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Free Speech & Abortion: The First Amendment Case Against Compelled Motherhood

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Abstract

The most important lessons are taught by example. Children learn the fundamental values that guide them throughout their lives from the examples set by their parents, especially their mothers. Even before they understand a language, they learn by observing and imitating the actions of their parents. For almost fifty years *Roe v Wade* guaranteed pregnant women the freedom to determine whether to carry their pregnancy to term. The right to obtain a safe abortion prior to viability is the most significant and controversial aspect of this freedom. The Supreme Court is now poised to overturn what it previously described as the central holding of *Roe* and allow state governments to restrict abortions prior to viability. If this occurs, it will not be because of an erosion of precedential authority. Instead, it will result from decades of concerted efforts to pack the Supreme Court with Justices who reject the premise that the substantive due process guaranteed by the Fourteenth Amendment limits the power of the states. Whether the Fourteenth Amendment independently restricts the power of states to regulate abortion, however, is not the focus of this essay. Instead, this essay argues that parallel developments in First Amendment law not only reinforce the traditional justification for safeguarding a woman's freedom to determine whether to continue the course of a pregnancy, but provides an independent justification for subjecting abortion restrictions to heightened judicial scrutiny. Over the past fifty years, Justices that would restrict the Fourteenth Amendment's role in guaranteeing individual liberty have successfully argued for a greater role for the First Amendment. Government regulation of conduct, especially commercial conduct, previously not recognized as protected speech have increasingly been subject to heightened judicial scrutiny and, in some cases, categorical protection. This essay examines two recent cases, *Masterpiece Cakeshop v. Colorado Civil Rights Comm.* and *Sorrell v. IMS Health, Inc.,* in which the Justices were required to consider whether the First Amendment and its protection of speech applied to conduct that would not traditionally have been considered speech. These cases highlight both the substantive and strategic value of (re)considering the myriad ways in which conduct is expressive or otherwise integral to expression and the nature of judicial review. When applied to abortion, this line of reasoning illuminates the expressive values at stake with pregnancy and childbirth; why abortion restrictions must be carefully scrutinized to ensure that they do in fact promote a legitimate interest in protecting the welfare of mother and child; and to prevent governing majorities from using childbirth to endorse and celebrate moral beliefs that are not shared by the pregnant woman and may be antithetical to her interests and the interests of a child.

ESSAY

Free Speech & Abortion: The First Amendment Case Against Compelled Motherhood

Raymond Shih Ray Ku[1]

I. Introduction

The most important lessons are taught by example. Children learn the fundamental values that guide them throughout their lives from the examples set by their parents, especially their mothers. Even before they understand a language, they learn by observing and imitating the actions of their parents. For almost fifty years, the Fourteenth Amendment of the United States Constitution has protected a woman's freedom to determine whether and when to become a mother.[2] After decades of partisan political pressure and maneuvering, a new conservative majority appears poised to fundamentally change if not overturn *Roe v. Wade*, and its central holding that governing majorities may not substitute their judgment for the judgment of the pregnant individual until the fetus becomes a person capable of surviving outside of the womb.[3] In *Dobbs v. Jackson Women's Health Org.*, the Supreme Court will consider whether a state may substitute its own judgment after the fifteenth week of pregnancy rather than the twenty-fourth normally associated with viability.[4] In anticipation of the appointments of Justices Kavanaugh and Coney Barrett, Mississippi and other states enacted laws in direct conflict with *Roe*.[5] For example, Ohio enacted a law that prohibits abortions once a fetal heartbeat may be detected, and makes no exception for

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[1] Professor of Law, Laura B. Chisolm Distinguished Research Scholar, Case Western Reserve University School of Law. I would like to thank Bryan Adamson, Caroline Corbin, Jessie Hill, and Steve Shiffrin for providing feedback on earlier versions of this essay.

[2] This essay recognizes that individuals of all gender identities, including transgender men and non-conforming individuals, may become pregnant and seek an abortion; it uses "woman" or "women" as shorthand when referring to individuals that may become pregnant and must decide whether to carry the pregnancy to term because abortion restrictions disproportionately affect individuals assigned female at birth and are often targeted specially because of this assignment.

[3] Roe v. Wade, 410 U.S. 113, 162 (1973) ("we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."); Planned Parenthood v. Casey, 505 U.S. 833, 858 (1992) ("Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty.")

[4] 945 F.3d 256 (5th Cir. 2019), *cert. granted* ___ S. Ct. ___, 2021 WL 1951792 (Mem) (May 17, 2021).

[5] *See, e.g.,* Emma Brown, *More Abortion Restrictions Have Been Enacted in the U.S. This Year than in Any Other,* NPR (Jul 9, 2021) (detailing new anti-abortion laws passed in anticipation of the new Supreme Court majority).

cases of rape or incest.[6] Alabama enacted a law that prohibits all abortions except in cases in which the woman's life is threatened or there is a lethal fetal anomaly.[7] While courts have routinely stayed the implementation of these laws,[8] anti-abortion advocates hope that the six conservative Justices, especially the five Catholic Justices, will conclude that the Fourteenth Amendment no longer limits the power of states to regulate, including ban, abortion prior to viability. Whether the Fourteenth Amendment independently restricts the power of state to regulate abortion because a state's interest in protecting life cannot outweigh a woman's liberty interest is not the focus of this essay. Instead, this essay argues that the First Amendment guarantees the pregnant woman the freedom to determine the course of their pregnancy and to determine when motherhood is in their best interest and the best interests of her child. This is true even when the asserted state interest is protecting prenatal life. Pregnancy and motherhood are expressive conduct under the Supreme Court's current understanding of freedom of speech, and laws restricting abortion coerce the pregnant to express and/or endorse messages they refuse to express.

Recognizing the fundamental expressive values implicated in compelling the pregnant to become mothers sheds new light on the liberty interests the Supreme Court previously recognized with regard to abortion.[9] Moreover, the First Amendment's prohibition against compelled expression, limits upon content and viewpoint based restrictions, and the scrutiny demanded when laws regulate both conduct and expression provide a more objective framework for evaluating the interests at stake.[10] This framework is not only more appropriate for evaluating the interests at stake, it exposes the false modesty of judicial deference in substantive due process cases. To the extent that Supreme Court has expanded the reach of the First Amendment in cases involving economic conduct, a corresponding recognition of the expressive interests at stake when women are compelled to identify as mothers reveals the unconstitutional of nature of restricting access to abortion even for the laudable purpose of protecting the unborn.

This essay begins by explaining and evaluating the Supreme Court's most recent decisions that consider whether and how the regulation of economic activities may conflict with interests protected by the First Amendment. Part II.A. discusses the Justices' current approach towards

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[6] *See* OH ST §§ 2919.191 et seq. (2019); Gabe Rosenberg, *A Bill Banning Most Abortions Becomes Law in Ohio*, NPR (Apr. 11, 2019).

[7] *See* AL ST §§ 26-23H et seq. (2019).

[8] The Supreme Court recently broke with this practice when a majority of the justices allowed a Texas law authorizing private individuals to seek statutory damages against anyone performing or otherwise aiding in the abortion of a fetus after a "fetal heartbeat" may be detected to take effect. *See* Whole Woman's Health v. Austin Reeve Jackson, 594 U.S. ___ (2021)

[9] While this essay focuses upon the relationship between abortion and speech as I subsequently note the First Amendment's protection of freedom of association and religion are also implicated.

[10] *See infra* Part III.

speech in *Masterpiece Cakeshop v Colo. Civil Rights*[11] and *Sorrell v IMS Health Inc.*[12] These decisions suggest that laws governing commercial transactions may implicate First Amendment concerns by dictating what information or beliefs may be conveyed through those transactions. When individuals are required to engage or refrain from conduct, their actions may take on symbolic meaning or play an integral role in facilitating speech protected under the First Amendment. Part II.B. explains the value of considering whether expression is implicated when regulating what may traditionally have been considered non-expressive conduct, and why appreciating the legitimate reasons for testing the limits of expression still demands a healthy degree of skepticism.

Part II.C. explains how the deferential standard of review developed in response to an earlier case involving the commercial relationship of bakers, the Supreme Court's seminal decision in *Lochner v. New York*,[13] both explains and justifies further consideration of the relationship between regulating conduct and concerns underlying the First Amendment's protection of speech. In its basic application, the rational basis test is not a standard of judicial review but a method of masking judicial bias for the ostensible purpose of deferring to elected representatives. In contrast, when expressive values are at stake courts must independently determine that the purpose of the restriction is legitimate and that the means chosen fit that purpose without unduly intruding upon protected liberties.

Part III. examines how a more expansive understanding of expression can be applied beyond commercial conduct. Under the principle of what's good for the goose is good for the gander, Part III.A. identifies the expression implicated by carrying a pregnancy to term; and explains why a woman's interests in motherhood should receive the same First Amendment consideration as bakers and data brokers. Laws prohibiting abortion compel women to assume the role of mother and to convey the corresponding beliefs and values that motherhood entails. With respect to expression, this includes the transfer and sharing of information and beliefs, endorsing and celebrating moral and sectarian religious beliefs in which birth outweighs all other interests including whether the mother is ready and capable of providing for the physical and emotional needs of the child, the relationship between mother and child, and a woman's place in society.

Having explained the expressive interests at stake, Part III.B. argues that laws prohibiting abortion violate the First Amendment because they infringe the woman's freedom to share and express beliefs in the manner of her own choosing, and are unrelated to the government's power to protect health and safety. This is true even if the professed purpose is protecting the health and safety of

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[11] __ U.S. __, 138 S. Ct. 1719 (2018).
[12] 564 U.S. 552 (2011).
[13] 198 U.S. 45 (1905). *See, e.g.,* Cass R. Sunstein, *Lochner's Legacy,* 87 Colum. L. Rev. 873 (1987) (discussing the significance of the *Lochner* decision).

the unborn. Relying upon the findings of the landmark 2020 TURNAWAY STUDY,[14] the essay illustrates why abortion restrictions do not advance a state's legitimate interest in protecting the health and safety of its citizens.

Lastly, Part III.C. explains the parallel problems raised by freedom of contract and reproduction, and how reproductive freedom may face the same Fourteenth Amendment obstacles as the freedom to contract. However, even if the Supreme Court concludes that the Fourteenth Amendment requires courts to defer to a legislative judgement that abortion can be prohibited to protect the unborn, the First Amendment requires judges to independently evaluate whether those laws legitimately serve that interest. Good intentions alone are insufficient to invade individual liberty if that invasion does not serve the purpose of safeguarding the life of the child. Courts should not be allowed create a fictional world that allows them to ignore the real consequences to of denying access to abortion. If laws restricting abortion will no longer be reviewed by courts under privacy and autonomy, women, like the bakers that preceded them, should find protection under the First Amendment.

II. The First Amendment & Freedom of Contract

The First Amendment specifically refers to freedom of speech and of the press, but the Amendment's protection extends beyond the literal and protects expression and association more generally. Freedom of speech protects individual expression even when the means of expression do not involve face to face verbal communication or the printing books, newspapers, and pamphlets.[15] Among other acts, the First Amendment applies to the freedom to engage or refuse to engage in symbolic acts such as saluting,[16] wearing armbands,[17] burning flags,[18] displaying a a license plate,[19] or marching in a parade.[20] Likewise, freedom of speech includes the freedom to determine when to join together with others,"[21] denies government the authority to dictate the terms of those relationships, especially with whom they must associate.[22]

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[14] DIANA GREEN FOSTER, THE TURNAWAY STUDY (Scribner 2020).

[15] *See* Frederick Schauer, The Boundaries of the First Amendment. A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765, 1773 (2004) ("That the boundaries of the First Amendment are delineated by the ordinary language meaning of the word 'speech' is simply implausible.").

[16] *See* West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

[17] *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

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

[19] *See* Wooley v. Maynard, 430 U.S. 705 (1977).

[20] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (holding that the First Amendment protects the freedom of parade organizers to decide who may march in their parade).

[21] NAACP v. Alabama 357 U.S. 449, 461 (1958) ("to engage in association for the advancement of beliefs and ideas….").

[22] *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

Despite the broad scope of protection, First Amendment doctrine still focuses on speech. Whether conduct is considered sufficiently expressive to be protected speech has considerable implications not simply as a predicate to a First Amendment claim, but, for determining the applicable standard of review. Under established free speech doctrine, laws based upon the content of speech, the viewpoint expressed, or that compel individuals to refrain from or engage in expression are presumptively unconstitutional, and will only be considered permissible if they survive strict scrutiny.[23] Correspondingly, content neutral laws that regulate both conduct and expression must survive intermediate scrutiny in which requires that the law serve a substantial government purpose unrelated to expression and that the means chosen interfere with the expression interests no more than necessary to achieve that purpose.[24] In contrast, when expression is not present state regulation of conduct is considered presumptively constitutional and courts must only determine whether the law is rationally related to a legitimate government interest, or in other words, is not arbitrary or capricious.[25] As such, a judicial determination that an act is speech has significant practical consequences and may even be dispositive. For example, Gerald Gunther famously described strict scrutiny as "'strict' in theory and fatal in fact."[26] And, scholars have described the rational basis test as "toothless in truth."[27] Therefore, it should come as no surprise that litigants have an incentive to engage in what Fredrick Schauer describes as "First Amendment opportunism"[28] in the hopes of achieving what Leslie Kendrick describes as "First Amendment expansionism."[29]

But what is speech? After thousands of years of human interaction, one would think the answer would be simple.[30] Such a belief would be wrong for two reasons. First, human creativity and ingenuity continuously expand our opportunities for expression. The framers of the constitution could not have imagined the advent of motion pictures, broadcast radio and television, or the Internet. Second, society in general and courts in particular may recognize the expressive nature of conduct not traditionally considered speech such as parades, the wearing of armbands, the burning of flags, or access to social media. Under these circumstances, judges engage in what has been described as translation, in which the First Amendment's existing protection is logically extended to previously unrecognized expression.[31]

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[23] *See, e.g.,* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).
[24] *See, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
[25] *See infra* Part II.C.
[26] Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).
[27] *See* Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees,* 89 CAL. L. REV. 999 (2001).
[28] Frederick Schauer, *First Amendment Opportunism, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175, 176 (Lee C. Bollinger & Geoffrey Stone eds., 2002) [hereinafter *OPPORTUNISM*].
[29] Leslie Kendrick, *First Amendment Expansionism,* 56 WM. & MARY L. REV. 1199 (2015).
[30] *See* Amanda Shanor, *First Amendment Coverage,* 98 N.Y.U L. REV. 318 (2018).
[31] *See* Brown v. Entertainment Merchants Assn., 564 U.S. 786 (2011) (protecting video games as expression); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (concluding that "expression by

However, what qualifies as speech can also be expanded for strategic or political ends.[32] Under certain circumstances, the connection between conduct and expression is merely plausible.[33] As mentioned above and explained in detail below, there are significant doctrinal and practical benefits to labeling an act speech rather than conduct. During the same fifty years that conservatives argued for overturning *Roe*, many of these same conservative justices, from the Burger Court to the Roberts Court, have expanded the coverage of the First Amendment to include political contributions,[34] commercial advertising,[35] access to the means of transmitting data,[36] the selling of video games,[37] the sale of prescription data,[38] the ownership of trademarks,[39] surcharges on credit card purchases,[40] and the sale of baked goods,[41] commercial activities that were neither traditionally nor inherently protected speech.

Critics argue that these doctrinal developments have more to do with a conservative agenda to insulate business interests and enshrine conservative social values than the protection of legitimate First Amendment interests.[42] This essay will not dive into the debate over the definitional boundary between protected speech and unprotected acts,[43] but instead "takes up the banner of radical reform" by acknowledging the "tension between judicial civil libertarianism and judicial deference to economic regulation,"[44] and why freedom of expression may ease some of that tension. While there are legitimate reasons to reject the conclusion that the First Amendment

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means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.")

[32] OPPORTUNISM, *supra* note 27 at 191 ("In numerous other instances, political, social, cultural, ideological, economic, and moral claims that are far wider than the First Amendment, and that appear to have no special philosophical or historical affinity with the First Amendment, find themselves transmogrified into First Amendment arguments.").

[33] See Frederick Schauer, *The Politics and Incentives of First Amendment Coverage,* 56 Wm. Mary L. Rev. 1613 (2015) [hereinafter *Coverage*]; Shanor, *supra* note 29.

[34] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[35] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[36] *See* Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622 (1994). *See also,* Raymond Shih Ray Ku, *Free Speech & Net Neutrality: A Response to Justice Kavanaugh,* 80 U. PITT. L. REV. 855 (2018-2019) (considering Justice Kavanaugh's understanding of the free speech claims of Internet service providers).

[37] *See* Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011).

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

[39] *See* Matal v Tam, 582 U.S. ___, 137 S. Ct. 1744 (2017).

[40] *See Expressions Hair Design*, __ U.S. __, 137 S.Ct. 1144 (2017)

[41] *See Masterpiece Cakeshop*, 584 U.S. ___, 138 S.Ct. 1719 (2018).

[42] *See* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015); Elizabeth Sepper, *Free Exercise Lochnerism,* 115 COLUM. L. REV. 1453 (2015); Amanda Shanor, *The New Lochner,* 2016 WIS. L. REV. 133.

[43] *See* Caroline Mala Corbin, *Speech or Conduct - The Free Speech Claims of Wedding Vendors,* 65 EMORY L.J. 241 (2015); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, Situation-Altering Utterances, and the Uncharted Zones,* 90 CORNELL L. REV. 1277 (2005).

[44] Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism,* 116 COLUM. L. REV. 1915, 2001 (2016).

prohibits governments from regulating the offering of goods and services, the Supreme Court's efforts to consider whether these acts are expressive, present a new and valuable insight into the constitutional role of the First Amendment. In *Expressions Hair Design v. Schneiderman*, Justice Breyer cautioned against an expansive definition of speech because, "virtually all government regulations affect speech. Human relations take place through speech. And human relations include community activities of all kinds -- commercial and otherwise."[45] Even if one agrees with Justice Breyer that all "human relations take place through speech," the ubiquity of expression and its connection to human relations alone should not dismiss whether expressive values are at risk. As the old saying goes, actions can speak louder than words.

A. Of Bakers and Data Brokers

Are cakes speech, the act of baking them expression, and what message, if any, do their sales convey? When a baker refuses to comply with anti-discrimination laws is that refusal protected by the First Amendment? These questions were presented to the Supreme Court in *Masterpiece Cakeshop v. Colo. Civil Rights* after a baker refused to bake a wedding cake for a same-sex wedding.[46] The baker argued that requiring him to do so violated his freedom of expression and exercise of religion.[47] And while a majority of the Justices agreed that the baker in that case did not receive a fair hearing, it left the free speech questions for another day.[48] What follows is not a detailed analysis of the decision itself, the arguments of the justices, or the commentary that surrounds it. Instead, the decision introduces readers to the questions presented in cases like *Masterpiece Cakeshop* which require courts to determine when and how the First Amendment applies to conduct that rises to the level of expression or gives rise to expression.[49]

The controversy in *Masterpiece Cakeshop* arose because a baker refused to provide a wedding cake for a same-sex couple's wedding arguing that doing so would violate his First Amendment rights to freedom of speech and religion.[50] The Colorado Civil Rights Division investigated after the couple lodged a complaint under the Colorado Anti-Discrimination Act.[51] The investigation found that the baker had "turned away customers on the basis of their sexual orientation,"[52] by refusing to "create" wedding cakes, but also at least one instance in which he refused to sell

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[45] *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J. conc).
[46] *Masterpiece Cakeshop,* 138 S. Ct. at 1723.
[47] *Id.*
[48] *Id*. at 1731-32.
[49] *See* Eugene Volokh, *The Law of Compelled Speech,* 97 TEX. L. REV. 355, 382-384 (2018) (arguing that the First Amendment protects individuals from government compulsion to create). [hereinafter *Compelled Speech*]. But *see* Ashutosh Bhagwat, *Producing Speech,* 56 WM. & MARY L. REV. 1029 (2015) (concluding that commercial businesses may be compelled to produce speech under antidiscrimination laws).
[50] *Masterpiece Cakeshop,* 138 S. Ct. at 1724.
[51] *Id.* at 1725.
[52] *Id*. at 1725.

cupcakes that would be consumed at a same-sex commitment ceremony.[53] In the latter instance, he informed that couple that his store "had a policy of not selling baked goods to same-sex couples for this type of event."[54] The Supreme Court ultimately ruled in favor of the baker concluding that the members of the state commission considering his appeal were openly hostile to religion.[55] Because it was unclear whether the wedding cake was a special item, the Court left the free speech question for another day.[56]

Even though the majority in *Masterpiece Cakeshop* did not address the question, the answer is important because as Justice Thomas notes in his concurring opinion:

> [T]his Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge freedom of speech, even if they impose "incidental burdens" on expression.[57]

With respect to anti-discrimination laws, like those in Colorado, prohibiting discrimination based upon race, gender, religion, and other protected traits are consistent with the First Amendment because discrimination is conduct.[58] As Thomas notes, "as a general matter," public accommodations laws do not "target speech" but instead prohibit "the *act* of discrimination against individuals in the provision of publicly available goods, privileges, and services."[59] However, citing the Supreme Court's decisions holding that the First Amendment protected the decision of the organizers of a St. Patrick's Day parade to exclude gay groups from openly marching in the parade and permitted the Boy Scouts of America to bar homosexuals from serving as troop leaders,[60] Justice Thomas argues that when, "'speech itself is to be the public accommodation' the First Amendment applies with full force."[61] So even though the *Masterpiece Cakeshop* majority

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[53] *Id.* at 1726.
[54] *Id.*
[55] *Masterpiece Cakeshop,* 138 S. Ct. at 1732,
[56] While this essay focuses upon the First Amendment's protection of speech, the concerns and observations are relevant to claims of freedom of religion as well. For an excellent analysis of these issues prior to the Supreme Court's decision in *Masterpiece Cakeshop see* Caroline Mala Corbin, *Speech Conduct - The Free Speech Claims of Wedding Vendors,* 65 EMORY L. J. 241, 248 (2015) (discussing the parallels between the freedom of speech and religion claims). Freedom of religion is arguably even more relevant following the Supreme Court's decisions in *Fulton v. City of Philadelphia,* ___ U.S. ___ (2021) and *Tandon v. Newsom,* 593 U.S. ___ (2021) (per curium) in which the Supreme Court expanded the Constitution's protection of individuals based upon their religious beliefs. Given that women seeking abortions do so because of sincerely held religious and moral beliefs, freedom of religion is likewise relevant and requires further consideration.
[57] *Masterpiece Cakeshop,* 138 S. Ct. at 1741 (Thomas, J. dissenting).
[58] *Id.*
[59] *Id.* (citations omitted emphasis in original).
[60] *Id.*
[61] *Id.*

did not address the question, it remains relevant and will inevitably require an answer from the Supreme Court.[62]

In *Masterpiece Cakeshop*, the baker argued that the Colorado Anti-Discrimination Act violated his freedom of speech "by compelling him to exercise artistic talents to express a message with which he disagreed."[63] Importantly, he did not argue that he was compelled to compose or adopt a specific message, either written or visual.[64] He was not asked to write a message or place an image on the cake. Instead, the baker argued that the act of selling the wedding cake was itself speech.[65] Conduct, however, does not become speech simply because it may "be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[66] The First Amendment applies to "conduct that is inherently expressive" and attributable to the actor.[67] According to the Supreme Court, this requires 1) the intent to convey a particularized message, and 2) in light of the circumstances the message would be understood by its viewers. [68] Under this approach, saluting[69] or burning the American flag,[70] wearing armbands,[71] and marching in parades have all been considered protected speech.[72]

Three Justices agreed with the baker that Colorado compelled him to convey the message that same-sex marriages are marriages and that they should be celebrated. In a concurring opinion for himself and Justice Alito, Justice Gorsuch concluded that not only does a cake without words convey a message, but it conveys the very message the baker wanted to avoid. "Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-

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[62] *See, e.g.,* Nelson Photography v. Louisville, 479 F. Supp.3d 543 (W.D. KY 2020) (concluding that a wedding photographer's freedom of speech was violated by anti-discrimination law that required her to photograph same sex weddings); Washington v. Arlene's Flowers Inc., 187 Wash.2d 804 (2017) (denying free speech claim of florist who refused to provide flowers to a same sex wedding), *cert. granted, vacated and remanded*, 138 S. Ct. 2671 (2018) (further consideration in light of *Masterpiece Cakeshop*), *on remand* 193 Wash.2d 469 (2019) (concluding that a florist's freedom of speech was not violated), *cert. denied,* __ S. Ct. __ (2021), 2021 WL 2742795; Elaine Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012), *cert. denied* 572 U.S. 1046 (2014) (rejecting the Free Speech claim of a photographer who refused to photograph a same sex wedding).

[63] *Masterpiece Cakeshop,* 138 S. Ct. at 1726

[64] *See* Agency for Int'l Development v. Alliance for Open Society Int'l, 570 U.S. 205 (2013) (holding that the First Amendment prohibited government from requiring funding recipients "to adopt a particular belief").

[65] *Masterpiece Cakeshop,* 138 S. Ct. at 1728.

[66] United States v. O'Brien 391 U.S. 367, 376 (1968).

[67] Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 66 (2006) (concluding that requiring law schools could not prohibit military recruiters for recruiting on campus despite the schools' unwilling to be associated with the military's "don't ask, don't tell" policy.).

[68] Spence v. Washington, 418 U.S. 405, 411 (1974) ("An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.").

[69] *See* West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

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

[71] *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[72] *See* Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

sex couple it celebrates a same-sex wedding."[73] In other words, the cake is a symbol equivalent to "an emblem or flag."[74] Following this logic, Colorado violated the baker's freedom of speech by forcing the baker to provide a flag to be used by others to express a message he did not share.[75]

Writing for himself and Justice Gorsuch, Justice Thomas considered the baking of a wedding cake to be expressive and entitled to First Amendment protection. First, "creating and designing custom wedding cakes" should be considered speech.[76] The Justices found it important that the baker "considers himself an artist" and the creation of cakes requires, "sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding."[77] Second, like Justice Gorsuch, Justice Thomas understood wedding cakes to convey a symbolic message, and he agreed with the baker that the cake communicates that "'a wedding has occurred, a marriage has begun, and the couple should be celebrated.'"[78] Finally, the baker's customary involvement with wedding cakes further supported the conclusion that his conduct was expressive. Justice Thomas explains that the baker personally consults with the couple, delivers the cake, "a focal point of the wedding celebration," and may stay and interact with guests at the event, and attendees will recognize the cake as the baker's creation and subsequently seek his services.[79] Under these facts, Justice Thomas concludes that Colorado law would require the baker to use his artistic talent to "acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated," both ideas with which he disagrees.[80]

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[73] *Masterpiece Cakeshop,* 138 S. Ct. at 1738 (Gorsuch, J. conc.).

[74] *Id.* (Like "an emblem or flag," a cake for a same-sex wedding is a symbol that serves as "a short cut from mind to mind," signifying approval of a specific "system, idea, [or] institution.") (quoting *West Virginia Bd. of Ed.,* 319 U.S. at 63).

[75] This description, however, does not accurately capture the issue raised in *Masterpiece Cakeshop.* Assuming that the First Amendment guarantees bakers the freedom to decide to bake cakes, as opposed to pies, and how to design those cakes, the Colorado law did not interfere with either of those decisions. Instead, the law limits the baker's discretion to refuse service to a customer interested in purchasing what the baker offered to the public. While the First Amendment prohibits the government from forcing a writer to write or to dictate the contents of that writing, the writer's freedom of expression is not violated because their words are read or used by someone with whom they disagree. **[property cases]**

[76] *Masterpiece Cakeshop,* 138 S. Ct. at 1742.

[77] *Id.* at 1742-43.

[78] *Id. at* 1743

[79] *Id.*

[80] *Id.* at 1744. *See* Volokh, *Compelled Speech, supra* note 48 at 383 (arguing that even in absence of endorsement, the compulsion "still involves people being required 'to foster … concepts' with which they disagree and 'to be an instrument for fostering public adherence' to a view that they disapprove of -- *Wooley* tells us this is unconstitutional."). *But see,* Bhagwat, *supra* note 48 (arguing that protection for "producing speech must be limited is because producing speech can involve a wide range of conduct that can cause social harm entirely independent of the communicative impact of the eventual speech."); Steven H. Shiffrin, *What is Wrong with Compelled Speech?,* 29 J. L. & POL. 499, 506 (2014) (arguing that requiring a wedding photographer to capture photos at a gay wedding does not force photographers "to be couriers of messages to which they are ideologically opposed."). Steven Shiffrin argues that "[t]he First Amendment inquiry focuses on what is objectively conveyed through the photographs;" and wedding photos do not say anything

In a dissenting opinion joined by Justice Sotomayor, Justice Ginsburg argues that neither the creation of wedding cakes, in particular, or the provision of baked goods, in general, constitutes expressive conduct. According to Ginsburg, the baker's conduct in *Masterpiece Cakeshop* could not be "reasonably understood by an observer to be communicative."[81] There was no evidence that an objective observer would understand "a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's."[82] In other words, accepting the argument that a wedding cake symbolizes that the event is a wedding and that the wedding should be celebrated, these messages are not reasonably attributed to the baker. In fact, no reasonable observer would know the baker's identity unless that information was communicated by more than the cake itself. In contrast a message of endorsement might reasonably be perceived if the law required the baker to publicly communicate his involvement to the wedding guests or if the baker was required to personally participate in the ceremony or attend the event. In light of these opinions, the question of whether the conduct was expressive turned upon who determines the symbolism associated with a service or product, the producer or the audience.[83]

While a dispute over wedding cakes might seem trivial to some, *Masterpiece Cakeshop* raises important questions about the relationship between conduct and speech. The baker created the cake, and imbued the cake with his culinary and aesthetic choices. As noted by Justice Thomas, it is completely plausible to consider the baker an artist and cakes his works of art. From a First Amendment perspective, without any additional content, is that protected speech?[84] If so, then the

about the morality of the wedding, but capture the event.) *Id.* at 507. *Cf.* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 647 (2001) (arguing that "the cases supposedly standing for the proposition that there is a right not to speak … stand for a right that is related to speech, in the sense that it involves the right not to be used as a vehicle for speech, but not for a right that is reducible to a right to be silent or a right to prevent misattribution...").

[81] *Masterpiece Cakeshop,* 138 S. Ct. at 1749, n.1 (Ginsburg, J diss.)

[82] *Id. Accord* Wash. v. Arlene's Flowers, 293 Wash.2d at 511-513 (concluding that a floral arrangement did not "actually communicate something to the public at large" and is not inherently expressive).

[83] Arguably whether the cake itself is expressive is a First Amendment red herring. Because of the limited message conveyed by the cake, the fundamental question is whether the relationship created by the sale of the cake implicates the baker's freedom of association or expressive association. As discussed later, these cases may be better understood through the First Amendment lens of association rather than speech. *See infra* note 169.

[84] Consideration of whether artistic or design choices are sufficient to qualify as expression is rooted in copyright law in which the question is whether the "author's" work is sufficiently original in order to receive copyright protection as a writing. *See generally* Feist Pubs. Inc., Rural Telephone Serv. Co., 499 U.S. 340 (1991) (considering whether a telephone directory is entitled to copyright protection). While copyright issues may certainly involve freedom of expression, they are not necessarily one and the same. *See* Eldred v. Ashcroft, 537 U.S. 187 (2003) (concluding that a twenty-year extension of copyright protection did not violate the First Amendment); Harper & Row, Pub'l, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (concluding a magazine's freedom of speech was not violated when copyright law prohibited it from publishing excerpts from a manuscript without the authorization of the author). *See generally* Raymond Shih Ray Ku, *The First Amendment Implications of Copyright's Double Standard,* 17 VA. SPORTS & ENT. L.

proverbial widget would be speech as long as its manufacturer claims to have imbued the widget with their creative choices and persona.[85] Elon Musk might very well claim that Tesla automobiles embody his expression. Moreover, what message does the cake embody? While the cake conveys information that stimulates our senses, hopefully signaling to the brain that it is divine and instilling the diner with a sense of satisfaction and bliss, is that the kind of sensory stimulation and input contemplated by the First Amendment? While these questions may sound esoteric, similar questions remain unanswered when considering when the regulation of video games and the virtual worlds and realities designed by programmers and generated by microprocessors violate the freedom of speech of developer and user.[86]

Sorrell v IMS Health, Inc. illustrates another aspect of the expressive conduct problem: how does First Amendment apply to conduct that may, but does not necessarily, contribute to the creation of speech? Specifically, how should courts review regulations that restrict the transfer of information and data? In *Sorrell,* a majority of the justices concluded that a statute regulating the sale of medical prescription records violated the First Amendment.[87] Vermont regulated the collection and dissemination of prescription information including information that would identify the prescriber. The statute required the consent of the prescriber before prescription information identifying the prescriber could be sold or used for marketing purposes.[88] This restriction was intended to protect the privacy of doctors, prevent drug companies from interfering with medical decisions, and to control prescription costs, and according to Vermont, the regulation of conduct unrelated to the suppression of expression.[89] According to Justice Kennedy, the First Amendment

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J. 163 (2018); Derek Bambauer, *Copyright = Speech*, 65 EMORY L. J. 199 (2015); C. Edwin Baker, *First Amendment Limits on Copyright,* 55 VAND. L. REV. 891 (2002); Rebecca Tushnet, *Copyright as a Model for Free Speech Law*, 42 B.C. L. REV. 1 (2000). Likewise, the relationship between art and the First Amendment has yet to be fully recognized. *See* Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment,* 1987 WIS. L. REV. 221 (1987) (arguing that Art should be considered subject to its own First Amendment analysis); Marci A. Hamilton, *Art Speech*, 49 VAND. L REV. 73 (1996) (same); Edward J. Eberle, *Art as Speech,* 11 U. PENN. J. OF LAW & SOCIAL CHANGE 1 (2007-2008) (arguing that Art should be considered as a unique form of speech) (same).

[85] Justice Thomas' analysis tracks his opinion in Star Athletic, LLC v. Varsity Brands, Inc., 580 U.S. ___, 137 S. Ct. 1002 (2016) in which he concluded that cheerleader uniforms were not excluded from copyright protection even if uniforms are considered useful articles which are statutorily excluded from copyright protection. Under the "useful articles doctrine," the widget would not receive copyright protection unless the artistic features can be identified separately from the utilitarian. *See* Robert C. Denicola, *Imagining Things: Copyright for Useful Articles After Star Athletica v. Varsity Brands,* 79 U. PITT. L. REV. 635 (2018). Moreover, whether an individual's creation should be considered their property is not the same as whether it conveys a message attributable to them.

[86] *See* Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011) (discussing and debating the expressive elements of video games and when freedom of expression may be implicated). *See also,* Mark A. Lemley, Eugene Volokh, *Law, Virtual Reality, and Augmented Reality,* 166 U. PA. L. REV. 1051 (2017-2018) (considering free speech claims for virtual and augmented reality); Raymond Shih Ray Ku, *Free Speech & Net Neutrality: A Response to Justice Kavanaugh,* 80 U. PITT. L. REV. 855 (2018-2019) (considering the free speech claims of Internet service providers).

[87] Sorrell, 564 U.S. at 557.

[88] *Id.* at 558-559.

[89] *Id.* at 560-561, 572-573

applied because the sale of this information was only prohibited based "in large part on the content of the purchaser's speech"[90] and by singling out the use of prescriber information only for marketing to prescribers.[91] Likewise, because pharmaceutical manufacturers were the primary users of this information for marketing, and their practice was the focus of the legislation, the court concluded that it disfavored "specific speakers."[92] As such, Justice Kennedy argued that the law defied the application of intermediate scrutiny to cases involving the regulation of conduct because it had the effect of restricting speech based upon the identity of the speaker and the content and viewpoint they wished to express.[93] Laws that regulate speech based upon content let alone viewpoint are presumptively unconstitutional.

Furthermore, Justice Kennedy concluded that, in addition to the restrictions placed upon the companies intending to use the information for marketing, the statute restricted the expression of those wishing to sell that information as well. According to the majority, information is speech, and because the information possessed by pharmacies and insurance companies was "subjected to 'restraints on the way in which the information might be used' or disseminated"[94] it violated their speech interests as well. In so doing, the Court rejected Vermont's argument that the law regulated conduct and not speech. According to Kennedy, information cannot be considered "a mere 'commodity' with no greater entitlement to First Amendment protection than 'beef jerky.'"[95] As a general proposition, gathering and publishing information is protected by the First Amendment.[96] And, according to Kennedy:

> Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber identifying information is speech for First Amendment purposes.[97]

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[90] *Id.* at 564.
[91] *Id.*
[92] Sorrell, 564 U.S. at 564-565.
[93] *Id.* at 565-566.
[94] *Id.* at 568.
[95] *Id.* at 570.
[96] For example, the First Amendment recognizes the freedom of news organizations to both gather and publish facts, *see, e.g.,* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (attending criminal trials); New York Times v. United States, 403 U.S. 713 (1971) (publishing the Pentagon Papers), but even that freedom is not absolute. *See* Cohen v. Cowels Media Co., 501 U.S. 663, 669-70 (1991) (concluding that First Amendment did not bar a promissory estoppel claim for disclosing the identity of a source). For example, Barry McDonald has argued that the First Amendment should only apply to certain recognized activities, *see* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 250 (2004). *But see* Baghwat, *supra* note 48 at 1053 (arguing that the freedom to gather news should apply more generally).
[97] Sorrell, 564 U.S. at 570.

In other words, because information is often used for expression, *a fortiori*, information is speech. And, the law restricted speech even though prescriber information was not gathered for publication, or, in fact, published.

Dissenting for himself and Justices Ginsburg and Kagan, Justice Breyer argued that the majority failed to distinguish between efforts to regulate the marketplace of ideas versus those that regulate the marketplace for goods and services.[98] According to Breyer, this distinction is crucial:

> Because many, perhaps most, activities of human beings living together in communities take place through speech, and because speech-related risks and offsetting justifications differ upon context…., the First Amendment imposes tight restraints upon government efforts to restrict, *e.g.*, "core" political speech, while imposing looser constraints when the government seeks to restrict, *e.g.*, commercial speech….[99]

Because of the ubiquity of speech, strict scrutiny should only apply when a law directly burdens speech whereas a "more lenient approach" applies when laws affect speech indirectly.[100] With respect to the Vermont law, Justice Breyer emphasized that it did not impose any burden based upon speech itself. No one was forbidden or compelled to say anything expressly or symbolically nor required to endorse any particular view.[101] And, prior to *Sorrell,* the Court had never concluded that the First Amendment prohibited or required heightened scrutiny when a government restricts the "use of information gathered pursuant to a regulatory mandate," as was the case in *Sorrell*.[102]

To the extent that the Vermont law applied only to certain content and to certain parties, Justice Breyer argued that those distinctions are inherent in any system of regulation.[103] For example, the Federal Drug Administration regulates "the form and content of labeling, advertising, and sales proposals of drugs, but not furniture,"[104] and, "might control in detail just what a pharmaceutical firm can, and cannot, tell potential purchasers about its product."[105] Such regulations are content-based because of the practice or industry being regulated, and they are "speaker-based" because only certain firms participate in that practice or industry. As such, the distinctions can and were made based upon the nature of the regulated activity rather than a regulation of speech. Under

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[98] *Id.* at 583 (Breyer, J. diss.).
[99] *Id.* at 582.
[100] *Id.* at 584.
[101] *Id.* at 585-586.
[102] *Id.* at 588. Some opinions suggest that the Constitution does not guarantee the most effective means to subsequently engage in speech. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001) ("We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method..."); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 36 (1973) ("Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech...").
[103] Sorrell, 564 U.S. at 589 ("Regulatory programs necessarily draw distinctions on the basis of content.").
[104] *Id.*
[105] *Id.* at 590.

those circumstances, the First Amendment imposes no additional limits upon the government's power to regulate the market and those participating in it.[106]

B. Two Truths and a Lie

Masterpiece Cakeshop and *Sorrell* illustrate the legal implications of acknowledging that sometimes a cake is more than just dessert or that information is not the same as beef jerky. The claim that a law regulating conduct impermissibly interferes with expression associated with that conduct requires courts to consider the expressive nature of conduct and how regulation of such fits within the freedom of speech guaranteed by the First Amendment. When parties invoke expression, courts engage in a more careful (and perhaps thoughtful) analysis of the purpose of the law and the extent to which the chosen means respond to the problem and the extent to which those means interfere with liberty. This is true even when the claimed relationship to speech is exceedingly thin.[107] What Frederick Schauer described as "First Amendment opportunism,"[108] serves three purposes, only two of which are legitimate.

In the first category of cases, judicial review is justified because activities may be analogous to previously protected speech. Under these circumstances, courts must determine whether regulation of that activity is covered by the First Amendment.[109] For example, does the activity convey a particularized message, and in light of the surrounding circumstances, a great likelihood that the message would be understood by as such.[110] Examples of these cases include First Amendment consideration of whether websites,[111] Facebook posts,[112] or posts to the President's Twitter account,[113] are examples of speech protected by the First Amendment. While category one cases present novel questions, judges are only required to perform their traditional function of interpretation.

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[106] If the First Amendment is, in fact, violated when restrictions are imposed based upon the content of the information, the circumstances in which that information may be used, and, as such, who may use that information, then an argument can be made that all data privacy laws are unconstitutional after *Sorrell*.

[107] *Coverage, supra* note 32 at 1616:

> What is most interesting about these various claims and arguments is not merely that some of them have been taken seriously.'" Rather, it is that they have been advanced at all, in contrast to what would have been expected a generation ago, when the suggestion that the First Amendment was even applicable to some of these activities would far more likely have produced judicial laughter or incredulity, if not Rule 11 sanctions.

[108] Schauer, *Opportunism, supra* note 27 at 176. *See also* Kendrick, supra note 28 at 1206-1209.

[109] *Coverage, supra* note 32 at 1617-1621.

[110] Spence v. Washington, 418 U.S. 405, 411 (1974) ("An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.").

[111] Reno v. A.C.L.U., 521 U.S. 844 (1997).

[112] Elonis v. United States, 575 U.S. ___, 135 S. Ct. 2001 (2015).

[113] Knight First Amendment Institute v. Trump, 928 F.3d 226 (2d Cir. 2019) *rehearing en banc denied,* 953 F.3d 216 (2d Cir. 2020).

Weddings cakes fall into this category, when courts must determine whether a cake is the speech of its baker, must it be customized, or include the baker's signature or signature style? For example, Eugene Volokh argues that *Masterpiece Cakeshop* raises the question of whether individuals can be compelled to create speech.[114] He argues that even if there is no endorsement, compelled creation and dissemination still "involve people being required to 'foster …. concepts' with which they disagree and 'to be an instrument for fostering public adherence' to a view the disapprove of…"[115] Likewise, the regulation of information gathering and dissemination raise important coverage and protection questions. Is data gathering equivalent to newsgathering? Is the transfer of information equivalent to publishing? As Ashtosh Bhagwat argues relying upon the traditional content versus content-neutral distinctions as Justice Kennedy does in *Sorrell* is an imperfect analogy when it comes to laws regulating speech producing conduct because it does not adequately consider whether the harm being combatted is "related to the message or communicative impact,"[116] or distinguish between instances in which the conduct leads to the production of speech of public versus private concern.[117]

In category two cases, judicial review is justified because First Amendment coverage is plausible if doubtful. Unless courts dismiss the claim out of hand, they must determine whether the activity is both covered and protected.[118] In cases like *Masterpiece Cakeshop,* even if the First Amendment coverage is doubtful judges may nonetheless consider whether the activity is protected even if only to refute such claims.[119] Under these circumstances, the First Amendment is applied "just in case" the initial coverage decision may be wrong or more complicated than it may appear. Even if the court is confident that the activity is not covered, they consider whether the regulation is nonetheless consistent with the corresponding degree of protection "even if" the conduct is covered. Even though freedom of speech is not clearly implicated, parties benefit from the more careful consideration of legislative purpose and the fit between ends and means required by the First Amendment which would otherwise be unavailable. As such, "the First Amendment offers strong protection at a seemingly low price of admission."[120] As discussed below, invoking

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[114] Volokh, *Compelled Speech, supra* note 48 at 382-384.
[115] *Id.*
[116] Bhagwat, *supra* note 48 at 1063.
[117] *Id* a 1065.
[118] Kendrick, *supra* note 28 at 1200 ("These claims are examples of what has been called First Amendment opportunism, where litigants raise novel free speech claims that may involve the repackaging of other types of legal arguments.").
[119] *See* David McGowan, *Approximately Speech,* 89 MINN. L. REV. 1416, 1418 (2005) ("Once in a while, a party will assert a free speech claim in a factual context judges recognize as involving expression but not free speech. To refute such claims, judges must make implicit free speech analysis explicit.").
[120] Kendrick, *supra* note 28 at 1209. Eugene Volokh argues, in my opinion persuasively, that instead of relying upon the speech/conduct distinction, First Amendment law would be better served by acknowledging that speech is implicated; that "[t]here are exceptions to the First Amendment's protection, and the courts ought to identify the boundaries of those exceptions." *See* Volokh, *Compelled Speech, supra* note 48 at

freedom of expression under these circumstances is a logical response to the arguable lack of protection provided under the rational basis test of the Fourteenth Amendment.

In the final category of cases, the conduct is unrelated to the marketplace of ideas or deliberative democracy, but instead, is used to categorically insulate other interests from regulation. In other words, the First Amendment is not invoked because the conduct should or may be expressive, or to justify a more thoughtful judicial review, but because it can be used to presumptively deny government the power to regulate the conduct.[121] Expression is not a value, but rather a tool, the chisel to make a square peg fit into a round hole allowing both parties and judges to use the First Amendment to presumptively declare laws unconstitutional based upon the judge's personal beliefs and worldview.[122] Given the conclusory nature of some of the opinions in *Masterpiece Cakeshop* and *Sorrell*, both may also fall into this category.

Like the grifter in The Music Man who manages to convince the public that the local pool hall was trouble because "trouble begins with T which rhymes with P which stands for pool," a talented lawyer and a receptive judge can exploit the broad outlines of expression to reach their preferred results. In general selling cakes or information is not considered speech as that word is commonly used or reasonably understood. These acts, however, can be connected to speech. Consider the syllogisms that arise from *Masterpiece Cakeshop* and *Sorrell.* In the former, the First Amendment protects speech; speech is a form of expression; expression is, therefore speech. Conduct that is not speech nevertheless may be understood as expressing some idea or opinion, even indirectly; therefore, the conduct is protected speech. The latter employs a different syllogism. In *Sorrell*, speech conveys information; information is, therefore, an essential element of speech; transfer and access to information is, therefore, protected speech. This simplistic and reductionist interpretation of the First Amendment ignores the reality that the Amendment does not protect all speech or apply simply because an activity may be labeled speech.[123]

Even if one overlooks the logic, category three cases are especially troublesome because the First Amendment analysis employed is inherently conclusory. By classifying conduct as speech,

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1337. Ultimately, I agree with Ashtosh Bhagwat conclusion that courts should not adopt a deferential standard of review but engage in searching judicial scrutiny. *See* Bhagwat, *supra* note 48 at 1058-1066.

[121] *See, e.g.,* McGowan, *supra* note 117 at 1417 ("A case is a free speech case when a judge says it is a free speech case … Because expression is present in every case, judges may engage in free speech analysis whenever they feel like it."); Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence,* 117 W. VA. L. REV. 231, 233 (2014) ("In several leading cases, conservative judges have used the First Amendment in a libertarian manner to invalidate regulations that reflected liberal or progressive values."); Frederick Schauer, *The Boundaries of the First Amendment. A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1794 (2004) ("Similarly, objections to government regulation of business that were originally based on concern for economic liberty have become objections to the regulation of commercial advertising.. . .").

[122] Kendrick, *supra* note 28 at 1210 ("Some would say that this is a more specifically political phenomenon: that what matters is who is making the First Amendment claim, or which judges are hearing it.").

[123] *See Coverage, supra* note 29 at 1619-1621; Kendrick, *supra* note 28 at 1212-1216.

regulations of conduct not only restrict speech, they will do so selectively based upon the content and viewpoint expressed, and as such are presumptively invalid.[124] A law requiring people to wear masks during a pandemic punishes only those individuals that refuse to obey the law. For those that would prefer not to wear a mask, complying with the mandate is an endorsement of their efficacy and/or that the mandate is a legitimate exercise of government authority. Correspondingly, by refusing to wear a mask they are being punished by the government by being subject to civil or criminal sanctions and/or public scorn and criticism. Prior to *Masterpiece Cakeshop* and *Sorrell*, courts would have acknowledged that such a law would limit the freedom of dissenters to express their dissent by violating the law. However, so long as the purpose of such a mandate is to prevent the spread of a virus, the law would be upheld because the government could reasonably conclude that exceptions would in fact undermine the very purpose of the law, and that reasonable alternatives exist for dissenters to express their disagreement. In this example, the only method of expression denied to dissenters is refusing to wear a mask free from legal and social consequences.

In contrast, when courts consider speech the object of regulation, prohibiting the act will almost certainly be considered unconstitutional. When the refusal to wear a mask is itself speech and considered the object of the regulation, dissenters may easily characterize the law as based upon the content of their expression, the efficacy of wearing masks and/or the authority of the government to mandate that individuals wear masks. Because they disagree with the mandate, they are being punished based upon their viewpoint. And, because the law primarily, if not exclusively applies to them, it singles out a specific group of speakers. Under traditional speech analysis, laws restricting speech under these circumstances are rarely if ever considered constitutional.[125] Even assuming that legitimate interests exist for wearing masks to prevent the spread of the deadly virus, the government would be denied the authority to prohibit the conduct. And, instead, it would either be required to recognize exceptions or limited to providing incentives to encourage people to wear masks or engage in speech of its own to inform the public of the importance of wearing masks. Once it is determined that a law is the regulation of expression, the constitutional path and destination are essentially predetermined. As Justice Kennedy noted in *Sorrell,* "In the ordinary case, it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory."[126]

C. Judicial Review Not Abdication

[124] *Sorrell,* 564 U.S. at 2667 ("In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint based."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").
[125] In the modern era, the Supreme Court has only upheld one law based under strict scrutiny and did so because of national security concerns. Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).
[126] *Sorrell,* 564 U.S. at 571.

There is a genuine jurisprudential reason to consider what otherwise could be rejected as legal sophistry in the second category of cases. A fundamental axiom of judicial review is that judges do not evaluate the wisdom of laws. Instead, they are supposed to limit their consideration to whether the challenged law is within the scope of the government's powers and whether the means chosen are reasonably adapted to those ends. Put differently, under the U.S. Constitution, judges guard against the exercise of arbitrary and invidious power, not wrongheaded or, even, erroneous policies. The difference between declaring a law unconstitutional because it is arbitrary versus wrong is what separates judicial review from judicial activism. The Supreme Court's adoption of principles of *laissez faire* economics and deregulation as exemplified in *Lochner v New York,* is one of the few, if not only, instances in which the Justices have been universally condemned for engaging in such activism.[127] Much has been written about *Lochner* and how cases like *Masterpiece Cakeshop* and *Sorrell* may represent a new effort to enforce principles of deregulation.[128] This essay does not engage in that debate, but rather explains that in response to *Lochner,* judicial review of claims arising under the Fourteenth Amendment may be laughable and conclusory in its own right.[129] This is currently true for laws regulating business and commercial interests, and, if anti-abortion advocates are successful, will be true for a woman's freedom to terminate her pregnancy.[130] Under these circumstances, reliance upon a fundamental constitutional interest like those protected by the First Amendment, is one of the few means of avoiding a constitutional dead end.

Today, the principle that states may exercise their police power to regulate the terms and conditions of contracts, employment, and commerce in general is firmly established. As the Supreme Court noted:

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[127] *See, e.g.,* Ferguson v Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that ... due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."); Griswold v. Conn., 381 U.S. 479, 482 (1965) (Overtones of some arguments suggest that *Lochner v. New York …* should be our guide. But we decline that invitation…. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.``); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966) ("We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.'") (quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)). *See also* David E. Bernstein, *Lochner's Legacy's Legacy,* 82 TEX. L. REV. 1, 2 (2003) ("The ghost of Lochner v. New York haunts American constitutional law. Almost one hundred years after the Supreme Court decided the case, Lochner and its progeny remain the touchstone of judicial error. Avoiding Lochner's mistake is the "central obsession" of modern constitutional law.") (footnotes omitted); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 269 (1998) ("[M]odern judges are more disturbed by the charge of Lochnering than the charge of ignoring the intentions of the Federalists and Republicans who wrote the formal text.").

[128] *See supra* note 21.

[129] *See, e.g.,* Clark Neily, *No Such Thing: Litigating under the Rational Basis Test,* 1 N.Y.U. J.L. & LIBERTY 898 (2005) (describing the rational basis test as "insane" and "dishonest");

[130] *See* infra Part III.C.

> Under our form of government, the use of property and the making of contracts are normally matters of private, and not of public, concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute, for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.[131]

In short, "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases."[132] As Justice Thurgood Marshall noted, "The structure of economic and commercial life is a matter of political compromise, not constitutional principles…."[133] However, simply because the states have the power to regulate business, does not mean that laws regulating business are necessarily constitutional. Instead, Due Process requires that "the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[134] Under what is now referred to as the rational basis test, a law is constitutional as long as it is rationally related to a legitimate government interest. Laws regulating the hours bakers may work or whether they must bake wedding cakes for same-sex marriages are considered consistent with the Fourteenth Amendment and its guarantee of due process of law because they are rationally related to the power of states, in Justice Marshall's words, to structure economic and commercial life.

Having concluded that the power to regulate economic and commercial conduct falls within the police power, unless another interest, like freedom of speech, is at stake, the remaining question is whether the law passes rational basis review. Unfortunately, rational basis review has meant very different things to different people, and at different times.[135] The Supreme Court's decision in

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[131] Nebbia v. New York, 291 U.S. 502, 523 (1934) (citations omitted).

[132] *Id.* at 527-528.

[133] Cleburne v. Cleburne Living Center, 472 U.S. 432, 472 (1985) (Marshall, J., conc. in part). *See also* Nebbia, 291 U.S. at 524-525:

> These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

[134] *Id.* at 511.

[135] *See, e.g.,* James M. McGoldrick Jr., *The Rational Basis Test and Why It Is So irrational: An Eighty-Year Retrospective,* 55 SAN DIEGO L. REV. 751 (2018) (discussing the history of the rational basis test under Due Process and Equal Protection cases); Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 GEO. J.L. & PUB. POL'Y 493 (2016) (discussing the evolution of the rational basis test for due process). *See also,* Aaron Belzer, *Putting the "Review" Back in Rational Basis Review,* 41 W. ST. U.L. REV. 239 (2014) (discussing the evolution of the rational basis test under equal protection). *But see* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018) (arguing that the teaching of rational basis review is both incomplete and misleading); Thomas B. Nachbar, *The Rationality of Rational Basis Review,* 102 VA. L. REV. 1627 (2016) (arguing for the importance of considering non-instrumental ends); Jane R. Bambauer & Toni M. Massaro, Outrageous and Irrational, 100 MINN. L. REV. 281 (2015) (arguing for the importance of rational basis review for establishing a floor).

U.S. Railroad Retirement Bd. v. Fritz[136] illustrates the range of what rational basis review entails and its consequences in a single decision. Congress restructured the benefits offered to railroad employees in the 1974 Railroad Retirement Act, and denied benefits to a group of workers that would otherwise have qualified under the prior Act.[137] Congress, however, provided those benefits to a similar group of workers if they had a "current connection" with the railroad industry as of the cutoff date.[138] The District Court concluded that the "current connection" distinction was not rationally related to the purpose of the Act, and, therefore the exclusion of the plaintiffs was unconstitutional.[139] The Supreme Court disagreed with a majority of the Justices concluding that the Act satisfied the rational basis test.

Justice Rehnquist's majority opinion employs the most deferential approach. According to Rehnquist, "the plain language of [the provision in question] makes the beginning and end of our inquiry."[140] As such, the purpose of the statute was to divide railroad retirees into two separate classes only one of which would receive benefits under the prior Act.[141] Having concluded that the purpose was legitimate, the Court moved on to whether the purpose was achieved in "a patently arbitrary or irrational way."[142] According to Rehnquist, this portion of the test was easily satisfied because when "there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether [the reasoning articulated by the Court] in fact underlay the legislative decision'...."[143]

Concurring in the judgment, Justice Stevens argued that "the Constitution requires something more than merely a "conceivable" or "plausible" explanation for the unequal treatment."[144] Instead, Stevens proposed what might be considered an objective test in which the Court, "must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature."[145] The Retirement Act satisfied this test because to protect the solvency of the retirement program it was reasonable to preserve some benefits while ending others, and differentiating beneficiaries based upon the timing of their service was reasonable.[146]

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[136] 449 U.S. 166 (1980).
[137] *Id.* at 168-173.
[138] *Id.* at 171-172.
[139] *Id.* at 174.
[140] *Fritz,* 449 U.S. at 176.
[141] *Id.* at 177.
[142] *Id.*
[143] *Id.* at 179.
[144] *Fritz,* 449 U.S. at 180 (Stevens, J. conc.).
[145] *Id.* 180-181.
[146] *Id.* 182.

In contrast, writing for himself and Justice Marshall in dissent, Justice Brennan criticized the majority for adopting a "mode of analysis employed by the Court in this case virtually immunizes social and economic legislative classifications from judicial review."[147] According to Brennan, one of the purposes of the Act was to preserve the vested benefits of workers who had earned them under the original Act. As such, denying those benefits to workers without a current connection was not only arbitrary and irrational, but "inimical" to its purpose.[148] In reaching this conclusion, Justice Brennan relied upon the House and Senate Reports which characterized the preservation of vested rights for individuals such as the plaintiffs as a "Principal Purpose of the Bill."[149] Without going into further detail, his opinion criticizes the majority's "plain" language analysis as tautological, that rational basis requires consideration of the actual purpose rather than *post-hoc* justifications offered by Government attorneys, and even accepting such arguments must still consider whether they "genuinely support such judgment."[150] With regard to the final point, even if the Court were to accept the argument that the decision was based upon "equitable" considerations, the Court must still evaluate "what principles of equity or fairness might genuinely support such a judgment."[151] Unfortunately, while there have been some glimpses of Justice Brennan's approach in more recent Supreme Court decisions, Justice Rehnquist's "plausible" test remains the standard.[152]

When the standard of review requires only that the law serve some hypothetically legitimate purpose, legal fiction replaces what might be an otherwise inconvenient truth. While line drawing may be inevitable, in may nonetheless be arbitrary.[153] In its most deferential form, the promise of rational basis review is an empty promise. In many respects, this is the polar opposite of *Lochner*. Instead of relying upon their own preferences to evaluate the law, judges are mandated to use their creativity to defend the law. If judges are not only free to rationalize and justify a law post hoc but required to do so, the constitutionality of the law does not turn on the law's legitimacy, but upon the considerable creativity of lawyers and the subjective limits of a judge's willingness to

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[147] *Fritz,* 449 U.S. at 183 (Brennan, J. diss.).
[148] *Id.* at 185-186.
[149] *Id.* at 185.
[150] *Id.* at 194.
[151] *Id.* at 194.
[152] *See* Romer v. Evans, 517 U.S. 620, ___ (1996) ("even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.") (concluding that a State constitutional amendment denying protected status persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" fails, indeed defies, even this constitutional inquiry"); Lawrence v Texas, 539 U.S. 588, ___ (2003) (concluding that state may only regulate the conduct of individuals to "prevent injury to a person or abuse of an institution the law protects").
[153] *See, e.g.,* City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (distinguishing between established pushcart vendors over newer ones); Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (concluding that it was no irrational permit only lawyers to engage in the business of debt adjusting); Williamson v. Lee Optical of Okla., 348 U.S. 483, 491 (1955) (holding that optometrists or ophthalmologists may independently fit glasses, but opticians may only do so with a prescription from an optometrists or ophthalmologists).

suspend disbelief. As such, because contracts are of genuine public concern, any law regulating contracts will be upheld even if the law does not advance the concern or does so arbitrarily. Given what Justice Brennan decried as a "toothless"[154] standard of review, the only way for a baker to get their objection taken seriously is to test the boundaries of expression.[155]

III. The First Amendment & Reproductive Freedom

If there are legitimate reasons to reconsider the expressive interests at stake when commercial conduct is regulated, those reasons apply with equal if not greater force when personal conduct is targeted. This section considers how this approach might with regard to one of the most contentions questions of individual autonomy: control over pregnancy.[156] What if any expressive interests are at stake when states seek to restrict or ban abortion? This part begins by identifying the expression associated with pregnancy, childbirth, and motherhood, and explains how compelling a woman to carry a pregnancy to term is covered by the First Amendment. Part III.B. discusses when the government's purpose is to protect prenatal life.

A. Of Pregnancy, Birth, and Motherhood

What does it say when a woman gives birth to a child? What messages are compelled if she is forced to carry a pregnancy to term? Remember: according to Justice Kennedy's majority opinion in *Sorrell,* the expressive act was the transfer of personal identifying prescriber information. In *Masterpiece Cake,* Justices Thomas and Gorsuch concluded that the wedding cake represented the endorsement of the legality of sex-marriage, that such unions were consistent with the baker's religious beliefs, and events to be celebrated. Because the messages associated with abortion and having a child are so clear and straightforward, the following is limited to messages that parallel those identified by the Supreme Court in the cases above.

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[154] *Fritz,* 449 U.S. at 184.

[155] Of course, except in category three cases, judicial review does not guarantee judicial victory. Even under First Amendment scrutiny bakers should not be exempt from public accommodations or other anti-discrimination laws because ending discrimination in places of public accommodation is a compelling government interest. *See* Board of Directors of Rotary Intern. v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (assuming that public accommodation laws infringe freedom of association, "the infringement is justified because it serves the State's compelling interest in eliminating discrimination against women"); Roberts v. U.S. Jaycees 468 U.S. 609, 624 (1984) (recognizing "eliminating discrimination and assuring its citizens equal access to publicly available goods and services ... plainly serves compelling state interests of the highest order.")

[156] For example, as described below, pregnancy and childbirth are more likely than selling wedding cakes to satisfy the test proposed by Caroline Corbin that "compelled expressive conduct should trigger free speech scrutiny only when someone is forced by their actions into conveying a viewpoint they disagree with." Corbin, *supra* note 42 at 261.

"We are cut from the same cloth." Conception, pregnancy, and birth are many things, but at the most fundamental and basic level, they are the transfer of information. The primary function of conception is to pass the combined genetic code of egg and sperm to the next generation.[157] A woman's contribution of information represents the blueprint of her physical, cognitive, and emotional existence. Recent research on intergenerational trauma suggests that a mother's experiences are also shared during her pregnancy.[158] The expressive nature of childbirth is so well ingrained it is the primary metaphor for artistic expression. Artists and inventors often describe their works in terms of children, and the complicated, personal creative process is often analogized to giving birth. As such, whether to have a child is, among other things, a decision about whether to transfer the most fundamental and personal of information, the blue print and instructions, that make us who we are to the next generation. Likewise, this transfer of information enables a parent to raise and educate their child passing on their values and beliefs: a freedom long recognized by Supreme Court.[159]

"I'm having a baby." Pregnancy itself conveys information as well. The physical state of pregnancy, especially when one "shows," conveys information to anyone who sees her, family, friends, and strangers alike, and the pregnant woman may prefer not to share that information or to control how and when that information is shared. While Justice O'Connor emphasized that motherhood, "ennobles her in the eyes of others,"[160] Justice Blackmun recognized that, "In other cases, ... the additional difficulties and continuing stigma of unwed motherhood may be involved."[161] The state of being pregnant conveys that she engaged in intercourse, and depending upon her situation, community, and upbringing, an act that may be considered irresponsible, immoral, or even criminal. Those informed about the pregnancy may not only use that information to judge her but may otherwise change their behavior for good or ill. And, per *Sorrell,* businesses may use the information to market goods and services to her. With respect to information sharing, terminating a pregnancy is a decision not to share information regarding one's physical and reproductive status with others.[162]

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[157] The fact that this information is not readily visible should not be a bar to First Amendment consideration. For example, computer code is considered speech subject to First Amendment protection. *See* Junger v. Daley, 209 F.3d 481 (6th Cir. 2000); Bernstein v United States, 176 F.3d 1132 (9th Cir. 1999).

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[159] *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing the freedom of parents to instruct their children in a foreign language); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (recognizing the freedom of parents to choose private education rather than public); Wisconsin v Yoder, 406 U.S. 205 (1972) (recognizing the freedom of parents to determine when to end their children's public education). While these decisions were decided under substantive due process, the Justices have recognized their connection to speech as well. *See* Employment Div. v. Smith, 494 U.S. 872, 881 (1990). *See also* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions,* 81 N.Y.U. L. Rev. 631 (2006) (arguing that communications between parents and their children are protected by the First Amendment).

[160] *Casey,* 505 U.S. at 852.

[161] *Roe* 410 U.S. at 153.

[162] Correspondingly, requiring women to carry a pregnancy to term compels her to say "I'm having his baby" even if that information is not shared with the sperm provider as conception results from the combination of genetic information.

"Good news." Likewise, pregnancy and a child's existence convey ideas, beliefs, and opinions the woman may not share or wish to express. Justice O'Connor's opinion is replete with references to the "profound and lasting meaning" associated with the decision to continue or terminate a pregnancy, and the conflicting views on the subject.[163] For example some people have, "such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being."[164] In contrast, others believe "that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent."[165] As a matter of expression, a woman may object to being seen as endorsing or celebrating one or both beliefs, or any of the "infinite variations."[166] Beyond personal circumstances, the woman may likewise object to being associated with the belief that giving birth is the right or moral message in a world when there are already children that could use a good home and when population growth contributes to poverty, overpopulation, and environmental decline.

"Abortion is murder." Moreover, because opponents of abortion have inextricably linked the act to questions of morality and good versus evil, pregnancy and childbirth are now viewed in starkly moral terms as well. Abortion is murder, evil, and inconsistent with the teachings of specific religions. And, by extension, someone that would choose an abortion is a murderer, evil, and sinful. It should go without saying that a woman may object to being seen as advocating or endorsing such messages even if she may personally agree.

"The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother."[167] Laws prohibiting abortion fundamentally change the meaning of motherhood and childbirth. If compelled to carry a child to term, conformance may be understood as acceptance or endorsement of a specific and historically subordinate role in society. This would include the message that a woman's role in society is to bear and raise children, and that she bears primary responsibility. Likewise, she may object to the message that carrying a child to term is more important than her physical and emotional wellbeing, the nature and quality of her life, or continuing her education or pursuing a career. Carrying a pregnancy to term may also represent acceptance or endorsement of systemic gender discrimination because without reproductive control, women literally have no control over their future, and that lack of control results in lifelong social and economic disparities. Finally, a woman may not want her pregnancy, giving birth, and the child to be seen as a celebration or cause for celebration especially in cases of rape and incest, or a constant reminder that she is "having *his* baby."

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[163] *Casey,* 505 U.S. at 873.
[164] *Id.* at 853.
[165] *Id.* at 853.
[166] *Id.* at 853.
[167] Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J. conc.).

Correspondingly, denying women the freedom to decide when to bear children alters the message for those that affirmatively choose to carry the pregnancy to term.[168] For example, women who choose to become mothers of children with down syndrome or genetic abnormalities often do so because the decision reflects their beliefs regarding life and motherhood, and allows them to convey their views and opinions to others.[169] However, when all women are required to carry pregnancies to term, the law alters the message of those that freely choose to do so. From the perspective of an outside observer, there is no difference between those that wish to celebrate the event and welcome the challenges to come, and those who do not.

Unlike *Masterpiece Cakeshop* and *Sorrell,* there is one more set of ideas and beliefs that a woman may not want to express or endorse. The birth of a child automatically assigns the woman the role of mother, whether she chooses to embrace that role or not, and inescapably creates an expressive relationship mother and child. A woman who raises a child may believe that she is communicating to the child that this is the best that she can do as a mother, or that she is either incapable or unwilling to provide the child with a better upbringing. She may object to the idea that she and the child can be used to endorse and celebrate the idea that any time is the right time to become a mother. Correspondingly, compelling women to give birth means that some women will choose to give the child up for adoption, to place the child in the custody of the state, or worse, abandon the child to fate. In other words, the woman may choose to deny "the infant a bond of love."[170] Under these circumstances, at the very least, she may not want to convey the idea that she wanted to abandon the child, does not love or care about the child's future. Correspondingly, she may not want the child to interpret her decision as a message that they are not wanted or unloved, and specifically, that their own mother neither wanted or loved them.

These are just a few examples of the beliefs and messages conveyed when women are forced to carry pregnancies to term. Of course, there are many positive messages connected to pregnancy and giving birth, but the question is not whether some people would voice different opinions; it is whether the First Amendment protects those that object to conveying or endorsing the government's message. Once a child is born, a woman is automatically assigned the role of mother. Values, identity and responsibilities come with this role, and her actions necessarily confer information and messages even when she objects to the role or would prefer to remain silent.

If forced to carry a pregnancy to term, the information that a woman is forced to provide to others, and the associated messages to which she might object are more clear, profound, and long lasting than the speech at issue in *Sorrell* or *Masterpiece Cakeshop.* The data broker did not play a role

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[168] I am indebted to B. Jessie Hill for this observation.
[169] *SEE* CHRIS KAPOSY, CHOOSING DOWN SYNDROME: ETHICS AND PRENATAL TESTING TECHNIQUES (2018).
[170] *Casey,* 505 U.S. at 853.

in creating the data and has no interest in the content of the information, only its commercial value. Even then the prescriber information will not necessarily be incorporated into even commercial speech, but may simply be used to estimate the number of pills to produce for the next quarter. Likewise, unless the baker chooses to publicize their involvement with the wedding, they are only required to sell a cake. The baker is not forced to spend time with the couple, attend or participate in the event, and is certainly not required to offer congratulations to the happy couple. In both cases, the messages are barely discernible and fleeting at best.

In contrast, the messages conveyed by pregnancy go to the core of human identity, dignity, and morality. They address the meaning of life, liberty, and the principles of free government. Once again, as Justice O'Connor described, reproductive freedom concerns "not only the meaning of procreation but also human responsibility and respect for it."[171] Moreover, women and the potential life they carry are inextricably and permanently bound together. During pregnancy, they are connected in the most intimate of ways, as the fetus is both part of her and inside of her, and her pregnancy is there for the entire world to see. She cannot hide the fact that she is pregnant or that her pregnancy has ended without taking extreme measures and even then, will not be able to hide those facts from everyone. While drug manufacturers might prefer to use prescriber data, they are still free to obtain that information from the doctors directly and to market and sell their products without that additional information. And, while the baker may be morally offended by a client that wants to purchase a cake, that may be their only interaction, and the baker can continue to sell wedding cakes to heterosexual couples. The messages are based upon commercial transactions. In contrast, when a woman is forced to carry a pregnancy to term, the messages she sends are unique to her and to her child, and they will continue for the remainder of their lives.[172]

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[171] *Id.*

[172] Reproductive freedom is not the only liberty guaranteed by the Supreme Court that implicates freedom of expression as well. The Supreme Court has long recognized the freedom of parents to determine how to educate their children. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (foreign language instruction); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (private education); Wisconsin v Yoder, 406 U.S. 205 (1972) (ending instruction). Likewise, the Supreme Court has recognized the freedom of individuals to express love and affection for one another. *See* Griswold v Connecticut, 381 U.S. 479 (1965) (use of contraception); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Lawrence v. Texas, 539 U.S. 558 (2003) (same sex sexual activity); Obergefell v. Hodges (same sex marriage). These cases involve freedom of expression and association as much as they do individual interests in autonomy, privacy, equality, and religion. For example, Lawrence Tribe has argued:

> In the end, what anchors all of these decisions - from Meyer and Pierce to Griswold and Lawrence - most firmly in the Constitution's explicit text and not solely in the premise of self-rule implicit in the entire constitutional edifice is probably the First Amendment's ban on government abridgements of "speech" and "peacabl[e] … assembl[y]," taking those terms in their most capacious sense.

Laurence H. Tribe, *Lawrence v. Texas: The Fundamental Right That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1939-1940 (2004). *See also* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association*, 99 Nw. U. L. Rev. 839, 841-842 (2005) (arguing that the Supreme Court's protection of freedom of association places too much on the messages those associations make to the public rather than their importance in internal formation of thoughts and ideas) ("Intimate associations, such as the family,

Lastly, it is impossible for women to disassociate themselves from the messages expressed by pregnancy and childbirth. In cases in which the individual is not compelled to speak but may be required to otherwise accommodate expression, the Supreme Court has consistently considered whether the complainant is capable of communicating that they are neither the source nor endorse the message to which they object.[173] As discussed above, the connection between mother and child is lifelong and, even if a mother chooses to withhold her identity from the child, it is impossible for her to dissociate herself from the myriad messages conveyed by her pregnancy and subsequent birth.

Once we consider whether pregnancy and childbirth may reasonably be understood as expressing certain ideas and beliefs, it becomes clear that laws prohibiting abortion interfere with a woman's decision to share important personal information and communicate core values and beliefs. In other words, the First Amendment covers a woman's decision to carry a pregnancy to term.

B. Freedom of Expression Embraces Reproductive Freedom

The First Amendment covers pregnant women the freedom to obtain safe abortions. By itself, this is a rather remarkable proposition. Abortion is a medical procedure, and freedom of speech is not the first freedom or right that comes to mind. Historically, the constitutional question is considered under the Fourteenth Amendment, and, a woman's freedom to obtain an abortion is protected by the Due Process Clause.[174] By preventing a woman from safely ending a pregnancy, abortion restrictions deny her the freedom to make the most personal decisions about herself and her life thus deny her the liberty guaranteed by the Due Process Clause.[175] Likewise, efforts to restrict

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friendships, and other close personal relationships, are sites for the formation and transfer of culture and the emotional attachments that are crucial to one's identity."); B. Jessie Hill, *The Deliberative-Privacy Principle: Abortion, Free Speech, and Religious Freedom,* 28 Wm. & Mary Bill Rts. J. 407 (2019) (arguing that a broader understanding of privacy underlies these issues).

[173] *See* Pruneyard Shopping Center v Robins, 447 U.S. 74 (1980) (concluding that a shopping center owner's freedom of speech was not violated when required to accommodate non-shoppers' freedom of expression); Turner Broadcasting Sys. Inc. v. FCC, 512 U.S. 622 (1994) (concluding that requiring cable operators to carry local broadcast stations did not violate the free speech interests of the cable operators); Capitol Square Review and Adv. Bd. v. Pinette, 515 U.S. 753 (1995) (concluding that the city must permit the Ku Klux Klan to erect a temporary cross in Capitol Square); Rumsfeld v Forum of Academic & Institutional Rights, Inc. (FAIR), 547 U.S. 47 (2006) (concluding that a law school's freedom of expression was not violated by requiring the school to admit military to campus to recruit with other employers).

[174] Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v Casey, 505 U.S. 833 (1992).

[175] *Roe,* 410 U.S. at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Casey,* 505 U.S. at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the

abortion have been considered violations of the Equal Protection Clause because of the traditional political and legal subjugation of women,[176] and, as Justice Ginsburg noted, the ability of women to "realize their full potential … is intimately connected to 'their ability to control their reproductive lives.'"[177] However, as the preceding demonstrates, compelling women to give birth to a child interferes with their expression as well. Denying the opportunity to obtain safe abortions compels women to share and communicate information, endorse ideas and opinions to which they object or which they would prefer not to discuss, and/or "the right not to be used as a *vehicle* for speech."[178] How would these claims be evaluated under the First Amendment? Even if freedom of speech is implicated is a state's interest in the protection of life sufficiently compelling to justify any restriction upon the woman's expression?

1. Women are not Symbols

Initially, one could argue that forcing a woman to give birth is presumptively invalid because it regulates the content of her expression. Under Justice Thomas' understanding in *Masterpiece Cakeshop,* compelled reproduction is compelled speech. The First Amendment denies the government the authority to force individuals to salute the flag and pledge allegiance,[179] display a message,[180] or contribute to a cause.[181] As the Justices have noted: "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[182] It is only logical to recognize that this principle should apply to compelling a woman to assume the identity and role of mother. Moreover, the nature of the compelled expression makes this circumstance particularly concerning. Anti-abortion legislation does not address injuries suffered by the public; supporters seek to compel others to follow their personal beliefs regarding the sanctity of life. As Justice Blackmun established in *Roe v. Wade,* there has never been any religious, scientific, or political consensus on when a fetus should be considered a person, and the Constitution speaks only in post-natal terms.[183] This is the fundamental reason for both the holding in *Roe* and its reaffirmation in

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mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.")

[176] Gonzales v. Carhart, 550 U.S. 124, 171-172 (2007) (Ginsburg, J. diss.). *See also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade,* 63 N.C. L. REV. 375 (1985); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

[177] *Gonzales*, 550 at 171.

[178] Tribe, *supra* note 78 at 647.

[179] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)

[180] Wooley v Maynard, 430 U.S. 705 (1977)

[181] Janus v. American Federation of State, County, and Municipal Employees, 585 U.S. ___, 138 S.Ct. 2448 (2018)

[182] Turner Broadcasting Systems, Inc. v. FCC, 512 U. S. 622, 641 (1994).

[183] *Roe,* 410 U.S. at 159-162.

Planned Parenthood v. Casey that state authority to prohibit abortions begins at viability.[184] Aside from viability or live birth, any other definition is essentially arbitrary and implicates the freedom of religion protected by the First Amendment because it compels dissenters to accept, endorse, and celebrate a particular religious belief. As discussed above, the pregnancy, birth, and the child's existence are symbols and testaments to such beliefs.

Relying upon *Sorrell,* one could argue that the law is unconstitutional because it punishes expression based upon its content, viewpoint, and identity of the speaker. Restrictions on abortion are based upon a pregnant woman's objection to endorsing and celebrating the belief that life begins at conception, and/or that a fetus is a person. They single out individuals capable of bearing children and penalize those that, at least for the time being, object to expressing an opinion on the topic of pregnancy or motherhood. In the words of Justice Kennedy, the law "singles out" a disfavored viewpoint and targets that restriction only at the group with the most at stake. As the preceding demonstrates, with respect to a fetus that can only survive in a woman's uterus, denying women the freedom to determine whether to give birth compels them to play the role of mother forcing them to adopt a disputed, often sectarian definition of life, to endorse that definition and celebrate its message. Again, under these circumstances, anti-abortion laws would be presumptively unconstitutional.[185]

2. "An Abstract Interest in Life"

But isn't abortion different because abortion end life? *Roe* itself recognized that States have a legitimate interest in protecting prenatal life even before viability.[186] As such, the public's interest protecting life, specifically the child's life, should be a sufficiently compelling government interest capable of outweighing a woman's expression. Assuming for the purposes of this analysis, that laws punishing speakers based upon the content of their communication or compelling them to convey the government's could still be upheld if they otherwise survive strict scrutiny, which requires that the law to serve both a compelling government interest AND be the least restrictive means to achieve that interest,[187] limiting access to abortion is not sufficiently tailored to achieve the purpose even under the more deferential standard of review establish in the seminal case of *United States v. O'Brien.*[188] In that decision, the Supreme Court concluded that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important

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[184] Casey, 505 U.S. at 870-871.

[185] While there is an outward appeal to the argument that abortions restrictions should be considered presumptively unconstitutional such a conclusion runs of risk of making this a category 3 argument which I criticized in Part II.B. The true value for this analysis is its relationship to categories 1 and 2, and the conclusion that pregnancy falls within the interests of the First Amendment AND that denying access to abortion interferes with those interests.

[186] *Roe,* 410 U.S. at 162 (recognizing that a state "has still *another* important and legitimate interest in protecting the potentiality of human life.") (emphasis in original).

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[188] 391 U.S. 367 (1968).

government interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms."[189] Such a law is constitutional if:

> [I]t is within the constitutional power of the Government; furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[190]

In both *Masterpiece Cakeshop* and *Sorrell,* the Justices acknowledged that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove 'White Applicants Only signs ..."[191] However, they did not consider the *O'Brien* test arguing that the law imposed more than an incidental burden on speech. Justice Thomas distinguished *O'Brien,* arguing that the test, "does not apply unless the government would have punished the conduct regardless of the expressive component."[192] Justice Kennedy likewise rejected this approach because the privacy law "on its face and in its practical operation … imposes a burden based on the content of speech and the identity of the speaker."[193]

Supporters of laws restricting abortion will argue that these laws satisfy *O'Brien* because the government has the power, if not duty, to protect the health and safety of its citizens. Abortion is conduct that ends potential life, and denying access to abortion is a legitimate means of protecting that life. Moreover, even if abortion is banned, individuals remain free to express their opinions on the subject and to persuade others to adopt their views personally or through the political process. As discussed below, while protecting prenatal life may be a substantial or even compelling government interest the purpose of protecting the life of the unborn only satisfies the

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[189] *Id.* at 376.
[190] *Id.* at 377.
[191] *Sorrell,* 564 U.S. at 567; *Masterpiece Cakeshop,* 138 S.Ct. at 1741
[192] *Masterpiece Cakeshop,* 138 S.Ct. at 1746.
[193] *Sorrell,* 564 U.S. at 567. Arguably, the laws in both *Masterpiece* and *Sorrell* would have satisfied *O'Brien* as regulations directed to commerce and governing the sale of goods. If states may prohibit a baker from discrimination based upon protected characteristics and cannot post a sign, "only heterosexual couples need inquire," they may prohibit the baker from refusing to bake a cake. Preventing discrimination in the marketplace is within the power of the government, it represents an important, if not compelling, government interest unrelated to the suppression of expression, and the restrictions on speech are no greater than is essential. With regard to the last requirement, the baker is free to express his views on same-sex marriage except by denying customers equal access to his services. The baker is only subject to this limitation because he voluntarily opened a business to the public and offered to sell wedding cakes. Likewise, in *Sorrell,* the law only prohibits the sale of prescriber data without the consent of the prescriber. Under these circumstances, privacy laws protect an individual's freedom to determine when and under what circumstances third parties may gain access to their activities, and the Supreme Court has traditionally recognized differing levels of protection when the speech involves matters of public versus private concern. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (declining to apply the same level of First Amendment protection for defamation when the speech did not involve a matter of public concern).

first element of *O'Brien.* States must still demonstrate that compelling women to become mothers is unrelated to suppressing the woman's expression and that any "incidental" impact on the woman's expression is no greater than necessary to further that interest. Furthermore, when considering these requirements, judges must conduct an independent evaluation and cannot defer to any plausible legislative justification and are not free, let alone required, to manufacture one of their own.

While supporters of anti-abortion measures may sincerely believe that compelling women to become mothers protects the life of the child, the First Amendment demands more than good intentions. While anti-abortion laws protect conception, insulating conception regardless of the pregnant woman's wishes is not equivalent to protecting the health and safety of the child during or after pregnancy. As Justice Brennan noted in a different context, "the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life…"[194] An extensive body of literature exists examining the relationship between unwanted pregnancies and the subsequent effects upon the women and children involved and that literature will not be repeated here.[195] Instead, this essay summarizes the findings from the TURNAWAY STUDY, a ten year study of a thousand women seeking abortions who either had the procedure performed or were forced to carry the pregnancy to term.[196] In light of this research, the criticisms and the reasons offered by the Supreme Court in both *Roe* and *Casey* take on new significance when considered under the heightened scrutiny required by the First Amendment.[197] The Constitutional question is not whether laws restricting abortion are effective or wise means of achieving the states' "legitimate interests in the health of the woman and in protecting the potential life within her,"[198] but whether states can demonstrate that laws restricting abortion further that legitimate purpose, and, therefore, are unrelated to the suppression of expression. If the law furthers a legitimate purpose unrelated to expression, the state must then demonstrate that any incidental burden on expression is no more than necessary to achieve that interest. While abortion restrictions protect conception, there is no factual support for the proposition that they protect the health and safety of the woman, the fetus she carries, or the child that may be born. Rather, the evidence strongly supports the opposite conclusion: denying women access to safe abortions exposes women and children to greater harm.

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[194] Cruzan v Director, Missouri Dep. of Health, 497 U.S. 261, 313 (1990) (Brennan, J, diss).

[195] *See* Caroline Mala Corbin, *Abortion Distortions,* 71 WASH. & LEE L. REV. 1175 (2014) (collecting studies); Jessica D. Gipson, Michael A. Koenig and Michelle J. Hindin, *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature,* Studies in Family Planning, Mar., 2008, Vol. 39, No. 1 (Mar., 2008), pp. 18-38. *See also* Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood,* 17 J.L. & Pol'y 97, 103-118 (2008) (summarizing medical risks and health consequences).

[196] DIANA GREENE FOSTER, THE TURNAWAY STUDY (Scribner 2020).

[197] The same can be said for considering abortion restrictions as sex discrimination under the Equal Protection Clause. *See supra* note 173.

[198] *Casey,* 505 U.S. at 871.

As the Supreme Court recognized in *Roe,* forcing a woman to carry a pregnancy to term negatively impacts her health and well-being and the health and well-being of the child.[199] By its very nature, pregnancy impacts the physical and emotional wellbeing of a pregnant woman, and carries with it a small, but very real chance that the pregnancy will result in the mother's death.[200] According to the Centers for Disease Control, in the United States approximately 700 women die per year because of complications related to pregnancy and delivery.[201] In 2017, the US recorded 17.3 deaths for every 100,000 live births.[202] Under no other circumstances does the government require individuals to risk or sacrifice themselves to save another life.[203] Drafting individuals for military service is the closest analogy, and the purpose of the draft is to protect the entire public, not to serve the interest of one potential life.[204]

Fortunately, death is a relatively rare outcome, but pregnancy can negatively affect health in other ways. Some women experience high blood pressure; for others high blood pressure damages organs including the liver and kidney, and in some cases lead to seizures.[205] For some women pregnancy results in diabetes which not only has life-long health consequences for them, but increases the risk of birth defects, stillbirth, and preterm birth.[206] Other women experience depression, in some cases severe, both during and after the pregnancy.[207] Women are subject to deep vein thrombosis and pulmonary embolism where blood clots form and break away to block the lungs.[208] Some women will experience hemorrhaging/serious bleeding that require medical

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[199] *Roe,* 410 US. at 153:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

Accord Thornburgh v American College of Obstetricians and Gynecologists, 476 U.S. 747, 769 (1986) (concluding that the state "cannot require the mother to bear an increased medical risk in order to save her viable fetus."). *See also* Smith, *supra* note 192 (summarizing the medical research). *See also* B. Jessie Hill, *Reproductive Rights as Health Care Rights,* 18 COLUM. J. GENDER & L. 501 (2009) (arguing that access to abortion can be seen as a right to protect one's health free from government interference).

[200] *See* Global, Regional, and National Levels of Maternal Mortality,1990–2015: A Systematic Analysis for the Global Burden of Disease Study 2015; Lancet 2016; 388: 1775–812.

[201] Maternal Mortality, Center for Disease Control and Prevention available at <https://www.cdc.gov/reproductivehealth/maternal-mortality/index.html>

[202] *Id.*

[203] *See* Donald H. Regan, *Rewriting Roe v Wade,* 77 MICH. L. REV. 1569 (1979) (evaluating whether a woman has a duty to protect the fetus as a Good Samaritan).

[204] *Id.* at 1605-1608.

[205] *See* Smith, *supra* note 192 at _ ; Maternal and Infant Health, Center for Disease Control and Prevention available at <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/index.html>.

[206] *Id.*

[207] *Id.*

[208] *Id.*

intervention, in some cases requiring a hysterectomy thus ending her physical ability to have children in the future.[209]

While the preceding risks apply to both wanted and unwanted pregnancies, the Turnaway Study documents that women forced to carry a pregnancy to term are more likely to experience negative mental and physical health consequences. With respect to mental health, the Study found that as a whole, there were no differences between the two groups with respect to long term mental health[210] and post-traumatic stress.[211] However, women denied an abortion experienced "more symptoms of anxiety and stress and lower levels of self-esteem and life satisfaction" in the short term.[212] The study found that the initial response to receiving an abortion was overwhelmingly relief.[213] The denial of an abortion led predominantly to feelings of sadness and regret.[214] Moreover, the study found that, as a group, women who had an abortion did not develop increasing feelings of regret in the years that followed, but rather experienced a decline in all emotions with relief still remaining the most common feeling.[215] With respect to regret, the study found that 95% of women reported that abortion was the right decision for them, with women who reported high community stigma associated with abortion to be the most likely to regret the decision.[216] Correspondingly, while the majority of women denied an abortion initially reported their continued desire for the procedure, feelings of regret declined over time, with women who had less family support, an easier time making the original decision, or placing the child for adoption being the most likely to continue to wish that they had the abortion.[217]

With respect to physical health, the study found that a woman's physical health is more likely to be harmed by carrying a pregnancy to term than having an abortion. In fact, "A woman in the United States is 14 times more likely to die from carrying a pregnancy to term than from having an abortion."[218] Given the impact of pregnancy on a woman's body, this result should not be surprising as the report notes a third of all deliveries involve a Caesarean section, and serious complications are associated with one in four births in general. [219] With respect to the women in the study, two deaths were reported for women who gave birth while there were no deaths among the women who obtained an abortion.[220] 6.3% of women that carried their pregnancies to term reported potentially life threatening conditions compared to 1.1% of women whose abortions were

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[209] *Id.*
[210] TURNAWAY, *supra* note 193 at 109.
[211] *Id.* at 118-120
[212] *Id* at 108.
[213] *Id.* at 121.
[214] *Id.* at 122.
[215] TURNAWAY, *supra* note 193 at 123.
[216] *Id.* at 125.
[217] *Id.* at 126.
[218] *Id.* at 143.
[219] TURNAWAY, *supra* note 193 at 143.
[220] *Id.* at 149-150.

performed just under the gestational limit and .5% of women in the first-trimester.[221] Long term, women who gave birth were more likely to report poor or fair health and experience high blood pressure.[222]

Both *Roe* and *Casey* concluded that states may not limit abortions when the woman's health and life is threatened because doing so would violate her substantive rights under the Fourteenth Amendment. Under the First Amendment, requiring a woman to subject herself to the risks of pregnancy itself, let alone a failure to recognize exceptions for the health and safety of the woman, undermines the argument that denying women access to abortions serves the purpose of protecting her health and safety during pregnancy. The unfortunate reality is that forcing women to carry a pregnancy to term guarantees that some women will die, the health of other women will be impaired for life, and still others will lose the ability to become pregnant in the future.

Likewise, restricting abortion does nothing to provide for a healthy pregnancy. Other than forcing the pregnant woman to remain pregnant, these laws do nothing to ensure a healthy pregnancy or a healthy birth. Laws restricting or banning abortions are not contingent upon access to healthcare, treatment for substance dependency, mental health services, nutrition, housing, transportation, financial assistance, assistance with children for whom she is already responsible, education, or job training and placement. These services are not only relevant to the health of the woman, but fundamental to the healthy development of the fetus. Without any guarantee that a pregnant woman will receive the resources necessary for a healthy pregnancy, laws restricting abortion guarantee that some pregnancies will result in otherwise avoidable miscarriages, birth defects including brain damage, learning and developmental disabilities, and other life-threatening conditions.[223] Once again, under these circumstances, laws prohibiting abortion only protect conception. While such laws guarantee that pregnancies will continue, they do nothing to ensure that compelled pregnancies result in live births or healthy children. Without more, prohibiting abortion only guarantees that some children will be born with lifelong medical and developmental challenges, and still others will be born only to experience a painful, brutal, and short existence.[224]

Lastly, laws restricting abortion do nothing to address the lifelong emotional and economic well-being of woman or child. Laws prohibiting abortion force women to confront obstacles that they

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[221] *Id.* at 146.
[222] *Id.* at 148.
[223] *See* Under-Nutrition Before and During Pregnancy available at <https://healthengine.com.au/info/under-nutrition-before-and-during-pregnancy>.
[224] *See* Smith, *supra* note 165 at 117 ("[w]omen repeatedly state that one of the main reasons they choose to terminate wanted pregnancies is that the information they learn in the second trimester confirms, if the fetus were to survive, its life would be short and fraught with pain.") (quoting Brief of IRHA at 11, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380).

would not have otherwise faced.[225] Overall, the TURNAWAY STUDY found that women denied abortions were more likely to experience:

> [a]n increase in poverty; a decrease in employment that lasts for years; a scaling back of aspirational plans and years spent trying to raise a child without enough money to pay for food, housing, and transportation instead of pursuing other life goals.[226]

Of the women in the study, sixty-one percent of women denied abortions were living below the poverty level six months after birth compared to 45% of women who received the abortion.[227] And, over the next four years the women who had given birth were significantly more likely to be poor,[228] and more likely to be "raising children as single parents with no family support."[229] This was not only true for the woman and newborn but for her existing children as well.[230] Existing children were not only more likely to experience poverty, but also less successful at achieving age related developmental milestones such as fine motor skill, expressive language, and social-emotional.[231] With respect to the child born from the unwanted pregnancy, the study found that the women were more likely to report less emotional attachment with the child including feelings of being trapped,[232] and while the mother may subsequently develop a closer relationship this initial bonding phase is associated with the child's long-term psychology and development outcomes.[233] Moreover, the study found that women denied abortions were more likely to experience violence from the father.[234] In part, this can be attributed to the fact that having the child results in ongoing contact with abusers.[235]

Some women will decide not to maintain a relationship with the child following the pregnancy. Lucky children will be well cared for by relatives or adopted by caring and nurturing families. Unfortunately, others will be left to the mercy of underfunded and understaffed state or private institutions. Many of these children will be neglected and abused.[236] Without anyone to support

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[225] *See* TURNAWAY, *supra* note 193 at 163-186 (documenting the profound effect on the lives of women denied abortions).
[226] *Id* at 165.
[227] *Id.* at 176.
[228] *Id.* at 177.
[229] *Id.* at 185.
[230] TURNAWAY, *supra* note 193 at 202.
[231] *Id.* at 202-204
[232] *Id.* at 206-207.
[233] *Id.* at 208
[234] *Id.* at 232.
[235] *Id.* at 234.
[236] *See* Zdenek Dytrych, Zdenek Matejcek, Vratislav Schuller, Henry P. David and Herbert L. Friedman, *Children Born to Women Denied Abortion*, Family Planning Perspectives, Jul. - Aug., 1975, Vol. 7, No. 4 (Jul.-Aug.,1975), pp. 165-171; Henry P. David, *Born Unwanted, 35 Years Later: The Prague Study,* Reproductive Health Matters, May, 2006, Vol. 14, No. 27, Human Resources for Sexual and Reproductive Health Care (May, 2006), pp. 181-190.

them, guide them, or be their champion, they will be unable to form healthy relationships and be incapable of caring for themselves.[237] The failure of anti-abortion laws to address the actual health and safety concerns of woman and child only reinforces the conclusion that those laws do not advance a state's legitimate interest in the health and safety of woman and child, and, therefore, are unconstitutional. Standing alone, antiabortion laws are not pro-child, pro-woman, or pro-life. They are simply anti-abortion.

C. Judicial Review not Activism

Having identified how abortion implicates a woman's freedom of speech, and why laws restricting abortion violate the First Amendment, this part concludes by addressing the Fourteenth Amendment Due Process connection between bakers and pregnant women, and why First Amendment analysis reveals the defect of paying lip service to judicial review in both circumstances. If judges must more carefully evaluate whether bakers should be free to deny their services to same-sex couples, women should, at the very least, receive the same consideration when it comes to bearing children.

In the years, if not months to come, the First Amendment may become the only provision of the Constitution that requires, or allows, courts to consider whether laws restricting abortions restrict a woman's freedom no more than necessary to protect health and safety. Because the Supreme Court's decisions on reproductive freedom are based upon the Due Process Clause of the Fourteenth Amendment, the Supreme Court may conclude that like freedom of contract, laws interfering with a woman's decision to carry a pregnancy to term are subject only to rational basis review. Unless courts adopt the standard proposed by Justice Brennan in *Fritz*[238] or something similar, laws restricting abortion, if not outlawing abortion, will be upheld under the "any plausible" reason standard. Under this standard, the underlying purpose and its relationship to the actual health and safety of mother and child become irrelevant. Instead, reality is replaced by any plausible fiction fabricated by the government. As discussed in Part II.C., this is judicial abdication, not judicial review.

With respect to reproductive freedom, the error of judicial abdication is compounded by the fact that it only becomes the standard if the Supreme Court engages in judicial activism. States will only be entitled to this level of deference if the Supreme Court overrules *Roe* and its progeny. While it is certainly true that a Supreme Court decision can be wrong from the day it was decided, overturning *Roe* necessitates rejecting almost fifty years of precedent during which, in the face of constant and vocal criticism, Justices appointed by both parties consistently concluded that the liberty guaranteed by the Constitution includes the liberty of a woman to decide whether to carry

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[237] *Id.*
[238] *See supra* Part II.C.

a pregnancy to term. As Justice O'Connor emphasized in *Casey,* the only honest explanation for rejecting *Roe* is a surrender to political pressure.[239] In other words, if states are given the authority to define life as beginning from conception or to exercise the police power under those circumstances, regardless of the justification, it will not be because the Court is correcting an error in legal reasoning, the bias of previous Justices, or because of changed circumstances; it will be the result of a concerted political effort to pack the judiciary with judges who are more committed to ending abortion than upholding the rule of law. To reach their desired outcome, they will not follow precedent or rely upon the text of the Constitution which only refers to persons born or the longstanding definition of state police power as protecting the interests of the public. Instead, they must overturn precedent and argue that the terms used in the Constitution and understood over centuries have been misunderstood and misapplied. They will then ignore the fact that being capable of surviving outside of the womb is the only definition of a person that is not arbitrary. Instead, they will adopt the highly disputed proposition that the power of state begins at the moment of conception, and, perhaps with some exceptions, is superior to any interest of the individuals actually affected. The Supreme Court must do all of this to give states the authority to burden the freedom and lives of individuals to vindicate a theory of life that members of the public do not share and do not want imposed upon themselves or others. After adopting all of these disputed theories, *Lochner* will now be invoked to not only deny courts the authority to review legislative decisions, but to impress them in the service of defending those decisions, no matter how arbitrary or cruel.

There may someday be a future in which protecting life at conception is not where a state's power begins and its obligations end. In this world, protecting fetal life might be a rational and reasonable part of a comprehensive system that protects health and promotes the wellbeing of all its citizens, not just their conception. In a world where the government takes sufficient responsibility for the lives that it changes, requiring a woman to carry her pregnancy to term may be more than symbolism. The pregnant woman and potential child would be more than living tributes to someone else's definition of life, but would be treated as human beings equally deserving of dignity and respect as those who would fundamentally change their lives. If such a world were to exist, prohibiting abortion as a means of protecting the health and safety of citizens would be less arbitrary and more reasonable (even if still unconstitutional). But in the United States in 2021, and for the foreseeable future, this is nothing more than fantasy. Unfortunately, if courts must defend rather than evaluate whether a law is consistent with the freedom guaranteed by the U.S. Constitution, then a fantasy will be all they need to ignore the reality that denying woman access to safe abortions only serves to vindicate the moral and religious beliefs of abortion opponents by imposing lifelong harm and hardship on women and children.

IV. Conclusion: A right by any other name …

[239] *Casey,* 505 U.S. at 867 ("So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

"The beginning of wisdom is to call things by their right names." - Confucius.

Following the lead of the current Justices of the Supreme Court, this essay evaluated the reasons for renaming freedom of contract and reproductive freedom, freedom of "speech," and what wisdom it might provide. We learned that expression is sufficiently elastic to justify a closer analysis of the claims of bakers and mothers. Moreover, understanding that expression is implicated becomes a legitimate means of obtaining some semblance of judicial review. While heightened review may not change the result, nor should it necessarily, it plays an important role in ensuring that the principles of the Constitution, including the principle of judicial review are upheld. If this is true for contracts, it is also true for abortion. Appreciating the symbolism and messages involved in carrying a pregnancy to term, the essay demonstrated that laws prohibiting abortion hijack women and children to serve as testament to the proposition that the unborn are more important than the living, and demonstrate that beliefs of those opposed to abortion are more important than the pain and suffering they inflict upon strangers. Unless courts are permitted or even forced to explain how such a state of affairs is consistent with the justice and liberty guaranteed by the Constitution, they will be unable to hide the evidence that forcing women to carry a pregnancy to term imposes significant harm upon mother and child alike. All of this was made possible by considering whether old problems should be given new names.

However, the story of bakers and mothers is as much about the freedom to determine when and how we share our lives as it is about the messages we share. The baker's real objection is not being compelled to voice his support for same-sex marriage -- that was not what the law required; the baker is objecting to being forced to do business with a same-sex couple getting married. Likewise, while privacy laws may limit the information a party would like to use for expression based upon what information represents, the primary purpose of privacy protection is to provide individuals with some agency over when they will become the subject of surveillance. Likewise, the pro-life movement behind efforts to restrict or outlaw abortion unquestionably wants to send the message that life begins at conception and should be celebrated. But abortion is also a disagreement over whether the pregnant woman is free to determine when, if ever, she will create the most fundamental and intimate of associations and become a mother to a child. While these cases have traditionally been considered under substantive due process, or as explored above, under freedom of speech, the individual nature of those freedoms tends to overshadow the fact that the decisions and consequences take place in relationships, not in isolation.[240]

[240] A full discussion of this topic is far beyond the scope of this essay, but in short, I believe that the power of the government to regulate relationships is directly related to the consensual nature of the relationship, how open those associations are to strangers, and the power they exercise or seek to exercise over those outside of the association, and is predicated on the government's authority to protect individual and group autonomy from private as well as public power. Seana Shiffren and Lawrence Tribe have already sketched more comprehensive theories of freedom of association beyond freedom of expression. *See* Shiffrin, *supra* note 169 at 867-869 (grounding associational freedom in liberalism and the value of cooperative activity);

While a woman's decision to terminate a pregnancy clearly involves "her body, her choice," protection of individual and personal autonomy is only part of the story, and on its own allows opponents to describe abortion as selfish and anti-family. Framing the pregnant woman's liberty interest as the freedom to determine "what's best for me" does not capture or reflect the actual reasons women seek abortions which have more to do with the relationships that will be created or altered by a pregnancy. In the Turnaway Study, researchers found that the women in the study overwhelmingly sought an abortion because they believed it was best for their existing children and the potential child.[241] The women did not choose abortions flippantly or callously to have more time to party for example, they chose abortion because they believed that they would not be able to provide the resources and environment to safely raise a healthy child, or be ready for the physical, mental, and emotional demands of good parenting.[242] Women were also concerned about whether they would be raising the child on their own as poor relationships with men was cited as a major reason for seeking an abortion as the relationships were already too fragile, toxic, or abusive.[243] Unsurprisingly and unfortunately, as discussed in Part III.B, the women denied abortions accurately predicted the hardships they and their children would face, and the study ends with a plea to trust women.

Ultimately, it should not matter whether a woman's freedom is labeled as privacy, speech, or association. While the Constitution names certain freedoms, it protects liberty in general and expressly rejects the proposition that only named freedoms are guaranteed.[244] Names only matter because members of the Supreme Court use them to change the nature of judicial review. While this approach may be useful shorthand, the Justices also use the labels they create to hide when they are not defining the liberty of all, but rather mandating their own moral code. Even more troubling is the fact that when Judges share the same moral code as legislators, they use names as a justification to defend laws enacted based upon those shared beliefs even when they are arbitrary or "sweep unnecessarily broadly and thereby invade the area of protected freedoms."[245] With respect to a woman's freedom to determine whether to carry a pregnancy to term, we should not be distracted by efforts to name the freedom or worry about what doctrinal box it should be assigned to. The only constitutional issue is whether the government can force a woman to become a mother when she believes, quite accurately, that it will be to the detriment of both her AND the

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see Tribe, *supra* note 169 at 1941 (grounding associational freedom in Kantian terms). For more "traditional" analysis of freedom of association *see* Thomas I. Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1 (1964); Kenneth L. Karst, *The Freedom of Intimate Association,* 89 YALE L.J. 624 (1980); Ashutosh Bhagwat, *Associational Speech,* 120 YALE L. J. 978 (2011).

[241] TURNAWAY, *supra* note 193 at 35-42.

[242] *Id.*

[243] *Id.*

[244] U.S. Const. Amend. 9 ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.")

[245] NAACP v. Alabama, 377 U. S. 288, 307 (1964).

child, and when those that would impose their judgment upon those women do so without taking any responsibility for the consequences of their actions.