AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**National Institute of Family and Life Advocates v. Becerra, \_\_\_ U.S. \_\_\_** (2018)

*The National Institute of Family and Life Advocates operates crisis pregnancy centers in California and other states. These facilities provide women with various services, but do not terminate pregnancies. California in 2015 required clinics “providing family planning ore pregnancy related services” to notify all clients that “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA approved methods of contraception), prenatal care, and abortion for eligible women.” Federal clinics and clinics that provided the full range of family planning services did not have to post this notification. That notice including contact information for the local county social services office. Unlicensed facilities were required to notify clients that “[t]his facilities is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.” Immediately after this measure was passed, the National Institute of Family and Life Advocates and other crisis pregnancy centers asked for an injunction forbidding the state attorney general, who when the case reached the Supreme Court was Xavier Becerra, from implementing the notification requirement. They claimed the law compelled speech in violation of the First Amendment as incorporated by the due process clause of the Fourteenth Amendment. The local district court and Court of Appeals refused to grant an injunction. The National Institute of Family and Life Advocates appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-4 vote granted a preliminary injunction. Justice Clarence Thomas’s majority opinion claimed that the National Institute had demonstrated they would likely prevail on the merits of their First Amendment claim. Thomas claims that California had enacted a content-based regulation of speech. Why does he make that claim? Under what conditions does he believe states may compel professionals to speak? Does the ruling, as the dissent suggests, cast doubt on whether states may require doctors to tell parents to make sure to use seat belts when driving their children? In* Planned Parenthood v. Casey *(1992), the Supreme Court ruled that states could be required to inform persons seeking abortion about the possibility of adoption. How does Justice Thomas distinguish this decision? Is the dissent right that there is no good distinction? Both Thomas and Justice Anthony Kennedy insist that California is forcing clinics to make pro-abortion speech. Breyer claims the state is merely compelling clinics to provide information. Who has the better of that argument?*

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ib066fe1f793f11e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations “target speech based on its communicative content.” As a general matter, such laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” This stringent standard reflects the fundamental principle that governments have “‘no power to restrict expression because of its message, its ideas, its subject matter, or its content.’“

The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices “alte[r] the content of [their] speech.” Here, for example, licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing. By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly “alters the content” of petitioners' speech.

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. . . [T]his Court has not recognized “professional speech” as a separate category of speech. Speech is not unprotected merely because it is uttered by “professionals.” . . . And [this Court] has been especially reluctant to “exemp[t] a category of speech from the normal prohibition on content-based restrictions.” This Court's precedents do not permit governments to impose content-based restrictions on speech without “‘persuasive evidence ... of a long (if heretofore unrecognized) tradition’” to that effect.

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This Court's precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts. . . . [That] standard does not apply here. Most obviously, the licensed notice is not limited to “purely factual and uncontroversial information about the terms under which ... services will be available.” The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about state-sponsored services—including abortion, anything but an “uncontroversial” topic. . . . 

In addition to disclosure requirements . . . , In *Planned Parenthood of Southeastern Pa. v. Casey*, . . . this Court upheld a law requiring physicians to obtain informed consent before they could perform an abortion. . . . The joint opinion in Casey rejected a free-speech challenge to this informed-consent requirement. It described the Pennsylvania law as “a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion,” which “for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure.” The joint opinion explained that the law regulated speech only “as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”

The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed. If a covered facility does provide medical procedures, the notice provides no information about the risks or benefits of those procedures. Tellingly, many facilities that provide the exact same services as covered facilities—such as general practice clinics, are not required to provide the licensed notice. The licensed notice regulates speech as speech.

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The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech “pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.” Take medicine, for example. “Doctors help patients make deeply personal decisions, and their candor is crucial.” Throughout history, governments have “manipulat[ed] the content of doctor-patient discourse” to increase state power and suppress minorities:

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In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.

If California's goal is to educate low-income women about the services it provides, then the licensed notice is “wildly underinclusive.” The notice applies only to clinics that have a “primary purpose” of “providing family planning or pregnancy-related services” and that provide two of six categories of specific services. Other clinics that have another primary purpose, or that provide only one category of those services, also serve low-income women and could educate them about the State's services. . . . The FACT Act also excludes, without explanation, federal clinics and Family PACT providers from the licensed-notice requirement. California notes that those clinics can enroll women in California's programs themselves, but California's stated interest is informing women that these services exist in the first place. California has identified no evidence that the exempted clinics are more likely to provide this information than the covered clinics. In fact, the exempted clinics have long been able to enroll women in California's programs, but the FACT Act was premised on the notion that “thousands of women remain unaware of [them.]’

Further, California could inform low-income women about its services “without burdening a speaker with unwanted speech.” Most obviously, it could inform the women itself with a public-information campaign. . . . California argues that it has already tried an advertising campaign, and that many women who are eligible for publicly-funded healthcare have not enrolled. But California has identified no evidence to that effect. And regardless, a “tepid response” does not prove that an advertising campaign is not a sufficient alternative.

We next address the unlicensed notice. . . . California has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome. . . . California has not demonstrated any justification for the unlicensed notice that is more than “purely hypothetical.” The only justification that the California Legislature put forward was ensuring that “pregnant women in California know when they are getting medical care from licensed professionals.” . . . California points to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals. . . .

Even if California had presented a nonhypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech. The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest. It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers. While the licensed notice applies to facilities that provide “family planning” services and “contraception or contraceptive methods,” the California Legislature dropped these triggering conditions for the unlicensed notice. The unlicensed notice applies only to facilities that primarily provide “pregnancy-related” services. Thus, a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed. . . .

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JUSTICE KENNEDY, with whom CHIEF JUSTICE ROBERTS, JUSTICE ALITO, and JUSTICE GORSUCH join, concurring.

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It does appear that viewpoint discrimination is inherent in the design and structure of this Act. This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these. And the history of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs.

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JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

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Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation. Virtually every disclosure law could be considered “content based,” for virtually every disclosure law requires individuals “to speak a particular message.” . . . Many ordinary disclosure laws would fall outside the majority's exceptions for disclosures related to the professional's own services or conduct. These include numerous commonly found disclosure requirements relating to the medical profession. See, e.g., Cal. Veh. Code Ann. § 27363.5 (requiring hospitals to tell parents about child seat belts). . . .

The majority, at the end of Part II of its opinion, perhaps recognizing this problem, adds a general disclaimer. It says that it does not “question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.” But this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification. The majority, for example, does not explain why the Act here, which is justified in part by health and safety considerations, does not fall within its “health” category. . . .

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. . . . Historically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution. Ever since this Court departed from the approach it set forth in *Lochner v. New York* (1905), ordinary economic and social legislation has been thought to raise little constitutional concern. As Justice Brandeis wrote, typically this Court's function in such cases “is only to determine the reasonableness of the Legislature's belief in the existence of evils and in the effectiveness of the remedy provided.” The Court has taken this same respectful approach to economic and social legislation when a First Amendment claim like the claim present here is at issue. Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession. The Court took the view that a State may condition the practice of medicine on any number of requirements, and physicians, in exchange for following those reasonable requirements, could receive a license to practice medicine from the State. . . .

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. . . [T]he Court [in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)] considered the State's statutory requirements, including the requirement that the doctor must inform his patient about where she could learn how to have the newborn child adopted (if carried to term) and how she could find related financial assistance. The Court then held that the State's requirements did not violate either the Constitution's protection of free speech or its protection of a woman's right to choose to have an abortion. . . . If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? . . . .

. . . . *Casey*, in [the majority’s] view, applies only when obtaining “informed consent” to a medical procedure is directly at issue. This distinction, however, lacks moral, practical, and legal force. The individuals at issue here are all medical personnel engaging in activities that directly affect a woman's health—not significantly different from the doctors at issue in *Casey*. . . . The Act requires these medical professionals to disclose information about the possibility of abortion (including potential financial help) that is as likely helpful to granting “informed consent” as is information about the possibility of adoption and childbirth (including potential financial help). . . .

The majority contends that the disclosure here is unrelated to a “medical procedure,” unlike that in Casey, and so the State has no reason to inform a woman about alternatives to childbirth (or, presumably, the health risks of childbirth). Really? No one doubts that choosing an abortion is a medical procedure that involves certain health risks. But the same is true of carrying a child to term and giving birth.. . . Childbirth itself, directly or through pain management, risks harms of various kinds, some connected with caesarean or surgery-related deliveries, some related to more ordinary methods of delivery. . . .

In any case, informed consent principles apply more broadly than only to discrete “medical procedures.”. . . In California, clinics that screen for [breast cancer](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ib73a5554475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) must post a sign in their offices notifying patients that, if they are diagnosed with [breast cancer](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ib73a5554475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), their doctor must provide “a written summary of alternative efficacious methods of treatment,” a notification that does not relate to the screening procedure at issue. . . .

The majority also finds it “[t]ellin[g]” that general practice clinics—i.e., paid clinics—are not required to provide the licensed notice. But the lack-of-information problem that the statute seeks to ameliorate is a problem that the State explains is commonly found among low-income women. That those with low income might lack the time to become fully informed and that this circumstance might prove disproportionately correlated with income is not intuitively surprising. . . .

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The majority concludes that . . . the disclosure “in no way relates to the services that licensed clinics provide.” But information about state resources for family planning, prenatal care, and abortion is related to the services that licensed clinics provide. These clinics provide counseling about contraception (which is a family-planning service), ultrasounds or pregnancy testing (which is prenatal care), or abortion. The required disclosure is related to the clinic's services because it provides information about state resources for the very same services. A patient who knows that she can receive free prenatal care from the State may well prefer to forgo the prenatal care offered at one of the clinics here. And for those interested in family planning and abortion services, information about such alternatives is relevant information to patients offered prenatal care, just as *Casey* considered information about adoption to be relevant to the abortion decision.

. . . . Whether the context is advertising the professional's own services or other commercial speech, a doctor's First Amendment interest in not providing factual information to patients is the same: minimal, because his professional speech is protected precisely because of its informational value to patients. There is no reason to subject such laws to heightened scrutiny.

. . . Abortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth. The disclosure includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other. Similarly, the majority highlights an interest that often underlies our decisions in respect to speech prohibitions—the marketplace of ideas. But that marketplace is fostered, not hindered, by providing information to patients to enable them to make fully informed medical decisions in respect to their pregnancies.

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. . . [T]he key question is whether these exempt clinics are significantly more likely than are the pro-life clinics to tell or to have told their pregnant patients about the existence of these programs—in the absence of any statutory compulsion. If so, it may make sense—in terms of the statute's informational objective—to exempt them, namely if there is no need to cover them. But, if there are not good reasons to exempt these clinics from coverage, i.e., if, for example, they too frequently do not tell their patients about the availability of abortion services, the petitioners' claim of viewpoint discrimination becomes much stronger. The petitioners, however, did not develop this point in the record below. . . .

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. . . . There is no basis for finding the State's interest “hypothetical.” The legislature heard that information-related delays in qualified healthcare negatively affect women seeking to terminate their pregnancies as well as women carrying their pregnancies to term, with delays in qualified prenatal care causing life-long health problems for infants. Even without such testimony, it is “self-evident” that patients might think they are receiving qualified medical care when they enter facilities that collect health information, perform obstetric ultrasounds or [sonograms](https://1.next.westlaw.com/Link/Document/FullText?entityType=mproc&entityId=Iad570df7475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), diagnose pregnancy, and provide counseling about pregnancy options or other prenatal care. . . .

. . . . The Act does not, on its face, distinguish between facilities that favor pro-life and those that favor pro-choice points of view. Nor is there any convincing evidence before us or in the courts below that discrimination was the purpose or the effect of the statute. Notably, California does not single out pregnancy-related facilities for this type of disclosure requirement. And it is unremarkable that the State excluded the provision of family planning and contraceptive services as triggering conditions. Ante, at 18–19. After all, the State was seeking to ensure that “pregnant women in California know when they are getting medical care from licensed professionals,” and pregnant women generally do not need contraceptive services.

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