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From Gods to Google

ABSTRACT. The First Amendment has become a significant barrier to sensible technology regulation. The conventional explanation for this is the Court's deregulatory turn in free-speech law. But the Lochnerization story is incomplete. The Court's profound solicitude for religious speakers plays a central role in the current digital-free-expression landscape. By protecting the speech of certain religious dissidents, the Court has created a set of constitutional entitlements that logically extend to technology firms. Along the way, the Court has eroded its ability to apply the First Amendment sensibly to novel technologies.

This Feature draws the doctrinal through line from gods to Google. We first sketch the basic contours of today's technology regulation and explain why it is vulnerable to First Amendment challenge. We then give an overview of free-speech case law that develops what we call the oppressed-speaker paradigm. The Roberts Court has been motivated not just by free-market zeal but also by the trope of a persecuted religious minority standing fast in the face of a domineering and majoritarian regulator.

We pay special attention to *303 Creative LLC v. Elenis*, identifying several doctrinal defects likely to have an impact on technology regulation. Technology firms have wasted no time in relying on *303 Creative* to challenge a variety of new laws—most notably in last Term's *Moody v. NetChoice, LLC*, which involved free-speech challenges to the regulation of internet platforms. The Court in *Moody*, however, sidestepped or ignored the most serious implications of *303 Creative*.

It may be tempting to think the Court could reconcile the two cases by distinguishing religious speakers from platforms. But doing so would impermissibly enshrine viewpoint and speaker discrimination into free-speech law. The Court thus confronts a conundrum of its own making: either (1) apply the principles developed for religious speakers to new technologies and expose a wide range of technology policy tools to constitutional attack, or (2) create special rules for religious speakers, which would violate the Court's own notions about viewpoint and speaker neutrality. A principled resolution of this conflict cannot be that free-speech law affords special protection for religious speakers. The Roberts Court must find legitimate and coherent limiting principles for the First Amendment landmines it has laid.

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INTRODUCTION

Digital technologies raise a host of public-policy puzzles. The use of artificial intelligence (AI) in both the private and public sectors raises concerns about the fairness, transparency, and accountability of these systems.[1] As social-media platforms have become our "modern public square,"[2] critics have decried platforms' content-moderation practices as censorship.[3] The explosion of "surveillance capitalism" imperils citizens' privacy.[4] Law-enforcement officers seek access to encrypted devices and services,[5] while the U.S. government perceives a national-security risk in the possibility that foreign-owned technology companies will export users' sensitive personal data.[6] And then there are the children.[7] In 2023, the U.S. Surgeon General issued an advisory detailing "ample indicators" that social media poses "a profound risk of harm to the mental health and well-being of children and adolescents."[8] As one doctor put it, "The internet is a giant hypodermic, and the content, including social media like Meta, are the psychoactive drugs."[9]

Across these different domains, there is both bipartisan agreement that regulation should be enacted and a rough consensus about the relevant set of policy tools available to do so. The problem is that these tools are vulnerable to

1. *See infra* notes 65-66 and accompanying text.
2. Packingham v. North Carolina, 582 U.S. 98, 107 (2017).
3. *See infra* notes 42-44 and accompanying text.
4. *See infra* notes 34-36 and accompanying text.
5. *See infra* note 62 and accompanying text.
6. *See infra* notes 59-61 and accompanying text.
7. *See* Ginia Bellafante, *If Your Child Is Addicted to TikTok, This May Be the Cure*, N.Y. Times (Nov. 17, 2023), https://www.nytimes.com/2023/11/17/nyregion/tiktok-social-media-children-addiction.html [https://perma.cc/4MCK-XYTU] (noting claims that the content and addictive properties of social media are harming children). For a discussion of social media and addiction, see generally Matthew B. Lawrence, *Addiction and Liberty*, 108 Cornell L. Rev. 259 (2023); and Matthew B. Lawrence, *Public Health Law's Digital Frontier: Addictive Design, Section 230, and the Freedom of Speech*, 4 J. Free Speech L. 299 (2024) [hereinafter Lawrence, *Public Health*].
8. *Social Media and Youth Mental Health: The U.S. Surgeon General's Advisory*, U.S. Dep't of Health & Hum. Servs. 4 (2023), https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf [https://perma.cc/6BDW-V7ZV]; *see also* Albertina Antognini & Andrew Keane Woods, *Shallow Fakes*, 128 Pa. St. L. Rev. 69, 94-116 (2023) (identifying a taxonomy of harms that stem from social media, including the harms experienced by teenage users in particular).
9. Matt Richtel, *Is Social Media Addictive? Here's What the Science Says.*, N.Y. Times (Oct. 25, 2023), https://www.nytimes.com/2023/10/25/health/social-media-addiction.html [https://perma.cc/9EFL-2XCU].

powerful First Amendment challenges. Because digital technologies involve "images, words, symbols, and other modes of expression,"[10] nearly every regulation of digital technologies could be characterized under current law as a restraint on speech.[11] This is partly a result of what scholars call the Lochnerization of the First Amendment, driven by the Supreme Court's free-market skepticism of legislative policymaking.[12] But Lochnerization is only part of the picture.

In this Feature, we show that the Court's profound solicitude for religious speakers is a central but underappreciated part of the current digital-free-expression landscape. By protecting the speech of certain religious dissidents, the Court has created a set of constitutional entitlements that logically extend from gods to Google. Along the way, the Court has eroded its ability to apply the First Amendment sensibly to novel technologies. The Court cannot avoid this problem by simply distinguishing religious speakers from technology speakers. Doing so would violate a core free-speech principle prohibiting viewpoint discrimination; indeed, this Court has admonished the political branches that they are "prohibited" from enacting "restrictions distinguishing among different speakers, allowing speech by some but not others."[13] The Court thus confronts a conundrum of its own making: either (1) apply the principles developed for religious speakers to new technologies, rendering a wide range of technology policy tools vulnerable to constitutional attack, or (2) create special

10. 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023) (agreeing with the Tenth Circuit's holding that a wedding website containing these elements qualifies as "pure speech").

11. For a very recent example, look at the First Amendment challenges raised by technology companies against the California Age-Appropriate Design Code Act (CAADCA), a law enacted "with the express aims of promoting robust online privacy protections for children under the age of eighteen." NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024).

12. *See, e.g.*, Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 134-35 (discussing the development and consequences of "a growing constitutional conflict between the First Amendment and the modern administrative state"); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 182 (2015); *cf.* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917 (2016) (noting that, although claims are being made that the First Amendment is being used to resurrect "economically libertarian substantive due process jurisprudence of the early twentieth century," such concerns can be traced back to the 1930s and 1940s); Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1246 (2020) (arguing that the *Lochner*-like nature of contemporary free-speech law stems from an interpretation of the right as a "strong but limited negative autonomy right" that "guarantees freedom from intentional government interference with an individual's autonomy, but . . . provides almost no protection whatsoever from private interference and constraint").

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

rules for religious speakers, which would violate the Court's own notions about viewpoint and speaker neutrality.

Two recent Supreme Court cases illustrate the dilemma. In *303 Creative LLC v. Elenis*, the Court excused a Christian website designer from compliance with a state public-accommodations law. The Court held that requiring the website designer to create a wedding website for a same-sex couple compelled "pure speech" in service of government ideology[14]—as if the government were forcing schoolchildren to pledge allegiance to the flag, like in *West Virginia Board of Education v. Barnette*.[15] The Court did not consider whether the state could demonstrate compelling reasons for its nondiscrimination law. It simply announced a categorical prohibition against government compulsion of "pure speech."[16] And because *303 Creative* was decided on free-speech rather than free-exercise grounds, its reach logically cannot be limited to religious speakers.[17]

Recognizing this, technology companies immediately seized upon the case to challenge state regulation of internet platforms in *Moody v. NetChoice, LLC*.[18] *Moody* involved two state laws that restrict platforms' ability to control how third-party content is presented to other users—including decisions to filter, prioritize, label, and remove posts—and require platforms to provide individualized explanations of content-moderation decisions.[19] Paul Clement, representing the platforms, argued that these state laws sought to compel speech in exactly the way that *303 Creative* flatly foreclosed. Clement's opening statement revealed how central *303 Creative* was to the platforms' argument: "[Y]ou cannot have the forced dissemination of third-party speech . . . . And *Reno* [*v. ACLU*] and *303 Creative* make clear those principles are fully applicable on the

14. *303 Creative*, 600 U.S. at 587.

15. 319 U.S. 624, 642 (1943).

16. *303 Creative*, 600 U.S. at 587.

17. *See infra* Section III.A.

18. 603 U.S. 707 (2024). Both the petitioners and respondents discussed *303 Creative* in their briefs. Brief for Petitioner at 38, *Moody*, 603 U.S. 707 (No. 22-277); Brief for Respondents at 47-48, *Moody*, 603 U.S. 707 (No. 22-277). Twenty-one amicus briefs cited or discussed *303 Creative*. *See, e.g.*, Brief for Electronic Frontier Foundation et al. as Amici Curiae in Support of Petitioners (No. 22-555) and Respondents (No. 22-277) at 21, *Moody*, 603 U.S. 707 (Nos. 22-277, 22-555); Brief for American Principles Project as Amici Curiae Supporting Petitioners in No. 22-277 and Respondent in No. 22-555 at 13-16, *Moody*, 603 U.S. 707 (2024) (Nos. 22-277, 22-555). It was also front and center in oral arguments. Transcript of Oral Argument at 63, 102, *Moody*, 603 U.S. 707 (No. 22-277).

19. Fla. Stat. § 501.2041 (2024); Tex. Bus. & Com. Code Ann. §§ 120.001–.151 (West 2023); Tex. Civ. Prac. & Rem. Code Ann. §§ 143A.001–.008 (West 2023).

Internet."[20] If the Court stands behind *303 Creative* and holds fast to its views about speaker neutrality, then the protections it has developed for religious speakers *must* extend to technology companies.

The Becket Fund for Religious Liberty, in an amicus brief supporting neither party, offered the Court a starkly different path.[21] It urged the Court to cabin its religious-speaker cases by explicitly granting special protection to religious speakers only.[22] But carving out special rules for religious speakers would inject a new and pernicious dynamic into free-speech doctrine, casting doubt on decades of case law emphasizing the importance of speaker and viewpoint neutrality.[23] It is the Free Exercise Clause, with its textual commitment to the protection of religion, that offers special consideration to faith-based reasons for acting or refusing to act.[24] In the speech realm, the government must be

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20. Transcript of Oral Argument, *supra* note 18, at 63 (citing Reno v. ACLU, 521 U.S. 844 (1997); *303 Creative*, 600 U.S. at 570).

21. The Becket Fund for Religious Liberty noted that "NetChoice and CCIA rely heavily on cases involving religious speakers, including *303 Creative*, *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), *Masterpiece Cakeshop, Ltd.* v. *Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018), *McCullen* v. *Coakley*, 573 U.S. 464 (2014), *NIFLA* v. *Becerra*, 138 S. Ct. 2361 (2018), *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), *Watchtower Bible & Tract Soc'y of N.Y.* v. *Village of Stratton*, 536 U.S. 150 (2002), *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977)." Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Neither Party at 4, *Moody*, 603 U.S. 707 (Nos. 22-277, 22-555).

22. *Id.* at 4-6.

23. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."); *see also* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 766 (2015) ("With *Citizens United*, the Court for the first time gave full-throated articulation to the principle that discrimination on the basis of the identity of the speaker is offensive to the First Amendment, even when there is no content discrimination."); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2436 (2014) ("For constitutional purposes at least, it is entirely irrelevant to courts whether the speakers are members of the press or whether they are actively pursuing the news."); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality opinion) ("[M]edia representatives enjoy the same right of access as the public . . . ."); Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) (stating that "the liberty of the press is no greater and no less" than that of everyone else (quoting R v. Gray [1900] 2 QB 36 at 40 (Eng.))).

24. *See, e.g.*, Robert Post, *Public Accommodations and the First Amendment:* 303 Creative *and "Pure Speech*," 2023 SUP. CT. REV. 251, 301 (explaining that "while claims of conscience may be relevant to Free Exercise jurisprudence, they have no natural home in free speech doctrine" and that "[b]y improperly transposing intuitions about religious freedom into the quite different context of freedom of speech, the Court in *303 Creative* creates doctrinal chaos"); Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 WM. & MARY BILL

neutral toward a range of ideologies and viewpoints, including attitudes about religion.[25] It can neither disfavor nor favor religious speech. The First Amendment's nearly absolute prohibition on viewpoint discrimination means that putting religious speech on a higher plane than nonreligious speech (or antireligious speech) is no more acceptable than favoring liberal speech over conservative speech.[26]

Given the express arguments made to the Court in *Moody*, the Justices could not have missed the question: are technology companies protected by the absolutist principles embraced in *303 Creative*, or is that approach reserved for speakers with religious convictions? Instead of answering the question, the *Moody* Court blinked. All nine Justices agreed to vacate and remand the cases, holding that the courts of appeals below had failed to apply the correct standard for facial challenges under the First Amendment.[27] They flatly ignored the

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RTS. J. 287, 310 (2019) (arguing, in the interval between *Masterpiece Cakeshop* and *303 Creative*, that "pure compelled-speech claims are fundamentally conscience-based" and therefore "should be rooted in the constitutional provision which protects conscience rather than the provision which protects democracy," meaning "the Free Exercise Clause, *not*, as current doctrine suggests, the Free Speech Clause").

25. Just as "giving offense is a viewpoint," Matal v. Tam, 582 U.S. 218, 243 (2017), so too is giving glory to God. Speech that conveys the speaker's sense of religious obligations or divinely revealed truth expresses a viewpoint about the world and one's relation to it. The fact that religious speech encapsulates a potentially limitless range of different faiths, each with their own view of the "duty which we owe to our Creator, and the manner of discharging it," Everson v. Bd. of Educ., 330 U.S. 1, 64 (1947), does not diminish the extent to which religious speech expresses a viewpoint for the purposes of free-speech analysis.

26. After repeatedly specifying that it seeks special status for *religious* speakers, the Becket brief closes by urging the Court to "distinguish between the claims of conscience and the claims of commerce as they apply to speech." Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Neither Party, *supra* note 21, at 8. We note that this is a very different proposition—a pluralist proposal to privilege *all* claims of conscience, whether secular or religious, over merely commercial interests. Were this in fact the position being advanced, we wouldn't necessarily disagree—at least at this level of abstraction. There is a long tradition in free-speech jurisprudence of treating commercial speech as lower on the speech hierarchy than core political speech. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564-66 (1980) (setting forth the intermediate-scrutiny test for commercial speech). The problem is that *303 Creative* itself did a great deal to unsettle this distinction. The indisputably commercial context in which it arose suggests that the Court was uninterested in preserving a more deferential approach to state regulation of the marketplace. Its failure to engage sufficiently with the fact that the plaintiff was a business open to the public is one of its most troubling defects, as we explain in Part III.

27. Justice Kagan noted that "NetChoice chose to litigate these cases as facial challenges, and that decision comes at a cost." *Moody*, 603 U.S. at 723. She further explained that the applicable standard for facial challenges in free-speech cases is whether "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legit-

technology companies' arguments that *303 Creative*'s firm assertion that website design is "pure speech" was either controlling in the platform cases or somehow distinguishable on other grounds, including on the ground that the website designer in *303 Creative* was a religious speaker.[28] Litigants and lower courts are now left with the difficult task of squaring *Moody* with *303 Creative* and earlier religious-speaker cases.[29] All remain viable cases in the Court's new doctrinal thicket and imperil sensible technology regulation as much as the case law driven by Lochnerian impulses.

The significant implications of the religious-speaker case law for modern technology law have not been previously identified. This likely is because the topics of religious speakers and technology regulation have long been viewed as distinct rather than potentially related phenomena. Although technology-law scholars and policymakers are acutely aware of the deregulatory consequences of recent First Amendment cases in general,[30] and some commentators even

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imate sweep." *Id.* (quoting Ams. for Prosperity Found. (APF) v. Bonta, 594 U.S. 595, 615 (2021)) (citing United States v. Hansen, 599 U.S. 762, 770 (2023)). She continued:

> The first step in the proper facial analysis is to assess the state laws' scope. What activities, by what actors, do the laws prohibit or otherwise regulate? . . . The next order of business is to decide which of the laws' applications violate the First Amendment, and to measure them against the rest.

Id. at 725.

28. *See, e.g.*, Brief for Respondents, *supra* note 18, at 47-48; Brief for Electronic Frontier Foundation et al. as Amici Curiae in Support of Petitioners (No. 22-555) and Respondents (No. 22-277), *supra* note 18, at 21.

29. See, for example, the Ninth Circuit's recent opinion in *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1108 (9th Cir. 2024), which evaluates the CAADCA and treats *Moody* largely as a call for the correct standard for facial challenges. The Ninth Circuit went ahead to analyze the law under the First Amendment, applying strict scrutiny to its provisions on impact assessments. *Id.* ("[W]e conclude that this oversight [in not applying the correct approach to facial challenges] did not cause any error in the district court's analysis of the CAADCA's [Data Protection Impact Assessment (DPIA)] report requirement. That is because the DPIA report requirement, in every application to a covered business, raises the same First Amendment issues." (citation omitted)).

30. For an example of a recent First Amendment case that has alarmed some technology-law scholars and policymakers, see *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 558-61 (2011), which addressed a data privacy law of sorts. *See infra* text accompanying notes 159-165 (discussing *Sorrell*'s legacy in later Supreme Court cases); *see also, e.g.*, Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1507 (2015) (arguing that data privacy law generally does not implicate First Amendment concerns because "the question is not the 'speechiness' of the *human activity* being regulated, but the purpose and effect of the *government regulation*"); Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 879-90 (2012) ("[T]he First Amendment provides full constitutional protection to disclosures of even personal data . . . ."); Gautam Hans, *No Exit: Ten Years of 'Privacy vs. Speech' Post*-Sorrell, 65 WASH. U. J.L. & POL'Y 19, 23

anticipate application of First Amendment protections to nonhuman technology speakers,[31] none has examined the significant role that religious-speaker protection per se has played in expanding this toolkit. Meanwhile, First Amendment scholars have criticized the Court's religious-speaker cases, but largely on their own terms.[32] No scholar has thoroughly explored how the cases also may jeopardize regulatory responses to the harms of digital technology. We bridge these gaps here.

This Feature proceeds in four Parts. Part I sketches, in broad strokes, what current technology regulation looks like and why. This includes platform regu-

(2021) (contending that privacy laws "should not automatically fall into the category of content-based regulations" but could nonetheless satisfy "strict scrutiny"); Kyle Langvardt, *Crypto's First Amendment Hustle*, 26 YALE J.L. & TECH. 130, 132-33 (2024) (acknowledging and rejecting the argument that cryptocurrencies should receive First Amendment protection); Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 357 (2021) (acknowledging that technology companies may use the First Amendment for deregulatory purposes and urging doctrinal distinctions between companies arguing for users' First Amendment rights and those arguing for their own rights); James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 874 (2014) (proposing that a search engine is not a "conduit" or "editor" but rather an "*advisor*"); Jeff Kosseff, *First Amendment Protection for Online Platforms*, 35 COMPUT. L. & SEC. REV. 199, 200 (2019) (finding that the First Amendment only offers platforms "limited protection[s]" when compared to Section 230); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1498 (2013) (differentiating "software that serves as a 'speech product,'" which should be subject to First Amendment protection, "from that which is a 'communication tool,'" which should not receive such protections); Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 172 (2017) (reconciling the "right to record" with "current First Amendment doctrine").

31. *See, e.g.*, Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1173-75 (2016) (exploring how First Amendment theory and doctrine both leave room for protecting nonhuman speech); Toni M. Massaro, Helen Norton & Margot E. Kaminski, *SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2488-91 (2017) [hereinafter Massaro et al., *SIRI-OUSLY 2.0*] (explaining that the First Amendment may protect "strong AI speech" but that this need not deprive free speech of a human-centric focus).

32. *See* David S. Schwartz, *Making Sense of* 303 Creative*: A Free Speech Solution in Search of a Problem* 2-3 (Univ. Wis. L. Sch. Rsch. Paper Series, Paper No. 1792, 2024), https://ssrn.com/abstract=4702932 [https://perma.cc/J6JH-JVUQ] (arguing that the *303 Creative* Court "blunders into [the] problem" of whether public-accommodations laws can "command compliance that is expressive of ideas that the regulated party disagrees with," and addresses it partially, myopically, and badly). *But see* David D. Cole, *"We Do No Such Thing":* 303 Creative v. Elenis *and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 YALE L.J.F. 499, 501 (2024) (attempting to cabin the reach of *303 Creative* by taking the Court "at its word" and restricting its reach to situations in which a commercial actor would refuse to serve all customers who seek the actor's services to express a point of view with which the actor disagrees, as opposed to refusing to serve based on the status of the customer).

lation, data privacy laws, national-security laws, regulations to protect children, and laws governing AI. This summary sets the stage for our discussion of why the Court's religious-speaker cases are particularly dangerous for much of contemporary technology law.

Part II provides an overview of the First Amendment cases leading up to *303 Creative* that illustrate what we call the oppressed-speaker paradigm. The Roberts Court is motivated by the trope of a persecuted religious minority standing fast in the face of a domineering and ideologically majoritarian regulator. It often invokes *Barnette*, which held that Jehovah's Witness schoolchildren have a free-speech right not to recite the Pledge of Allegiance or salute the flag upon pain of expulsion from public school (and criminal sanctions for their parents).[33] Yet the compelling *Barnette* narrative of conscience and courage often is ill-suited for other contexts and speakers, including ones that involve complex regulation of emerging technologies. After all, these speakers generally are not individuals, not conscience-motivated, not relatively powerless, and not subject to comparable majoritarian pressures expressed through coercive government power. Indeed, in some cases, the government regulator may be acting to *defend* other, minoritized speakers from censorship and undue coercion by the private technology speakers.

Part III turns to *303 Creative*. The majority opinion makes five problematic moves: (1) applying free-speech principles rather than free-exercise principles to Colorado's public-accommodations law; (2) treating the design of wedding websites as "pure speech" rather than a combination of conduct and speech; (3) characterizing the website as the speech of the vendor rather than the speech of the customer; (4) assuming the antidiscrimination mandate was unduly coercive without actually assessing the magnitude of the compliance burden; and (5) concluding that the antidiscrimination mandate was categorically unconstitutional without examining the state's justifications. For each doctrinal move, we explain the potential threat to sensible technology policy.

Finally, in Part IV, we parse *Moody* and its implications. On the one hand, the Court's application of the First Amendment to technology platforms was subtler and more sophisticated than its treatment of website design in *303 Creative*. This is a welcome development. But *Moody*'s refusal to acknowledge, much less explain, how the two cases interact creates a doctrinal mess for lower courts and regulators. Squaring the more nuanced approach on display in *Moody* with the "pure speech" absolutism of *303 Creative* will not be an easy task.

We argue that the Court must confront both the doctrinal excesses and the internal conundrum within its recent cases. We maintain that free-speech law

33. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 630, 642 (1943).

normatively and analytically should not grant special protection to religious speakers. The proper doctrinal through line *must be* from gods to Google, and back. If the Court is unwilling to embrace the "pure speech" construct when deployed by technology companies, it must reevaluate its overprotective treatment of religious speakers. Or the Court must clearly provide guidelines to determine how the doctrine might take into account context-specific distinctions that do not depend implicitly on a speaker's religious views. It must offer, in other words, First Amendment limiting principles derived from the role that speech ought to play in our democracy. This will require far more care and nuance than evidenced by current First Amendment doctrine.

I. TECHNOLOGY LAWS

We begin with several examples of technology laws that are endangered by the Court's recent approach to the First Amendment. Across these laws, regulators employ selections from a common set of policy tools: transparency requirements, expert oversight, risk management, and design regulation. We mention these tools not to endorse them, but rather to illustrate that the dominant regulatory instruments of the day are particularly vulnerable to First Amendment challenges under the Court's recent religious-speaker case law. We close this Part by identifying the First Amendment landmines these laws currently face.

A. The Current State of Technology Lawmaking

In this Section, we first provide a snapshot of the current state of technology lawmaking, focusing primarily on U.S. law governing digital information flows. The technologies governed by the following laws gather, host, distribute, process, channel, mediate, and sell information—and this alone often triggers First Amendment scrutiny of the laws that govern them. But these technologies also cause trouble. Lawmakers have recently responded to an array of perceived and actual harms by proposing or enacting a suite of laws, including (1) data privacy laws; (2) content-moderation laws; (3) laws aimed at protecting children; (4) national-security laws; and (5) artificial-intelligence laws. Here, we briefly describe each before going on to identify the policy tools these laws commonly deploy.

1. *Data Privacy Laws*

States are increasingly enacting data privacy laws in response to now-pervasive business models built on monetizing sensitive private information.[34] For decades, the dominant approach to data privacy in the United States has been "notice-and-choice,"[35] which aims to ensure that privacy disclosures provide users with sufficient notice to effectuate individual choices about what technologies to use. Despite being widely criticized as ineffective, this approach remains a fixture of American data privacy law.[36]

Starting in 2018, a wave of states—including California, Colorado, Virginia, Utah, and others—responded to the inadequacies of notice-and-choice by enacting laws that more directly regulate the collection, processing, and use of personal data.[37] Unlike European data privacy law, which covers nearly every entity that processes personal data, these laws typically target the subset of businesses most likely to have large impacts on privacy.[38] They commonly rely on a set of individual transparency rights, including having access to one's per-

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34. *See, e.g.*, Danielle Keats Citron, The Fight for Privacy: Protecting Dignity, Identity, and Love in the Digital Age 156-62 (2022); Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 8-10, 52-54 (2019); Neil Richards, Why Privacy Matters 168-70 (2021); Shoshana Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power 83-86, 101-03 (2019).

35. *See, e.g.*, Daniel J. Solove, *The Limitations of Privacy Rights*, 98 Notre Dame L. Rev. 975, 998 (2023) ("In the United States especially, privacy law relies far too heavily on the notice-and-choice approach, which involves providing people with notice and then relying on them to make decisions about their privacy.").

36. *Id.*; *see also* Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 Stan. Tech. L. Rev. 431, 444 (2016) ("When the FTC first started to regulate privacy in the late 1990s, it adopted a basic notice and choice regime for businesses that was congruous with many of the [Fair Information Practices (FIPs.)]"); Woodrow Hartzog & Neil Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. Rev. 1687, 1704 (2020) ("'[N]otice' often means little more than burying data practices in the fine print of a dense privacy policy, while 'choice' means choosing to use a service with its nonnegotiable data practices as a take-it-or-leave-it option.").

37. *See, e.g.*, Cal. Civ. Code § 1798.100-.199.100 (West 2024) (regulating the collection and processing of consumer data); Colo. Code Regs. § 904-3:7.09 (2024) (regulating the collection and use of personal data).

38. *See, e.g.*, Cal. Civ. Code § 1798.140 (West 2024) (defining businesses by size (really, annual revenue), amount of personal data processed (typically, of over 100,000 people), and/or the extent to which their business models rely on the selling or sharing of personal data (more than fifty percent of annual revenue)).

sonal data held by a company and receiving notifications of data collection.[39] Often, these transparency rights are coupled with light-touch compliance obligations monitored and enforced by state attorneys general.[40] In the past few years, Congress has repeatedly come close to passing a similar federal data privacy law, most recently the American Privacy Rights Act.[41]

2. Content-Moderation Laws

As members of the Court have recently observed, "[S]ocial-media platforms have become the 'modern public square.'"[42] Private actors, of course, are not constrained by the constitutional prohibition on abridging freedom of speech. Yet private control of this new "public square" can have a significant effect on which information is available to the public, whose voices are heard, and what harms may be inflicted by speech in these spaces.[43]

Consequently, there has been growing interest in government regulation of what technology firms call "content moderation" and critics call platform "censorship."[44] Proposals have ranged from direct regulation of content-moderation policies to requirements that "platforms . . . disclose information about their

39. *See* Anupam Chander, Margot E. Kaminski & William McGeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1750-52 (2021).

40. *See id.* at 1757, 1759-60 (explaining the California Attorney General's role in enforcing the California Consumer Privacy Act).

41. For an overview of the content of the American Privacy Rights Act, see *The American Privacy Rights Act of 2024: Section-by-Section Summary*, U.S. SENATE COMM. ON COM., SCI. & TRANSP., https://www.commerce.senate.gov/services/files/E7D2864C-64C3-49D3-BC1E-6AB41DE863F5 [https://perma.cc/7HB8-H5V2]. For discussion of why and how it stalled, see Lauren Feiner, *A Meeting to Consider a Bipartisan Privacy Bill Just Crumbled*, VERGE (June 27, 2024, 4:49 PM EDT), https://www.theverge.com/2024/6/27/24187313/house-energy-commerce-committee-cancels-apra-privacy-bill-markup [https://perma.cc/85RU-34WW]; and Suzanne Smalley, *As Backlash Mounts, Data Privacy Bill Markup Is Canceled Moments Before It Was to Start*, RECORD (June 27, 2024), https://therecord.media/apra-data-privacy-bill-markup-cancelled-congress [https://perma.cc/3682-X2MZ].

42. Moody v. NetChoice, LLC, 603 U.S. 707, 767 (2024) (Alito, J., concurring in the judgment) (quoting Packingham v. North Carolina, 582 U.S. 98, 107 (2017)).

43. *See* Andrew Keane Woods, *Public Law, Private Platforms*, 107 MINN. L. REV. 1249, 1260-61 (2023).

44. *Moody*, 603 U.S. at 769 (Alito, J., concurring in the judgment) ("'Content moderation' is the gentle-sounding term used by internet platforms to denote actions they take purportedly to ensure that user-provided content complies with their terms of service and 'community standards.' The Florida law eschews this neologism and instead uses the old-fashioned term 'censorship.'").

content moderation activities to the public."[45] The European Union, for example, recently enacted the Digital Services Act, which builds on an existing regime of platform liability and safe harbors to regulate society-wide risks, including threats to democracy, threats of gender-based violence, and threats to public health.[46]

In the United States, Section 230 of the Communications Decency Act has long been the main federal law governing online content moderation, immunizing platforms from liability for hosting user content and moderating content on their sites.[47] Despite the existence of Section 230, Florida and Texas passed laws in 2021 to regulate how social-media firms handle content moderation. The Florida law, S.B. 7072 (the "Stop Social Media Censorship Act"), prohibits social-media firms from banning "journalistic enterprise[s]" and political candidates.[48] The Texas law, H.B. 20, bans large platforms (those with more than fifty million active users) from blocking, removing, or demonetizing content based on users' views.[49] Both laws impose transparency obligations that would require platforms to disclose details about their content-moderation policies.[50] Both also require that platforms explain certain adverse actions to affected individuals and afford those individuals some process rights.[51] These laws were the subject of the Supreme Court's recent ruling in *Moody*, discussed further below.[52]

3. Laws to Protect Children Online

Since the advent of the internet, legislators have introduced bills to protect children online. The first serious effort, the Communications Decency Act, prompted the Court's first internet speech case, *Reno v. ACLU*, which struck

45. Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1383 (2018).

46. *See* MARTIN HUSOVEC, PRINCIPLES OF THE DIGITAL SERVICES ACT 19-32 (2024); *see also* European Parliament and Council Regulation 2022/2065, 2022 O.J. (L 277) 1, 64 [hereinafter Digital Services Act] (defining systemic risks for risk analysis).

47. 47 U.S.C. § 230 (2018). Copyright law creates a different, parallel regime for content moderation of copyrighted content. *See* 17 U.S.C. § 512 (2018).

48. FLA. STAT. § 501.2041 (2024).

49. TEX. BUS. & COM. CODE ANN. §§ 120.001–.151 (West 2023); TEX. CIV. PRAC. & REM. CODE ANN. §§ 143A.001–.008 (West 2023).

50. FLA. STAT. § 501.2041(2)(a), (c), (e) (2024); TEX. BUS. & COM. CODE ANN. §§ 120.051–.053 (West 2023).

51. FLA. STAT. § 501.2041(2)(d) (2024); TEX. BUS. & COM. CODE ANN. § 120.103(a) (West 2023).

52. Moody v. NetChoice, LLC, 603 U.S. 707, 713 (2024); *see infra* Part IV.

down aspects of the law criminalizing the distribution of sexual images to minors on First Amendment grounds.[53] Today, there is yet again broad support for regulation specially designed to protect children from a different set of online harms.[54]

The recent California children's privacy law, the California Age-Appropriate Design Code Act (CAADCA), is one example.[55] Among other things, it requires the providers of online services to conduct impact assessments to determine potential harms to children.[56] It focuses particularly on the design of online products, emphasizing the importance of default privacy settings and regulating addictive and manipulative design.[57] There have been several similar federal proposals, including the controversial Kids Online Safety Act (KOSA), which passed the Senate in July 2024 but stalled in the House.[58]

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53. 521 U.S. 844, 849, 858 (1997).

54. *See, e.g.*, Press Release, Colo. Att'y Gen., Bipartisan Coalition of Attorneys General Call for Congress to Require Surgeon General Warning on Social Media Platforms (Sept. 10, 2024), https://coag.gov/press-releases/surgeon-general-warning-social-media-9-10-2024 [https://perma.cc/Y3RT-CTW3]; Letter from Nat'l Ass'n of Att'ys Gen. to Mike Johnson, Speaker, House of Representatives, Chuck Schumer, Senate Majority Leader & Mitch McConnell, Senate Minority Leader [1] (Sept. 9, 2024), https://coag.gov/app/uploads/2024/09/SM-Warning-Label-Letter_FINAL.pdf [https://perma.cc/F59J-G29W] ("We, the attorneys general of the 42 undersigned states, write in support of the United States Surgeon General's recent call for Congress to require a surgeon general's warning on social media platforms. Young people are facing a mental health crisis, which is fueled in large part by social media. As Surgeon General Murthy recognized, this generational harm demands immediate action."); *see also* Lawrence, *Public Health*, *supra* note 7, at 299, 317-19 (discussing claims about social-media companies' "addictive design" and recounting litigation against major social-media platforms for harming children's development and mental health).

55. Cal. Civ. Code §§ 1798.99.28-.40 (West 2024).

56. *Id.* § 1798.99.31.

57. *Id.*

58. *Kids Online Safety Act*, U.S. Sen. Richard Blumenthal, https://www.blumenthal.senate.gov/about/issues/kids-online-safety-act [https://perma.cc/XX6R-2L3A]; Press Release, Sen. Richard Blumenthal & Sen. Marsha Blackburn, Blumenthal & Blackburn Celebrate Senate Passage of the Bipartisan Kids Online Safety Act (July 30, 2024), https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-blackburn-celebrate-senate-passage-of-the-bipartisan-kids-online-safety-act [https://perma.cc/8ZRY-ZTTT]; Vittoria Elliott, *The Controversial Kids Online Safety Act Faces an Uncertain Future*, Wired (Aug. 5, 2024, 1:34 PM), https://www.wired.com/story/kids-online-safety-act-kosa-stalled-in-house [https://perma.cc/H7NT-WG6B]. Critics of the Kids Online Safety Act claim that it will be potentially used to prevent youth from accessing sexual-health content and content on LGBTQ+ issues online. *See* Jasmine Mithani, *Why Some LGBTQ+ Groups Oppose the Current Kids Online Safety Act*, 19th News (Mar. 27, 2024), https://19thnews.org/2024/03/why-some-lgbtq-groups-oppose-the-current-kids-online-safety-act [https://perma.cc/HB7K-D2C7].

4. National-Security Laws

In the wake of Russia's effort to use social media to influence the outcome of the 2016 U.S. presidential election, several measures have been proposed to protect national security online. The most sweeping example is the recent federal law passed to force the Chinese firm ByteDance to divest ownership of its U.S. subsidiary, or else have its most popular product, the social-media platform TikTok, banned in the United States.[59] The Committee on Foreign Investment in the United States also forced the divestiture of foreign-owned internet products.[60] Legislators have proposed a range of measures, including requiring the Secretary of Commerce to regulate information-technology companies that have ties to foreign adversaries.[61]

Digital intelligence collection and evidence gathering also raise law-enforcement and national-security concerns. Encryption is a critical technology that secures digital information. But federal and state law-enforcement officials have aggressively advocated for weakening encryption by prohibiting the design or sale of fully-encrypted products that law enforcement cannot access.[62] Cryptocurrencies have raised similar concerns, with the White House recently warning that they "may pose significant illicit finance risks, including money laundering, cybercrime and ransomware, narcotics and human trafficking, and terrorism and proliferation financing."[63] Because new information technologies

59. Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H, 138 Stat. 955, 955-59 (2024).

60. For example, the Committee on Foreign Investment in the United States informed a Chinese firm that its ownership of the gay dating app, Grindr, was a national-security concern and compelled them to sell the app to non-Chinese owners. Jay Peters, *Grindr Has Been Sold by Its Chinese Owner After the US Expressed Security Concerns*, VERGE (Mar. 6, 2020, 1:26 PM EST), https://www.theverge.com/2020/3/6/21168079/grindr-sold-chinese-owner-us-cfius-security-concerns-kunlun-lgbtq [https://perma.cc/T8P9-PDED].

61. *See* Restricting the Emergence of Security Threats that Risk Information and Communications Technology (RESTRICT) Act, S. 686, 118th Cong. § 3(a)(1)(D) (2023).

62. *See Going Dark: Encryption, Technology, and the Balance Between Public Safety and Privacy: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 2-5 (2015) (statement of James Comey, Dir., Federal Bureau of Investigation, and Sally Yates, Deputy Att'y Gen. of the United States); Andy Greenberg, *Why Proposed State Bans on Phone Encryption Are Moronic*, SLATE (Jan. 29, 2016, 12:14 PM), https://slate.com/technology/2016/01/new-york-and-california-have-proposed-state-bans-on-phone-encryption.html [https://perma.cc/AMC7-DL6D] (describing proposed bills in New York and California to prohibit the sale of full-disk-encrypted phones).

63. Exec. Order No. 14,067, 3 C.F.R. 345, 347 (2023).

have implications for national security, they have prompted regulators to propose novel legislation.[64]

5. Artificial-Intelligence Laws

Numerous forums, from technical standards-setting bodies to transnational institutions like the Organisation for Economic Cooperation and Development, have already developed governance principles for AI.[65] Many of these principles converge around core concepts such as fairness, accountability, transparency, explainability, and human oversight.[66]

The so-called "Algorithmic Impact Assessment" has been central to proposed AI laws and guidance, from the EU AI Act to the U.S. National Institute of Standards and Technology's AI Risk Management Framework.[67] Since the necessary information and expertise for building and evaluating an AI system are often housed with engineers inside the firm that develops it, many AI regulations ask those firms to evaluate their own work. AI risk regulation typically

64. *See* Andrew Crocker, *The Senate's New Anti-Encryption Bill Is Even Worse than EARN IT, and That's Saying Something*, ELEC. FRONTIER FOUND. (June 24, 2020), https://www.eff.org/deeplinks/2020/06/senates-new-anti-encryption-bill-even-worse-earn-it-and-thats-saying-something [https://perma.cc/44NQ-SC7D] (describing the Lawful Access to Encrypted Data Act, which would "give the Justice Department the ability to require that manufacturers of encrypted devices and operating systems, communications providers, and many others must have the ability to decrypt data upon request").

65. *See* Gary Marchant & Carlos Ignacio Gutierrez, *A Global Perspective of Soft Law Programs for the Governance of Artificial Intelligence*, CTR. FOR L., SCI. & INNOVATION 11 (2021), https://lsi.asulaw.org/softlaw/wp-content/uploads/sites/7/2022/08/final-database-report-002-compressed.pdf [https://perma.cc/9W7N-F7NJ] (identifying and classifying AI soft-law programs, including those from private companies and the Organisation for Economic Cooperation and Development (OECD)); *see also* Gary E. Marchant & Carlos Ignacio Gutierrez, *Soft Law 2.0: An Agile and Effective Governance Approach for Artificial Intelligence*, 24 MINN. J.L. SCI. & TECH. 375, 377, 390-91 (2022) (proposing an artificial-intelligence regulatory scheme using a "soft law" approach that emphasizes creating norms rather than relying on enforcement mechanisms and outlining recommendations from the OECD).

66. *See, e.g.*, *OECD AI Principles Overview*, OECD (2024), https://oecd.ai/en/ai-principles [https://perma.cc/859P-7EYC]; Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law arts. 5, 8-9, Sept. 5, 2024, C.E.T.S. No. 225, https://rm.coe.int/1680afae3c [https://perma.cc/8PYK-Z7R4].

67. *See, e.g.*, European Parliament and Council Regulation 2024/1680, 2024 O.J. (L 1689) 1, 1; Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, *supra* note 66, art. 3; *see also generally* Nat'l Inst. of Standards & Tech., *Artificial Intelligence Risk Management Framework: Generative Artificial Intelligence Profile*, U.S. DEP'T OF COM. (July 2024), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.600-1.pdf [https://perma.cc/25LH-RKJ9] (providing a companion resource for the AI Risk Management Framework for Generative AI).

tasks companies with identifying and mitigating any risks of AI systems, including risks of bias, discrimination, and privacy violations.[68] These delegated risk-mitigation processes are subject to light-touch oversight, if any.[69] Regulators have also turned to external expert audits to establish further accountability.[70] Some have looked to proposed individualized transparency rights (such as a "right to explanation" of an AI decision) and accompanying individual procedural rights (such as a "right to contest" an AI decision) that would be partial solutions to algorithmic opacity and the shift in power dynamics away from the affected individual.[71]

B. Central Policy Aims and Tools

This recent wave of laws has arisen to deal with the societal impact of developing technologies. Whether these laws survive constitutional scrutiny is contingent upon having First Amendment doctrine that is sensitive to a wide range of highly contextual factors. Worryingly, the Court's free-speech doctrine is increasingly formalist and often blind to context and the important government reasons for regulation.

In this Section, we highlight common policy tools that recur across technology laws and are already particularly subject to First Amendment challenges. These tools are motivated by a set of common policy goals. We discuss several of these high-level motivations before going into detail about the specific policy tools. Then, in Section II.C, we elaborate on the kinds of First Amendment tripwires these tools encounter.

A central motivation behind today's technology policymaking is to combat power imbalances between individuals and companies: data brokers monetizing vast quantities of personal data, employers using AI to make hiring decisions, or online platforms targeting individuals with advertising and manipulative or false content, to name just a few. Technology law typically aims to give individuals some purchase over this vast and often bewildering area of corporate decision-making by adding disclosures and even due-process-like rights.[72]

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68. *See* Margot E. Kaminski, *Regulating the Risks of AI*, 103 B.U. L. Rev. 1347, 1372-86 (2023).

69. *See id.*

70. *See, e.g.*, N.Y.C., N.Y. Rules of the City tit. 6, ch. 5, §§ 5-300 to -304 (2023) (establishing bias audits for the use of algorithms in hiring).

71. For an overview, see Margot E. Kaminski & Jennifer M. Urban, *The Right to Contest AI*, 121 Colum. L. Rev. 1957, 1975-86 (2021).

72. *See supra* Sections I.A.1, I.A.3, I.A.5. *See generally* Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. Chi. L. Rev. 829 (2021) (exploring possible applications of due-process rights on technology platforms).

This typically occurs against the backdrop of worries that incumbent technology companies can leverage their concentrated positions of power not just against consumers but against competitors in the marketplace. Indeed, one ongoing policy discussion is whether power imbalances between users and companies are best addressed by affording individuals a set of rights against these companies, including but not limited to privacy rights, or by going after platform dominance structurally through antitrust law.[73]

Much, though not all, of the law of digital technology currently subject to First Amendment challenges is fundamentally concerned with platforms, websites that host the content of large numbers of users. Like policy discussions in technology law writ large, platform policy discussions often focus on power imbalances.[74] Platforms have more power than users, who typically at most can leave the platform, if they are not locked in by network effects.[75]

Platform policy debates also illustrate a second recurring motivation in technology lawmaking: balancing the multiple recognized speech interests at play. That is, technologies have users, and often both the technology developer and the users can assert speech interests, oftentimes competing ones. Platform law therefore involves three sets of parties: the state, the firm, and the users.[76] In First Amendment terms, when the government passes a law regulating a platform, both the platform and its users might have a plausible speech interest. When we say that we worry about the court's oppressed-speaker paradigm moving from religious speakers to algorithmic speakers, we are especially concerned about the effects this will have in privileging platform companies' interests over users' interests in the context of platform regulation.

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73. *See* Erika Douglas, *What Is Privacy—to Antitrust Law*, 14 U.C. IRVINE L. REV. 817, 867 (2024) (describing the conflict between the motivating norms of antitrust and individual privacy rights protecting personal data). *See generally* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (describing consumer harms and arguing that Amazon should be subject to antitrust scrutiny).

74. *See infra* notes 81-82.

75. *See, e.g.*, Jack Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2036 (2018) ("One might also object that network effects will prevent broad diversity in social media because users will flock to the platforms with the largest user base."). Jack Balkin goes on to explain why this might not be a concern. *Id.*

76. *Id.* at 2014; *see also* Daphne Keller, *The Three-Body Problem: Platform Litigation and Absent Parties*, LAWFARE (May 4, 2023, 9:00 AM), https://www.lawfaremedia.org/article/the-three-body-problem-platform-litigation-and-absent-parties [https://perma.cc/9Q7N-VXVV] (describing the "competing interests of platforms, speakers, and people harmed by speech"); Rozenshtein, *supra* note 30, at 351-53 ("Sometimes companies invoke the rights of their users in addition to their own First Amendment rights.").

A third aim of current technology policymaking is to address the mediating role of technologies, shaping how users act and think and often deliberately manipulating users.[77] Technologies, from online platforms and cellular telephones to Internet-of-Things devices and robots, sit between citizens and other individuals, citizens and the market, and citizens and their governments. These technologies do not just neutrally deliver information or goods or services; they constitute individuals and social interactions through mediation and often manipulation.[78] That is, technologies shape people and craft relationships as much as people use technologies.

Concerns about mediation and manipulation are front and center in platform policymaking. Platforms, like other technologies, are not neutral—a fact lawmakers increasingly recognize, prompting them to craft laws targeting content-moderation algorithms[79] and prohibiting the use of manipulative choice architectures known as "dark patterns."[80] Indeed, platform law has increasingly moved from asking the "collateral censorship" question—how to avoid overregulating platforms such that they do not remove too much user content[81]—to asking the "manipulation" question—that is, how to regulate platforms so that they do not manipulate users in service of corporations' self-interested ends.[82] These are questions about the alignment and misalignment of platform interests and user interests, and what to do when these interests diverge.

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77. *See* Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1913 (2013) ("Networked information technologies mediate our experiences of the world in ways directly related to both the practice of citizenship and the capacity for citizenship, and so they configure citizens as directly or even more directly than institutions do.").

78. *Id.*

79. FLA. STAT. § 501.2041(2)(a), (c), (e) (2024); TEX. BUS. & COM. CODE ANN. §§ 120.051–.053 (West 2023).

80. *See* CAL. CIV. CODE § 1798.99.31(b)(7) (West 2024) (using the term "dark patterns" to describe "lead[ing] or encourage[ing] children to provide personal information beyond what is reasonably expected . . . to forego privacy protections, or to take any action . . . materially detrimental to the child's physical health, mental health, or well-being").

81. *See, e.g.*, Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 328-49 (2011) (describing how the limits of the collateral-censorship rationale should inform our understanding of Section 230).

82. *See, e.g.*, Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 26 (2019) (defining manipulation); Helen Norton, *Manipulation and the First Amendment*, 30 WM. & MARY BILL RTS. J. 221, 222 (2021) (exploring how to "regulate manipulation consistent with the First Amendment"); Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 998 (2014) (exploring the question of when "*leveraging data* against the consumer becomes a problem worthy of legal intervention"); Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815, 818 (2019) (discussing the manipulation risks of AI).

There are other recurring motivations driving the enactment of technology laws. To name just a few, these include concerns about harms: preventing significant psychological harms, including anxiety and addiction; preventing physical harms, including gender-based violence, eating disorders, and suicide; protecting the most vulnerable targets of manipulation and addictive technologies, with a focus on children; and countering bias and discrimination often built into data-driven technologies, including AI. Other recurring motivations focus on regulatory design, such as getting technological expertise into technology lawmaking, future-proofing laws as much as possible to guard against predictably rapid technological and social change, and leaving ample room for (value-guided) technological development and innovation.

Below we identify a set of common policy tools motivated by these and other concerns. These tools are used across the different technology laws referenced above, from platform regulation to newer AI policy. They include transparency, expert oversight, risk management, and design regulation. As we will show, they each run headlong into obstacles within current First Amendment doctrine, stemming from the Court's outsize solicitude for religious speakers coupled with its general deregulatory impulses.

1. Transparency

Transparency requirements are central to several new technology laws. New state data privacy laws, for example, typically afford a set of individual rights centered on transparency and choice.[83] For example, under the California Consumer Privacy Act, individuals are to be informed about whether a company is collecting their data, the types of personal data a company has, and how a company uses that data.[84]

Regulators have sought to ensure the efficacy of these and other individual disclosures by requiring that they be posted in understandable terms.[85] In some cases, transparency rights can be goods in and of themselves. Often, though, they are necessary for effectuating other specific individual data privacy rights, such as the rights to opt out of the sale of one's data, to opt out of

83. *See* Margot E. Kaminski, *Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability*, 92 S. CAL. L. REV. 1529, 1552-53, 1565 n.166 (2019); Chander et al., *supra* note 39, at 1751-55, 1758; *see also* Jane R. Bambauer, *How to Get the Property Out of Privacy Law*, 133 YALE L.J.F. 1087, 1087-89 (2024) (calling for a move toward more risk regulation and fewer individual rights).

84. Chander et al., *supra* note 39, at 1752-53.

85. *See, e.g.*, CAL. CIV. CODE § 1798.99.31(a)(7) (West 2024) (requiring that disclosures be clear and understandable through the use of age-appropriate language in disclosures).

profiling, or to correct mistakes in one's data.[86] These rights are based on Fair Information Practices (FIPs), a set of data privacy principles that date back to the 1970s.[87] FIPs aim to correct power imbalances and institute procedural fairness, and they exist in data protection laws around the world.[88]

Recent state content-moderation laws deploy similar transparency tools, albeit to different ends, including the questionable end of ideological balance.[89] They require transparency about moderation policies, roughly analogous to the disclosure of a privacy policy.[90] Sometimes they require individualized explanations of decisions to censor or moderate user content.[91]

All such laws involve mandatory disclosures.[92] As we discuss in the next Section, the Court's increasingly expansive interpretation of what counts as coercion of speech, and its nearly automatic rejection of measures that compel expression even in commercial settings, make all of these laws that center on mandatory disclosures acutely vulnerable to First Amendment challenges.

2. *Expert Oversight*

These laws also often establish expert oversight to address concerns about technical expertise. These policy moves could be characterized as transparency measures, but rather than focusing on conveying information to users or to the public, they aim to force technical information disclosures to third-party experts or expert regulators. Pacing the law to keep up with technological change is rarely the core issue in these contexts; the law regularly copes with all kinds

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86. *See, e.g.*, Margot E. Kaminski, *The Right to Explanation, Explained*, 34 BERKELEY TECH. L.J. 189, 211 (2019) ("Individual transparency provisions, as the guidelines make clear, are intended to empower individuals to invoke their other rights under the GDPR.").

87. *See* Woodrow Hartzog, *The Inadequate, Invaluable Fair Information Practices*, 76 MD. L. REV. 952, 953 (2017) ("The FIPs model of privacy regulation has been adopted by nearly every country in the world that has decided to take data protection seriously.").

88. Chander et al., *supra* note 39, at 1750.

89. For example, the Texas law at issue in *NetChoice, L.L.C. v. Paxton* includes a stringent disclosure requirement aimed at increasing platform transparency. *See* 49 F.4th 439, 446 (5th Cir. 2022), *vacated sub nom.* Moody v. NetChoice, LLC, 603 U.S. 707 (2024).

90. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 22675-22681 (West 2024) (requiring social-media companies to make disclosures about their content-moderation policies).

91. FLA. STAT. § 501.2041(2)(d) (2024); TEX. BUS. & COM. CODE ANN. § 120.103(a) (West 2023).

92. *See, e.g.*, FLA. STAT. § 501.2041(2) (2024); TEX. BUS. & COM. CODE ANN. § 120.103(a) (West 2023); NetChoice, LLC v. Bonta, 113 F.4th 1101, 1111 (9th Cir. 2024).

of change, both technological and social.[93] But getting governmental access to technological and industry expertise presents difficulties for drafting informed technology laws and for enforcing them.

Targeted disclosures and oversight mechanisms—such as requiring disclosures to experts, oversight by expert boards, or expert audits—can enable external expert oversight and improve future policy decisions.[94] Expert oversight may also be deployed to bolster a governance regime that tries to harness internal company technical expertise toward self-regulation while still holding a firm accountable to public values through third-party or regulatory monitoring.[95] Thus, in these recurring expertise-centered discussions, we see an emphasis on (a) moving expertise from within industry to regulators and external experts and (b) relying on private-sector expertise that is kept accountable through oversight. Examples of the former include required disclosures to expert boards or third-party auditors.[96] Examples of the latter include required disclosures to consumer-protection enforcers that often themselves house technical and legal expertise.[97] These tailored disclosure measures are again vulnerable to First Amendment challenges stemming from the Court's tendency to see compelled-speech problems everywhere.

3. Risk Management

Recent data privacy laws, laws protecting children online, and AI laws all rely to some degree on risk regulation and a specific tool: the impact assessment. Recent data privacy laws typically have a risk-monitoring and risk-

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93. Margot Kaminski, *Technological "Disruption" of the Law's Imagined Scene: Some Lessons from Lex Informatica*, 36 BERKELEY TECH. L.J. 883, 890-95 (2021) (describing the "pacing problem" and the complex "interplay between law and technology" (citing Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 556 (1998))); Margot Kaminski & Meg Leta Jones, *Constructing AI Speech*, 133 YALE L.J.F. 1212, 1217 (2024) ("The deterministic framing typically also presumes that technological development inherently moves at a pace law is not equipped to follow (the so-called 'pacing problem')").").

94. So, for that matter, does public transparency, when the public includes experts—but that is less our focus here, as it overlaps with the more general transparency measures discussed above.

95. *See* Kaminski, *supra* note 83, at 1557-64 (describing so-called "collaborative governance" as a governance approach that seeks to harness private-sector expertise for the public good).

96. *See, e.g.*, N.Y.C., N.Y. ADMIN. CODE tit. 20, ch. 5, §§ 870-871 (2023).

97. *See, e.g.*, NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 944 (N.D. Cal. 2023) (discussing CAADCA's compelled disclosures to regulators), *aff'd in part, vacated in part*, 113 F.4th 1101 (9th Cir. 2024).

management component. Data privacy laws around the world have used versions of this light-touch risk regulation that tasks companies with policing themselves, while also trying to design various forms of accountability over that delegation to prevent it from turning overly self-interested.[98] AI law deploys a similar tool in the algorithmic-impact assessment, also called an AI-impact assessment.[99]

Impact assessments are intended to be light-touch regulatory instruments that encourage companies to identify, assess, and fix their own problems.[100] Laws establishing impact assessments often use broad terms about what risks must be prevented—such as risks to "privacy" or "fairness"—effectively delegating more specific decisions about their interpretation in practice to regulated entities.[101] Laws also typically require that impact assessments be disclosed to or discoverable by regulators, to establish oversight over an otherwise self-governing process.[102] Recently, impact assessments, too, have been vulnerable to First Amendment scrutiny.[103] Their vague terms—which are vague as a matter of regulatory design—are particularly vulnerable to tailoring challenges, once First Amendment scrutiny applies.

4. Regulating Design

The last recurring policy move is a recent and growing trend toward regulating technological design. Technological interfaces are often deliberately designed to be viscerally manipulative and even addictive. Consequently, mitigating their harms often entails trying to change the design of the product or intervening in product development.[104] California's children's privacy law is so directly aimed at design that it is called the "California Age-Appropriate *Design* Code Act."[105] Several recent U.S. privacy laws target "dark patterns," which are

98. Kaminski, *supra* note 83, at 1557-64; *see* Ari Waldman, *The New Privacy Law*, 55 U.C. DAVIS L. REV. ONLINE 19, 22 (2021) (offering a more critical take).

99. Kaminski, *supra* note 68, at 1380-86.

100. *See* Andrew D. Selbst, *An Institutional View of Algorithmic Impact Assessments*, 35 HARV. J.L. & TECH. 117, 122-24 (2021).

101. *See id.* at 150.

102. *See id.* at 150-52.

103. *Bonta*, 113 F.4th at 1119-22; *Bonta*, 692 F. Supp. 3d at 938-39.

104. WOODROW HARTZOG, PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES 24-25 (2018).

105. CAL. CIV. CODE § 1798.99.28 (West 2024) (emphasis added); *see also* Appellant's Opening Brief at 8-9, *Bonta*, 113 F.4th 1101 (No. 23-2969) (noting that the CAADCA is "modeled after the United Kingdom's Age Appropriate Design Code, commonly referred to as the 'Chil-

attempts to manipulate users against their own interests—often through addictive interface design.[106] The recently-stalled KOSA also prohibits dark patterns and requires public reporting of addictive design.[107] The American Privacy Rights Act would also prohibit dark patterns.[108]

This trend reflects a longstanding theme in technology policy.[109] Design dictates people's behavior by constraining, channeling, and enabling them.[110] Code plainly encodes values.[111] Thus, regulators frequently intervene in the design of technologies to protect the public interest. Regulators require car manufacturers to install seatbelts. They nudge websites to capture and share user information with the government. They push AI companies to try to minimize risks of disinformation and discrimination. New data privacy laws also reflect what is known as "Privacy by Design": an attempt to bake privacy values into the design of a technology early in its development.[112]

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dren's Code,' which requires that all websites likely to be accessed by children provide privacy protections by default").

106. *See, e.g.*, COLO. CODE REGS. § 904-3:7.09(D) (2024) ("Consent obtained in violation of this [regulation] may be considered a Dark Pattern.").

107. S. 1409, 118th Cong. §§ 4(e)(2), 6(c)(2)(C) (2023) (providing that "[i]t shall be unlawful for any covered platform to design, modify, or manipulate a user interface of a covered platform with the purpose or substantial effect of subverting or impairing user autonomy, decision-making, or choice with respect to safeguards or parental controls required under this section" and considering "whether and how the covered platform uses system design features that increase, sustain, or extend use of a product or service by a minor, such as automatic playing of media, rewards for time spent, and notifications").

108. H.R. 8818, 118th Cong. § 107 (2024).

109. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 30-42 (1999) (describing the way that cyberspace design choices, like architectural choices, constrain behavior in regulation-like ways); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 554 (1998) ("[L]aw and government regulation are not the only source of rule-making. Technological capabilities and system design choices impose rules on participants.").

110. *See generally* HARTZOG, *supra* note 104 (discussing how design choices affect user privacy); Ian Kerr, *The Devil Is in the Defaults*, 4 CRITICAL ANALYSIS L. 91 (2017) (discussing how technological defaults influence user choice).

111. *See* HARTZOG, *supra* note 104, at 94-95; *see also* Reidenberg, *supra* note 109, at 569 (describing the relationship between technological design, law, and policy choices); Kaminski, *supra* note 93, at 887 ("[T]echnology isn't understood to be value-neutral, authoritative, or inevitable. It reflects choices. It's political.").

112. This approach was adopted by the Federal Trade Commission (FTC) as early as 2012. *See* Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Remarks at the Privacy by Design Conference, Privacy by Design and the New Privacy Framework of the U.S. Federal Trade Commission 1 (June 13, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/privacy-design-and-new-privacy-framework-u.s.federal-trade-commission/120613privacydesign.pdf [https://perma.cc/EHK4-C5G7].

To be sure, thorny questions arise about the legitimacy of government intervention in technological design.[113] Because design constrains behavior, regulating through design can effectively produce government-favored outcomes while obscuring government involvement and absolving it from immediate responsibility and feedback.[114]

Like other technology policy tools, attempts at regulating technological design typically deal in broad strokes, not specific details. Legislators rarely provide comprehensive marching orders in design provisions. Instead, they typically delegate responsibility both to companies that have design expertise to apply the principles and to nimbler regulators who can draw on developing expertise and fill the gaps with soft law. A regulator like the Federal Trade Commission (FTC) might issue nonbinding guidelines, for example, on how to design effective notice in mobile apps.[115]

Legislatures attempting to regulate the design of digital products and services face the risk that, because these products are constituted through words and images, their rules will be challenged under the Free Speech Clause of the First Amendment.[116] As many leading design scholars recently noted in an amicus brief before the Ninth Circuit, nearly every court to consider design regulations has rejected the idea that code regulation triggers First Amendment protections.[117] But the risk is clear: legislatures attempting to regulate the design of digital products and services will see their rules challenged on free-speech grounds.

C. First Amendment Landmines

We have provided an overview of recent technology laws and highlighted several cross-cutting policy tools. These laws and specific policy tools are, it

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113. *See, e.g.*, Deirdre K. Mulligan & Kenneth A. Bamberger, *Procurement as Policy: Administrative Process for Machine Learning*, 34 Berkeley Tech. L.J. 773, 779-80 (2019) (describing the tension between the regulator's "'procurement' mindset" and technological design).

114. *See, e.g.*, Aaron Perzanowski, The Right to Repair: Reclaiming the Things We Own 110-24 (2021) (describing how intellectual-property regimes can give private actors enormous power to shape their products in ways that do not in fact comport with the goals behind the intellectual-property regime).

115. Press Release, Fed. Trade Comm'n, FTC Announces Video with Tips for Mobile App Developers (Mar. 13, 2013), https://www.ftc.gov/news-events/news/press-releases/2013/03/ftc-announces-video-tips-mobile-app-developers [https://perma.cc/VUT9-FD4Y].

116. *See, e.g.*, NetChoice, LLC v. Bonta, 113 F.4th 1101, 1112 (9th Cir. 2024).

117. *See* Brief of Amici Curiae Design Scholars in Support of Defendant-Appellant at 5-14, *Bonta*, 113 F.4th 1101 (No. 23-2969).

turns out, highly vulnerable to free-speech challenges. This may surprise readers unfamiliar with the breadth of current First Amendment doctrine and how recent extensions offer powerful defenses against even commonly accepted tools of the regulatory state. We here outline several recent technology-law cases as examples of how this free-speech expansionism casts a constitutional shadow over a wide range of regulation that many people, including Supreme Court Justices, may favor. We return to these cases, their references, and their reasoning in greater detail in the next Part, after this sketch of the relevant First Amendment landmines that logically apply to technology regulation. This case law includes decisions that protect religious speakers in particular, with important consequences for efforts to regulate technology companies.

Not all of these cases are wrongly decided as a matter of current First Amendment law. Rather, two important points emerge from these cases. First, companies are repeatedly—and successfully—raising First Amendment challenges to common technology policy tools. Second, the First Amendment tripwires are everywhere: if companies do not succeed on one claim or framing, they often succeed on another.

Take transparency requirements. Although these increase rather than decrease information,[118] multiple courts have questioned the constitutionality of technology-law transparency requirements.[119] For example, a district court found that the CAADCA's transparency sections "require businesses to affirmatively provide information to users, and by requiring speech necessarily regulate it."[120] The judge deemed certain transparency requirements unconstitutional because they failed the applicable means-ends analysis.[121] The requirement that disclosures to children must be made in age-appropriate lan-

118. *See* Brief of the Knight First Amendment Institute at Columbia University as Amicus Curiae in Support of Neither Party at 21, Moody v. NetChoice, LLC, 603 U.S. 707 (2024) (Nos. 22-277, 22-555); Keller, *supra* note 76 (discussing platform transparency).

119. NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 961 (N.D. Cal. 2023), *aff'd in part, vacated in part*, 113 F.4th 1101 (9th Cir. 2024); X Corp. v. Bonta, 116 F.4th 888, 902 (9th Cir. 2024).

120. *Bonta*, 692 F. Supp. 3d at 945 (explicating relevant provisions, including ones "requiring businesses '[p]rovide any privacy information . . . concisely, prominently, and using clear language suited to the age of children likely to access that online service, product, or feature,'" "requiring that businesses 'provide an obvious signal to [a] child' if the child is being tracked or monitored by a parent or guardian via an online service, product, or feature," and requiring that businesses "[p]rovide prominent, accessible, and responsive tools to help children . . . exercise their privacy rights and report concerns" (alterations in original) (first quoting CAL. CIV. CODE § 1798.99.31(a)(7) (West 2023); then quoting CAL. CIV. CODE § 1798.99.31(a)(8) (West 2023); and then quoting CAL. CIV. CODE § 1798.99.31(a)(10) (West 2023))); *see id.* at 943 (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995), which holds that "information on beer labels" constitutes speech).

121. *Id.* at 948-60.

guage was found insufficiently tailored to advance a substantial state interest in protecting children's privacy.[122]

The Ninth Circuit later vacated that aspect of the district-court decision regarding the CAADCA.[123] However, in a different 2024 case, *X Corp. v. Bonta*, a Ninth Circuit panel found the transparency requirements of another law—governing social-media platforms by requiring disclosure of their content-moderation policies—unconstitutional.[124] The Ninth Circuit reasoned, "When a state 'compel[s] individuals to speak a particular message,' the state 'alter[s] the content of their speech,' and engages in content-based regulation."[125] The court explained that "[e]ven a pure 'transparency' measure, if it compels non-commercial speech, is subject to strict scrutiny."[126] The Ninth Circuit applied strict scrutiny and found an aspect of the law (the so-called "Content Category Reports") unconstitutional.[127]

These transparency cases have implications for other information flows established to enable effective industry self-regulation and to aid expert and regulatory oversight. Take another policy tool, even further afield from any prototypical example of what might constitute compelled speech: using a risk-management approach to govern new technologies by requiring impact assessments. Recently, the Ninth Circuit found that a requirement that companies report on impact assessments to the state attorney general violated the First Amendment.[128]

First, the court determined that the requirement triggered First Amendment scrutiny because "the [impact assessment] report requirement clearly compels speech by requiring covered businesses to opine on potential harm to

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122. *Id.* at 953-54 ("Nothing in the State's materials indicates that the policy language provision would materially alleviate a harm to minors caused by current privacy policy language, let alone by the terms of service and community standards that the provision also encompasses. NetChoice is therefore likely to succeed in showing that the provision fails commercial speech scrutiny."). For the legal standard the court applied, see *id.* at 949 ("[T]he Court evaluates the commercial speech regulation under the last two prongs of the *Central Hudson* analysis, *i.e.*, whether the 'restriction . . . directly advance[s] the state interest involved' and whether it is not 'more extensive than is necessary to serve that interest.'" (alterations in original) (quoting Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898, 903 (9th Cir. 2009))).

123. *Bonta*, 113 F.4th at 1108.

124. 116 F.4th at 898.

125. *Id.* at 900 (alterations in original) (quoting Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, 585 U.S. 755, 766 (2018)).

126. *Id.* at 902.

127. *Id.* at 898.

128. *Bonta*, 113 F.4th at 1115-16.

children."[129] This is a dangerous, even bizarre, conclusion. If such reporting requirements are compelled speech that triggers strict scrutiny, then the government can rarely impose them, if ever. Under similar logic, tax law may impermissibly compel speech because it requires filers to fill out a tax form, and securities law may impermissibly compel speech because it requires firms to opine about the risks investors might face.[130] The range of regulatory measures that depend on this sort of reporting is vast, yet the door is now open for aggressive scrutiny of all of them.

Then, although the panel accepted the government's interest in protecting children, it rejected the government's contention that the law was narrowly tailored. Rather, it concluded that "the relevant provisions are worded at such a high level of generality that they provide little help to businesses in identifying which of those practices or designs may actually harm children."[131] In other words, by trying to be nimble, to capture an array of present and future practices, and to rely on industry self-regulation accompanied by light-touch regulatory oversight, California lawmakers triggered and flunked strict scrutiny.[132]

If laws make it through one set of First Amendment landmines, they often encounter others. For example, both the CAADCA and the similar Utah Minor Protection in Social Media Act regulate a subset of technology companies in order to protect children's privacy.[133] Both laws, among other things, establish certain design requirements, such as setting high default privacy settings for children's accounts,[134] requiring companies to disable certain features that pro-

129. *Id.* at 1117.

130. As the Second Circuit found, the First Amendment is not implicated in a securities rule that requires the vendors of algorithmic stock-picking applications to register with the Commodity Futures Trading Commission. *See* Commodity Futures Trading Comm'n v. Vartuli, 228 F.3d 94, 111 (2d Cir. 2000). But we note that the picture of the First Amendment's application to securities law has, thanks to the Court's deregulatory turn in speech law, become much more complicated. *See* Helen Norton, *What Twenty-First-Century Free Speech Law Means for Securities Regulation*, 99 Notre Dame L. Rev. 97, 101-03 (2023); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 Wm. & Mary L. Rev. 613, 641-45 (2006).

131. *Bonta*, 113 F.4th at 1122.

132. *See id.* (observing that much of the law might not even impact protected speech). The Ninth Circuit at least clarified that its holding did not necessarily extend to all other laws that require impact assessments, and, unlike the lower court, refrained from attacking many of the usual tools of data privacy laws. *See id.* at 1125.

133. *See, e.g.*, Cal. Civ. Code § 1798.99.30 (West 2024) (providing CAADCA definitions); Utah Code Ann. § 13-71-101(13) (LexisNexis 2024) (defining "[s]ocial media company").

134. Utah Code Ann. § 13-71-202(1) (LexisNexis 2024) (requiring a social-media company to "set default privacy settings to prioritize maximum privacy" for minor account holders);

long user engagement,[135] or banning features that directly manipulate users.[136] Speech law has long distinguished between speech and conduct. There is a meaningful difference, for example, between a government regulation that compels you to express a value you do not hold—salute a flag you do not support, for example—and a government regulation that compels you to do something of little expressive value, like add a child-safety cap to a bottle of medicine or seat belts to a car. Yet in the digital world, because products and services are developed with words typed into a software compiler, courts can elide this distinction. This seems to have happened in the aforementioned CAADCA case, where the district court found the law's design requirements to be unconstitutional across the board.[137] The court evaluating Utah's law, however, never even reached the design requirements because it found that the law, which targeted "social media companies," was impermissibly content-based.[138]

We will come back to the myriad tripwires laid for technology laws by current First Amendment doctrine. The point is that regulators now have an almost-impossible task. If they write broad requirements to future-proof their laws, they may violate free speech means-end analysis. If they focus their laws to target certain companies, they may trigger strict scrutiny on grounds that the laws are content- or even viewpoint-based. If they deploy direct regulation, they risk being told there are other, less restrictive means available. But if they deploy less restrictive, supervised self-regulation, they run into compelled-speech challenges. There is no easy or obvious way to navigate these First Amendment landmines. And surprisingly, many of these landmines come not from cases arising out of the Court's purely deregulatory impulses but from cases arising out of its concern for religious speakers.

CAL. CIV. CODE § 1798.99.31(a)(6) (West 2024) (stating that "default privacy settings" for children should "offer a high level of privacy").

135. UTAH CODE ANN. § 13-71-202(5)(a) (LexisNexis 2024) (requiring a social-media company to "disable . . . features that prolong user engagement," including "autoplay functions that continuously play content without user interaction").

136. CAL. CIV. CODE § 1798.99.31(b)(7) (West 2024) (prohibiting "dark patterns"); *id.* § 1798.140(*l*) ("'Dark pattern' means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decisionmaking, or choice, as further defined by regulation.").

137. NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 953 (N.D. Cal. 2023) ("[T]he State has not met its burden under *Central Hudson* of showing 'a reasonable fit between the means and ends of the regulatory scheme' . . . so that NetChoice is likely to succeed in showing the restriction fails commercial speech scrutiny." (quoting Junior Sports Mags. Inc. v. Bonta, 80 F.4th 1109, 1119 (9th Cir. 2023))), *aff'd in part, vacated in part*, 113 F.4th 1101 (9th Cir. 2024).

138. NetChoice, LLC v. Reyes, Nos. 23-cv-00911 & 24-cv-00031, 2024 WL 4135626, at *8 (D. Utah Sept. 10, 2024).

II. THE ROAD TO *303 CREATIVE*: A STORY OF CHURCHES AND INTERNET PLATFORMS

Even before *303 Creative*, numerous strands of First Amendment doctrine already provided regulated companies with powerful tools for challenging technology policy. These include the Court's embrace of an oppressed-speaker paradigm; its tendency to invoke heightened scrutiny for ordinary economic regulation when it perceives even a hint of content or speaker favoritism; its acute sensitivity to any form of government "compelled speech," however light the actual burden on speakers; and its skepticism of government oversight of private associations and religious groups.

Each of these developments reflects the well-documented deregulatory turn in First Amendment doctrine described by some as free-speech Lochnerization.[139] But we also see an overlooked component of this deregulatory turn: solicitude for religious speakers in particular. The Roberts Court, with a supermajority that includes both committed free-market conservatives and staunch social-religious conservatives, often deploys a narrative of oppression in religious-speaker cases to justify extending speech protections that later can be used by strategically deregulatory litigants.

A. The Oppressed-Speaker Paradigm

The Court's oppressed-speaker narrative reflects a negative theory of the First Amendment, which focuses on the detrimental consequences of government regulation rather than the positive benefits of uninhibited speech.[140] This is an appealing justification for free-speech protections because, as Helen Norton observes, "the government gives us plenty of reason to distrust it."[141] In application, this negative theory seeks primarily to curb government overreach

139. *See supra* note 12 and accompanying text.

140. *See, e.g.*, Massaro et al., *SIRI-OUSLY 2.0*, *supra* note 31, at 2491-94 (describing the negative theory of free speech).

141. Helen Norton, *Distrust, Negative First Amendment Theory, and the Regulation of Lies*, KNIGHT FIRST AMEND. INST. 4 (Oct. 19, 2022), https://s3.amazonaws.com/kfai-documents/documents/f875d8996b/Norton--Helen---Distrust--Negative-1st-Amndmnt-Theory---Regul-of-Lies_10.18.22.pdf [https://perma.cc/TX25-WGZV]; *see also* Massaro et al., *SIRI-OUSLY 2.0*, *supra* note 31, at 2491-95 (discussing how the implications of this expansion of theoretical support may lead logically, albeit not inevitably, to protection of much AI speech); Lakier, *supra* note 12, at 1299, 1309, 1334 (discussing the tension between "post-*Lochner*" thinking and the Court's deregulatory approach to the First Amendment).

rather than promote democratic participation or ensure a marketplace of ideas. It is inherently hostile to regulation.[142]

Negative theory appeals to the Roberts Court because it unites the majority's libertarian preferences with its social-religious conservative inclinations. A majority of the Justices seek to prevent a domineering government from repressing and conscripting speakers in the name of oppressive majority interests. This libertarian instinct often dominates regardless of the strength and integrity of the government's regulatory interests, the actual power and speech opportunities of the speaker, and how general-purpose and facially neutral a law might be.[143] Moreover, when this general antigovernment instinct is paired with its sympathy for religious speakers, the Court is inclined to protect the speaker in ways that maximize and expand free-speech protections. Think of a church not allowed to post signs for its services,[144] an antiabortion protestor prevented from engaging in on-site "sidewalk counseling" of patients,[145] a Catholic church prevented from posting signs about confession,[146] or a faith-based crisis pregnancy center compelled to post a sign informing clients that it does not provide abortions.[147]

In such contexts, this Court is on highest free-speech alert and treats the speakers as analytically comparable to the Jehovah's Witness schoolchildren in *Barnette*. There, the Court poetically held that "[i]f 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."[148] In recent cases, the Roberts Court has found that pharmaceutical marketers, healthcare providers, and commercial website designers face the kind of perse-

142. Norton, *supra* note 141, at 5 ("[N]egative theory serves as a guardrail on government, but negative theory warrants guardrails of its own to prevent the paralysis that accompanies unbounded distrust.").

143. *Id. See generally* Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365 (2014) (discussing multiple ways in which modern compelled-speech doctrine imposes unreasonable constitutional limits on government disclosure and alleged affirmation mandates).

144. Reed v. Town of Gilbert, 576 U.S. 155, 161 (2015); *cf.* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 69 (2022) (holding that a sign code that distinguished between on-premises and off-premises electronic signs was a facially content-neutral regulation and thus triggered only intermediate review); *Reagan Nat'l Advert. of Austin*, 596 U.S. at 86 (Thomas, J., dissenting) (claiming that the majority's conclusion was inconsistent with *Reed*).

145. McCullen v. Coakley, 573 U.S. 464, 472 (2014).

146. *Reagan Nat'l Advert. of Austin*, 596 U.S. at 91 (Thomas, J., dissenting).

147. NIFLA v. Becerra, 585 U.S. 755, 761 (2018).

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

cution that requires judicial intervention.[149] It has done so even when the regulations in question were not meant to compel ideological orthodoxy but to serve important and generally applicable government interests.[150] This analogical reasoning leaps across time and context, with little correction or recognition of how the newly protected speakers' burdens and situations are materially different from the older, archetypal ones.

Take, for example, *Sorrell v. IMS Health Inc.*, which involved a data privacy law of sorts passed by the Vermont legislature.[151] The law regulated the sale of "prescriber-identifying information" to pharmaceutical marketers.[152] On the ground that "the creation and dissemination of information are speech within the meaning of the First Amendment," the Court opined that there was "a strong argument that prescriber-identifying information is speech for First Amendment purposes."[153]

Since *Sorrell* was decided in 2011, technology-law scholars have been agitated in particular over its proclamation in dicta that "information is speech."[154] But the significance of *Sorrell* lies less in its debatable language on First Amendment coverage than in how its deregulatory moves were motivated by negative theory. The Court did not actually *hold* that all data is speech or that all data privacy laws must be subject to heightened scrutiny. Rather, the Vermont law's "speaker- and content-based burden on protected expression" was the reason the law triggered heightened scrutiny.[155] The Court feared that the Vermont legislature disfavored pharmaceutical advertisers as speakers because of their particular pro-marketing viewpoints on prescription drugs.[156] It also was unimpressed by Vermont's proffered explanations of the relevant govern-

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149. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (concerning pharmaceutical marketers); *NIFLA*, 585 U.S. at 778-79 (concerning healthcare providers); 303 Creative LLC v. Elenis, 600 U.S. 570, 579 (2023) (concerning commercial website designers).

150. *See* Robert Post, NIFLA *and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1088-91 (2022) (discussing the contextual and historical differences between compelled declarations of government ideology in the public sphere and regulatory disclosures).

151. *Sorrell*, 564 U.S. at 557.

152. *Id.* at 558-59.

153. *Id.* at 570. Elsewhere, the Court says an "individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Id.* at 568 (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984)).

154. *Id.* at 571. For examples of such discussion, see Bhagwat, *supra* note 24, at 860-61; and Hans, *supra* note 30, at 24-25.

155. *Sorrell*, 564 U.S. at 571.

156. *Id.* at 563 ("[P]harmacies may sell the information to private or academic researchers, but not, for example, to pharmaceutical marketers." (citation omitted)).

ment interests and painted a picture in which the pharmaceutical marketers were being selectively and unfairly burdened by government.[157] This reasoning has led technology companies to likewise argue that simply identifying categories of regulated entities can constitute an impermissible speaker- and content-based burden on their free speech.[158]

B. Skepticism of "Content-Based Distinctions"

A few years after *Sorrell*, the Court's concerns about persecuted speakers came to a head in *Reed v. Town of Gilbert*, prompting it to reevaluate decades of law on what constitutes "content-based" regulation.[159] The town of Gilbert enacted an ordinance that generally banned the public posting of signs but carved out exceptions for "Ideological Sign[s]," "Political Sign[s]," and "Temporary Directional Signs Relating to a Qualifying Event."[160] Each category was treated differently, with "ideological signs" treated the most favorably.[161] The Good News Community Church and its pastor, Clyde Reed, wished to post temporary signs advertising church services beyond the time limits specified by the ordinance, and they challenged the ordinance as content-based discrimination.[162]

Justice Thomas, writing for the majority, held that because the law was content-based, it triggered strict scrutiny.[163] "Content based," in his view,

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157. In the Court's words, "The law on its face burdens disfavored speech by disfavored speakers." *Id.* at 564; *see also* Richards, *supra* note 30, at 1520 (explaining that "[b]ecause the law banned the use of data for speech by the marketers, but allowed it for speech by their political opponents, it discriminated on the basis of viewpoint and was thus unconstitutional," and describing that conclusion as "a straightforward application of basic free-speech law").

158. For example, a group of internet service providers challenged Maine's regulation of telecom privacy as unconstitutional because it targeted service providers but not websites. *See* ACA Connects – Am.'s Commc'ns Ass'n v. Frey, 471 F. Supp. 3d 318, 326 (D. Me. 2020). Notably, plenty of laws distinguish between the regulation of telecom providers and the regulation of other media. This is evident in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C). *Compare* 47 U.S.C. § 206 (2018) (referring to "common carriers"), *with id.* § 230 (referring to "interactive computer services"). The Court also noted this in *National Cable & Telecommunications Association v. Brand X Internet Services*. 545 U.S. 967, 975 (2005) ("The [Telecommunications] Act regulates telecommunications carriers, but not information-service providers, as common carriers.").

159. 576 U.S. 155, 171 (2015).

160. *Id.* at 159-60.

161. *Id.* at 159-61.

162. *Id.* at 161-62.

163. *Id.* at 163-64.

means "a law applies to particular speech because of the topic discussed or the idea or message expressed."[164] Thomas further clarified that only laws that are facially content-neutral require any additional inquiry as to government motive and justification, while all facially content-specific laws automatically trigger strict scrutiny.[165]

This was a sweeping modification of settled law. As Justice Breyer noted, countless laws facially classify based on content under the broad *Reed* definition and almost certainly would flunk strict scrutiny were *Reed* woodenly applied.[166] And as Justice Kagan observed, content-based regulations have historically triggered strict scrutiny only when "there is any 'realistic possibility that official suppression of ideas is afoot.'"[167]

To justify his broader view of when facially content-based laws trigger strict scrutiny, Justice Thomas invoked potential persecution of religious speakers: "[O]ne could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the [content-based] Sign Code to make it more difficult for the Church to inform the public of the location of its services."[168] That is, a content-based law, even if not motivated by official suppression of ideas, gives too much leeway to enforcers to go after substantive messages and viewpoints—and disfavored religious actors in particular.

The concern about disfavored speakers at issue in *Sorrell*[169] thus reemerged in *Reed* and prompted doctrinal expansion. Although merely naming particular categories of regulated speakers does not automatically trigger strict scrutiny, after *Reed* it clearly invites a closer look: "[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects

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164. *Id.* at 163.

165. *Id.* at 165-66.

166. *Id.* at 177-78 (Breyer, J., concurring) (noting that "[r]egulatory programs almost always require content discrimination," and "to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity," and then listing examples, including "governmental regulation of securities," "of energy conservation labeling practices," "of prescription drugs," "and so on").

167. *Id.* at 182 (Kagan, J., concurring) (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

168. *Id.* at 167-68 (majority opinion); *see also id.* at 168 ("Accordingly, we have repeatedly 'rejected the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas."'" (alteration in original) (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993))).

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

a content preference."[170] By tightening the link between speaker-based regulation and content-based regulation, *Reed* makes it considerably harder for lawmakers to write laws that categorize the entities they regulate, including various kinds of technology companies, or that compel specific disclosures.[171] This dynamic is manifest in the ongoing litigation over California's effort to ensure age-appropriate design, where the district court felt "troubled by the CAADCA's clear targeting of certain *speakers*—i.e., a segment of for-profit entities, but not governmental or nonprofit entities."[172]

In *City of Austin v. Reagan National Advertising of Austin*, the Court tried to cabin *Reed* by clarifying that regulations are content-based only if they discriminate based on "the topic discussed or the idea or message expressed."[173] In other words, the problem in *Reed* was not that you had to read a sign to enforce the law, but that the city attempted to regulate event announcements differently depending on whether they concerned "ideological," "political," or other (in that case, religious) subjects.[174]

This attempted contraction of *Reed* leaves plenty of room for parties to challenge laws that regulate based on speaker identity. The law in *Reagan Na-*

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170. *Reed*, 576 U.S. at 170 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994)); *see also id.* ("[A] content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers.").

171. *See id.* at 177-78 (Breyer, J., concurring) (providing examples of disclosures in securities regulation, confidentiality requirements, and elsewhere that would trigger strict scrutiny as content-based); *see also* Genevieve Lakier, Reed v. Town of Gilbert, Arizona *and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 234-37 (examining the "normative justifications" behind *Reed* and the changes it makes to First Amendment doctrine).

172. NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924, 946 (N.D. Cal. 2023) (emphasis added), *aff'd in part, vacated in part*, 113 F.4th 1101 (9th Cir. 2024).

173. 596 U.S. 61, 69 (2022) (quoting *Reed*, 576 U.S. at 163) (explaining that *Reed* could not be read to stand for the "extreme" principle that a signage law is content-based—and thus triggers strict scrutiny—if you first must read a sign in order to apply the law). The Court in *Reagan National Advertising of Austin* held that laws distinguishing between "on-premises" and "off-premises" signs were not content-based regulation, but rather content-neutral and location-based regulation triggering only intermediate scrutiny, even though an enforcer technically has to read a sign to determine whether it refers to on- or off-premises activity. *Id.* at 69-72. The Court reasoned that First Amendment doctrine consistently has held that "restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral," citing precedents allowing the regulation of solicitation as examples. *Id.* at 72. Tellingly, Justice Thomas, who authored *Reed*, stated in his dissent that "*Reed*'s rule [was] that any law that draws distinctions based on communicative content is content based." *Id.* at 97 (Thomas, J., dissenting) (arguing that the majority's "skepticism is misplaced" because "[w]e have often acknowledged that the need to examine the content of a message is a strong indicator that a speech regulation is content based").

174. *Id.* at 75 n.6 (majority opinion).

tional Advertising of Austin made specific reference to sign location, an element long found to be a content-neutral way of regulating speech under the time, place, and manner test.[175] Other laws may not fare so well. As Justice Breyer observed, many "ordinary regulatory programs" such as securities-related disclosures and laws governing the labeling of prescription drugs still are likely to be found content-based after *Reagan National Advertising of Austin*.[176]

For technology policy, this possibility is especially troubling because both data privacy disclosures and mandated transparency relating to the use of particular technologies are now vulnerable to content-discrimination challenges.[177] It is also notable that concerns about religious-speaker oppression surfaced in *Reagan National Advertising of Austin* despite the absence of *any* religious speaker in the case. Justice Thomas's dissent worried that the law in *Reagan National Advertising of Austin* could be misused to disfavor "signs conveying messages like 'God Loves You'" and "dozens of religious and political messages that would be next to impossible to categorize under Austin's rule."[178] Religious and political—in that order.

Reed thus represents a significant deregulatory turn, despite *Reagan National Advertising of Austin*. It imperils lawmakers' legitimate attempts to identify the objects and subjects of regulation by category. This blunt and context-insensitive test was driven not only by the Court's deregulatory impulses, but also by the Justices' concerns for religious speakers. Yet its logic and reach cannot be confined to religious speakers.

C. Finding Compelled Speech Everywhere

Until recently, transparency requirements and mandatory factual disclosures often survived First Amendment challenges.[179] After all, transparency generally increases, rather than restricts, the flow of speech. Courts distinguished between what Alan K. Chen identifies as the "paradigmatic, but fortunately rare, case of a law that requires individuals to say or display a purely ide-

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175. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 304, 306-07 (1940) (upholding regulation of the time, place, and manner of solicitation).

176. *Reagan Nat'l Advert. of Austin*, 596 U.S. at 79-81 (Breyer, J., concurring).

177. *See Bonta*, 692 F. Supp. 3d at 947-48 (refraining from deciding whether some parts of CAADCA are content-based regulations of noncommercial speech, but assuming for purposes of the motion that CAADCA only regulates commercial speech).

178. *Reagan Nat'l Advert. of Austin*, 596 U.S. at 105 (Thomas, J., dissenting).

179. *See* Post, *supra* note 150, at 1077-78; Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881, 891-92 (2022).

ological statement with which they disagree"[180] and a "law[] that require[s] licensed professionals and businesses to disclose truthful factual information relating to their services, operations, and products."[181] The latter received either a lower form of commercial-speech scrutiny,[182] or was found to be entirely outside the First Amendment's coverage.[183]

No longer. The Court now shows deep suspicion of *any* compelled speech, even simple factual notices.[184] A particularly telling example is *National Institute of Family and Life Advocates* (*NIFLA*) *v. Becerra*, another religious-speaker case.[185] The Court in *NIFLA* held that a California law impermissibly compelled the speech of crisis pregnancy centers supported by NIFLA, a faith-based nonprofit that advances pro-life causes.[186] The law required that licensed clinics post notices alerting clients that the state provides free or low-cost family-planning services, including abortions, and providing a phone number that clients can call for further information about those services.[187] It also required

180. Chen, *supra* note 179, at 885.

181. *Id.* at 886.

182. Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 646-47 (1985).

183. *See* Chen, *supra* note 179, at 894 ("Federal securities law includes a range of mandatory disclosures associated with corporate securities. Yet, such regulations are not even considered to fall within the coverage of the First Amendment."); *see also* Norton, *supra* note 130, at 112-13 (describing mandatory-disclosure rules).

184. Many scholars have expressed concerns about the Court's compelled-speech doctrine, including its internal contradictions, its threat to valid government interests in requiring disclosures, and the Court's overbroad claims about when and how it genuinely, let alone unduly, burdens speaker autonomy. See, for example, Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 ARIZ. L. REV. 421, 442-44, 450-51 (2016); Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 6; William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171-72, 195 (2018); Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 112 (2019); Chen, *supra* note 179, at 882; Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1279-80 (2014); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1377-79 (2019); Massaro, *supra* note 143, at 404-15; Post, *supra* note 150, at 1072; Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2412 (2004); Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731, 735-36 (2020); and Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 357 (2018).

185. 585 U.S. 755 (2018).

186. *Id.* at 778-79.

187. *Id.* at 760-61.

unlicensed clinics to post a notice alerting clients that the clinics' personnel are not licensed to provide medical services.[188]

The Court held that the notices were compelled speech that impermissibly burdened the clinics' right to speak and distorted their pro-life messages in a viewpoint-specific and speaker-sensitive manner.[189] Notably, the Court bypassed the more deferential test for mandatory commercial-speech disclosures outlined in *Zauderer v. Office of Disciplinary Counsel*.[190] The Court also refused to view the notices as a permissible form of professional-speech regulation, akin to informed-consent requirements, aimed at protecting the interests of potential clients.[191] Rather, it expressed concern that state governments might manipulate professional speech "to increase state power and suppress minorities."[192]

In its eagerness to see the notices as an effort to suppress minority views, the Court failed to assess the actual degree to which posting the information would silence the clinics or intrude into matters of conscience in any tangible way. Nothing mandated that clinic personnel intone the government-service messages, endorse them, point patrons to them, or refrain from criticizing abortion sharply as a violation of the sanctity of human life.[193] The clinics remained free to urge pregnant clients to choose childbirth. The Court nonetheless treated the notice requirement as a total capture of the clinics' expressive autonomy. It did not matter that these were businesses open to the public, not street-corner pro-life speakers, or that the notices were aimed at alerting patrons of other available options (regarding what was then a constitutionally

188. *Id.* at 760-62. The notices needed to be posted at the entrance of the facilities and in at least one waiting area, and to be at least 8½ by 11 inches, in no less than 48-point type. *Id.* at 764-65.

189. *Id.* at 766-79.

190. 471 U.S. 626, 638 (1985). The *NIFLA* Court stated that "[t]he *Zauderer* standard does not apply here." 585 U.S. at 768-69. Most obviously, the licensed notice is not limited to "purely factual and uncontroversial information about the terms under which . . . services will be available." *Id.* at 765; *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995) (describing the Court's jurisprudential approach to commercial speech).

191. *NIFLA*, 585 U.S. at 771-72 (quoting Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. Rev. 201, 201-02 (1994)). The majority compared this to the fascist Ceausescu and Nazi regimes, where the state dictated the medical advice physicians gave their patients. *Id.*

192. *Id.* at 771.

193. *See* Cal. Health & Safety Code § 123472 (West 2024) (requiring only that facilities covered by the act post or distribute the notice about the availability of these services).

protected reproductive right) about which the Court had previously held that states may intervene to control private and physician speech.[194]

NIFLA's failure to distinguish between laws that compel private religious speakers to utter government scripts—the paradigmatic *Barnette* schoolchildren—and regulation of entities that provide health services to the public has clear deregulatory implications for the transparency provisions of technology laws. As we outlined above, several of the central technology policy tools involve simple factual disclosures that now can be framed as unconstitutional compulsion under *NIFLA*'s reasoning.

D. Skepticism of Government Oversight

Closely related is another strand of religious-speaker case law involving suspicion of mandatory disclosures to the government. In these cases, the concern is not that a mandatory government message will be attributed to the private party, but that a mandatory-disclosure rule may subject religious groups to the hostile management of Big Brother.

Three years after *NIFLA*, the Court decided *Americans for Prosperity Foundation* (*APF*) *v. Bonta*.[195] In that case, two public charities challenged California's requirements that they disclose the names and addresses of certain donors to the state attorney general as part of the state's mandatory charity registration process.[196] The Court described the first charity, Americans for Prosperity Foundation, as loosely libertarian.[197] It described the second charity, Thomas More Law Center, as a religious speaker, "a public interest law firm whose 'mission is to protect religious freedom, free speech, family values, and the sanctity of human life.'"[198] These claimants "introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physi-

194. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881-83 (1992) (opinion of O'Connor, Kennedy & Souter, JJ.) (stating it was not an undue burden on a person seeking an abortion to require the doctor to inform the person about the nature of the procedure, the likely gestational age of the fetus, the health risks of abortion and childbirth, the availability of printed materials describing the fetus, medical assistance for childbirth, potential child support, and agencies that would provide adoption or other alternatives to abortion).

195. 594 U.S. 595 (2021).

196. *Id.* at 600-03.

197. *Id.* at 602 (describing APF as "a public charity that is 'devoted to education and training about the principles of a free and open society, including free markets, civil liberties, immigration reform, and constitutionally limited government'") (quoting Brief for Petitioner at 10, *Americans for Prosperity Foundation* (*APF*), 594 U.S. 595 (No. 19-251)).

198. *Id.* (quoting Brief for the Petitioner Thomas More Law Center at 4, *APF*, 594 U.S. 595 (No. 19-255)).

cal violence" when an earlier version of the registration regime resulted in a leak of their identities.[199]

The Court held in *APF* that California's donor-disclosure requirements were unconstitutional. It acknowledged that the state had a "sufficiently important interest" in "preventing wrongdoing by charitable organizations."[200] However, it found that the "exacting scrutiny" applied to disclosure laws requires narrow tailoring and that the disclosure requirements were not narrowly tailored.[201] It reasoned that "California's interest is less in investigating fraud and more in ease of administration. This interest, however, cannot justify the disclosure requirement."[202] In a boon to regulated companies everywhere, the Court noted that "disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public.'"[203]

This was another notable turn from prior case law. Over a decade earlier, in *Doe v. Reed*, the Court subjected a similar disclosure requirement to a more relaxed and context-sensitive form of intermediate scrutiny.[204] The Court upheld a public-records law that required the disclosure of the identities of political-referenda signatories against a facial challenge.[205] As Justice Sotomayor wrote in her dissent in *APF*, the Court "departs from [*Doe v. Reed*'s] nuanced approach in favor of a 'one size fits all' test. Regardless of whether there is any risk of public disclosure, and no matter if the burdens on associational rights

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199. *Id.* at 617 (quoting Brief for the Petitioner Thomas More Law Center at 4, *APF*, 594 U.S. 595 (No. 19-255)). It is notable how much ink the Court spilled on concerns about the privacy interests of these plaintiffs, given how little concern it has evinced for privacy harms elsewhere. Justice Sotomayor's dissent pointed out, however, that these were concerns arising from disclosure *to the public*, and not raised by confidential disclosure to the Attorney General in light of new security mechanisms. *Id.* at 626 (Sotomayor, J., dissenting).

200. *Id.* at 611-12 (majority opinion).

201. *Id.* at 618 ("We are left to conclude that the Attorney General's disclosure requirement imposes a widespread burden on donors' associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State's interest in administrative convenience is sufficiently important.").

202. *Id.* at 614.

203. *Id.* at 616 (alterations in original) (quoting Shelton v. Tucker, 364 U.S. 479, 486 (2021)).

204. 561 U.S. 186, 196 (2010) ("To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" (quoting Davis v. FEC, 554 U.S. 724, 744 (2008))); *see also APF*, 594 U.S. at 628 (Sotomayor, J., dissenting) (explaining that, in *Doe v. Reed*, "the Court rejected a facial challenge to the public disclosure of referenda signatories on the ground that the 'typical referendum' concerned revenue, budget, and tax policies unlikely to incite threats or harassment") (quoting *Reed*, 561 U.S. at 200-01)).

205. *Doe*, 561 U.S. at 202.

are slight, heavy, or nonexistent, disclosure regimes must always be narrowly tailored."[206]

APF thus forges an important additional weapon for the technology-company arsenal: the heightened ability to challenge compelled disclosures not only to the public but also to the government. To be clear, we think the porting of *APF* into other compelled-disclosure contexts is doctrinally incorrect. It is a case about associational privacy rights, not about compelled speech.[207] (The Court in *APF* does not cite *NIFLA*, indicating that it too places *APF* in a distinct category of cases.) But technology companies have every incentive to use it, and at least one court has cited *APF* to invalidate a provision requiring companies to disclose information to the government only, in a case having nothing whatsoever to do with associational privacy.[208] The case thus adds to the wider phenomenon we highlight here: free-speech expansionism that has accelerated under the Court's new supermajority, especially in cases that involve the alleged coercion of religious speakers.

E. Implications for Technology Law

Taken together, the foregoing First Amendment developments imposed formidable obstacles to many recently enacted technology laws even before *303 Creative*. These developments were animated by concern for oppressed speakers, especially religious speakers, but cannot logically be confined to these speakers or their regulatory contexts. And indeed, they have not been so confined. *Reed* and *NIFLA*, for example, played important roles in *X Corp. v. Bonta*, a recent Ninth Circuit case involving disclosure of content-moderation policies.[209] The court cited *Reed* for the principle that "[a] content-based regulation 'target[s] speech based on its communicative content'"[210] and for its rejection of the intermediate standard applied to mandatory disclosures of commercial

206. *APF*, 594 U.S. at 634 (Sotomayor, J., dissenting).

207. *Id.* at 601 (majority opinion) ("We must decide whether California's disclosure requirement violates the First Amendment right to free association."); *id.* at 606 (discussing freedom of association and compelled disclosures).

208. NetChoice, LLC v. Bonta, 113 F.4th 1101, 1118 (9th Cir. 2024).

209. X Corp. v. Bonta, 116 F.4th 888, 894 (9th Cir. 2024).

210. *Id.* at 899 (second alteration in original) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

speech in *Zauderer*.[211] It also cited *NIFLA* for the conclusion that the disclosure provisions should be subject to strict scrutiny.[212]

Reed was also instrumental in a federal district-court case evaluating Utah's children's privacy law.[213] The judge found the law to be impermissibly content-based because it targeted social-media companies and not other internet platforms.[214] The judge reasoned that "the Act's Central Coverage Definition divides the universe of internet platforms into social media services . . . and other internet platforms."[215] According to the judge, that impermissibly "single[d] out social media companies based on the 'social' subject matter 'of the material [they] disseminate[].'"[216]

Finally, the Ninth Circuit's recent decision on the impact-assessment provisions of the California children's privacy law invoked *APF*'s ruling on disclosures to the government. The court reasoned that while the impact assessments "are not public documents and retain their confidential and privileged status even after being disclosed to the State," *APF* stands for the proposition that the First Amendment applies "even when the compelled speech need only be disclosed to the government."[217] The Ninth Circuit struck down the impact-assessment reporting regime.[218]

Each of these cases was decided after *303 Creative*, but, importantly for our purposes, they are shot through with pre-*303 Creative* religious-speaker case law. This suggests that *303 Creative*, which we turn to next, is not a one-off. Rather, it is part of a line of cases where the Court protects religious speakers in a way that has much broader impact. In these recent technology cases we see more than just a deregulatory First Amendment. What emerges is the legacy of a Court's solicitude for religious speakers spilling over into the regulation of technology. And as we explain in the next Part, *303 Creative* made this problem considerably worse.

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211. *Id.* at 895, 902-03.

212. *Id.* at 899.

213. NetChoice, LLC v. Reyes, Nos. 23-cv-00911 & 24-cv-00031, 2024 WL 4135626, at *10 (D. Utah Sept. 10, 2024).

214. *Id.* at *11.

215. *Id.* at *10.

216. *Id.* (alterations in original) (quoting NetChoice, LLC v. Fitch, No. 24-cv-170, 2024 WL 3276409, at *9 (S.D. Miss. July 1, 2024)).

217. NetChoice, LLC v. Bonta, 113 F.4th 1101, 1117-18 (9th Cir. 2024).

218. *Id.* at 1108.

III. *303 CREATIVE*, RELIGIOUS BELIEVERS, AND TECHNOLOGY COMPANIES

In *303 Creative*, the Court made five troubling moves that have direct and profound implications for technology regulation. First, the Court applied free-speech principles rather than free-exercise principles to Colorado's public-accommodations law. That allows speakers to challenge regulations regardless of whether they are motivated by religious conscience. Google can invoke the deregulatory arguments made by the Christian website designer in *303 Creative*, without showing that it has any genuine religious beliefs. Second, the Court concluded that refusing to design wedding websites for same-sex couples was "pure speech" rather than a combination of conduct and speech. If technology services are labeled "pure speech" simply because they are composed of "images, words, symbols, and other modes of expression,"[219] companies will have a silver bullet for nearly every conceivable regulation, no matter its shape or purpose. Third, the Court concluded that the speech in question belonged to the vendor rather than the customers for whom the website was designed. If courts continue to conflate the expressive interests of, say, Facebook, with the expressive interests of its customers, then the First Amendment will serve the interests of corporate managers rather than the interests of users. Fourth, the Court assumed that the compliance burden was unduly coercive without any inquiry into the actual weight of the burden imposed. Without a candid assessment of how deeply a regulation intrudes on a protected interest, it is difficult to assess whether a given technology regulation is tailored appropriately to a legitimate government interest. Fifth, the Court failed to even consider the government interests at stake, much less to weigh their strength. The Court eschewed strict scrutiny and concluded instead that the law was categorically unconstitutional. If this unprecedented approach applies to other regulatory scenarios, then the government will have no chance to persuade a court that its technology regulation carefully advances even the most compelling nonspeech interests.

A. Forgoing Free Exercise in Favor of Free Expression

303 Creative involved a challenge to the Colorado Anti-Discrimination Act (CADA) brought by Lorie Smith, a Christian website designer who was planning to expand her business to provide customized wedding websites.[220] Smith contended that providing design services for same-sex couples planning a

219. 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023).

220. *Id.* at 579-80.

wedding would violate her religious beliefs.[221] She therefore sought to be exempted from CADA's requirement that businesses open to the public not discriminate on the basis of sexual orientation.[222] The conduct that Lorie Smith wished to pursue—the commercial design of wedding websites for opposite-sex couples but not same-sex couples—was both an act inspired by her religious faith and expressive. It thus fell within the protection of *both* the Free Exercise and the Free Speech Clauses.[223]

In such circumstances, the Court may choose which doctrinal principles to use. For example, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a Christian baker's challenge to the same Colorado law, the Court applied a free-exercise analysis, allowing it to sidestep whether creating a wedding cake counts as speech.[224] The Court relied upon the comments of a Colorado civil-rights commissioner in concluding that the government had subjected the baker to antireligious bias, thereby violating the Free Exercise Clause.[225]

In *303 Creative*, however, the Court chose to review only Lorie Smith's free-speech claims. That choice was perhaps unsurprising, given the uncertainty that pervades free-exercise doctrine.[226] Kenji Yoshino argues that "the *303 Creative* Court pivoted to free speech because the Court had reached an impasse in its free exercise jurisprudence."[227] While that is undoubtedly true, it is important to understand that this pivot produced a doctrinal framework that is more protective of religious speakers than even the most robust version of free exercise. And the resulting free-speech principles can then be used to shield all

221. *See id.* at 582.

222. *See id.* at 580-82.

223. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523 (2022) (describing the "overlapping protection for expressive religious activities" provided by the Free Speech and Free Exercise Clauses).

224. 584 U.S. 617, 621-25 (2018).

225. There is an extensive literature critiquing this conclusion, especially when viewed in light of the Court's refusal to acknowledge the anti-Muslim animus of the Trump travel bans. For a partial sampling, see Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 164 (2018), which argues that "these errors reflect a deeper and more profound mistake on the part of the Court, which was to confuse a matter of etiquette with the demands of civility"; and Marc Spindelman, Masterpiece Cakeshop*'s Homiletics*, 68 CLEVELAND ST. L. REV. 347, 349-50 (2020), which suggests that although the Court's holding is narrow, its symbolic effect is not.

226. Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 244 (2023).

227. *Id.* at 245.

speakers from regulation, not just ones with religious motivations or messages.[228]

The impasse Yoshino describes arises from the current Court's discomfort with the reasoning of *Employment Division, Department of Human Resources of Oregon v. Smith*, which held that the Free Exercise Clause allows states to prohibit peyote use, even for sacramental purposes, and to deny unemployment benefits to someone discharged for religiously inspired peyote use.[229] The Court has subsequently interpreted *Smith* as holding that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable."[230] This test has never been formally overruled, in part because some of the Justices who are ready to see it go are uncertain about what should replace it.[231] In that sense, Yoshino is quite right to describe an impasse.[232]

Yet in the Roberts Court's hands, *Smith* has proved capacious enough to provide considerable protection to religious objectors seeking exemptions from general laws.[233] Indeed, a law that provides merely the possibility of a secular

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228. *See* Sherbert v. Verner, 374 U.S. 398, 420 (1963) (Harlan, J., dissenting) (describing the Court as requiring for the first time that unless a state can satisfy strict scrutiny, it must accommodate those whose failure to comply with a law "is due to their religious convictions"); *see also* Yoshino, *supra* note 226, at 269 ("To briefly state the obvious, the religion clauses protect individuals only on the basis of their religion."); Nathan S. Chapman, *The Case for the Current Free Exercise Regime*, 108 IOWA L. REV. 2115, 2122-23 (2023) ("Government agencies and courts adjudicating such claims must ensure that they are based on religion (or conscience, for claims based on accommodations extending to nonreligious conscience) and that the claimant's beliefs are sincere.").

229. 494 U.S. 872, 875, 890 (1990). For a chronicle of the "doctrinal dissembling" in free-exercise jurisprudence that pre- and post-dates *Smith*, see James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 690-92.

230. Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021) (citing *Smith*, 494 U.S. at 878-82).

231. *Id.* at 543 (Barrett, J., concurring); *see also* Christopher C. Lund, *Answers to* Fulton*'s Questions*, 108 IOWA L. REV. 2075, 2077 (2023) ("Why should generally applicable regulations affecting religion categorically get strict scrutiny when many generally applicable regulations affecting speech do not?").

232. *See* Yoshino, *supra* note 226, at 254.

233. The Roberts Court has frequently scrutinized state measures and found them to be either not "generally applicable" or not neutral, thus triggering strict scrutiny and leading to their invalidation. *See, e.g.*, *Fulton*, 593 U.S. at 542 (holding that Philadelphia violated the free-exercise rights of a Catholic social-services organization by refusing to "contract with [it] for the provision of foster care services unless it agree[d] to certify same-sex couples as foster parents"); Tandon v. Newsom, 593 U.S. 61, 62 (2021) (per curiam) (granting injunctive relief to plaintiffs who wished to gather at home for religious exercise in contravention of California's COVID restrictions); Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 21 (2020) (per curiam) (enjoining the enforcement of COVID restrictions against the plaintiff

exception—even if it has never actually been granted—will not be considered "generally applicable" and will need to provide a religious exemption unless it can satisfy strict scrutiny.[234] *Fulton v. City of Philadelphia* revealed that what the Justices dislike about *Smith*—its lax treatment of neutral and generally applicable laws that impose burdens on religious actors—can be narrowed to a point of virtual irrelevance without an explicit disavowal.[235]

The Court's subsequent invalidation of emergency public-health measures during the COVID-19 pandemic provided additional illustration in the starkest of circumstances.[236] In *Tandon v. Newsom*, the Court instructed that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[237] As others have

religious organizations); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 625 (2018) (holding that the Colorado Civil Rights Commission's application of state antidiscrimination law violated a bakery owner's free-exercise rights); *see also* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1094 (2022) (explaining that *Smith* has allowed for "an incredibly expansive view of religious discrimination to achieve not only what pre-*Smith* free exercise doctrine would have accomplished, but more").

234. *Fulton*, 593 U.S. at 536. As some religion scholars have urged, "The constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22-23 (2016); *see also* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49 (describing certain cases as requiring that "religion get something analogous to most-favored nation status"). Using a version of this approach in *Fulton*, the Court held that Philadelphia was required to exempt religious foster-care agencies from compliance with antidiscrimination provisions because there was a formal mechanism for granting exceptions, even though no exception had ever been given. 593 U.S. at 534-37. The nondiscrimination provisions were "therefore examined under the strictest scrutiny" and failed. *Id.*

235. *See Fulton*, 593 U.S. at 541 (explaining why it was deemed unnecessary to revisit *Smith* in order to rule for the religious foster-care agencies seeking exemptions); *id.* at 544 (Barrett, J., concurring) (same).

236. *See Tandon*, 593 U.S. at 62-64; *Roman Cath. Diocese*, 592 U.S. at 17-19; S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021). In *Tandon*, the public-health orders at issue prohibited more than three households from gathering at home, including for religious worship. *Tandon*, 593 U.S. at 63. Because hair salons, retail stores, and other secular activities were permitted to gather larger numbers of people in public buildings, the majority viewed the emergency measures as a selective burden on religious exercise, *see id.* at 63-64, even though both secular and religious in-home gatherings were similarly restricted.

237. *Tandon*, 593 U.S. at 62; *see also* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2238 (2023) (explaining that the Court "now embraces what has been called the 'most-favored-nation' theory . . . which holds that the denial of a religious exemption is presumptively unconstitutional if the state 'treats some comparable secular activities more favorably'" (quoting *Tandon*, 593 U.S. at 63)); *cf.* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV.

noted, few laws will qualify as neutral and generally applicable under this conception.[238]

The Roberts Court thus has greatly invigorated free-exercise doctrine without formally abandoning *Smith*. Free-exercise challenges now frequently trigger the most searching review of government regulations.[239] Just as *Fulton* and *Tandon* produced significant victories for religious claimants within the rubric of *Smith* by treating the challenged laws as not generally applicable, so too could CADA have been judged against this increasingly demanding framework. Only if the Colorado law had managed to satisfy this cramped view of "neutral and generally applicable" would the Court have needed to decide whether to overrule *Smith* to side with the Christian web designer in *303 Creative*.

Perhaps the Court was uncomfortable with how close this question would have been. CADA has *no exemptions of any kind*, and there were no allegations that it was applied in a manner that flunked the neutrality assessment.[240] A dissenting judge in the case below nonetheless opined that the "entire CADA enforcement mechanism is structured to make case-by-case determinations" and thus posed the potential for the kind of individualized exemptions invalidated in *Fulton*.[241] The majority might have adopted that approach if it was searching

2397, 2403 (2021) (considering whether "equal value is being administered in the service of a problematic political program").

238. *See* Koppelman, *supra* note 237, at 2242 ("It is hard to find any law that cannot be characterized as excusing comparable activity, especially if, as the Court says, the comparison is based on whether the state ever tolerates any setback to its pertinent interests. Few government purposes, not even the most critical ones, are pursued with monomaniacal intensity."). As Andrew Koppelman goes on to note, "The laws against speeding make exceptions for ambulances." *Id.* at 2248.

239. It is certainly true, as Kenji Yoshino observes, that in *303 Creative* the religious-exemption claims were "shunted . . . over" to free speech. Yoshino, *supra* note 226, at 262. But describing this as a result of the "impasse" over *Smith*, *id.* at 245, fails to capture how extensively the Court has refashioned free-exercise doctrine to be highly protective of religious objectors.

240. The allegedly antireligious comments by the Colorado official that gave the Court an easy answer for ruling in favor of the religious cakemaker in *Masterpiece Cakeshop* were not present in *303 Creative*. The Court could have treated the Colorado Anti-Discrimination Act (CADA) as forever tainted by those past comments, but this would have been a break from its approach in a wide range of cases where the Court has refused to find a law invalidated by prior manifestations of discriminatory intent. *See* Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. Rev. 947, 992, 996 (2022).

241. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1208 (10th Cir. 2021) (Tymkovich, J., dissenting), *rev'd*, 600 U.S. 570 (2023). Judge Tymkovich was undoubtably drawing on *Sherbert v. Verner*, which required the state to show a compelling interest in order to deny unemployment benefits to a Seventh-day Adventist whose religion prevented her from working on Saturday. 374 U.S. 398, 399 (1963). Even after the Court changed course in *Smith*, *Sherbert* may have survived in the form of a circumscribed rule that applies whenever there is a system of "indi-

for a way to rule for the web designer without explicitly overruling *Smith*, although we note that this would leave the *Smith* framework completely eviscerated. This reasoning treats the discretion that is inherent in any law-enforcement regime as "parceling out exceptions" based on secular reasons, thereby requiring the government to do so for religious ones.[242] This would render the category of "neutral and generally applicable laws" in *Smith* to be a nearly empty set.

Whether the Court adopted this rationale or instead overruled *Smith* overtly, the next step would be to apply strict scrutiny, as required by the pre-*Smith* regime of *Sherbert v. Verner*[243] and *Wisconsin v. Yoder*.[244] But the Court, using its free-speech theory instead, struck down the Colorado law without conducting any strict-scrutiny analysis, a radical and profoundly troubling doctrinal move that we examine more closely in Section III.E.[245] Our point at this juncture is a comparative one: free-exercise analysis would have engendered a close examination of the state interests advanced by the law, not the categorical rule of invalidity that the Court deployed as part of its free-speech analysis.

By choosing free speech, the Court used a doctrinal framework that was perhaps more likely to yield a favorable result for the religious claimant in this instance because it did not afford Colorado an opportunity to satisfy strict scrutiny.[246] But it thereby chose a framework that is indifferent to whether regula-

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vidualized governmental assessment of the reasons for the relevant conduct." Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990) (recharacterizing *Sherbert* in this way rather than overruling it).

242. *303 Creative*, 6 F.4th at 1208 (Tymkovich, J., dissenting).

243. *Sherbert*, 374 U.S. at 403.

244. 406 U.S. 205, 214 (1972).

245. *303 Creative* did not decisively foreclose the application of strict scrutiny in all cases that present a compelled-speech question. *See 303 Creative*, 600 U.S. at 602-03 (invalidating CADA as violative of the First Amendment without weighing state interests or applying any form of means-ends balancing). Rather, it eschewed a narrow-tailoring assessment silently, without explaining why it was unnecessary or what kind of rule was being applied instead. *See id.*

246. One might be skeptical that a strict-scrutiny assessment under free-exercise doctrine would give the state any real opportunity for success in defending a challenged law. In *Tandon* and *Fulton*, the Court rejected the government's reasons for refusing a religious exemption. Tandon v. Newsom, 593 U.S. 61, 63-64 (2021) (per curiam); Fulton v. City of Philadelphia, 593 U.S. 522, 541-42 (2021). But strict scrutiny arose in those cases as a result of a determination that the state had already allowed either an actual or a theoretical secular exemption. As Andrew Koppelman has explained, it is not merely that the presence of exemptions triggers strict scrutiny and therefore the government must show a compelling state interest; it is that "*the presence of exceptions is taken to show that the interest is not compelling at all*." Koppelman, *supra* note 237, at 2285.

tions are being challenged for religious or nonreligious reasons.[247] A constant principle over decades of fluctuation in free-exercise doctrine is that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[248] Free speech, in contrast, protects "even simple bigots in any expressive context instead of just those with sincere religious objections in religious contexts."[249] After *303 Creative*, powerful information-technology entities that have no plausible claim to sincere religious belief can assert that their products and services are expressive and are being impermissibly coerced.

The move from free exercise to free speech also shifts the terrain from what typically functions as an individualized-exemption system to a frontal attack on the validity of the regulatory enterprise.[250] Absent evidence of purposeful discrimination against religious observers, free-exercise doctrine presupposes that state actors are free to enact and enforce rational laws, as long as they do not unduly burden religious exercise.[251] Free-exercise doctrine endeavors to assess when the state is required to offer an exemption from a law that it will otherwise continue to enforce.

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247. *See* Yoshino, *supra* note 226, at 246 (explaining that free-speech exemptions can be asserted by anyone, "without regard to religious affiliation").

248. *Yoder*, 406 U.S. at 215 (contrasting religious belief to "purely secular considerations," no matter how "virtuous and admirable"). The Court went on to recognize that "determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question." *Id.* While we certainly agree, an exploration of the difficulty in drawing clear lines between religious and secular beliefs is beyond the scope of this Feature. For present purposes, we draw on the formulation offered by Christopher L. Eisgruber and Lawrence G. Sager, who conceive of religion as "deeply held beliefs and commitments" with "spiritual foundations." CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 52, 70, 95 (2007); *see also* Lund, *supra* note 231, at 2078-81 (conceptualizing freedom of religion "as a right of conscience" and freedom of speech "as something else").

249. Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 182.

250. *See id.* at 173-74 (discussing the ways that an exemption system must work to satisfy free-exercise doctrine and arguing that *Smith*'s treatment of *Sherbert*, while characterized by some as a disingenuous retrofitting, speaks of an individualized decision-making process); *cf.* Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 516 nn.130-32 (2017) (noting free-speech cases in which exemptions have been granted).

251. Nelson Tebbe notes that while a liberty approach to free exercise "almost always entails a religious exemption from a general law," violations of the conceptually distinct equal-value principle can sometimes "be remedied by invalidation of a regulatory provision." Tebbe, *supra* note 237, at 2428 (showing how recent free-exercise cases depended on an "equal value" rule that requires that state regulations apply with equal value to both religious and secular activities).

In choosing free-speech doctrine instead, the Court did not frame its decision as an assessment of whether a religious exemption from an otherwise-valid law was required. To the contrary, the Court sweepingly denounced the law as an "effort to '[e]liminat[e]' disfavored 'ideas'"[252] and insisted that Colorado could not "force an individual to 'utter what is not in [her] mind' about a question of political and religious significance."[253] The state was admonished that individuals cannot "be conscripted to disseminate the government's preferred messages."[254] This kind of rebuke is entirely foreign to *Sherbert v. Verner*[255] and *Wisconsin v. Yoder*,[256] the pre-*Smith* cases exhibiting the most protective approach to religious liberty. In those cases, the Court concluded that states must exempt religious believers from otherwise-unremarkable eligibility rules for state unemployment benefits and compulsory education but reinforced that such regimes were legitimate programs for states to pursue.[257]

The disfavor for the core regulatory enterprise in *303 Creative* echoes *Barnette*, where free-speech principles were used to conclude that "the state simply

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252. 303 Creative LLC v. Elenis, 600 U.S. 570, 602 (2023) (alterations in original) (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023)).

253. *Id.* at 598 (alteration in original) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943)). Commentators noted Justice Gorsuch's "angry" reference to government-imposed training as "reeducation programs" during oral argument. Mark Joseph Stern, *The Frightening Implications of Gorsuch's Angry Questions About State "Reeducation*," SLATE (Dec. 6, 2022, 6:00 PM), https://slate.com/news-and-politics/2022/12/gorsuch-reeducation-discrimination-lgbtq-civil-rights-303-creative.html [https://perma.cc/YPW2-5KUF].

254. *303 Creative*, 600 U.S. at 592.

255. *See* 374 U.S. 398, 409-10 (1963) ("[N]othing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.").

256. *See* 406 U.S. 205, 213-14 (1972) (acknowledging that states have "a high responsibility for education" and requiring a showing that an educational requirement "interferes with the practice of a legitimate religious belief" for it to be struck down).

257. In *Sherbert*, Justice Brennan found it "significant[]" that South Carolina's unemployment scheme exempted Sunday Sabbath observers from the work-availability requirement, reflecting a "religious discrimination" that "compounded" the error of refusing to exempt a Seventh-day Adventist. 374 U.S. at 406. But even with this concern about the scheme's evenhandedness, the opinion made clear that "nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." *Id.* at 410. *Yoder* contains a similar discussion, recognizing that states have "a high responsibility for education" but acknowledging that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." 406 U.S. at 213-15.

cannot compel an affirmation of patriotic loyalty" from anyone, regardless of whether the individual objects for religious or nonreligious reasons.[258] The Court treated *Barnette* as easy and obvious governing precedent for its conclusion that the website designer cannot "be conscripted to disseminate the government's preferred messages."[259] But to draw on *Barnette*, the Court had to view a public-accommodations law, prohibiting discrimination against individuals based on protected status, as equivalent to a compulsory "affirmation of patriotic loyalty."[260] The comparison is strained, to say the least: CADA is an effort to secure equal treatment in the marketplace for historically marginalized people, not a political creed that the government requires unwilling minors to intone as part of their mandatory education. CADA was not treated as a presumptively valid law potentially subject to a religious exemption, but as an intrinsically wrongful coercion of thought and expression.[261] This triggered an especially potent form of negative-theory reasoning, under which the regulated business was viewed as an oppressed speaker entitled to protection from an overweening legislature. A free-exercise analysis, in contrast, would have focused on whether Colorado could provide an exemption to religious dissenters without unduly undermining its general and presumptively valid regulatory purposes.[262]

The consequences of using free-speech principles rather than free-exercise principles in *303 Creative* are now in full view. If the government (1) is not merely required to grant individualized exemptions but is also prohibited from doing anything that suggests it is conscripting speakers to disseminate its preferred message, and (2) any speaker, regardless of religious belief, can raise an objection, what began as a concern for religious freedom has a far vaster deregulatory reach. This not only casts doubt on whether much secular expressive conduct in places of public accommodation can be regulated; it also imperils a wide array of technology regulation that applies to any conduct that is as "expressive" as web designing for a customer. As we explain in the following Sec-

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258. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1322 n.363 (1970) (describing *Barnette*'s main holding).

259. *303 Creative*, 600 U.S. at 592; *see id.* at 585 (citing *Barnette* as an instance where the "Court offered a firm response" to a state government who "sought to test . . . foundational principles" of free speech).

260. *See* Ely, *supra* note 258, at 1322 n.363.

261. *303 Creative*, 600 U.S. at 592, 598 (chastising Colorado for attempting to "coopt an individual's voice for its own purposes" and trying "to eliminate ideas that differ from its own").

262. *See, e.g.*, Laycock, *supra* note 249, at 173; *see also* Koppelman, *supra* note 237, at 2276 ("Religious accommodations always involve a guess about whether there will be so many claims that the law's purpose will be thwarted . . . .").

tions, the Court in *303 Creative* significantly disrupted the free-speech framework it deployed in ways that could have major ramifications for technology regulation.

B. "Pure Speech" and the Erosion of the Speech/Conduct Distinction

Free-speech doctrine distinguishes between two kinds of claims: ones where a government regulation directly infringes upon a claimant's protected speech, and ones where the government aims to regulate conduct and, in doing so, burdens speech incidentally.[263] The first kind of regulation typically is subject to strict scrutiny, at least where the regulations are content-based; the second receives only intermediate scrutiny.[264] A threshold question in *303 Creative*, therefore, was whether the Colorado law sought to regulate speech or conduct. Justice Gorsuch treated this question as *resolved* by Colorado's stipulation that the customized website content was expressive.[265] He neglected to analyze whether impairment of Smith's purported expression was an incidental by-product of a law aimed at regulable conduct.[266] He also failed to analyze whether the state's regulation *permissibly* prohibited that expression under intermediate scrutiny.

To understand why this was incorrect, consider three scenarios that are each expressive and involve communication of the same central message. First,

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263. *See* Texas v. Johnson, 491 U.S. 397, 406-07 (1989) (recognizing that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word" and that "where '"speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms'" (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)) (citing *O'Brien*, 391 U.S. at 376-77; Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); Dallas v. Stanglin, 490 U.S. 19, 25 (1989))).

264. *O'Brien*, 391 U.S. at 376-77 (holding that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, . . . a government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

265. *303 Creative*, 600 U.S. at 587-88 (stating that he agreed with the Tenth Circuit that the wedding websites would be pure speech and that this was a "conclusion that flows directly from the parties' stipulations").

266. What the state actually conceded was that all of Smith's graphic designs and website designs were "expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message." Petition for a Writ of Certiorari at 181a, *303 Creative*, 600 U.S. 570 (No. 21-476).

a political protester stands on a public street corner holding up a sign denouncing the government. This protester is engaged in core political speech, in a form and a place where speech rights are strongest. Government efforts to sanction such speech based on its content must satisfy the most demanding form of judicial scrutiny, which the government rarely can survive.[267] This is particularly so if the government regulation compels the regulated person to speak or remain silent.[268]

Now consider the same speaker, who expresses the same political idea by detonating a bomb in a government building. The speaker announces this intention in advance to ensure that all clearly understand the meaning of the act. The bombing is expressive in that it is intended to communicate an idea, yet the nature of the conduct is such that it does not fall under the free-speech umbrella *at all*, let alone insulate the speaker from liability for this crime.

Finally, assume that the same speaker bellows the same political message through a bullhorn in a residential neighborhood, at night. The government can permissibly regulate this noise through the time, place, and manner rules outlined in *Ward v. Rock Against Racism*.[269] So long as the government is not aiming the law at the speaker's message and leaves open "ample alternative channels for communication," a law governing the noise aspect of the speech would likely be upheld.[270]

In general, when a speaker chooses a *conduct-laced* means of expression that includes actions that the government has an important interest in regulating (e.g., preventing noise, property destruction, fires, littering, trespassing, defacing of sacred objects, physical harms to others, or disruptions of order), the Court applies the *O'Brien* test.[271] This test asks whether the regulation is within the government's constitutional power; whether the government interest in regulating the conduct is sufficiently important; whether the regulation is aimed at the conduct, not the speech; and whether the measure reaches no further than necessary in doing so.[272] The test focuses on whether the government

267. *See supra* text accompanying notes 158-177.

268. *See, e.g.*, NIFLA v. Becerra, 585 U.S. 755, 766 (2018) (citing Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)); *see also supra* text accompanying notes 177-190 (discussing the Court's opposition to compelled speech in *NIFLA*).

269. 491 U.S. 781, 796-802 (1989).

270. *Id.* at 791. For a critique of this doctrine, see Enrique Armijo, *The "Ample Alternative Channels" Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657, 1689-1728 (2016).

271. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). *But see* Lund, *supra* note 231, at 2082 ("*O'Brien* is not the rule in *any* of the compulsion cases . . . .").

272. *O'Brien*, 391 U.S. at 377.

has a legitimate interest in regulating the conduct and then proceeds to the question whether its incidental effect on expression is justified.

The web designer's refusal to design websites for same-sex weddings was a conduct-laced means of expressing her beliefs. Colorado sought to regulate the "refusal to serve" step of her expressive activities as well as any announcement of her intentions to discriminate on the site. It rendered impermissible the following conduct: refusing to provide wedding websites for commercial sale on equal terms regardless of sexual orientation and engaging in speech that effectively barred such access.

Prohibitions on discriminatory conduct by businesses that hold themselves out to the public have been around in the United States since the 1960s.[273] Some versions of public-accommodations and common-carriage protections are potentially as ancient as Roman law.[274] In keeping with this tradition of regulating commercial activity, CADA should have been viewed as a regulation of conduct that swept up otherwise-protected expression, subject to a two-step *O'Brien* analysis.[275] The first step is about constitutional *coverage*: is designing a website for a same-sex wedding speech or expressive activity covered by the First Amendment? The answer to this is most likely—though not certainly—"yes." At the stage of web design, Smith would be using words, text, and artistic design. Given the trend exemplified by *Sorrell*, this would probably qualify as "speech" under the increasingly expansive First Amendment.[276]

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273. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201-207, 78 Stat. 241, 243-46 (codified as amended at 42 U.S.C. § 2000a). Precursors of the laws began much earlier, as part of Reconstruction, though their force was eviscerated by the *Civil Rights Cases* in 1883. 109 U.S. 3, 26 (1883) (striking down federal legislation banning private discrimination in places of public accommodation, on the ground that congressional power to enforce the Equal Protection Clause and other provisions of the Fourteenth Amendment was limited to regulation of state government). The Court later held that Congress has power to regulate places of public accommodation under the Commerce Clause. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

274. *See, e.g.*, David S. Bogen, *Ignoring History: The Liability of Ships' Masters, Innkeepers and Stablekeepers Under Roman Law*, 36 Am. J. Legal Hist. 326, 332 (1992) (discussing the duty of innkeepers to host passing travelers).

275. For discussion of a potentially problematic doctrinal fissure, see Lund, *supra* note 231, at 2082, which discusses a case where the Court opted for strict scrutiny instead of the *O'Brien* test when evaluating apparently compelled association.

276. Assessing the speech status of a parade, the Court has held that a "narrow, succinctly articulable message is not a condition of constitutional protection," noting that such a rule would fail to reach much protected speech, such as a Jackson Pollock painting. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995). Moreover, that parade organizers combine "multifarious voices" into the parade's expressive message does not mean the organizers lose constitutional protection. *Id.* There thus is no "particularized message" condition on speech protection. *Id.*; *see* Jennifer Petersen, How Machines Came

But even if customized web designs may be *covered* speech, that speech is not necessarily *protected*. *O'Brien* next asks if the covered speech is being infringed *directly* (e.g., compelling Smith to affirm or celebrate same-sex marriage) or *indirectly* via a government regulation aimed at her conduct (e.g., requiring Smith to serve same-sex couples on an equal basis with other customers seeking the same services). In the latter case, courts apply intermediate scrutiny to the regulation, not strict scrutiny.[277] This framework, which *Sorrell* left intact,[278] asks whether Colorado could regulate the conduct component of her refusal to serve without unduly or directly infringing upon the expressive component of that same conduct.

303 Creative did not provide a satisfactory answer to these questions. It relegated *O'Brien* to a footnote,[279] and dodged *O'Brien*'s two-step inquiry by characterizing Colorado's regulatory intentions as directed at the compulsion of speech, rather than the prohibition of discriminatory conduct.[280] This characterization is deeply perplexing. Colorado sought to enforce the same prohibition on discriminatory treatment against public accommodations that are expressive (e.g., web designers) and public accommodations that are, at least for the present, treated as nonexpressive (e.g., hotels and restaurants). If the regulation is one and the same, regardless of whether speech is involved, it cannot be said that Colorado seeks to compel speech itself, as opposed to prohibiting discriminatory conduct.[281] Colorado did not compel Smith to design a wedding

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TO SPEAK: MEDIA TECHNOLOGIES AND FREEDOM OF SPEECH 87-119 (2022) (discussing the relaxation of this aspect of speech coverage).

277. *O'Brien*, 391 U.S. at 376 ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

278. Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011) (acknowledging that "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct" and that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech").

279. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 600 n.6 (2023).

280. *See id.* at 594.

281. *See* Helen Norton, *How the Antidiscrimination Law of Commercial Transactions Really Works*, 48 SEATTLE U. L. REV. 467, 480 (2025) (discussing the novel assertion in the case that the sale of a commercially available product was expression under the First Amendment and noting that "the *303 Creative* decision rested in great part on a fundamental misunderstanding of how the antidiscrimination law of commercial transactions actually works: the majority's failure to recognize that these laws do not regulate businesses' choice of *what* to sell to the public, but instead their choice to refuse to permit certain customers, based on protected class status, to buy and receive those products and services"); *see also* Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. CHI. LEGAL F. 209, 225 (noting concern that the increasingly rigorous free-speech block on government regula-

website for a same-sex couple any more than it required her to crochet tea cozies—it merely set forth an equal-treatment condition on whatever commercial services she was choosing to provide to the public. And it proffered a compelling reason to do so: protecting the dignity and market-access rights of historically marginalized people. Instead of conducting a thorough inquiry into this second step, Justice Gorsuch mashed together passages from compelled-speech cases that did not engage *O'Brien* and declared that the government cannot force a person to "'utter what is not in [her] mind' about a question of political and religious significance."[282]

Justice Gorsuch did emphasize that Smith's denial of service to a same-sex couple would not be based on their "status," which would be the case if her website read something akin to "No LGBTQ people served here." Smith would serve gay customers, just not any seeking wedding web-design services and messages.[283] Indeed, she would not serve *any* customers—gay or straight—whose messages might violate her beliefs.[284] But this attempted distinction ig-

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tion portends an erosion of settled law that allows regulation of speech integral to illegal conduct).

282. *303 Creative*, 600 U.S. at 596 (alteration in original) (quoting W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943)). Justice Gorsuch's answer to *O'Brien* was simply to cite *Hurley* for the proposition that "there is nothing 'incidental' about an infringement on speech when a public accommodations law is applied 'peculiar[ly]' to compel expressive activity." *Id.* at 600 n.6 (alteration in original) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 563, 572 (1995)). But there was nothing peculiar about this application. *See also* Linda C. McClain, *Do Public Accommodations Laws Compel "What Shall Be Orthodox"?: The Role of* Barnette *in* 303 Creative LLC v. Elenis, 68 ST. LOUIS U. L.J. 755, 761 (2024) (noting how using *Barnette* divorced from its mandatory-flag-salute context distorts the case and its proper applications).

283. *303 Creative*, 600 U.S. at 580 (noting that Smith "provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation . . . [b]ut she has never created expressions that contradict her own views for anyone" (citation omitted)). For a deconstruction of the status/message distinction on which the majority's analysis rests, compare generally Yoshino, *supra* note 226.

284. *303 Creative*, 600 U.S. at 580. Lorie Smith's website currently states:

> I am a Christian—a believer of our Lord and Savior, Jesus Christ. The same deeply rooted convictions that motivate me to create messages for everyone also prevents me from designing messages that promote and celebrate ideas that violate my beliefs. As a result, I cannot design for same-sex weddings or any other wedding that contradicts God's design for marriage. Creating such messages would compromise my conscience and my Christian witness and tell a story about marriage that contradicts God's story of marriage—the very story He is calling me to promote. I'm not the best fit for every wedding, but the good news is that there are many talented graphic and website designers who would be.

Wedding Websites, 303 CREATIVE, https://303creative.com/custom-wedding-websites [https://perma.cc/WQA5-ND7B].

nores that all discrimination cases entail both conduct and *viewpoints* (e.g., racist ideologies, thoughts, motives, or biases that animate the unlawful conduct). An employer can fire an employee for no reason, but not for a discriminatory reason, despite how the latter implicates viewpoint-driven expression.[285] When the discriminatory viewpoint is expressed through employee dismissals, then it becomes an unlawful act—more like a physical block of an individual than a pure communication on a public street corner.[286] The government can prohibit that conduct: as the Court has explained, "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[287] In prior antidiscrimination cases, the Court landed on the regulable-conduct side of the speech-conduct continuum, despite the speech component.[288] *303 Creative* disrupts the careful balancing these precedents reflect.

Such an elision of the speech/conduct distinction may bedevil wide swaths of technology regulation, where nearly every potential regulatory act addresses some combination of speech and conduct. In the digital context, technologies often simultaneously communicate something and do something. Software that decrypts or encrypts also uses symbols and words. Should such software be protected as speech?[289] Can it be regulated as a potentially dangerous prod-

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285. *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (rejecting the argument that Title VII violates employers' First Amendment rights).

286. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). The Court thus has upheld nondiscrimination laws applied to public accommodations when confronted with First Amendment challenges. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 632 (1984); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545-46 (1987); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1995). Indeed, although Justice Gorsuch relies on *Hurley*, the Court there noted that public-accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572.

287. *Giboney*, 336 U.S. at 502.

288. Central to these cases is the understanding that places of public accommodation are not street corners where speech rights are maximal. Think, in contrast, of the Westboro Baptist Church picketing a serviceman's funeral with speech that the family of the deceased found not only hateful, but an intentional infliction of emotional distress. Snyder v. Phelps, 562 U.S. 443, 448-50 (2011). This speech nevertheless was protected *because it was on the street corner*—a public forum—not in the workplace. *Id.* at 456.

289. Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 720 (2000) ("For purposes of First Amendment coverage, therefore, the relevant distinction is not between encryption source code published in electronic as opposed to printed form, but rather between encryption source code that is itself part of public dialogue and encryption source code that is meant merely to be used.").

uct violating export controls?[290] Personal data that enables complex market manipulation by allowing commercial actors to identify consumer patterns, and even shape their decisions, can also be characterized as a necessary precursor to commercial speech.[291] In a related vein, a website is not just verbal content; it is also design that might consist of consent boxes that urge a user to click "yes," manipulative dark patterns, and even addictive elements.[292] On this understanding, the FTC has been targeting deceptive website design for decades.[293]

For governments to regulate the digital realm effectively in an era of proliferating First Amendment litigation, courts must be capable of disentangling the communicative elements of technology from conduct and must maintain space for legitimate government regulation of the latter. If online activity involving "images, words, symbols, and other modes of expression" triggers First Amendment coverage automatically and protection almost automatically, regulation would be almost impossible.[294] By treating an antidiscrimination law as the direct regulation of speech, *303 Creative* thus added new heft to the powerful arguments already available to technology companies in cases that involve conduct and speech.

C. Whose Speech Is It?: Conflating Customer Speech and Vendor Speech

After the Court determined that wedding-website design is "pure speech," the natural question—one highly relevant for technology regulation—was *whose* speech it was. After all, Smith held herself out as designing websites *for other people*,[295] even as she claimed the websites constituted her own protected speech.[296] In other words, do websites constitute the speech of the web designer or of the customers who request and pay for the design product?

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290. *Id.* at 713.

291. Calo, *supra* note 82, at 1034-40.

292. A multistate group of thirty-two attorneys general filed suit against Meta for, among other things, falsely representing that its platform is "safe and not designed to induce young users' compulsive and extended use." Complaint for Injunctive and Other Relief at 23, California v. Meta, Inc., No. 23-CV-05448 (N.D. Cal. Oct. 24, 2023).

293. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 627 (2014).

294. 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023).

295. In advertising her design services, Smith advises prospective customers that "[i]f we are a good match, you can rest assured I will design a unique, one-of-a-kind website celebrating your marriage and telling your special love story." *Wedding Websites*, *supra* note 284.

296. Brief for the Petitioners at 19, *303 Creative*, 600 U.S. 570 (No. 21-476).

The Court treated Smith as the relevant messenger in two respects. First, if the Colorado law were enforced against her, then she would be required to design a customized wedding website for a same-sex couple. According to Smith, her design process would entail "vet[ting]" each potential project, consulting with clients to elicit their "unique stories as source material," and "produc[ing] a final story for each couple using her own words and her own 'original artwork.'"[297] Second, if the law were enforced, she would not be allowed to say on her website that she would not create content for same-sex weddings due to her religious convictions. That is, the wedding-website designs for same-sex couples involved *her* speech and *her* silence, both wrongly compelled by government.

This conclusion, though, was hardly self-evident. Each website designed by Smith doubtless would be an original, customized creation produced with dedication and specialized skill. But would that make it *her* speech? As Tobias B. Wolff has argued, customers typically do not pay for the privilege of facilitating a vendor's own personal speech.[298]

Perhaps this should not matter. Current doctrine often protects speech even when nobody would attribute the speech to the party invoking the First Amendment. Billboard companies convey others' messages and still have limited free-speech rights,[299] even though few would think billboard companies endorse the messages that they advertise. Broadcast companies have limited free-speech rights,[300] even though viewers may not attribute to them the content of the programs they broadcast. Private libraries can assert free-expression rights if the government attempts to censor their collections,[301] even if nobody

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297. *303 Creative*, 600 U.S. at 588 (first quoting Petition for a Writ of Certiorari at 185a, *303 Creative*, 600 U.S. 570 (No. 21-476); then quoting Petition for a Writ of Certiorari, *supra*, at 186a; and then quoting Petition for a Writ of Certiorari, *supra*, at 183a). The Court was quoting from the parties' stipulations and asserting that they "lead the way" for this important analytical step. *Id.*

298. Brief of Professor Tobias B. Wolff as Amicus Curiae in Support of Respondents at 1-2, *303 Creative*, 600 U.S. 570 (No. 21-476).

299. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 520-21 (1981) (holding that a city ban on the construction of billboards advertising a business or its products was unconstitutional where other noncommercial signs were allowed); City Council v. Taxpayers for Vincent, 466 U.S. 789, 808-17 (1984) (upholding limits on the posting of political-campaign advertisements on public property).

300. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 397-99, 402 (1984) (striking down a rule against editorializing by public broadcasting).

301. Government censorship of books in public libraries may also trigger constitutional objections based on the public's right to receive ideas and the authors' free-speech rights. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 866-67 (1972) (plurality opinion) (holding that, although local school boards have broad control over the manage-

thinks that the library personnel or owners wrote or specifically endorse the messages in *Catcher in the Rye*, *The Color Purple*, *Lolita*, or *Rubyfruit Jungle*.

On the other hand, the Court has recognized the importance of authorial attribution in other cases. When addressing entities that carry the speech of others, such as newspapers, libraries, and parades, the Court has assessed how closely such carriers controlled and identified with the content produced and how effectively they could dissociate themselves from unwanted messaging.[302] The prospect of adequate dissociation was essential to the result in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*),[303] where the Court chose not to extend First Amendment protections to an unwilling carrier of a government message.[304] The Court held that law schools were not impermissibly forced to convey a government message or subjected to compelled silence when they were required by the Solomon Amendment to accommodate military-recruiter visits as a condition of federal funding.[305] Even though the universities were required to provide assistance in the form of emails, notices on school billboards, and flyers—all of which involved pure speech[306]—this government-imposed constraint on law schools' freedom of expressive association was seen as merely incidental to the government's regulation of conduct.[307]

In considering the balance of interests at stake, the Court in *FAIR* specifically noted that the law schools had multiple ways to convey their disagreement with the military's antigay "Don't Ask, Don't Tell" policy.[308] They could dissociate themselves from the government message to prevent the appearance of endorsement while still allowing access to the military recruiters on equal terms with other employment recruiters.[309] This was true even though an educational program is expressive, and schools obviously convey values through their teachings and other activities.

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ment of local affairs, school library collection policies must comport with the First Amendment and protect the "right to receive information").

302. *See id.* For a discussion of this point as it was developed in *Moody*, see *infra* Section IV.B.

303. 547 U.S. 47, 61-65 (2006).

304. *Id.* at 70.

305. *Id.*

306. *Id.* at 60-61.

307. *Id.* at 62.

308. *Id.* at 69-70.

309. *Id.*; *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87, 88 (1980) (holding that the state could require private shopping malls to provide access to individuals engaged in free-speech activities because the mall owners could "expressly disavow any connection with the message by simply posting signs").

FAIR is hard to square with *NIFLA*, where the Court gave no weight to the multiple ways that crisis pregnancy centers could have continued to express their opposition to abortion and vehemently dissociate themselves from the required notices.[310] Taken together, the cases reveal that the Roberts Court has been inconsistent on the importance of dissociation in compelled-speech cases. Here again, one can fairly ask whether religious speakers inspire greater judicial concern about the risk of misattribution than do other speakers. At a minimum, though, *FAIR* shows that the Court has occasionally viewed opportunities for dissociation to be outcome-determinative.

In *303 Creative*, as in *NIFLA*, the majority was wholly uninterested in the service provider's ample opportunities to avoid message attribution. Colorado did not require Lorie Smith to add her name to a same-sex couple's wedding website, indicate that she was their web designer, or otherwise associate her professional identity with a same-sex wedding message. She could have left her voice out, while otherwise serving the customers on equal terms as others who might hire her for their wedding messages.[311] She might have simply allowed the wedding couple to speak while staying respectfully silent herself, in the way Justice Scalia once suggested should suffice for schoolchildren who choose not to join in a prayer at a graduation ceremony.[312]

Could someone reasonably attribute a wedding website to Lorie Smith if she left her name off the final product? If not, why should she be treated as the relevant speaker, versus a behind-the-scenes set designer? Smith's services would facilitate the speech of the couple and effectively broadcast their wedding message. But reasonable observers would not conclude that this reflected her personal endorsement of their message. Services offered behind the scenes, where the circumstances provide no reason to fear that the service provider will be publicly associated with a message objectionable to her, present a different set of concerns than a novelist being conscripted to entwine her professional and public voice with the views of her clients, or a portrait artist being required to sign her name to a glorifying portrait of a dictator.

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310. *See supra* text accompanying notes 184-194.

311. *See* Blake E. Reid, *On Stipulations and Expressiveness*, Blake E. Reid (July 4, 2023), https://blakereid.org/on-stipulations-and-expressiveness [https://perma.cc/ZFL7-6YWC] ("None of this adds up to a concession from Colorado that the message of the hypothetical websites at issue here is actually attributable to the designer in a First-Amendment-cognizable way.").

312. *See* Lee v. Weisman, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting) (arguing that to assert that students who must merely sit in respectful silence while others are standing during a prayer at a public-school ceremony have "somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous").

Rather than asking the attribution question that predominated in *FAIR*, the Court in *303 Creative* relied on *Barnette* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* to conclude that CADA inflicted an unconstitutional coercion of the web designer's own speech.[313] But in neither of those cases did the complainants have the opportunities for dissociation available to Smith. In *Hurley*, the Court rejected the enforcement of Boston's antidiscrimination law against private citizens organizing a St. Patrick's Day parade, holding that the parade organizers could not be required to include groups that sought to impart a pro-gay message objectionable to the private parade organizers.[314] The potential attribution of the compelled message to the organizers was far more direct than the risk of affiliation that wedding vendors might face. The organizers initiated the parade on their own rather than at the behest of a paying customer, selected the units that would comprise the parade, and obtained a permit issued to them alone.

In contrast, Smith could choose to step aside, out of view, and completely obscure her participation in a message she regards as apostasy.[315] Like the law schools in *FAIR*, Smith was free to express her sincere disagreement with the government regulation in numerous other ways. And unlike the *Barnette* schoolchildren, she was not required to echo, salute, stand for, or otherwise join any vows, or convey anything at all about her own beliefs. The compelled speech at issue in *Barnette* was a mandatory extended-arm salute to the American flag while uttering the Pledge of Allegiance as part of an exercise meant to convey patriotic loyalty.[316] The coercion involved conscription of both students' bodies and voices, standing at attention in homage to the American flag, while intoning aloud and in unison a prescribed government message that specifically announced a first-person perspective.[317]

To see how much attribution matters to the result in this canonical case, suppose the same children had been required on a mandatory test to state the

313. 303 Creative LLC v. Elenis, 600 U.S. 570, 584-89, 590-92, 596, 599-600, 602 (2023) (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626-29, 634, 642 (1943); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 560-61, 563, 566, 568-79, 581 (1995)).

314. *Hurley*, 515 U.S. at 560-61, 563, 566, 568-79, 581.

315. We recognize that the theological question of complicity is a much more complex one than can be fleshed out here. *See, e.g.*, M. Cathleen Kaveny, *Complicity with Evil*, CRITERION, Autumn 2003, at 20, 22 (acknowledging the complexity of this topic). We also acknowledge that Smith could claim that forcing her to remove her name would be a form of compelled silence or anonymity. Our point is that this commercial vendor had choices at hand that are relevant to an assessment of how deeply her own expression was burdened.

316. *Barnette*, 319 U.S. at 627-29.

317. *See id.*

words of the Pledge of Allegiance and to explain why Americans regard it as a sacred message. The outcome likely would be different.[318] Answering an exam question does not impute any internalized sentiment to an individual; it does not falsely suggest the embrace of beliefs that might be anathema to the speaker. The First Amendment sin of conscription lies not merely in the mandatory nature of a recitation but also in its attributive quality.[319]

303 Creative has profound potential implications for technology policy because the question of authorial attribution is pervasive in digital spaces.[320] Treating a service provider or a platform as the relevant speaker for purposes of First Amendment analysis will be particularly consequential when the speech interests of the service provider or platform run counter to the speech interests of the customer or user. Say Facebook wants to take down a post that a user wishes to keep up. Would compelling Facebook to preserve user speech be compelled speech in the sense of *Barnette*? Carefully drawn distinctions among different speakers' rights are essential for evaluating the constitutionality of technology policy.

Early discussions of platform liability asked a version of this question of authorial attribution. Scholars and policymakers pondered when user speech should be legally attributable to a digital platform: when should a platform be liable for a user's speech? These cases toggled between comparing platforms to newspaper publishers, which are legally responsible for others' content, as opposed to more passive distributors like bookstores, which are legally responsible for content only when they have actual knowledge of defamatory material.[321] Congress responded by enacting Section 230 of the Communications

318. *Cf.* Post, *supra* note 150, at 1086-88 (posing hypotheticals in which children have to recite the Gettysburg Address or a famous poem).

319. *See* Shiffrin, *supra* note 184, at 763.

320. *See* Balkin, *supra* note 75, at 2017 (explaining the analytical challenges that arise for free-speech doctrine when the state asks entities who are part of the internet infrastructure to censor or control speakers who use digital services to communicate with others).

321. *Compare* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 139-41 (S.D.N.Y. 1991) (finding that a computer-service company was not liable as a publisher of the content posted online by its users unless it knew or had reason to know that published statements were defamatory), *with* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) (distinguishing *Cubby* to treat the owner of a computer network like a publisher that is liable for the content that it publishes because it had made editorial decisions).

Decency Act, which immunizes platforms from liability for user content in most contexts, including when they choose to take down content.[322]

As we observed in Part I, the digital speech environment often involves multiple potential speakers and their competing interests.[323] Platform interests and user interests do not always align. Sometimes they do, and platforms will fight for user interests and rights, speech or otherwise; indeed, technology firms raising First Amendment challenges sometimes invoke both customers' and firms' free-speech rights.[324] But other times, a platform may not want to carry a particular user's speech. A platform also may have more incentives than an individual user to bow to censorial pressure from government entities.[325] Simply assuming that the speech in question belongs to the vendor rather than the customer, as the Court did in *303 Creative*, elides these distinctions.

D. Finding that Government Regulation Conscripts the Conscience

Closely related to the attribution and dissociation issues is a question about the *degree* to which a speaker's expressive autonomy is burdened. The majority in *303 Creative* not only treated CADA's application to the web designer as an infringement of her speech but also viewed it as a particularly egregious one—a preemption of her expressive autonomy on a matter of conscience and religious belief. The majority offered no discussion of the avenues available to Smith both to comply with the law and to express her authentic views. As *FAIR* shows, however, when determining whether a regulation imposes *undue* coercion of expression, it should matter whether a speaker has other expressive options to distance themselves and their true beliefs from the message expressed.[326] Complying with the law while simultaneously proclaiming her own

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322. *See* 47 U.S.C. § 230(c)(1)-(2) (2018) (immunizing platforms from liability for both keeping content up and taking it down). *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019) (chronicling the history and impact of Section 230).

323. *See, e.g.*, Balkin, *supra* note 75, at 2017; *see also* Keller, *supra* note 76 (describing the "competing interests of platforms, speakers, and people harmed by speech").

324. Rozenshtein, *supra* note 30, at 351-53 (offering examples).

325. *See* Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 84-93 (2015) (explaining the economic pressures platforms face to "knuckle under" and describing the many pressures that governments exert on private actors without directly regulating their speech).

326. In a colloquy with Justice Alito during oral argument in *303 Creative*, counsel for the State affirmed that a website designer "can put anything it wants on a standardized website, even if that includes a denunciation of same-sex marriage." Transcript of Oral Argument at 67, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476). Counsel also agreed that one could even post "Made With Love by Amber, who believes that a valid marriage is a union

opposition to same-sex marriage would avoid the attribution problem and would reduce Smith's compliance burden for the very pragmatic reason that potential customers might choose to go elsewhere.[327]

These expressive alternatives put Smith in a quite different position than the parade organizers in *Hurley*. Once the Boston officials deemed a parade to be a public accommodation, the organizers had no alternative to design a parade without a pro-gay message. Smith, however, remained free to create an infinite number of additional websites, including websites attributed to her personally, that proclaim her competing view. If conscription is the core of what mattered in *Barnette*—that the government impermissibly forced schoolchildren to state publicly something they did not believe—then the degree to which the compelled disclosures actually impinge on expressive autonomy should matter.

To be sure, the Court has been inconsistent in its willingness to consider the degree of expressive autonomy available to a speaker. Even modest burdens on religious actors have been deemed impermissible in some recent cases.[328] For example, in *Kennedy v. Bremerton School District*, the Court held that a high-school football coach could not be prevented from praying on the field immediately after the game.[329] That the coach could pray after the event, in his car, on his drive home, during his lunch break, or anywhere else beyond the school and his official duties apparently did not matter. Nor was the Court in *NIFLA* moved by the fact that the pregnancy centers were free to denounce abortion and promote childbirth in myriad ways. The disinterest in expressive alternatives that the Court showed in *303 Creative* thus had precursors in these other religious-speaker cases.

If these compliance burdens impermissibly infringe speech, then many technology regulations will too. As we outlined in Part I, technology policy reflects extensive reliance on mandatory disclosures. Will the Court view these requirements as impermissible burdens on the beliefs of website designers and other programmers? Indeed, in the recent industry challenge to the CAADCA

between one man and one woman," as long as that appeared on every website the designer made. *Id.*

327. As Justice Alito predicted, "[T]hat website designer is not going to be serving a same-sex couple if the website designer puts that on the website." *Id.* at 68.

328. For example, in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, the Court respected the "complicity" burden alleged by the Catholic Order in holding that the government had the authority to promulgate rules that provided religious and moral exemptions to provisions of the Affordable Care Act. 591 U.S. 657, 687 (2020). Although the case was decided on statutory grounds, it reflects the Court's deference to religious actors' claims about burdens. *See id.*

329. 597 U.S. 507, 512-14, 543-44 (2022).

discussed above, the plaintiffs argued that an impact assessment of the risks of technology to children would be akin to compelled speech.[330] They cited *303 Creative* to contend that California's impact assessment is compelled speech that stands for something—protected values—inconsistent with platforms' own beliefs.[331] The Ninth Circuit agreed, stating that the law's impact assessment "report requirement . . . clearly compels speech by requiring covered businesses to opine on potential harm to children."[332] Undue conscription of technology actors' speech thus is given a broad reading, with serious concerns about the harms of their speech shunted aside.

E. From Strict Scrutiny to Categorical Invalidity

Even if one accepts the foregoing free-speech leaps—finding that commercial website design is pure speech and not a potentially regulable form of expressive conduct; that the speech in question is attributable to the website designer and not to the customer; and that requiring such services to be provided on equal terms unduly conscripts the commercial vendor's conscience—the inquiry should not be over. The next step should be to assess whether the state can show a compelling interest for the restriction and that the regulation is narrowly tailored to that interest.

Stunningly, *303 Creative* failed even to engage in strict scrutiny. A core tenet of free-speech law is that when the government regulates protected speech in a content-specific way, it still may prevail if it has a compelling reason for doing so.[333] Strict scrutiny is understood to be "the most demanding test known to constitutional law."[334] Governments usually fail it, but only after the asserted state interests have been closely examined.[335] The Court in *303 Creative* conducted no such analysis. It invoked *Barnette*, *Hurley*, and *Boy Scouts of America*

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330. Appellee NetChoice's Response Brief at 16, 31-33, NetChoice, LLC v. Bonta, 113 F.4th 1101 (9th Cir. 2024) (No. 23-2969) ("[T]he [Impact Assessment] requirement compels services to speak . . . .").

331. *Id.* at 31-33.

332. *Bonta*, 113 F.4th at 1117 (citing 303 Creative LLC v. Elenis, 600 U.S. 570, 586 (2023)).

333. *See, e.g.*, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 71 (2022); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

334. City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (discussing the rigors of strict scrutiny).

335. There is a small group of cases in which the Court upheld government action under strict scrutiny. *See, e.g.*, Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015); Holder v. Humanitarian L. Project, 561 U.S. 1, 28, 40 (2010); Burson v. Freeman, 504 U.S. 191, 211 (1992); Austin v. Mich. State Chamber of Com., 494 U.S. 652, 660 (1990); Buckley v. Valeo, 424 U.S. 1, 66-68 (1976).

v. Dale[336] not only as relevant to the component questions addressed above, but as a substitute for the application of strict scrutiny.[337] Yet none of these cases eschewed strict scrutiny in a way that resolved this question.[338] The Court then applied a categorical rule of invalidity without explaining when or why certain instances of compelled speech may be subject to this special treatment.

Justice Gorsuch nodded briefly toward "the vital role public accommodations laws play in realizing the civil rights of all Americans," but then emphasized the ways in which contemporary public-accommodations laws are broader than the historical versions recognized as serving a compelling interest.[339] He noted that "some States . . . have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public . . . [and] to prohibit more forms of discrimination."[340] He further observed that "approximately half the States have laws . . . that expressly pro-

336. 530 U.S. 640, 644 (2000) (holding that the First Amendment right to expressive association allowed the Boy Scouts to exclude an openly gay man from membership in the private organization despite state antidiscrimination laws).

337. *303 Creative*, 600 U.S. at 584-87.

338. *Barnette* predated the Court's formal tiers-of-review approach to constitutional law, so the absence of steps that we would now recognize as strict scrutiny in that opinion is unsurprising. The standard of review in *Hurley* is a matter of some dispute. Some scholars and jurists treat *Hurley* as if it applied strict scrutiny. *See, e.g.*, Clay Calvert, *Selecting Scrutiny in Compelled-Speech Cases Involving Non-Commercial Expression: The Formulaic Landscape of a Strict Scrutiny World After* Becerra *and* Janus*, and a First Amendment Interest-and-Values Alternative*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 67 (2020); Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359, 2364 (2020). Both the majority and dissenting opinions in the Tenth Circuit consider *Hurley* to have applied strict scrutiny. *See* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1179, 1182 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023); *id.* at 1192-93 (Tymkovich, J., dissenting). We are sympathetic to these views, but a fair question remains about *Hurley*'s analytical framework, given the absence of a narrow-tailoring assessment or any articulated determination of whether the government interest was compelling. An explanation for this may lie in the fact that the Massachusetts law was not applied to protect individuals from exclusion in the parade. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572-73 (1995). Rather, the law required inclusion of a group with a banner, which altered the expressive content of the parade organizers. *Id.* That is, the law's purpose arguably was to require speakers to modify the content of their expression, an improper objective that rendered further analysis unnecessary.

339. *303 Creative*, 600 U.S. at 590-93 (asserting that Colorado's public-accommodations law grew "from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants" but that "States have . . . expanded their laws to prohibit more forms of discrimination" and that "this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech").

340. *Id.* at 590-91.

hibit discrimination on the basis of sexual orientation" and that "this is entirely 'unexceptional.'"[341]

This emphasis on the expansion of public-accommodations laws in terms of both the range of covered business and the scope of protected classes is surely meant to communicate that contemporary regimes such as CADA have moved beyond the versions originally described as advancing a compelling interest. But the majority refuses to say how or why this expansion is constitutionally significant. If the Court believes that the state interest in prohibiting discrimination on the basis of sexual orientation is somehow weaker than the state interest in prohibiting racial discrimination, it should say so. Or if it believes that states have compelling interests only with regards to the classic public accommodations of yore—hotels, restaurants, riverboats, and trains[342]—then it should acknowledge this significant limitation. (Notably, this would pose significant difficulty for the Justices who are keen to characterize internet platforms as common carriers in cases such as *Moody* where the political valence is reversed.[343]) Instead, this passage conveys these implications subtly, without confronting whether Colorado has a compelling interest in prohibiting discrimination on the basis of sexual orientation across the spectrum of businesses defined by the state as public accommodations. Nor does the discussion assess how those interests weigh against the interests of religious speakers like Smith—precisely the difficult balancing that strict scrutiny demands.

This makes *303 Creative* an outlier even among the other recent cases that protect religious expression in doctrinally innovative ways. Although *NIFLA* laid the groundwork for the view that any compliance burden is tantamount to undue coercion,[344] the Court still applied strict scrutiny and preserved the possibility that other burdens of this nature might satisfy the demanding standard.[345] Even in *Kennedy*, where the Roberts Court protected a high-school foot-

341. *Id.* at 591 (quoting Masterpiece Cake Shop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 632 (2018)).

342. *See* Transcript of Oral Argument, *supra* note 326, at 61.

343. *See* Moody v. NetChoice, LLC, 603 U.S. 707, 751 (2024) (Thomas, J., concurring in the judgment) ("Though they reached different conclusions, both the Fifth Circuit and the Eleventh Circuit appropriately strove to apply the common-carrier doctrine in assessing the constitutionality [of these laws] . . . ."); *id.* at 794 (Alito, J., concurring in the judgment) ("Most notable is the majority's conspicuous failure to address the States' contention that platforms like YouTube and Facebook—which constitute the 21st century equivalent of the old 'public square'—should be viewed as common carriers.").

344. NIFLA v. Becerra, 585 U.S. 755, 778 (2018) ("[The law] targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech.").

345. *See id.* 766-76.

ball coach's right to pray on the public school's field immediately after a game,[346] the Court worked within the rubric of strict scrutiny.[347] It evaluated and then rejected the school's proffered interests for restricting the coach's speech in this context.[348]

303 Creative, in contrast, refused to consider whether the state interest in preventing harm to third parties was strong enough to withstand strict scrutiny. Instead, the Court deemed a public-accommodations law unenforceable against a covered business without seriously discussing the state's interest in nondiscrimination mandates. Regardless of the effect on the ultimate outcome, applying strict scrutiny would have forced the Court to assess more honestly

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346. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 512-14 (2022).

347. However, it did so with the slightest note of equivocation. Justice Gorsuch wrote: "Under the Free Exercise Clause, a government entity normally must satisfy at least 'strict scrutiny,' showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. A similar standard generally obtains under the Free Speech Clause." *Id.* at 532 (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 n.1 (1993)). If strict scrutiny, described in *City of Boerne v. Flores* as "the most demanding standard known to constitutional law," 521 U.S. 507, 534 (1997), is the least that a government would have to satisfy, then what would it be at most? One possibility is that Justice Gorsuch was laying the groundwork for categorical-invalidity rules of the sort seen in *303 Creative*.

Note that we are not arguing that cases like *Kennedy* properly applied the strict-scrutiny test, only that the Court in such cases engaged it. *Kennedy* relied on a notion that a once-compelling reason not to accommodate religious speech in these settings—avoidance of an Establishment Clause violation—is now impermissible discrimination against religion under the Free Exercise Clause. Under this logic, government efforts to avoid direction of its resources to private parties that discriminate against protected class members is now described as government hostility. And the opinion in *Kennedy* "disregards how vindicating a school official's religious claim will redound to the detriment of students who are religious minorities at a vulnerable time in their lives." Justin Driver, *Three Hail Marys:* Carson, Kennedy, *and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 255 (2022). That is, the cases illustrate the erosion of separatism as a guiding Establishment Clause principle and the emergence of what some have called structural preferentialism. *See* Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 1, 3-4 (2025).

348. To dismiss the school's concern about undue influence, the majority had to characterize the activity as a "private, personal prayer," an assertion contradicted by the photographic evidence provided by the dissent. *Kennedy*, 597 U.S. at 525; *id.* at 549 (Sotomayor, J., dissenting). For more on the "deceitful narrative spun by counsel" attempting to argue that the coach "was disciplined for holding silent, private prayers," see *Kennedy v. Bremerton School District*, 4 F.4th 910, 912 (9th Cir. 2021) (Smith, J., concurring). Judge Smith provided a chart that refutes each "unmoored claim" offered by the coach with "what the record actually shows." *Kennedy*, 4 F.4th at 917-20.

and respectfully what and whom Colorado sought to protect.[349] Instead, the Court suggested that the government can no longer demand compliance with public-accommodations laws whenever they may compel protected expression, no matter how compelling the government's asserted equality interests might be.[350]

In addition to the obvious ramifications this has for antidiscrimination law, this move seriously threatens technology law. As we saw in Section I.C, the First Amendment poses many tripwires for technology regulators. In many upcoming technology battles, there will be speech interests at play; the central policy question will be how to weigh those speech interests against government interests aimed at protecting people online. *303 Creative* would seem to displace this crucial weighing process in the vast set of cases in which the Court now sees "pure speech" as being "compelled."

IV. THE LANDSCAPE AFTER *MOODY*

The Court was forced to address the implications of *303 Creative* for technology law almost immediately. In *Moody*, social-media platforms argued that two recent state laws regarding content moderation impermissibly coerced private speech in the way that Colorado arguably coerced Lorie Smith's speech.[351] Meanwhile, religious groups urged the Court to limit *303 Creative* to religious speakers, thereby recognizing a new form of free-speech exceptionalism for religious speakers.[352] It seemed inevitable that the Court would have to evaluate both of these arguments and pick a winner.

But the *Moody* Court did neither. Instead, it unanimously agreed to vacate and remand the cases, holding that the courts of appeals below had failed to apply the correct standard for facial challenges under the First Amendment.[353]

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349. As Kenji Yoshino explains, once we understand the government interest to include protecting against the dignitary harms of humiliation and stigma rather than simply ensuring equal access to material goods and services, we can see that laws such as CADA could not be any more narrowly tailored, and the alternative-vendor argument loses force. *See* Yoshino, *supra* note 226, at 283-84.

350. 303 Creative LLC v. Elenis, 600 U.S. 570, 589-93 (2023).

351. *See supra* text accompanying note 18.

352. *See supra* text accompanying note 19.

353. Moody v. NetChoice, LLC, 603 U.S. 707, 717 (2024). The concurring Justices noted that the Court should have stopped with this unanimous conclusion, rather than offering additional thoughts about the merits. *Id.* at 749 (Jackson, J., concurring in part and concurring in the judgment); *id.* at 766 (Alito, J., concurring in the judgment).

The Court barely mentioned *303 Creative*. This baffling omission has significant implications for First Amendment doctrine and technology regulation.

Taking *Moody* and *303 Creative* together, we see both reasons for cautious optimism and reasons to worry. Several observations in the majority and concurring opinions reveal that some of the Justices are concerned about the doctrinal excesses and lack of nuance that we identify in *303 Creative*—at least as they apply to technology regulations. This is reassuring. But without more explicit clarification, the Court's silence about how *303 Creative* in particular applies to technology policy creates a mess for lower courts, regulators, and regulated industries. It also calls into question the Court's commitment to the idea that at least vis-à-vis speech rights, religious speakers do not enjoy special constitutional protections.

A. Speech Versus Conduct

The urgent and unanswered question is how *Moody* lines up with the principles of *303 Creative*. Are litigants and lower courts to understand that the expressive activity of the social-media platforms is different in a doctrinally significant way from the "pure speech" of the website designer? If so, how? By entirely ignoring *303 Creative*'s implications for the law of digital platforms, *Moody* leaves lower courts with no guidance on how to square the two decisions on the question of when the output of websites constitutes speech versus conduct.[354]

In considering whether content moderation should be considered protected speech or regulable conduct, or some mix of the two, the Court in *Moody* exercised considerably more caution than it had shown in *303 Creative*. Rejecting the Fifth Circuit's conclusion that the content-moderation practices of social-media platforms were "'not speech' at all, and so do not implicate the First Amendment,"[355] the five-Justice majority ruled that content moderation that is conducted to implement stated community standards by Facebook and YouTube constitutes "expressive activity"[356] covered and often protected by the First Amendment.[357]

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354. *Bonta* shows one way that lower courts might respond to *Moody*: applying only its holding on the standard for facial challenges, and ignoring most of its more nuanced dicta, including on compelled commercial speech. NetChoice, LLC v. Bonta, 113 F.4th 1101, 1115-19 (9th Cir. 2024).

355. *Moody*, 603 U.S. at 721 (quoting NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 466 (5th Cir. 2022), *vacated sub nom.* Moody v. NetChoice, LLC, 603 U.S. 707 (2024)).

356. *Id.* at 744 ("At least on the current record, the editorial judgments influencing the content of those feeds are, contrary to the Fifth Circuit's view, protected expressive activity."); *see also*

The Court thus accepted the characterization of some technology products as speech-like, or even outright speech. But the *Moody* opinion was not so glib as *303 Creative*'s reference to "pure speech." It also acknowledged the vast range of different activities potentially covered by the challenged laws—some of which, it hinted, might not be protected speech at all. For example, Justice Kagan observed that "[c]urating a feed and transmitting direct messages, one might think, involve different levels of editorial choice, so that the one creates an expressive product and the other does not. If so, regulation of those diverse activities could well fall on different sides of the constitutional line."[358]

Given the reckless breadth of the Court's suggestion in *303 Creative* that anything involving "images, words, [or] symbols" might be considered "pure speech,"[359] the mere reminder that a more cautious and granular approach is needed in the assessment of the targets of technology regulation comes as a welcome course correction. Noting the potential concrete nonspeech harms that can arise from content feeds, the majority in *Moody* acknowledged that "today's social media pose dangers not seen earlier: No one ever feared the effects of newspaper opinion pages on adolescents' mental health."[360] When

id. at 738 ("The individual messages may originate with third parties, but the larger offering is the platform's. It is the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so). And in the aggregate they give the feed a particular expressive quality. Consider again an opinion page editor . . . . For a paper, and for a platform too.").

357. *Id.* at 740 ("When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection.").

An important caveat: if the platform does not have "independent content standards," or potentially if it delegates decisions about objectionable content entirely to an algorithm, it is not clear the *Moody* holding will apply. *Id.* at 736 n.5. Justice Kagan noted, "Like them or loathe them, the Community Standards and Community Guidelines make a wealth of user-agnostic judgments about what kinds of speech, including what viewpoints, are not worthy of promotion. And those judgments show up in Facebook's and YouTube's main feeds." *Id.* Kagan further stated that "[w]e therefore do not deal here with feeds whose algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards." *Id.* Justice Jackson concurred in the First Amendment analysis about editorial choice at the level of principles but refrained from joining the majority's conclusion as applied to curation by social-media companies. *Id.* at 748-49 (Jackson, J., concurring in part and concurring in the judgment).

358. *Id.* at 725-26 (majority opinion). This is why the facial challenges could not be sustained; the Court needed more information about which side of the line the law regulates.

359. 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023).

360. *Moody*, 603 U.S. at 733.

Justice Kagan proceeded to treat content moderation as expressive activity because it involves "compiling and curating others' speech," she took time to probe the simplistic analogy to the editorial discretion exercised by newspapers, cable providers, and parade organizers.[361]

But *Moody* also leaves open challenging questions about the speech-conduct continuum in the social-media context. Even with Justice Kagan's important observation about the limited utility of old legal metaphors,[362] the implicit analogy to newspapers running through the opinion obscures important distinctions between old and new media. Newspapers distinguish themselves by their perspective on the world: some are conservative, some are progressive; some focus on finance and others on politics; some focus on regional news while others aim to have a national or international reach. Corporate social-media platforms, on the other hand, are primarily advertising platforms that distinguish themselves by the free services they provide—such as photo sharing and messaging—to collect user data for advertising purposes. Because of these and other differences between newspapers and social-media platforms that may affect which First Amendment test should apply and which government regulatory interests are at stake, the Court should be cautious about painting them with the same blunt free-speech brush.

As Justice Barrett pointed out in her concurrence, other important factual distinctions may also matter for deciding whether actions are best characterized as speech or as conduct.[363] Whereas Justice Kagan wrote that the platforms are "making expressive choices," when they "use their Standards and Guidelines" to decide what third-party content users will see and in what order,[364] Barrett counseled that "[e]ven for a prototypical social-media feed, making this determination involves more than meets the eye."[365] She envisioned a near future in which platforms hand off decisions about what constitutes "hateful speech" to AI:

> If the AI relies on large language models to determine what is "hateful" and should be removed, has a human being with First Amendment rights made an inherently expressive "choice . . . not to propound a particular point of view"? In other words, technology may attenuate the connection between content moderation *actions* (*e.g.*, removing posts)

361. *Id.* at 731.

362. *Id.* at 733 (noting that "analogies to old media" may be "useful" but are also "imperfect").

363. *Id.* at 745-48 (Barrett, J., concurring).

364. *Id.* at 740 (majority opinion).

365. *Id.* at 745 (Barrett, J., concurring).

> and human beings' constitutionally protected right to "*decide for [themselves]* the ideas and beliefs deserving of expression, consideration, and adherence."[366]

These factual distinctions become crucial when courts attempt to parse whether a technology regulation implicates merely conduct or also speech. For example, a Delaware district court denied in part a gunmaker's request to enjoin a law prohibiting the distribution of computer software to make 3D printed guns on First Amendment grounds.[367] It mattered to the court that the law in question "is not concerned with stifling expression of any idea" but rather "distributing code that could itself function to build a firearm."[368] And the D.C. Circuit rejected arguments by broadcasters that "any captioning requirement the FCC might impose would violate protected rights of the broadcasters by regulating the 'content' of their programming" because closed-captioning requirements do not "significantly implicate program content,"[369] and so the argument is "without merit."[370] In each of these cases, we see courts moving beyond the code-is-pure-speech shibboleth and interrogating whether a particular regulation of code is in fact an impermissible restriction on protected expression under the circumstances.

Moody did not reconcile its more nuanced treatment of the interplay between speech and conduct with the bald pronouncements of *303 Creative*. It eschewed the "pure speech" phrasing from *303 Creative*, instead using terms like "expressive product,"[371] "expressive activity,"[372] "expressive offering,"[373] and

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366. *Id.* at 746 (alteration in original) (citations omitted) (first quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 575 (1995); and then quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

367. Rigby v. Jennings, 630 F. Supp. 3d 602, 619-20 (D. Del. 2022).

368. *Id.* at 617. Drawing the speech/conduct distinction did not resolve all free-speech concerns in the case, but it did inform the court's choice to scrutinize the Delaware law under intermediate rather than strict scrutiny.

369. Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 807 (D.C. Cir. 2002) (distinguishing for First Amendment purposes between video descriptions and closed-captioning services, which merely repeat spoken words).

370. Gottfried v. FCC, 655 F.2d 297, 312 n.54 (D.C. Cir. 1981); *see also* Report and Order, Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 27 FCC Rcd. 787, 803-04 (2012) ("[W]e reject commenters' arguments that imposing closed captioning obligations on content owners would raise First Amendment concerns.").

371. *Moody*, 603 U.S. at 716, 718, 726, 731, 743.

372. *Id.* at 728-31, 744.

373. *Id.* at 738.

even the awkwardly phrased "curated speech product."[374] These phrases acknowledge the more conduct-like qualities of the platforms' activity and indicate a potentially more regulable output than "pure speech." Only a few times did the majority come out and use the word "speech" in isolation—stating, for instance, that "presenting a curated and 'edited compilation of [third party] speech' is itself *protected speech*."[375]

Justice Alito's thirty-three-page concurrence voiced considerably more skepticism about whether the relevant activity is speech or conduct than the majority, and certainly much more than was on display in *303 Creative*. His concurrence was joined by Justice Thomas and by Justice Gorsuch, who authored the majority opinion in *303 Creative*. The concurrence sensibly noted that whether social-media platforms are engaged in speech is more complicated than a simple analogy to newspaper editing.[376] Alito also protested the majority's "conspicuous failure to address . . . [whether platforms] should be viewed as common carriers."[377] In their zeal for a more searching review of the speech/conduct distinction as applied to social-media platforms, those who joined Justice Alito's opinion urged the Court to do exactly what they refused to do in *303 Creative*: to think critically about whether the challenged law sought to regulate service refusals by businesses open to the public. Nearly the same group of Justices who in *303 Creative* saw Lorie Smith's discriminatory provision of website-design services as "pure speech" decried the *Moody* majority for failing to consider the conduct-like qualities of social-media platforms.

What prompted them to see complexities in one case that they ignored in the other? If their more searching inquiry into the speech/conduct distinction arises only when a speaker does not invoke religious reasons for challenging government regulation, then that distinction was left unstated, perhaps because such a distinction would be at odds with the Court's own free-speech principles regarding speaker neutrality.

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374. *Id.* at 717.

375. *Id.* at 744 (alteration in original) (emphasis added) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 570 (1995)).

376. *Id.* at 793 (Alito, J., concurring in the judgment) ("[T]he majority paints an attractive, though simplistic, picture of what Facebook's News Feed and YouTube's homepage do behind the scenes. Taking NetChoice at its word, the majority says that the platforms' use of algorithms to enforce their community standards is *per se* expressive. But the platforms have refused to disclose how these algorithms were created and how they actually work.").

377. *Id.* at 794 (citing Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1223-24 (Thomas, J., concurring)).

B. Attribution and Dissociation

Unlike in *303 Creative*, tensions between platform interests and user interests took center stage in the Court's analysis in *Moody*. The Florida and Texas laws were passed to protect the interests of users whose posts fared poorly in the platforms' content-moderation process—a group of users that the states understood as those with conservative views.[378] By intervening to protect these users from the vicissitudes of the platforms' policies, the states conveyed their understanding that the interests of the users and the platforms were in conflict—and that the interests of the users should prevail.

According to the *Moody* majority, the First Amendment does not allow the states to make this choice because content moderation is an expressive activity, akin to newspaper editing. Prevalent throughout the opinion was the recognition that the platforms' First Amendment claims rested on the speech *of their users*: the majority described the platforms as "compiling and curating others' speech"[379] and treated content moderation as an effort to "combin[e] 'multifarious voices' to create a distinct expressive offering."[380]

In this regard the *Moody* opinion improved significantly on *303 Creative*'s utter failure to acknowledge that speech on a wedding website is at least in part the speech of the customers who solicit, purchase, approve, and circulate the website to their friends and family. *Moody*'s engagement with the fact of third-party speech,[381] and its reliance on key third-party-speech cases like *Miami*

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378. Justice Kagan noted: "The law's main sponsor explained that the 'West Coast oligarchs' who ran social-media companies were 'silenc[ing] conservative viewpoints and ideas.' The Governor, in signing the legislation, echoed the point: The companies were fomenting a 'dangerous movement' to 'silence' conservatives." *Id.* at 741 (majority opinion) (alteration in original) (citation omitted) (first quoting NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1116 (W.D. Tex. 2021), *vacated*, 49 F.4th 439, 466 (5th Cir. 2022), *vacated sub nom.* Moody v. NetChoice, LLC, 603 U.S. 707 (2024); and then quoting *Paxton*, 573 F. Supp. 3d at 1108). Kagan also included the following quote from the district-court opinion in an explanatory parenthetical, *see id.*, which the district court explained was from Governor Greg Abbott's Twitter account: "[s]ilencing conservative views is un-American, it's un-Texan[,] and it's about to be illegal in Texas," *Paxton*, 573 F. Supp. 3d at 1109 (alterations in original) (quoting Greg Abbott (@GregAbbott_TX), TWITTER (Mar. 5, 2021, 8:35 PM), https://x.com/GregAbbott_TX/status/1368027384776101890 [https://perma.cc/AT8B-BVT6]).

379. *Id.* at 710.

380. *Id.* at 738 (quoting *Hurley*, 515 U.S. at 569).

381. The majority specifies that the "'editorial function itself is an aspect of speech.' . . . Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own." *Id.* at 731 (quoting Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996) (plurality opinion)).

Herald Publishing Co. v. Tornillo,[382] *Pacific Gas & Electric Co. v. Public Utilities Commission*,[383] and *Turner Broadcasting System, Inc. v. FCC*,[384] might be understood as a partial, albeit subtle, corrective to *303 Creative*. In *303 Creative*, the Court failed even to acknowledge the presence of third-party speech; *Moody* at least explains why a successful First Amendment claim might be built on it.[385]

But taken as a whole, the discussion of attribution—whose speech is it?—throughout *Moody* raised as many questions as it resolved. The majority opinion noted that while "no one will wrongly attribute to [the platforms] the views in an individual post," users "may well *attribute to the platforms* the messages that the posts convey *in toto*."[386] This is an important distinction: the expressive product at issue is the compilation, not the users' speech.

Yet rather than ask whether it matters that users "may well attribute to the platforms" the message inherent in the compilation, Justice Kagan downplayed the role of attribution in prior case law: "[T]his Court has never hinged a compiler's First Amendment protection on the risk of misattribution."[387] Kagan recognized that cases like *Rumsfeld v. FAIR*[388] and *PruneYard Shopping Center v. Robins*, which upheld laws that required private shopping centers to "host" unwelcome speakers,[389] actually suggest that attribution does matter, as we discuss above.[390] A key aspect of those cases is that nobody thought that the law school or the shopping center was speaking when they were forced to host un-

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382. 418 U.S. 241 (1974).

383. 475 U.S. 1 (1986).

384. 512 U.S. 622 (1994).

385. *Moody*, 603 U.S. at 731. Again, we do not suggest that this conclusion is beyond dispute. A common theme across the concurrences was the fear that, given the undeveloped state of the record, the majority acted precipitously in concluding that content moderation should be treated as expressive activity. As Justice Jackson cautioned, "[C]ourts must make sure they carefully parse not only what entities are regulated, but how the regulated activities *actually function* before deciding if the activity in question constitutes expression and therefore comes within the First Amendment's ambit." *Id.* at 749 (Jackson, J., concurring in part and concurring in the judgment). And Justice Alito's concurrence protested that "we do not know how the platforms 'moderate' their users' content, much less whether they do so in an inherently expressive way under the First Amendment." *Id.* at 766-67 (Alito, J., concurring in the judgment). In comparing *Moody* favorably to *303 Creative* for its engagement with the core issue of third-party speech, we do not mean to assert that the *Moody* majority ultimately got it right.

386. *Id.* at 739 (majority opinion) (emphasis added).

387. *Id.*

388. 547 U.S. 47 (2006).

389. 447 U.S. 74, 88 (1980).

390. *Moody*, 603 U.S. at 739-40; *see supra* text accompanying notes 302-310.

welcome speakers with unwanted messages. But Kagan attempted to distinguish those cases because "the host of the third-party speech was not *itself* engaged in expression."[391]

This is confusing. Does attribution—and the distinction between platform expression and user expression—matter to the Court or not? Justice Kagan seemed to be discarding attribution in favor of an assessment that distinguishes between passively hosting third-party speech, which is not expressive activity, and actively selecting and compiling third-party speech, which is. But this maneuver is circular. In both *PruneYard* and *FAIR*, the low risk of misattribution and the ample opportunities for dissociation plainly were integral to the Court's conclusion that the reluctant host was merely being asked to provide a neutral site for third-party speech rather than being forced to engage in its own unwanted expressive activity.[392]

Notably, the members of the Court who had no use for attribution concerns in *303 Creative* were quite struck by their importance in *Moody*. Justice Alito's concurrence urged attention to the differences between compilations that are "inherently expressive" and those that are not.[393] He described a spectrum

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391. *Id.* at 740 (emphasis added).

392. The role of misattribution in driving the outcomes of *PruneYard* and *FAIR* is so much more influential than *Moody* acknowledges that we feel compelled to quote an extended passage here. In *PruneYard*, while explaining why a California law requiring a shopping center to host unwanted speakers did not violate the First Amendment, the Court noted:

> [A shopping center is] a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

PruneYard, 447 U.S. at 87.

Regarding *FAIR*, Justice Kagan's distinction between hosts that are speakers versus those that are not speakers seems especially inapt. Educational institutions are inherently and pervasively expressive entities: compelling them to carry third-party messages that violate their antidiscrimination principles and their accreditation rules cannot be justified based on this distinction. Kagan recognizes that schools do have an expressive function but suggests that they have multiple roles; she would draw the free-speech protection line around their more intentionally and quintessentially expressive activities, such as teaching within the classroom. *See Moody*, 603 U.S. at 732 n.4.

393. *See Moody*, 603 U.S. at 781-82 (Alito, J., concurring in the judgment).

ranging from "dumb pipes" that pass on whatever they are fed, to compilations like the opinion pages of newspapers that are clearly expressive and identified with the newspaper itself.[394] Alito even proposed a three-part test to determine when a hosting requirement would constitute speech compulsion. That test would require "a compiler [to] show that *its* '*own message* [is] affected by the speech it [is] forced to accommodate.'"[395] He spent considerable time on *FAIR* and *PruneYard* and chastised the majority for its effort to "downplay, if not forget" these important precedents.[396] Pervasive throughout this discussion was the idea that attribution of hosted views to the conveyer of those views should matter; not all editors, conduits, or compilers manifest the requisite level of identification with the compelled message at issue.[397]

It is hard to dispel deeper questions about why these three Justices were suddenly keen to subject the platforms to an attribution analysis that they deemed unnecessary for the Christian website designer. Perhaps the Becket Fund's theory of a separate, religiously inflected speech doctrine is enjoying something of a soft launch here.[398] These Justices may implicitly be importing free-exercise dynamics into free-speech doctrine, resulting in greater protection for religious speakers alone. But such speaker favoritism cannot be reconciled with the viewpoint neutrality and speaker equality demanded by the Court's own deregulatory speech doctrine. Free-speech principles logically flow from gods to Google, and they do not privilege god-fearing speakers over Google.

The Court's treatment of attribution in compelled-speech cases thus has become incoherent—and this incoherence will not simply fade away. If *Barnette* was correctly decided, and yet schools remain free to ask students to provide the text of the Pledge of Allegiance on an exam question, then the role that attribution plays in differentiating between permissible and impermissible speech compulsion must matter. How are courts to handle this concern con-

394. *See id.* at 782 (citing Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 458 (2014) (Scalia, J., dissenting) (using the term "dumb pipes")).

395. *Id.* at 784 (second and third alterations in original) (emphasis added) (quoting Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 63 (2006)).

396. *Id.*

397. *See id.* at 785 n.18 ("To be sure, in *Turner* . . . we held that the First Amendment applied even though there was 'little risk' of misattribution in that case. But that is only because the claimants . . . had already shown that [the law] affected the quantity or reach of the messages that they communicated through 'original programming' or television programs produced by others. . . . In cases not involving core examples of expressive compilations, such as in *PruneYard* and *FAIR*, *a compiler's First Amendment protection has very much turned on the risk of misattribution*." (emphasis added) (citations omitted) (first quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994); and then quoting *Turner*, 512 U.S. at 636)).

398. *See supra* notes 21-22 and accompanying text.

sistently and neutrally across the many free-speech litigants whose claims they will consider?

C. Conscription of Conscience

Citing *303 Creative*, NetChoice urged the Court to rule in *Moody* simply that states could not compel the dissemination of unwanted messages.[399] *303 Creative*, as explained above, arrived at this result without any analysis of how heavily the challenged law actually burdened the speaker's autonomy.[400] In *Moody*, the Court was more attentive to the magnitude of the burden faced by the platforms, while also emphasizing that the government cannot "force a private speaker, including a compiler and curator of third-party speech, to convey views it disapproved."[401] This framing suggests that the Court sees itself as protector of a speaker at risk of being coerced by the Leviathan state into conveying messages that it does not wish to disseminate. Remarkably, Justice Alito suggested a quite different power dynamic at work. He noted the "enormous power" held by social-media companies and sympathetically characterized the states as merely trying to "prevent covered platforms from unfairly treating" their users.[402]

Suffice it to say that the relationship between the state and technology companies may not lend itself to ready consensus about who is David and who is Goliath. The most sensible way forward is for courts to assess carefully how burdensome the imposition really is and what options and alternatives are available to the reluctant host to preserve their expressive autonomy. For all its shortcomings, the *Moody* majority offers considerably more in this regard than the opinions in *NIFLA*, *Kennedy*, or *303 Creative*. The *Moody* opinion explained in detail the substantial burden these laws inflict on platform expression, observing that the platforms would no longer be able to disfavor posts that "support Nazi ideology; advocate for terrorism; or espouse racism, Islamophobia, or anti-Semitism."[403] Offering a slew of other examples, Justice Kagan concluded that "Texas's law profoundly alters the platforms' choices about the views they will, and will not, convey."[404] This analysis vastly improves on the unex-

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399. Brief for Respondents, *supra* note 18, at 19-20, 47-48.

400. *See supra* Section III.D.

401. *Moody*, 603 U.S. at 742.

402. *Id.* at 761 (Alito, J., concurring in the judgment).

403. *Id.* at 737 (majority opinion).

404. *Id.* (observing that platforms would be prohibited from disfavoring posts that "glorify rape or other gender-based violence; encourage teenage suicide and self-injury; discourage the

amined suggestion in *303 Creative* and prior compelled-speech cases like *NIFLA* that *any* imposition on the use of words is excessive and undue.

This aspect of *Moody* could lead to an improved doctrinal framework that considers not merely whether a regulated party is being asked to "say" something that they do not want to say, but also looks closely at the nature and extent of the burden on the speaker. Disputes about speech compulsion should assess whether the challenged law really presents the kind of conscription the Court is worried about.[405] Some relevant factors may include whether the unwilling host retains adequate mechanisms to preserve and communicate its own messages while simultaneously complying with the challenged law, as well as whether the burden is outweighed by important, even compelling, government interests that may protect third parties' interests, including their expressive interests. These important questions should be reincorporated into compelled-speech analysis. The disconnect between *303 Creative* and *Moody* raises the troubling possibility, however, that one faction of the Court has silently coalesced around a principle that secular speakers are subjected to a burden analysis that religious speakers need not satisfy.

D. Meaningful Scrutiny

On the question of scrutiny, *Moody* neither followed nor distinguished *303 Creative*. Implicitly, it offered a corrective to *303 Creative* by specifying that either strict or intermediate scrutiny would apply, as is typical in First Amendment cases,[406] and by considering actual evidence about the state interests un-

use of vaccines; advise phony treatments for diseases; or advance false claims of election fraud").

405. *See, e.g.*, Chen, *supra* note 179, at 893-96 (arguing that "the majority of compelled factual statements" enhance communication by "providing more information, while not implicating the same speech harms associated with compelled ideological statements").

406. *Moody* also took up, though did not ultimately decide, whether requirements of individual explanations of content-moderation decisions were constitutional. The majority indicated that the correct standard of scrutiny is the *Zauderer* standard for compelled commercial speech. *Moody*, 603 U.S. at 727 n.3 ("As noted, requirements of that kind violate the First Amendment if they unduly burden expressive activity. So our explanation of why Facebook and YouTube are engaged in expression when they make content-moderation choices in their main feeds should inform the courts' further consideration of that issue." (citation omitted) (citing Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985))). But it provided no discussion as to why *Zauderer* is the correct test. Justice Alito's concurrence merely noted that *Zauderer* is the correct test by default: both lower courts applied it, and NetChoice failed to challenge its application below. *Id.* at 796 & n.57 (Alito, J., concurring in the judgment).

derlying these challenged laws.[407] But the Court in *Moody* did not illuminate how courts should evaluate these interests.

As it turns out, the interests that Texas openly and consistently sought to advance were precisely the kind that give life to negative theory.[408] The state's avowed desire was to boost conservative viewpoints on the platforms, an easy justification for the Court to reject even under *O'Brien*'s more deferential intermediate-scrutiny test, which applies to conduct regulation that incidentally burdens speech.[409] If the majority opinion in *Moody* stands for one thing, it is that the government cannot pursue a viewpoint-sensitive agenda by conscripting private parties to help adjust the scales of public discourse and reduce perceived marketplace distortions.

For now at least, the inappropriateness of Texas's proffered interests displaced a more thorough discussion of the legitimate interests that government might have in protecting the marketplace of ideas from capture, distortion, and other serious harms that content moderation by major platforms might cause.[410] To be clear, *Moody* represents an important corrective to *303 Creative*'s scrutiny-free approach. But the Court's refusal to reconcile the two cases remains problematic because it fails to provide guidance to lower courts grappling with technology cases and suggests that religious speakers may receive implicit, if not explicit, sui generis treatment.

E. What Lies Ahead?

As an assessment of speech claims in the digital age, *Moody* improves upon *303 Creative* in several ways. It offers a more context-sensitive analysis and re-

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407. *Id.* at 740 (majority opinion).

408. *Id.* at 741 (stating that Texas's interests articulated at litigation "mirrored the stated views of those who enacted the law, save that the latter had a bit more color"); *see supra* note 378 (discussing Texas's interests); *see also Moody*, 603 U.S. at 743 ("The interest Texas asserts is in changing the balance of speech on the major platforms' feeds, so that messages now excluded will be included . . . under the First Amendment, that is a preference Texas may not impose.").

409. *Moody*, 603 U.S. at 740 ("Under that standard, a law must further a 'substantial government interest' that is 'unrelated to the suppression of free expression.' Many possible interests relating to social media can meet that test; nothing said here puts regulation of NetChoice's members off-limits as to a whole array of subjects. But the interest Texas has asserted cannot carry the day: It is very much related to the suppression of free expression, and it is not valid, let alone substantial." (citations omitted) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968))).

410. *See id.* at 767-68 (Alito, J., concurring in the judgment) (discussing, for instance, the impact of social media on youth mental health).

vives the kind of means-ends balancing that can account for substantial government interests. It suggests an intention to consider regulations that are not viewpoint-discriminatory and are aimed at legitimate government interests rather than at the content of speech. And it points to an intermediate-scrutiny standard for compelled disclosures related to content moderation.[411] But *Moody* also replicates some of *303 Creative*'s shortcomings, most notably its willingness to find protected speech where there are pressing questions about potentially regulable conduct. It also inexplicably fails to acknowledge whether and how *303 Creative* and *Moody* interact, leaving lower courts to sort out the appropriate interplay between the two cases.

To see this, consider again the post-*Moody* cases that overturned recent technology regulations: *NetChoice, LLC v. Bonta*, *X Corp. v. Bonta*, and *NetChoice, LLC v. Reyes*.[412] *Moody* was cited in each for the simple holding that lower courts had applied the wrong standard for facial analysis.[413] On closer inspection, however, *Moody* also was used in ways that suggest considerable confusion about its lessons. *Reyes* and *Bonta* cited *Moody* for the basic principle that content moderation receives First Amendment protection—without engaging any of the subtleties we discuss above.[414] None took up Justice Kagan's hint that intermediate scrutiny might be appropriate, even for regulation of content moderation itself. Instead, all three applied strict scrutiny, which the laws failed.[415] None of these cases meaningfully acknowledged Kagan's important point in *Moody* that "an entity engaged in expressive activity when performing one function may not be when carrying out another,"[416] nor did they attempt to distinguish legitimate government interests from interests aimed impermissibly at expression. In fact, in *Reyes*, the district court evaluating Utah's children's privacy law found that singling out social-media companies for regulation triggered strict scrutiny, regardless of what was in the regula-

411. *See id.* at 727 n.3 (majority opinion) (pointing to *Zauderer* as the correct standard for evaluating compelled disclosures).

412. NetChoice, LLC v. Bonta, 113 F.4th 1101 (9th Cir. 2024); X Corp. v. Bonta, 116 F.4th 888 (9th Cir. 2024); NetChoice, LLC v. Reyes, Nos. 23-cv-00911 & 24-cv-00031, 2024 WL 4135626 (D. Utah Sept. 10, 2024).

413. *Bonta*, 113 F.4th at 1115-16; *X Corp.*, 116 F.4th at 899; *Reyes*, 2024 WL 4135626, at *9 n.92.

414. *Reyes*, 2024 WL 4135626, at *9; *Bonta*, 113 F.4th at 1118 ("Moreover, the Supreme Court recently affirmed 'that laws curtailing [] editorial choices [by online platforms] must meet the First Amendment's requirements.'" (alterations in original) (quoting *Moody*, 603 U.S. at 717)).

415. *See Bonta*, 113 F.4th at 1119; *X Corp.*, 116 F.4th at 902-03; *Reyes*, 2024 WL 4135626, at *11.

416. *Moody*, 603 U.S. at 732 n.4.

tion.[417] And none of these cases caught the *Moody* majority's instruction that lower courts should assess individualized transparency requirements in content-moderation laws under the lower form of scrutiny applicable to uncontroversial factual disclosures.[418] Indeed, two courts ignored *Moody*'s language and applied strict scrutiny to mandated disclosures.[419]

All of these cases missed the complexities of *Moody*'s analysis and its potential shifts away from *303 Creative* and its religious-speaker predecessors. Instead, they applied the *303 Creative* line of cases, with significant consequences for the technology regulations at issue. In the dispute over California's impact-assessment requirements, the plaintiffs wielded *303 Creative* in their brief before the Ninth Circuit, claiming that California's impact assessment is a kind of compelled speech inconsistent with platforms' own beliefs.[420] The panel's opinion later cited *303 Creative* for the point that "[i]t is well-established that the First Amendment protects the right to refrain from speaking at all"—referring not to a compelled ideological declaration but to a government reporting requirement.[421] This suggests the lawyers and lower courts may believe that *Moody* left *303 Creative* fully intact, despite the ways in which *Moody* departs from *303 Creative*. This is hardly surprising, given the Court's failure to offer clear guidance for when lower courts should use which set of principles. The Court will thus eventually have to face the ramifications that *303 Creative* has

417. *Reyes*, 2024 WL 4135626, at *10. A footnote in *Moody* describes a statute that similarly singles out particular companies, to the exclusion of "internet service providers, email providers, and any online service, website, or app consisting 'primarily of news, sports, entertainment.'" *Moody*, 603 U.S. at 721 n.2 (quoting FLA. STAT. § 120.001(1) (2024)). But the majority in *Moody* does not suggest that this triggers strict scrutiny under *Reed*.

418. *Moody*, 603 U.S. at 727 n.3 ("Although the discussion below focuses on Texas's content-moderation provisions, it also bears on how the lower courts should address the individualized-explanation provisions in the upcoming facial inquiry. As noted, requirements of that kind violate the First Amendment if they unduly burden expressive activity." (citing Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985))).

419. *X Corp.*, 116 F.4th at 899-900 (citing NIFLA v. Becerra, 585 U.S. 755, 766 (2018)); *Bonta*, 113 F.4th at 1119 ("[T]here is no question that strict scrutiny, as opposed to mere commercial speech scrutiny, governs our review of the DPIA report requirement."); *Bonta*, 113 F.4th at 1121 (citing *NIFLA*, 585 U.S. at 766). In *Bonta*, the Ninth Circuit potentially insulated other impact assessments from a similar fate by distinguishing the impact assessment at issue. 113 F.4th at 1120-21 ("That obligation to collect, retain, and disclose purely factual information about the number of privacy-related requests is a far cry from the CAADCA's vague and onerous requirement that covered businesses opine on whether their services risk 'material detriment to children' . . . . The problem here is that the risk that businesses must measure and disclose to the government is the risk that children will be exposed to disfavored speech online.").

420. Appellee NetChoice's Response Brief, *supra* note 330, at 31-33.

421. *Bonta*, 113 F.4th at 1117 (citing 303 Creative LLC v. Elenis, 600 U.S. 570, 586 (2023)).

for technology law and respond more clearly to the many unresolved questions left open by *Moody*. It could decide that, unlike Lorie Smith, technology companies *can* be compelled to provide speech that they do "not wish to provide."[422] The question then will be why, and whether religion is working to produce these different results. Smith's faith surely led the Court to see an easy analogy to *Barnette*, despite the doctrinally significant differences we outlined above, and without any kind of scrutiny. In contrast, the Court may be inclined to treat Silicon Valley entrepreneurs' coercion claims with greater skepticism and may be far less willing to fit these actors into the oppressed-speaker narrative of *Barnette* and its progeny.

We do not suggest that technology companies should be viewed as oppressed speakers in the mold of *Barnette*. Rather, we have identified and critiqued many aspects of current free-speech doctrine that may undermine bipartisan consensus on technology regulation designed to address important concerns. The proper course, in our view, is to revisit these First Amendment landmines, and consider doctrinal modifications that better calibrate the deregulatory power of the First Amendment and restore a greater measure of government capacity to respond to the harms these new technologies can cause. To the extent that the cases most likely to weaken government regulatory power deal with religious speakers, the Court must take far greater care not to distort universally applicable free-speech principles out of its powerful instinct to protect what it views as oppressed, minoritized individuals. Rather than hammering free-speech doctrine into blunt tools designed for one favored speaker, but logically available to all, the Court should resolve religious-expression cases with an eye toward preserving as much as possible of the legitimate regulatory regimes from which conscientious objectors seek to be excused. Free-exercise doctrine, despite its fluctuations and the uncertainty surrounding the future of *Smith*, provides the Court with ample power to protect religious speakers' legitimate claims of conscience without dismantling the regulatory state.[423]

What the Court clearly should not do is to continue to apply free-speech principles in a way that seems to depend heavily on the faith of a particular speaker and the religious content of her claims. This undermines normatively sound viewpoint- and speaker-neutrality principles that should be maintained

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422. *303 Creative*, 600 U.S. at 588.

423. We note that if religious-expression disputes are resolved using free-exercise rather than free-speech doctrine, the Court will eventually have to revisit a problem with which it has never been fully comfortable: to what extent does free-exercise doctrine protect conscientious objections arising out of nontheistic belief systems? While beyond the scope of this project, this newly urgent problem is the subject of forthcoming work by Rebecca Aviel and Toni Massaro.

as core principles of free-speech doctrine. Whether done tacitly or explicitly, such special treatment for a certain class of speakers may validate the mounting suspicion that this Court is "intent on becoming the supple servant of conservative ideology."[424] It would be ironic, to say the least, if Justices so intent on sniffing out the disparate treatment of certain viewpoints, speakers, and content by the political branches exempt themselves from the restraints of neutrality in the adjudication of speech disputes.

CONCLUSION

At the dawn of the internet, one could tell an optimistic story about the synergies between new technology, American free-speech culture, and American democracy. If the First Amendment was in significant part premised on the idea that there is too little speech in the world, then a technology that makes it easier for individuals to speak to a public audience would seem to qualify as a First Amendment technology.[425] In the words of one judge in an early case: "As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion."[426] That case, *ACLU v. Reno*, subsequently posed the Supreme Court's first test of an internet regulation,[427] culminating in the Court striking down aspects of the revised Communications Decency Act as unconstitutional.[428] In short, the First Amendment was a friend to the early internet, and the early internet was understood to be a friend to free speech.

Today, however, the story one might tell about democracy, free speech, and technology is bleaker. Where the First Amendment was once the guardian of both a healthy democracy and a healthy internet, today it impedes the regulation of even straightforward digital harms. In this light, the move from gods to Google is not just a problem for speech law or technology law; it is a problem for democracy. The Court has crafted a First Amendment that not only may undermine bipartisan consensus on baseline technology regulation but also

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424. Post, *supra* note 24, at 301.

425. Jack Goldsmith, *The Failure of Internet Freedom*, KNIGHT FIRST AMEND. INST. (June 13, 2018), https://knightcolumbia.org/content/failure-internet-freedom [https://perma.cc/JFY4-GFPY] (arguing that one of the two pillars of the United States's early internet policy was an anticensorship principle, which the United States sought to export: "American-style freedom of speech and expression on the global internet").

426. ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

427. *See* ACLU v. Reno, 521 U.S. at 849-53.

428. *Id.* at 885; *see* Mark S. Kende, *The Supreme Court's Approach to the First Amendment in Cyberspace: Free Speech as Technology's Hand-Maiden*, 14 CONST. COMMENT. 465, 474-75 (1997).

frustrate the well-functioning of the republic—precisely the opposite of what James Madison, Justice Brandeis, and so many others predicted.[429] Those early free-speech sages were correct about the fit between free speech and democracy, but the fit is contingent; it demands a subtle and context-sensitive approach.[430] It will suffer from a Court that reshapes the law to protect its favored speakers or viewpoints, without anticipating the wider implications and uses of such moves by other speakers.

Navigating the current incoherence will require the Court to rein in simplistic instincts in religious-speaker cases and to identify defensible limiting principles. It will require it to deploy the kind of careful, contextual reasoning that is sensitive to the very distinctions missing in the Court's recent religious-speaker cases: distinctions between speech and conduct, between the interests of vendors (platforms) and their customers (users), and between true conscription of conscience and justified regulation. It also will require judicial respect for real harms, and a willingness to balance liberty and government regulatory interests. Negative theories that cloud this balance or inspire free-speech absolutism should be avoided. It is no overstatement that the future of technology regulation and the health of our democracy may depend on this.

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429. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969); 4 ANNALS OF CONG. 934 (1794) (statement of Rep. James Madison) (telling the House, as the drafter of the First Amendment, that "[i]f we advert to the nature of republican government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people"); *see also* Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1098 (2016) (developing the thesis that "the primary—albeit not necessarily the only—reason why the First Amendment protects freedom of speech is to advance democratic self-governance"); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121-65 (1993) (contending that free speech is a "precondition" for democracy); Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 33-35 (2012) (summarizing cases); *cf.* Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1634-39 (2021) (expressing concern about free-speech doctrine that threatens to undermine democracy, rather than reinforce it, and discussing means by which to prevent this corrosion).

430. This calls for an approach capable of adapting to new speech technologies and new regulatory challenges. *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2296 (2014) (noting that recent decades have seen "significant changes in the practices and technologies of free expression, changes that concern a revolution in the infrastructure of free expression," and that "[t]hat infrastructure, largely held in private hands, is the central battleground over free speech in the digital era").