers, and those who support their activities, cite the one-on-one counseling, and the free ultrasounds they provide, as critical and effective tools to persuade women to choose child-birth.<sup>118</sup>

Abortion choice supporters have always criticized some of the activities of pregnancy centers as providing incomplete, inaccurate, or misleading information and counseling about risks and options to the women who seek their services, who are in “crisis” because of an unexpected pregnancy and who are “disproportionately young, poorly educated or poor.”<sup>119</sup> The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act)<sup>120</sup> stemmed from these types of concerns. An Assembly committee received evidence that the “nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers” operating in the state were “disseminating medically inaccurate information about [available] pregnancy options . . .”<sup>121</sup> According to the bill analysis, the pregnancy centers “present themselves as comprehensive reproductive health centers, but are commonly affiliated with, or run by organizations whose stated goal is to prevent women from accessing abortions.”<sup>122</sup> These centers, the bill analysis continued, employ “intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making

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116. *About NIFLA*, NAT'L INST. FAM. & LIFE ADVOCS., <https://nifla.org/about-nifla/> (last visited Jan. 2, 2021) (describing “two key programs to support compliance and conversion for pregnancy centers [to licensed medical facilities]”).

117. *Nat'l Inst. of Fam. & Life Advocs. v. Harris*, 839 F.3d 823, 831 (9th Cir. 2016) (listing the staff of Pregnancy Care Clinic, the licensed pregnancy center plaintiff in the case, as including “two doctors of obstetrics and gynecology, one radiologist, one anesthesiologist, one certified midwife, one nurse practitioner, ten nurses, and two registered diagnostic medical sonographers”).

118. *See* Belluck, *supra* note 114 (quoting Jeanneane Maxon, vice president for external affairs at Americans United for Life, an anti-abortion group, who describes the centers’ “ground level, one-on-one, reaching-the-woman-where-she’s-at approach”); *About NIFLA*, *supra* note 116 (“NIFLA recognized the importance of using ultrasound in a pregnancy center setting for reaching abortion-minded women more than two decades ago, and has been pioneering the way in which the pro-life movement uses this important tool ever since. Ultrasound offers a window to the womb, and this impacts a woman’s decision to choose life . . .”).

119. *Rosen*, *supra* note 114; *see* Belluck, *supra* note 114 (quoting Jean Schroedel, a Claremont Graduate University politics professor, to say that “there are some positive aspects” to centers, but that “things pregnant women are told at many of these centers, some of it is really factually suspect”); *see also* Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, *AMA J. ETHICS* (Mar. 2018), <https://journalofethics.ama-assn.org/article/why-crisis-pregnancy-centers-are-legal-unethical/2018-03>.

120. CAL. HEALTH & SAFETY CODE §§ 123470–123473.

121. Joint Appendix at 84, 86, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140).

122. *Id.* at 85.



fully-informed, time-sensitive decisions about critical health care.”<sup>123</sup>

Although the activities of pregnancy centers prompted legislative research and action, the FACT Act defined the class of regulated facilities more broadly.<sup>124</sup> The FACT Act’s purpose, according to the bill’s author, was “to provide reproductive health assistance to low income women” and, more specifically, “because pregnancy decisions are time sensitive,” to ensure that “California women . . . receive information about their rights and available services at the sites where they obtain care.”<sup>125</sup> The Act required all licensed covered facilities<sup>126</sup> to disseminate<sup>127</sup> a notice stating, “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].”<sup>128</sup>

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123. *Id.*

124. CAL. HEALTH & SAFETY CODE §§ 123470–123473; Nat’l Inst. of Fam. & Life Advocs. v. Harris, 839 F.3d 823, 830 (9th Cir. 2016), *rev’d & remanded by* 138 S. Ct. 2361 (2018) (“[T]he Legislature found that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics unable to enroll patients in state-sponsored programs to state the existence of these services. Assem. Bill No. 775 § 1(c)–(d).”); Joint Appendix, *supra* note 121, at 86 (“Because approaches that have treated CPCs and full-service pregnancy centers differently have been challenged as violating the First Amendment, the report concludes that the best approach to a statutory change would regulate all pregnancy centers, not just CPCs, in a uniform manner, which is the approach that this bill adopts.”).

125. Joint Appendix, *supra* note 121, at 84.

126. The FACT Act defines a licensed covered facility as “a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services,” and that also satisfies two or more of the following criteria:

- (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
- (2) The facility provides, or offers counseling about, contraception or contraceptive methods.
- (3) The facility offers pregnancy testing or pregnancy diagnosis.
- (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
- (5) The facility offers abortion services.
- (6) The facility has staff or volunteers who collect health information from clients.

CAL. HEALTH & SAFETY CODE § 123471.

127. The FACT Act requires that the Licensed Notice be disclosed by licensed facilities in one of three possible manners:

- (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.
- (B) A printed notice distributed to all clients in no less than 14-point type.
- (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures.

*Id.* § 123472(a)(2).

128. *Id.* § 123472(a)(1).

Prior to the effective date of the FACT Act, NIFLA and other organizations filed a lawsuit arguing that its notice provisions<sup>129</sup> violated their federal constitutional free speech rights by compelling them to speak a government message contrary to their beliefs.<sup>130</sup> The Court accepted review of the case at the preliminary injunction stage and reversed the decision of the court of appeals which, like the district court, had found the regulated entities to have no likelihood of success under established precedent.<sup>131</sup>

With respect to the licensed center notice, the court of appeals had addressed both the general question of where to place the circumstances presented by the case within existing free speech doctrine, to determine the level of review and analysis, and the specific question whether the circumstances of the FACT Act, neutral on its face, revealed a purpose by the California Legislature to discriminate against the pregnancy centers because of their viewpoints, which would provoke strict scrutiny review. The court first found no purpose to discriminate against the pregnancy centers' viewpoint.<sup>132</sup> In so doing, it reviewed the classification of centers subject to the notice requirement and found the exemption of facilities enrolled in state programs to be sufficiently explained by the fact that they "already provide all of the publicly-funded health services outlined in the [notice]."<sup>133</sup> The court next addressed the doctrinal question of what level of scrutiny should apply to the circumstances of the notice imposed on licensed pregnancy centers, and on the licensed medical professional within them, presented by the case. Although it acknowledged that the notice requirement was content-based, it considered the exceptions to the general rule that content-based regulations of speech provoke strict scrutiny. It quickly rejected application of the *Zauderer* exception<sup>134</sup> but found the notice requirement analogous to the one imposed on abortion providers

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129. In addition to the licensed center notice, the FACT Act requires unlicensed clinics to post a notice informing clients that they were unlicensed. *Id.* § 123472(b). The licensed center notice is the focus of this article.

130. *Nat'l Inst. of Fam. & Life Advoc. v. Harris*, 839 F.3d 823 (9th Cir. 2016).

131. *Id.* at 845.

132. *Id.* at 835 ("The Act . . . does not discriminate based on viewpoint. It does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker. Instead, the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services.").

133. *Id.*

134. *Id.* at 834 n.5 ("We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review. . . . Commercial speech 'does no more than propose a commercial transaction.' . . . The Act primarily regulates the speech that occurs within the clinic, and thus is not commercial speech.") (citations omitted) (citing *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985), then quoting *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 604 (9th Cir. 2010)).

upheld by the Court in *Casey*.<sup>135</sup> It noted a split among the circuits as to whether the *Casey* plurality had identified a level of review for regulations of medical professional client counseling of the same type, and concluded that, in its brief statements, it had not. Applying circuit precedent, the court of appeals reasoned that “the level of protection to apply to specific instances of professional speech or conduct is best understood as along a continuum.”<sup>136</sup> On one end of the continuum, when a professional engages in “public dialogue,” the context of the speech is “constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection,” implemented by strict scrutiny review of government actions that alter the content of the speech.<sup>137</sup> On the other end of the continuum, “lies professional conduct, where the speech at issue is, for example, a form of treatment.”<sup>138</sup> When regulating conduct, “the state’s power is great, even though such regulation may have an incidental effect on speech,” so content-based actions imposed on professional conduct, which occurs by means of speech, are subject to rational basis scrutiny.<sup>139</sup> Professional client counseling exists at the midpoint, where:

“the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it” because “[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.”<sup>140</sup>

At this midpoint, the court determined that an intermediate level of review best balanced the speech rights professional speakers retain, when counseling clients, and the enhanced authority of the state to regulate their speech to protect the interests of their client listeners.<sup>141</sup>

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135. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–75 (2018); *see also id.* at 2372 (rejecting application of the disclosure standard established in *Zauderer*, 471 U.S. 626, on the ground that pregnancy facility speech is not commercial speech).

136. *Harris*, 839 F.3d at 839; *see Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014), *overruled in part by Becerra*, 138 S. Ct. 2361; *see also King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014); *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 568–70 (4th Cir. 2013).

137. *Harris*, 839 F.3d at 839.

138. *Id.*

139. *Id.* at 839 (quoting *Pickup*, 740 F.3d at 1229).

140. *Id.* (alteration in original) (quoting *Pickup*, 740 F.3d at 1228).

141. At the mid-point, the court found applying intermediate scrutiny is consistent with the principle that “within the confines of a professional relationship, First Amendment protection of a professional’s speech is somewhat diminished,” *Pickup*, 740 F.3d at 1228, but that

The court found the California notice to apply to professional speech at this midpoint. The distinction among speech between a professional and a client and other types of speech, it explained,

stems from the belief that professionals, “through their education and training, have access to a corpus of specialized knowledge that their clients usually do not” and that clients put “their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity.”<sup>142</sup>

“There is no question,” according to the court, “that [pregnancy center] clients go [there] precisely because of the professional services [they] offer[], and that they reasonably rely upon the[m] for [their] knowledge and skill.”<sup>143</sup> The court applied intermediate scrutiny to the California notice and upheld it.<sup>144</sup>

The Supreme Court disagreed with the evaluation of the evidence of a purpose to discriminate against the pregnancy centers on the basis of their viewpoints and with its doctrinal reasoning. As to purpose, it noted “serious concerns” that sufficient evidence of viewpoint discrimination by the California Legislature was present, which Justice Kennedy, joined by three other justices from the majority, echoed in concurrence.<sup>145</sup> Rather than rest its decision on that ground, however, the Court based its finding that the petitioners had shown a likelihood of success on the merits on its analysis of doctrine, and its placement of the notice as outside the exceptions that would provoke some type of deferential review.<sup>146</sup> It rejected application of the *Zauderer* exception on multiple grounds, including that mention of abortion fails the requirement that the content of the information the state requires be delivered be “uncontroversial.”<sup>147</sup> It rejected application of the *Casey* exception on the ground that it applied only to information-delivery requirements imposed

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professionals also do not “simply abandon their First Amendment rights when they commence practicing a profession.” *Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014).

142. *Harris*, 839 F.3d at 839 (alteration in original) (quoting *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014)).

143. *Id.* at 840.

144. *Id.* at 842 (“We conclude that the Licensed Notice is narrowly drawn to achieve California’s substantial interests.”).

145. *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2370 n.2 (2018); *id.* at 2378 (Kennedy, J., concurring).

146. *See id.* at 2378–79 (Kennedy, J., concurring) (expressing relief that the Court’s analysis was not confined to finding a discriminatory purpose in the circumstances of the particular case before the Court because then “some legislators might have inferred that if the law were reenacted with a broader base and broader coverage it then would be upheld”).

147. *Id.* at 2372.

on medical professionals as part of obtaining informed consent to a medical procedure.<sup>148</sup> It also rejected the court of appeals' conclusion that a standard other than strict scrutiny should apply to information-delivery requirements imposed on professional speech.<sup>149</sup> Instead, it likened "professional speech" to fully protected public issue speech, which the rule of strict scrutiny of content-based classifications applies.<sup>150</sup> Harkening to the principle of an unrestricted marketplace of ideas, it noted the diverse views that professionals may have, which lead to "good-faith disagreements" about topics within their fields and listed instances of dangerous censorship of speech by medical professionals and by authoritarian governments in the past as warnings of the consequences of upholding laws, like the one before it, which "manipulat[e] the content of doctor-patient discourse . . . ."<sup>151</sup>

### *B. The Doctrinal Distinction Between the Circumstances of Client Counseling*

The notice provision imposed on licensed professional client counseling at pregnancy centers queued up a question at the heart of free speech doctrine. The Court had to classify the novel circumstances of the communications at issue in the case within existing doctrine, which draws a highly significant distinction between communications within the public realm of information and ideas, which must remain unrestricted by government judgments about their content,<sup>152</sup> and communications instrumental to transactions among individuals. The Court has always interpreted the Constitution to permit the government to regulate to fulfill its function of protecting the health, safety, and welfare of its citizenry.<sup>153</sup> The

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148. *Id.* at 2373–74.

149. *Id.* at 2371.

150. *Id.* at 2375 (finding no "persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles," but stating that it did not "foreclose the possibility that some such reason exists").

151. *Id.* at 2374.

152. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

153. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1652 (2009) ("There are countless ways in which civil liability implicates free speech, such as the torts of defamation, invasion of privacy, intentional infliction of emotional distress, and the right of publicity. Even tort actions for negligence can be brought in response to a person's speech. Numerous contracts restrict speech, such as employment contracts, settlement arrangements, and confidentiality agreements. Trade secret law can also restrict speech, as can other forms of intellectual property law. There are numerous restrictions in condos, cooperatives, and apartment buildings about when, where, and how residents can display signs or otherwise engage in speech.") (footnotes omitted).

new circumstances had attributes that could put the communications on either side of the line. On the one hand, the speakers self-identify as proselytizing ideology, and particularly a deeply felt ideology commanded by religious doctrine. They also self-identify as extraordinarily burdened by the requirement that they acknowledge the existence of the procedure they oppose because any information, and particularly this most detested information, injected into advocacy changes its content and disrupts their abilities as speakers to curate the information and opinions they present to persuade their listeners to agree with them and choose the course of conduct they recommend. Proselytizing religion is a type of communication that classifies as most highly protected from government intervention. On the other hand, the speakers do so in their roles as licensed medical professionals, providing counseling and services to individuals clients drawn to listen because of the professionals' greater expertise, and performing procedures and using tools, which they must have a government issued license to deploy. In these ways, the communications track as instrumental to providing individualized services, a type of communication which governments have had longstanding constitutional authority to choose to regulate to protect the abilities of citizen listeners to make decisions about their own health, safety, and welfare.

Classifying the circumstances of the pregnancy center notice required the Court to compare the contexts of the communications and the form and content of the information-delivery requirements in doctrine, and their links to implementing free speech principles. With respect to the context of the communication, the Court did not classify the full range of professional client counseling as the same doctrinally, or even the full range of licensed medical professional counseling of pregnant women about their medical procedure options. Instead, the Court distinguished the circumstances of client counseling in pregnancy centers from facilities that provide abortions and, to a lesser extent, the form and content of the notice from the information-delivery requirements that remain subject to lower level review. This doctrinal distinction leaves the pregnancy center communications, curated to influence the clients' choices, in place and unsupplemented, and, as is the nature of doctrinal distinctions, protects communications of the same type from regulation as well. At the same time, the distinction leaves in place the authority of states to continue to require doctors performing abortions, and other procedures important to women's health, to deliver information curated by the state to influence the clients' choices. Both

results diminish women's rights to exercise autonomy in health and life decision making.

The methodology of changing the doctrinal distinction that expanded the scope of women's right to equal protection provides a background against which to examine this harmful combination of results for consistency. This Part examines each subpart of the Court's reasoning—rejecting application of the *Zauderer* and *Casey* exceptions and application of the new exception for professional client counseling—in turn.<sup>154</sup>

### 1. *Zauderer*<sup>155</sup>

The *Zauderer* exception, understood to apply to commercial speech, is not the more natural fit of the existing exceptions to the circumstances of the case. The Court discussed it briefly and dismissed its application to the notice requirement at issue on multiple grounds.<sup>156</sup> All of these will further liberate commercial speakers from regulation for the purpose of providing more information to the customers and clients they seek to persuade. One particularly impacts the authority of states to regulate to protect the rights of women to receive information important to their decision making.

The content of the notice, according to the Court, failed to meet the requirement that it be “purely factual and uncontroversial” because it included mention of the availability of abortion, which is “anything but an ‘uncontroversial’ topic.”<sup>157</sup> Situated within the reasoning of the exception, the requirement that an information-delivery requirement be “uncontroversial” implements constitutional principle by segregating ideological messages that advocate opinions imposed on individuals outside the commercial context from requirements that commercial speakers deliver additional facts to consumers to enhance their abilities to make informed, personal choices among products and services.<sup>158</sup> Corporate speakers

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154. See *Becerra*, 138 S. Ct. at 2379–89 (Breyer, J., dissenting) (making a number of the same points as are made in these parts, without a particular focus on women's rights or religious liberty and joined by Justices Ginsburg, Sotomayor, and Kagan).

155. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626 (1985).

156. *Becerra*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651) (noting that the nature of the communication between medical professionals and clients seeking pregnancy-related counseling and services is different than the “commercial advertising” to clients, or potential clients, about the speaker's “terms [of] service,” to which *Zauderer*'s “lower level of scrutiny” applies and the content of the notice—“disclos[ing] information about *state*-sponsored services”—“in no way relates to the services that licensed clinics provide”).

157. *Id.* at 2372.

158. *Zauderer*, 471 U.S. at 651 (distinguishing the government's action to prescribe orthodoxy in commercial advertising from prescribing “what shall be orthodox in politics,

have relied upon it to narrow the *Zauderer* exception to gain protection from particular forms of information-delivery requirements, such as graphic warnings on cigarette packages, which they have successfully argued send an opinion, rather than only facts.<sup>159</sup>

The contents of these information-delivery requirements, and the claims based on them, however, are different from the content of the California notice and the claims that may be based upon it. The content of the California notice delivered a fact about abortion—it is a service supported by resources available from the state. Perhaps even more significantly, the contents of the California notice were the same as the *Casey* information-delivery requirement, which required doctors to deliver factual information about childbirth and which the Court reaffirmed as consistent with the free speech guarantee.<sup>160</sup>

The Court's quick conclusion that mere mention of abortion is controversial, and thereby expands the right of speakers to avoid government regulations that include it, requires examination because it suggests a slip of ideological preference into the definition of the scope of the free speech right. The Court seems to say that mention of the fact of the availability of abortion is controversial, and akin to opinion advocacy, because in the public realm its appropriateness remains hotly contested or perhaps because the speakers upon whom the information-delivery requirement is imposed disagree strongly with the decisions that have made it a legal option, and so experience the imposition of the information-delivery requirement in this way. In their strong objections—based on commands they understand to come from an authority greater than themselves and superior to the state—the pregnancy center

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nationalism, religion, or other matters of opinion”) (quoting *W. Va. State Bd. of Educ. v. Barrette*, 319 U.S. 624, 642 (1943)).

159. Ellen P. Goodman, *Corporate First Amendment Grab: Three Trends and a Data Application*, MEDIUM (May 29, 2016), <https://ellgood.medium.com/corporate-first-amendment-grab-three-trends-and-a-data-application-5046103e6628> (“With varying degrees of success, groups like the Washington Legal Foundation and Cato Institute have challenged country-of-origin labels, mercury disposal labels, graphic tobacco warnings, calorie disclosures, airline tax disclosures, obesity warnings for sugary sodas, and product sourcing disclosures. They argue that these government-mandated disclosure regimes mask ideological agendas, and that the information that must be disclosed is either not purely factual or tendentious, or both.”).

160. The *Casey* plurality's brief discussion did not explicitly require that the information the state required doctors to deliver be uncontroversial. It emphasized, however, that it should be “truthful, nonmisleading information,” which presumably implements the same constitutional principle. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).



speakers resemble the speakers whose claims generated compelled speech doctrine.<sup>161</sup> But there the resemblance ends.

The controversial nature of the topic of abortion in public discussion or the perception of particular speakers that the mere mention of the procedure is opinion advocacy, however strongly held, cannot change the constitutional significance of the words the state requires them to disseminate. The availability of abortion is a fact, because the decisions to make the procedure legal and available have been made by means of judicial interpretation and through the democratic process. The legality of abortion and the availability of resources to support it are facts in California, just like the legality of childbirth and the availability of resources to support it were facts in Pennsylvania.<sup>162</sup> Distinguishing between the two circumstances, on the ground that one presents controversial opinion and the other does not, does not link to implementing free speech principles.

With the link from application to principle stripped away, the possibility arises that the circumstances of the case influenced this identification of a distinction in the doctrine, which will reverberate far beyond them. Specifically, the possibility arises that the ideology of the speakers, upon whom the information-delivery requirement was imposed, influenced the determination of which content is controversial within the meaning of the free speech guarantee, and which is not. And here, that ideology stems from sincere and strongly held religious beliefs. In this way, and according to this close examination, the Court's conclusion that the mere mention of abortion imposed on religiously motivated medical professionals—but not childbirth imposed on those acting according to a secular ideology—is “controversial” and tips the constitutional balance and risks incorporating the religious motivation of medical professionals when counseling clients into the definition of the scope of the free speech right. This potential for priority protection for religiously motivated speakers, to avoid disclosing a fact they deem controversial, would reach beyond medical professionals, to the full range of product and service providers subject to the *Zauderer* exception. Women need products and services to exercise their rights, and they need facts about those products and services to make

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161. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (prohibiting state government from requiring a Jehovah's Witness to use his vehicle license plates to display the state motto “Live Free or Die,” which he found repugnant to his religious beliefs); *Barnette*, 319 U.S. 624 (preventing enforcement of a regulation forcing Jehovah's Witnesses to salute the American flag in schools, which would violate the religion's command to “not bow down thyself . . . nor serve” any “graven image”).

162. *Casey*, 505 U.S. at 854–55.

informed decisions about how to exercise them. Recognizing and challenging the creep of religious belief into the definition of the constitutional right against compelled speech is crucial to protecting the authority of democratically elected bodies to regulate to protect women's rights.

## 2. *Casey*<sup>163</sup>

The nature of the professional-client counseling communication and the content of the information-delivery requirement in *Casey* looked much like the nature of the communication and the content of the notice requirement in *NIFLA*. In both, licensed medical professionals counseled individual pregnant clients about their health care options in circumstances where a choice to undergo a medical procedure must be made and provided services, including medical procedures, to implement and support the clients' choices. The information-delivery requirements, to which the professional speakers objected, listed resources available from the state to support the client's choice of medical procedures that the facility did not provide. The *NIFLA* Court nevertheless distinguished the nature of the communications by describing the *Casey* requirement as a "regulation of professional conduct that incidentally burden[ed] speech" whereas the California licensed facility notice regulated "speech as speech."<sup>164</sup> According to the Court, the *Casey* requirement was "incidental" because it regulated speech "only as part of the practice of medicine," mandating that a medical professional provide a patient "certain specific information" as part of the traditional process of obtaining consent to perform a medical procedure.<sup>165</sup> By contrast, the California notice by form and content did not fit the model of informed consent "firmly entrenched" in American law because it was not "tied to a procedure" and did not, in addition to listing state resources supporting alternate choices, provide information about the risks and benefits of the procedures the facilities provide.<sup>166</sup> The Court noted as well, in summary, that it "d[id] not question the legality of health and safety warnings long considered permissible,"<sup>167</sup> which presumably in form and content extend beyond the

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163. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

164. *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2373–74 (2018).

165. *Id.* at 2373.

166. *Id.*

167. *Id.* at 2376.

narrow confines of informed consent to a procedure a medical professional proposes to provide.<sup>168</sup>

The Court did not directly link its fine distinctions between the types of licensing medical professional client counseling communications or the content of the information-delivery requirements to free speech principles.<sup>169</sup> This link would explain why speech preceding a procedure that the medical professional proposes to perform defines the outer boundary of the state's authority to regulate professional speech to serve client listeners' interests in full information to aid their decision making. In fact, in its discussion of *Casey* and its application, the Court focused exclusively on the comparative proximity of medical professional speakers to performing procedures and did not identify, or differentiate according to their constitutional significance, the interests of the client listeners in receiving complete information about medical care alternatives at all. Instead, the difference it spotted, and repeatedly emphasized, is that the nature of the communication and the form and content of the *Casey* requirement is consistent with "[l]ongstanding," "traditional," and "firmly entrenched" understandings of the scope of government regulation of the interactions between medical professionals and clients.<sup>170</sup> The California requirement, however, imposed on a facility as a notice posted to all its clients advising them of resources relevant to them all because of their shared health condition, to the Court, seems new.<sup>171</sup>

The lesson of the evolution of the doctrine of women's rights is that traditional understandings of what the Constitution's broad principles mean, in application to particular practices, do not legitimize current interpretations of these applications, when the circumstances of regulation and the exercise of the rights have changed. The California notice requirement addresses the new circumstance of facilities using their state-licensed status to draw low-income clients in with promises of client-centered counseling. This advice is offered for free and of the type traditionally offered by medical professionals, but may often be decidedly untraditional because the medical professional's counseling and advice may prioritize an ideology that dictates choices according to an overriding divine mandate, rather than for reasons that relate to the risks and

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168. See Reply Brief for Petitioners at 16–18, *Becerra*, 138 S. Ct. 2361 (No. 16-1140) (arguing that protecting NIFLA's rights would not undermine routine disclosure requirements).

169. *Becerra*, 138 S. Ct. at 2385 (Breyer, J., dissenting) (concluding that the distinction "lacks moral, practical, and legal force").

170. *Id.* at 2372–73.

171. *Id.* at 2373–74.

benefits of alternate choices based on the client's particular physical, social, and economic circumstances.<sup>172</sup> Nothing in the distinction between old and new circumstances of providing medical counseling and services to pregnant clients explains why the balance between speakers' rights and the authority of the state to regulate to provide full information to aid client decision making differs in the two circumstances. In fact, the way many abortions occur has changed. A third of early abortions do not occur by means of a medical procedure,<sup>173</sup> a reality that the Court seems not to have recognized when relying on traditional practices to ground its result. So, what was old is now new. Medical technology has outpaced the precedent that interprets its constitutional significance, at least as described by the Court.

Once again, with a grounding in principle removed, the distinction between the essentially similar circumstances of medical professional counseling suggests a preference among speakers, because of what they say or, perhaps, why they say it.<sup>174</sup> The preference appears even more vivid when viewed in combination with the states' retained constitutional authority to require doctors who perform abortions to deliver information outside the traditional informed consent boundaries of the "risks or benefits of th[e] procedure[]" and intentionally crafted to persuade women to make a personal health care choice to serve public priorities.<sup>175</sup> The apparent preference critically defines the scope of the free speech right, leaving in place the authority of states to continue to impose ever more burdensome speech requirements on abortion providers when counseling clients while carving from the state's reach medical professionals' client counseling motivated by the anti-abortion viewpoint which, by emphasis by the Court, aligns quite precisely with religiously motivated speech.<sup>176</sup> It could be that the Constitution permits neither the California nor the Pennsylvania types of regulation of the client counseling speech by licensed medical professionals. But the heads-I-win-tails-you-lose conclusion of the Court cannot be explained by reference to implementing constitutional principles. Like the *Zauderer* "controversial" distinction, it raises the possibility that particular circumstances of the speakers, the cause to

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172. Bryant & Swartz, *supra* note 119.

173. *The Availability and Use of Medication Abortion*, KAISER FAM. FOUND. (June 8, 2020), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/>.

174. *See Becerra*, 138 S. Ct. at 2388 (Breyer, J., dissenting) (suggesting the same possibilities).

175. *See id.* at 2373–74.

176. *Id.* at 2368.

which they are “devoted,” and perhaps the religious belief that motivates the devotion, have crept into the doctrine that defines the scope of the free speech right.

### 3. *Professional Speech*

After distinguishing the circumstances of the California covered facility notice from those that fall within exceptions to the rigorous review that applies to content-based speech regulations, the *NIFLA* Court rejected the court of appeals’ determination that mid-level review best implements constitutional principles in the circumstances of the California notice imposed on the medical professional speech to clients that occurs in pregnancy centers.<sup>177</sup> In so doing, it failed to reference the court of appeals’ “continuum” of types of professional speech, specifically its determination that client counseling differs from public advocacy in a way that should change the constitutional balance between speakers’ rights and states’ rights to supplement the information available to the client listeners. Instead, it frames the issue as whether it should treat the entire category of “professional speech” as “a unique category that is exempt from ordinary First Amendment principles.”<sup>178</sup> Not surprisingly, the Court found that it should not.

Addressing the broad range of “professional speech,” the Court linked full protection for it to fulfilling core constitutional principles. First, professional speech conveys valuable ideas and information. The Court has “long protected” the free speech rights of professionals in diverse contexts.<sup>179</sup> It has “stressed” that such protection is particularly important “in the fields of medicine and public health, where information can save lives.”<sup>180</sup> Second, content-based regulation of professional speech threatens harmful censorship by the government of “unpopular ideas or information” in the guise of fulfilling “legitimate regulatory goal[s].”<sup>181</sup> With respect to medicine specifically, doctors’ “candor is crucial” to “help patients make deeply personal decisions . . . .”<sup>182</sup> Throughout history, governments have “manipulat[ed] the content of doctor-patient discourse’ to increase state power and suppress minorities . . . .”<sup>183</sup>

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177. *Id.* at 2375 (finding no “persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles”).

178. *Id.*

179. *Id.* at 2374.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* (alteration in original).

Specifically, the Nazi regime “violated the separation between state ideology and medical discourse” by teaching German doctors that “they owed a higher duty to the ‘health of the Volk’ than to the health of individual patients.”<sup>184</sup> Third, regulation of professional speech threatens the emergence of truth through competition in an “uninhibited marketplace of ideas.”<sup>185</sup> Professionals “have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields.”<sup>186</sup> The people, as marketplace participants, must choose what is true from amongst the wide variety of information and opinions that professionals may offer, rather than the government deciding which ideas should prevail.<sup>187</sup> Finally, the category of “professional speech” is a “difficult category to define with precision” and could extend to cover “a wide array of individuals.”<sup>188</sup> This broad definition would give states “a powerful tool to impose ‘invidious discrimination of disfavored subjects’” by requiring that individuals acquire a license to operate.<sup>189</sup>

The reach of the Court’s reasoning is vast. Its application to the particular circumstance of pregnancy center speech to clients adds more weight to the conclusion that a speaker’s religious motivation has now entered into free speech doctrine to define the scope of the right. The abortion advocacy activities that receive the highest protection from government regulation occur in all venues of public communication—media, internet, streets, outside government buildings—and in all stages of the political process. Within the geographic vicinity of medical facilities that offer abortions, the speech occurs as abortion protests outside, sidewalk counseling of individual clients as they enter, and marketing campaigns geofenced to target women in the waiting rooms.<sup>190</sup> This speech can be graphic, accusatory, tailored to persuade the listeners to the ideological position, and can present information curated to persuade without disclosing that it is not accepted by medical

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184. *Id.*

185. *Id.*

186. *Id.* at 2374–75.

187. *Id.* at 2375.

188. *Id.*

189. *Id.* at 2366 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n.19 (1993)).

190. *All About Geofencing*, CHOOSE LIFE MKTG. (Oct. 22, 2019), <https://www.chooselife-marketing.com/all-about-geofencing/> (describing how the geofencing “advertising tactic” allows a pregnancy center to set up a “virtual fence” around “[an] abortion clinic down the street from their office” so that “[w]hen ever an [sic] abortion clinic clients walk into that zone, they can be shown ads [on their phones] that give information about the pregnancy center’s free ultrasounds and pregnancy tests”).

professionals.<sup>191</sup> Prioritizing speaker autonomy in these contexts fulfills free speech principles more generally because listeners receive access to everything, so that they may listen, evaluate, and participate as equals in the discussion and debate. All participants in the public exchange of ideas understand that the other speakers are speaking from their own experience, according to their own perspectives, and quite likely curating the information and advice they present to persuade listeners to engage in conduct that fulfills the speaker's interests, without respect to the different circumstances and interests of the listener.

The Court reasons that the Constitution grants medical professionals counseling clients in pregnancy centers the same scope of discretion to use their tools, and craft their speech, to fulfill their own persuasive objectives as public advocates possess when arguing opinions more generally. The Court seems to say that all individuals offering personalized services, whether operating under a state license or not, possess this broad right to curate their speech to clients to persuade them to a choice, which may implement an ideological mandate outside the particular circumstances of the client. But this cannot be correct. By law, many types of professionals must offer advice crafted to serve the best interests of the client and must avoid conflicts of interest that would influence their advice.<sup>192</sup> Suppose a number of “bankers,” “accountants,” or well-funded investment advisors were committed to the belief that making high-return investments is the best way to lift low-income individuals out of poverty. Could they advertise free advice and counseling, set up pop-up clinics in the neighborhoods where their target clientele reside, provide information and advice curated to persuade them to acquire high-risk investments, and resources to support their decisions to do so? Could they provide tablets, Internet access, website addresses for making investments and trades, and remain

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191. See Diana Pearl, *Free Speech Outside the Abortion Clinic*, THE ATLANTIC (Mar. 19, 2015), <https://www.theatlantic.com/health/archive/2015/03/free-speech-outside-the-abortion-clinic/388162/> (describing the experience of one woman who after arrival at an abortion clinic was surrounded by a “group of 12 wield[ing] signs covered in photos of aborted fetuses with the word ‘murder’ printed across them in big block letters”); see also Dennis Carter, *The COVID-19 Crisis Hasn't Stopped Abortion Protests. Now, Clinics Need Backup.*, REWIRE NEWS GRP. (Apr. 15, 2020, 4:21 PM), <https://rewire.news/article/2020/04/15/the-covid-19-crisis-hasnt-stopped-abortion-protests-now-clinics-need-backup/>.

192. For example, “Regulation Best Interest (BI) is a 2019 Securities and Exchange Commission (SEC) rule requiring broker-dealers to only recommend financial products to their customers that are in their customers’ best interests, and to clearly identify any potential conflicts of interest . . . .” Adam Hayes, *Regulation Best Interest (BI)*, INVESTOPEDIA (Feb. 4, 2021), [https://www.investopedia.com/what-is-the-sec-s-regulation-bi-best-interest-rule-4689542#:~:text=Regulation%20Best%20Interest%20\(BI\)%20is,financial%20incentives%20the%20broker%2Ddealer.](https://www.investopedia.com/what-is-the-sec-s-regulation-bi-best-interest-rule-4689542#:~:text=Regulation%20Best%20Interest%20(BI)%20is,financial%20incentives%20the%20broker%2Ddealer.)

constitutionally immune from a state mandate that these clinics post a notice stating that information about the risk of various types of investments is available on the Internet, and providing links to several websites? Does the Court really mean that lawyers, who deem prenuptial agreements imprudent, may advertise free pre-marriage counseling to individual clients, and in those conversations, selectively omit the option and otherwise craft the information and expert advice presented to persuade all clients to that choice, and escape discipline?<sup>193</sup>

It could be that the Court really intends to sweep away almost all of the government's traditional authority to license professionals and regulate, under the auspices of the license, the activities of the professionals that take the form of speech. But this seems unlikely. And if the Court does not intend to interpret the Constitution to protect all instances of licensed professional client counseling, offered free, and out of strong and sincere ideological motivation, from information-delivery requirement regulation, then the question arises: What distinction rooted in constitutional principle explains why some instances, but not others, receive preference? Once again, the Court's doctrinal reasoning raises the possibility that concerns specific to the content of the notice at issue and the impact on the particular professional speakers played a role in the interpretation.

The Court's descriptions of the link to free speech principles exude an undertone of a threat to religious liberty. The references to government efforts to "suppress unpopular ideas" under the guise of valid public purposes and the use of state power to "suppress minorities" and "invidious[ly] discriminat[e against] disfavored subjects"<sup>194</sup> mirror the Court's increasing vigilance to root out by means of application of the free exercise guarantee, "subtle departures from neutrality" and "covert suppression of particular religious beliefs."<sup>195</sup> Then, a new move seems to happen when the Court imports the goal of preserving an uninhibited marketplace of ideas into the licensed professional client counseling relationship, which includes all the many perspectives that may result in "good faith disagreements" among professionals. Applied to the situation of pregnancy centers before it, achieving this goal means leaving the

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193. *Cf. Becerra*, 138 S. Ct. at 2374–75 (offering, among the types of "good-faith disagreements" among professionals, the examples of "bankers and accountants" who "might disagree about the amount of money that should be devoted to savings," and "lawyers and marriage counselors [who] might disagree about the prudence of prenuptial agreements").

194. *Id.*

195. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).



licensed professional client conversations within them unregulated by the state. The perspective that escapes regulation is that no client should choose abortion and, behind that, the “good faith” and “fair minded” perspective<sup>196</sup> that a command superior to the client’s personal circumstances should guide the licensed professional’s advice. The Court’s comments that the “candor” of medical professionals in client counseling is crucial and that substitution by medical professionals of a “higher duty” for concern for “the health of individual patients” presents a great danger to them are interesting, in light of its holding that states must allow medical professionals to omit relevant treatment options for the purpose of persuading patients to conform their health decisions to a higher command.<sup>197</sup> While the Court is highly concerned about professional speakers manipulating client decision making in the former situation, when driven to do so by state mandate, it simply does not perceive a problem in the latter, in which its interpretation forbids the state to intervene in any way. At least in application to the case before it, the distinction the Court draws precludes the state from choosing to protect health care consumers by counteracting gaps in information about options imposed by the overlay of religious belief onto the practice of medicine.

The link to constitutional principle that the Court articulates, merging all instances of “professional speech” that reflect religious perspectives, particularly endangers the ability of women to maintain and expand democratically enacted rights to support their autonomous decision making in the specific circumstances of client counseling. Governments must treat religious perspectives equally with all others when it regulates publicly directed speech.<sup>198</sup> The Court’s holding extends this equal treatment rule into the client counseling relationship, based on an implicit determination that the balance between speaker and listener interests in the two contexts are the same. But the Court never addresses the circumstances of pregnancy center clients, or the state’s claim that their medical condition, and economic circumstances, make them particularly in need of assistance in receiving full information about their options, rather than having to fend, in the marketplace of licensed

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196. *Cf. Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (acknowledging that the view of marriage as “a gender-differentiated union of man and woman . . . has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world”); *id.* at 692, 712 (Roberts, C.J., dissenting) (“These apparent assaults on the character of fair-minded people will have an effect, in society and in court.”).

197. *Becerra*, 138 S. Ct. at 2374 (quoting *Wollschlaeger v. Governor*, 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc) (W. Pryor, J., concurring)).

198. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 825 (1995).

professional opinions, for themselves. Transposing the rule of equal treatment from the realm of publicly directed speech into the circumstances of licensed medical professionals' counseling means that states may not choose to ensure a base level of client focus in the licensed professional-client relationship, in the form of information to aid the nonexpert listeners, who depend upon the expert advice to make their own "deeply personal decisions," which impact the fulfillment and direction of their lives.<sup>199</sup> More explanation of why constitutional principle commands this balance between individual right and government authority to regulate in the specific and limited context of individualized client counseling by licensed professionals is required to dispel the inference that religious motivations of the speakers has entered into defining the scope of the free speech right.

### C. Purpose

Although the *NIFLA* Court does not hinge its decision on a finding that the California Legislature acted with discriminatory purpose when it enacted the notice requirements, it notes, at the beginning of its opinion, that it had "serious concerns" that it did so.<sup>200</sup> Hints, tentative conclusions, and historical examples of governments "manipulat[ing]" speech "to increase state power and suppress minorities" run through its opinion.<sup>201</sup> Justice Kennedy wrote separately, joined by the three justices who also joined the Court's opinion, to "underscore that the apparent viewpoint discrimination . . . is a matter of serious constitutional concern."<sup>202</sup> Petitioners did not develop evidence of discriminatory purpose through discovery, and because the case was only at the preliminary injunction stage, such facts had not been presented or refuted at trial.<sup>203</sup>

But the Court's selective recitation of facts, its multiple references to the suspicious scope of the FACT Act's coverage, and the content of briefs filed in the case make reasonably clear the

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199. *Cf. Becerra*, 138 S. Ct. at 2374 (quoting *Wollschlaeger*, 848 F.3d at 1328 (W. Pryor, J., concurring)).

200. *Id.* at 2370 n.2.

201. *Id.* at 2374.

202. *Id.* at 2378 (Kennedy, J., concurring).

203. *Id.* at 2389 (Breyer, J., dissenting) (noting that petitioners did not, at any level of review, present facts to support their claim that the Act's provisions disproportionately impact facilities with pro-life views); *see* Transcript of Oral Argument at 40–42, *Becerra*, 138 S. Ct. 2361 (No. 16-1140) (exhibiting that Justice Alito cited an amicus brief that says 98.5% of covered facilities are CPCs, but state counsel disputed that and said a state study showed a significant number of non-pro-life centers covered by the Act and noted the information-gathering problem because it depended upon centers self-reporting their covered status).

evidence the Court relied upon to express its “concerns” that, despite the facial neutrality of the California statute, unconstitutional discrimination against petitioners based upon their “pro-life (largely Christian belief-based)”<sup>204</sup> viewpoint “apparent[ly]” occurred.<sup>205</sup>

### 1. *Disproportionate Impact*

The Court’s suggestions that the notice provisions are the product of unconstitutional viewpoint discrimination refer in large part to the disproportionate impact of its provisions on the pregnancy centers.<sup>206</sup> The FACT Act identifies covered facilities according to the services they provide or advertise.<sup>207</sup> The Court’s suggestions mirror petitioners’ argument that the description of services, combined with the exemptions the FACT Act provides, single out pregnancy centers in application.<sup>208</sup> The inference of purpose to target pregnancy centers because of the viewpoints they express depends upon its conclusion that the exempt facilities are the same as covered facilities with respect to serving the state’s asserted purpose.<sup>209</sup> But differences between the types of facilities exist. With respect to the licensed center notice requirement, general practice clinics require payment, whereas pregnancy centers offer their services for free.<sup>210</sup> The legislature aimed the licensed notice requirement particularly at addressing the information needs of low-income women. Therefore, exemption of general practice clinics from the notice requirement that applies to pregnancy centers can be explained by the different “patients the group[s] generally serve[] and the needs of that population.”<sup>211</sup> The exemption from the licensed notice requirement of facilities that agree to enroll patients in state programs that provide the full range of pregnancy services,

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204. *Becerra*, 138 S. Ct. at 2368.

205. *Id.* at 2378 (Kennedy, J., concurring).

206. *Id.* at 2374 (“Tellingly, many facilities that provide the exact same services as covered facilities . . . are not required to provide the licensed notice.”); *id.* at 2375–76 (citing *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 802 (2011) (“If California’s goal is to educate low-income women about the services it provides, then the licensed notice is ‘wildly underinclusive’” and, therefore, “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”)); *id.* at 2377 (the unlicensed notice “covers a curiously narrow subset of speakers”).

207. CAL. HEALTH & SAFETY CODE § 123471(a)–(b).

208. See Brief for Petitioners at 62, *Becerra*, 138 S. Ct. 2361 (No. 16-1140).

209. *Becerra*, 138 S. Ct. at 2388–89 (Breyer, J., dissenting) (summarizing petitioners’ claims, particularly that the statute “does not cover facilities likely to hold neutral or pro-choice views, because it exempts facilities that enroll patients in publicly funded programs that include abortion”).

210. *Id.* at 2368.

211. *Id.* at 2386 (Breyer, J., dissenting).

including abortion, could be explained by a showing that these facilities are significantly more likely to inform patients about the existence of these programs than are the pregnancy centers.<sup>212</sup>

These reasons for the different treatment of pregnancy centers and exempted facilities, especially at the preliminary injunction stage, plausibly relate to characteristics of the pregnancy centers other than their advocacy of a viewpoint and serve the legitimate public policy purposes that the legislature articulated. Under the methodology for determining whether the disproportionate disadvantage a law imposes on individuals shows a government purpose to target them because they exhibit a protected trait, a plausible purpose should be enough.

As women well know, even a perfect or near-perfect overlap between a targeted condition or status and a protected characteristic does not prove a legislative purpose to target the characteristic in Equal Protection Clause doctrine, even when attributes of the condition or status link to fulfilling the legitimate purpose that the government articulates. Funding pregnancy benefits would raise the cost of funding a disability insurance program, so the cost of the condition—and not that exclusively women experience it—explained the exclusion.<sup>213</sup> The information-delivery and waiting-period requirements imposed exclusively on women seeking abortions are not targeted at them because of the sex trait, rather the requirements fulfill the state's legitimate interest in ensuring that "important decisions will be more informed and deliberate . . ." <sup>214</sup> An absolute preference for veterans for state employment serves the purpose of rewarding service, not disadvantaging women, although it dramatically disproportionately did so.<sup>215</sup> The state's awareness of the impact, and its attempt to ameliorate it with respect to low-level clerical positions, did not change the Court's conclusion.<sup>216</sup>

California's explanations for its exemptions rely on attributes of the condition of offering medical services to low-income women for free, which is distinct from the viewpoint the pregnancy centers advocate.<sup>217</sup> The exemption that depends upon agreeing to enroll women in state services may overlap very significantly with centers that do not have ideological objections to the contraceptive and abortion services that the state provides. Like women's conditions

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212. See *id.* at 2389 (stating that the record needs to be developed to determine whether this is true).

213. See *Geduldig v. Aiello*, 417 U.S. 484, 493–94 (1974).

214. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992).

215. See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 278–81 (1979).

216. *Id.* at 281–82 (Marshall, J., dissenting).

217. See *Becerra*, 138 S. Ct. at 2375.

that stem from their biology or legal status derived from a separate source of authority, pregnancy centers' condition of not enrolling women in state programs derives from their ideological objections but the condition, not the protected characteristic from which the condition derives, explains why the law treats them differently.

The Court's serious concern that the law's disproportionate disadvantage on pregnancy centers shows a legislative purpose to target their religiously motivated anti-abortion speech, when their activities provide a plausible reason for the law's distinctions, reflects a different degree of sensitivity to unequal treatment than the Court's consistent refusal to draw an inference of a government purpose to favor religious institutions in private school funding programs that foreseeably, and dramatically, disproportionately benefit them.<sup>218</sup> The Court adheres to this rule even when the provisions of the aid programs overlap with the characteristics of religious schools quite precisely.<sup>219</sup> The theory that the Court has consistently accepted, with respect to laws that dramatically disproportionately benefited religious schools, is that they were nevertheless neutral because nonreligious private schools could choose to open and become eligible to receive the financial benefit.<sup>220</sup> So, too, in California, nonreligious pregnancy centers could choose to open, and they would be subject to the notice requirement. In both instances, the likelihood is low, because religious motivation, and funding from the religious organization for the purpose of promulgating belief, explains the existences of the schools, and pregnancy centers, with the particular characteristics, specifically offering lower tuition or pregnancy services for free. But the likelihood that the relative proportions of benefited entities will shift does not matter to the determination of discriminatory purpose when the question is whether the government unconstitutionally favors religious entities. When the question is reversed, to ask whether a disproportionate disadvantage shows a purpose to discriminate against religious entities, it should not matter either.

The more generous standard the Court applies to find discriminatory purpose under the Free Speech Clause appears like the moving standard under the Free Exercise Clause. It may be that the Court will reinterpret the meaning of that clause to provoke strict

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218. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 703 (2002) (Souter, J., dissenting) (noting that 96.6% of all students participating in state voucher program go to religious schools).

219. See *id.* at 704–05 (Souter, J., dissenting) (explaining that a few open spaces exist at the few nonreligious schools and the amount of the voucher mirrors full tuition at religious schools, while tuition at nonreligious private schools is much higher).

220. See *id.* at 652; see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

scrutiny review on a showing less than a purpose to discriminate on the basis of religious motivation.<sup>221</sup> And even if it does not, the inconsistency between the label and the methodology would be restricted to the interpretation of the single clause, where an interpretation could be that it provides a priority to religious exercise, rather than equal treatment. But the core meaning of the Free Speech Clause, as emphasized by the *NIFLA* Court, is to guarantee equal treatment of all speech from multiple viewpoints.<sup>222</sup> A purpose to discriminate against a viewpoint, not a substantial burden on the speakers, is its mark of unconstitutional action, and that standard is not moving. So, when the Court uses the looser Free Exercise Clause-type methodology to determine whether the government acts with a purpose to discriminate against viewpoints expressed by religious speakers, it seems to incorporate religious belief into its interpretation of the scope of the free speech guarantee.

## 2. *Direct Evidence*

Although the *NIFLA* Court does not rely on it, the case provides a vehicle to consider the type of direct evidence the Court has found to overcome the facial neutrality of a government action to show that the government decision maker acted with unconstitutional animus. The *NIFLA* Court's short, one-paragraph recitation of facts sets the stage for the theme of unconstitutional viewpoint discrimination by the California Legislature that runs through the opinion. The first sentence targets the purpose of the FACT Act to regulate the pregnancy centers, which it identifies as motivated by a pro-life viewpoint and religious belief. It then selectively quotes the bill's author:

“[U]nfortunately,” the author of the FACT Act stated, “there are nearly 200 licensed and unlicensed” crisis pregnancy centers in California. . . . These centers “aim to discourage and prevent women from seeking abortions.” . . . The author of the FACT Act observed that crisis pregnancy centers “are commonly affiliated with, or run by organizations whose stated goal” is to oppose abortion—including “the National Institute of Family and Life Advocates,” one of the petitioners here. . . . To address this perceived problem, the FACT Act imposes two

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221. See *Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020) (mem.).

222. *Becerra*, 138 S. Ct. 2361.

notice requirements on facilities that provide pregnancy-related services . . . .<sup>223</sup>

By means of this series of sentences, the Court portrays the “perceived problem” that the legislature sought to remedy to be the existence of facilities, which advocate from a pro-life and religious point of view.<sup>224</sup> Indeed, if burdening “some speakers whose speech [the author] d[id]n’t much like” were the problem that legislature sought to remedy by means of the FACT Act, the claim of unconstitutional gerrymandering might raise “a serious issue.”<sup>225</sup> The catch, however, is that the meaning attributed to the author by the Court’s quotations is not the meaning contained within the bill analysis, from which the Court drew its description. The full quotation reads:

[t]he author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with a woman’s ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women’s health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.<sup>226</sup>

So, this full description does not portray the “problem” perceived by the bill’s author, or the members of the California Legislature who voted in favor of the bill, to be the mere existence of pro-life, faith-based pregnancy centers or their religiously motivated, anti-abortion viewpoints. The bill analysis describes the problem perceived by the author to be the conduct of pregnancy center personnel when undertaking the activities of advertising and counseling, and the harm that conduct causes to members of the public, which the California government has the authority and responsibility to protect. These are very different meanings with respect to the

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223. *Id.* at 2368 (alteration in original) (citations omitted).

224. *Id.*

225. Transcript of Oral Argument, *supra* note 203, at 38 (Kagan, J.); see *Becerra*, 138 S. Ct. at 2389 (Breyer, J., dissenting) (“[I]f there are not good reasons [for the exemptions,] the petitioners’ claim of viewpoint discrimination becomes much stronger.”).

226. Joint Appendix, *supra* note 121, at 84–85.

inference of viewpoint discrimination, which the Court draws and as to which it seeks to persuade readers.<sup>227</sup>

So much of the difference in meaning between the descriptions of the author's statements in the Court's opinion and in the bill analysis hinges on what about the pregnancy centers, precisely, the bill author judged to be "unfortunate." If the author expressed a judgment of dislike for the speakers because of their religious beliefs or anti-abortion ideology, this judgment, by a lawmaker and if attributed to the entire legislature, would support a finding of unconstitutional viewpoint discrimination. The Court's felt need to present this meaning to support its tentative conclusion of discriminatory purpose, as opposed to a meaning under which the focus of the lawmakers' judgment was on the actions of the speakers and the impact of those actions on members of the public, emphasizes the different constitutional significances of these two meanings. The meaning the Court presents supports a finding of a discriminatory purpose. The words the bill's sponsor said, did not.<sup>228</sup> Muddying the distinction risks chilling criticism by lawmakers of conduct that may be motivated by religious belief, which they have a First Amendment right to express.

Another example from the same Supreme Court term underscores the threat to free speech by public officials, which the Court's merging of religiously motivated conduct with speech to find a purpose to discriminate on the basis of the latter presents. By contrast to the implication of viewpoint discrimination by the *NIFLA* Court, the Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* hinged its decision on a finding that the Colorado Civil Rights Commission did not consider the case before it "with the

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227. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) (selective quotations may form the basis for defamation liability if they do not meet the standard of "substantial truth").

228. The Court quotes loosely again when reviewing the unlicensed pregnancy center notice requirement, which required the centers to post a notice informing clients they were not licensed. The Court stated:

[t]he only justification that the California Legislature put forward was ensuring that "pregnant women in California know when they are getting medical care from licensed professionals." . . . At oral argument, however, California denied that the justification for the FACT Act was that women "go into [crisis pregnancy centers] and they don't realize what they are."

*Becerra*, 138 S. Ct. at 2377 (alteration in original) (citation omitted). The Court implied that the state's counsel denied that the purpose of the unlicensed notice requirement was to inform clients, who may not know the licensed or unlicensed status of the centers, what it was. But the state's counsel did not say that. The entire colloquy, which contains a subsequent qualification by counsel about the statute's dual purposes, shows that the questions and the answers related to the *licensed* clinic notice. The quoted reference to what women do or do not know when they go into pregnancy center did not relate to whether or not they were licensed at all. Transcript of Oral Argument, *supra* note 203, at 44.



religious neutrality that the Constitution requires.”<sup>229</sup> The Court declined to expand the scope of “speech” under the Free Speech Clause to protect a business person who objected on religious grounds from complying with a state public accommodations law that required him to create and supply a cake to a same-sex couple to be used at their wedding.<sup>230</sup> Instead, the Court relied on what it perceived to be different treatment of bakers with similar claims, and statements by members of the Colorado Civil Rights Commission to find that the commission violated the Free Exercise Clause by acting with a purpose to discriminate against him because of his religious beliefs.<sup>231</sup>

Perspectives may differ on the meaning of words, as the Court acknowledges, with respect to several official comments that it cites as evidence of the commission’s “hostility” toward the claimant’s sincere religious beliefs.<sup>232</sup> Nevertheless, the Court drew the clear conclusion that one set of comments, by a commissioner, “disparage[d the claimant’s] beliefs,” and that the comments, combined with the failure of the commission as a whole, and the state in its brief to the Court, to disavow the comments,<sup>233</sup> “cast doubt on the fairness and impartiality of the Commission’s adjudication of [the] case.”<sup>234</sup> The commissioner stated:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>235</sup>

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229. 138 S. Ct. 1719, 1724 (2018).

230. *Id.* at 1723–32.

231. *Id.*

232. *Id.* at 1729 (“Standing alone, these statements are susceptible of different interpretations.”).

233. Pressed by Justice Kennedy at oral argument, counsel for the state disavowed the statement, to the extent it could be interpreted to show a purpose to target the baker because of his religious motivation. Transcript of Oral Argument at 53, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (“JUSTICE KENNEDY: Do you now disavow or disapprove of that statement? MR. YARGER: I -- I do, yes, Your Honor. I think -- I need to make clear that what that commissioner was referring to was the previous decision of the Commission, which is that no matter how strongly held a belief, it is not an exception to a generally applicable anti-discrimination law.”).

234. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30.

235. *Id.* at 1729.

The Court reasoned as follows:

[t]o describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.<sup>236</sup>

The Court noted further:

[m]embers of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. . . . In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.<sup>237</sup>

A comparison between the expression of dislike the *Masterpiece Cakeshop* Court interpreted to show hostility toward religious belief by an adjudicatory body and the statements of dislike made by the justices themselves in the course of adjudication is at least interesting. Neither of the *Masterpiece Cakeshop* Court's conclusions about the meaning of the Colorado commissioner's statement are inevitable. The Colorado commissioner did not describe religious belief as "despicable." What he described as despicable was using religious belief as the rhetoric that justifies conduct that "hurt[s] others."<sup>238</sup> Use of the word "rhetoric" does not necessarily imply that the beliefs are insincere.<sup>239</sup> In its traditional sense, rhetoric is the use of words

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236. *Id.*

237. *Id.* at 1730 (first citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–542 (1993); and then citing *id.* at 558 (Scalia, J., concurring in part and concurring in judgment)).

238. *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

239. See Marc Gold, *The Rhetoric of Rights: The Supreme Court and the Charter*, 25 OSGOODE HALL L.J. 375, 376–77 (1987) ("The study of rhetoric currently enjoys a Renaissance in a variety of disciplines. No longer pejoratively considered to be ornamental and usually misleading speech, rhetoric is now understood to be an indispensable and inescapable tool of practical reason in all domains of human activity.").

as a means of persuasion.<sup>240</sup> The commissioner expressed strong dislike for the use of freedom of religion as a tool to persuade listeners that discrimination that hurts others is justified. And the historical examples the commissioner offers are true, as is the phenomenon that freedom of religion has in the past, and is currently used, to justify discrimination. So, the Court seems to say that a decision maker acts with unconstitutional discriminatory purpose toward religious belief when the decision maker acknowledges a judgment of strong dislike for citing one's own belief system as the justification for conduct that interferes with others' rights.

The *NIFLA* Court and concurrence use rhetoric strikingly similar, in words and meaning, to that used by the Colorado commissioner to support his point of view. The Colorado commissioner lists historical examples to illustrate the extreme consequences of accepting the claim of the litigant before the adjudicatory body. The *NIFLA* Court lists historical examples from China's Cultural Revolution, Stalin's Soviet Union, Nazi Germany, and Ceausescu's Romania to illustrate the extreme consequences of accepting California's claim that it may require licensed medical professionals to post the informational notices.<sup>241</sup> The Colorado commissioner expresses extreme dislike for the rhetorical justification of religious belief for the particular conduct that is the subject of the adjudication. Those concurring in *NIFLA* express strong disdain for the California Legislature's "congratulatory statement" that the FACT Act was part of a "legacy of 'forward thinking'" with respect to the public policy choice to be at the forefront of the nation in protecting women's reproductive rights.<sup>242</sup> It is "not forward thinking," the concurring justices insist, to rely upon that ideology, in the Act's official history, as a justification for engaging in conduct which, in their view, interferes with others' rights.<sup>243</sup> To be sure, "despicable" is a strong word. But "egregious" is a strong word, too, and the Court has placed this label on the conduct of government officials, including by implication the members of the California Legislature, who have acted according to sincerely held ideological beliefs.<sup>244</sup>

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240. *Id.* at 377 (footnote omitted) (stating that the "traditional conception" of rhetoric, "based upon the Aristotelian definition" is "as the faculty of discovering the available means of persuasion in a given case"); *id.* ("Rhetorical analysis thus conceived involves the analysis of the means used to persuade the audience that the result in a given case or set of cases was justified.")

241. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018).

242. *Id.* at 2379.

243. *Id.*

244. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (funding religious speakers would violate the Establishment Clause).

The selective quotation by the *NIFLA* Court to support its concerns that a purpose to discriminate against the anti-abortion viewpoint, motivated by religious beliefs, and the interpretation of the commissioner's words, and the failure of other government officials to disavow the them, present the real possibility that the Court's increasingly fervent efforts to root out official discrimination against religious beliefs will chill protected criticisms of the conduct that results from them. A reasonable conclusion that both lawmakers and adjudicators could draw is that it is safer to avoid acknowledging the religious motivation of the activities they regulate or adjudicate at all, lest they get called out in the United States Reports as having acted with a purpose to discriminate against deeply and sincerely held beliefs rather than the conduct those beliefs command.<sup>245</sup> And this silencing of statements acknowledging the religious motivation for conduct that hurts other people, and, although a closer question, of criticism of religious belief as an appropriate justification for such conduct, by public officials will hurt women specifically, as they work to secure and maintain rights through the democratic process, which they do not possess through the Constitution. Whatever the movement in Free Exercise Clause doctrine turns out to be, the doctrine of the Free Speech Clause is that religious viewpoints and practices are entitled to equal—but not specially advantaged—treatment with the viewpoints and practices motivated by other ideologies.<sup>246</sup> If this is so, then decision makers, whether lawmakers or adjudicators, must have the freedom to express dislike for religiously motivated conduct, because of the harm they perceive the conduct to cause to other people, without raising the inference that their actions stem from a purpose to discriminate on the basis of the religious motivation. Otherwise, because of its special relevance to a finding of discriminatory purpose on the part of official decision makers, religious belief has crept into the definition of the scope of the free speech right.

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245. Elizabeth Clark, *Symposium: And the Winner Is . . . Pluralism?*, SCOTUSBLOG (June 6, 2018, 11:36 AM), <https://www.scotusblog.com/2018/06/symposium-and-the-winner-is-pluralism/> ("Public commentators on national media regularly and casually describe measures promoting religious freedom as 'religious bigotry,' an 'invitation to discriminate,' 'not about religious freedom,' 'a fig leaf for intolerance,' or the like. [In light of the *Masterpiece Cakeshop* interpretation, if this sort of language is used or relied on by legislators, or especially adjudicative bodies, it now can be considered clear evidence of lack of neutrality.").

246. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

## CONCLUSION

Women's rights and religious liberty exist in tension. To the extent that the Constitution protects an individual right to one of them, it prohibits those who prioritize the other from writing that priority into law, binding everyone subject to it to the conduct, mandates, and prohibitions that priority mandates. The Court interprets the point of equilibrium, and these interpretations fluctuate. But over the years, by means of layered and cemented interpretations, a core truth has emerged to manage the tension between the two important rights guarantees. This is that religious liberty may flourish and reign within the clauses under which those who wrote and ratified the Constitution intended to protect it specifically. But outside the twin provisions that the Court interprets to define its boundaries, it does not define the scope of constitutional rights guarantees—those that protect women's rights or any others.

Now, the Court's aggressive interpretations of the scope of religious liberty under the explicit rights provisions threaten to cross the line, injecting a priority for religious motivation into the definition of the scope of the free speech guarantee. The methodology of interpreting the scope of women's rights provides a baseline against which to examine and check this spread. We can check that the Court transparently traces the new doctrinal distinctions it makes to implementing constitutional principles. Although we may not agree with it, we will understand. Examining the reasoning for the link to principle will reveal when it fails to exist. In these circumstances, and when claims of religious liberty appear in cases that do not implicate the specific guarantees directly, we can examine whether religious beliefs may have influenced the distinctions the Court draws, and thus crept into the definition of the constitutional right. We can also look carefully at the Court's evaluation of the evidence of the disproportionate impact of seemingly neutral government action to ensure that its conclusions adhere to the "because of not merely in spite of" standard, which constrains the scope of women's equal protection rights. We can check its conclusions about the words of government officials as well, to ensure that those assessments' separate meanings that show a purpose to discriminate against religiously motivated conduct, or the appropriateness of religious beliefs as a justification for conduct that hurts others, from a purpose to discriminate against the beliefs themselves, and so do not chill the criticisms of religiously motivated conduct which may attach to women's efforts to secure rights through the democratic process.