

SPEECH V. CONDUCT, SURCHARGES V. DISCOUNTS: TESTING THE LIMITS OF THE FIRST AMENDMENT AND STATUTORY CONSTRUCTION IN THE GROWING CREDIT CARD QUAGMIRE

Clay Calvert, Rich Shumate,** Stephanie A. McNeff,***
Stephenson Waters*****

*This article examines First Amendment speech concerns and related issues of statutory construction raised by anti-surcharge statutes that prohibit merchants from imposing “surcharges” on credit card purchases, but allow them to offer “discounts” to cash-paying customers. The article uses the split of authority created by the November 2015 opinion of the U.S. Court of Appeals for the Eleventh Circuit in *Dana’s Railroad Supply v. Florida* and the September 2015 decision by the Second Circuit in *Expressions Hair Design v. Schneiderman* as a timely springboard for analyzing these issues. In September 2016, the U.S. Supreme Court agreed to hear *Expressions Hair Design* and oral argument occurred in January 2017. These cases not only test the fundamental dichotomy in First Amendment jurisprudence between speech and conduct, but also the extent to which courts should provide narrowing constructions to rescue otherwise unconstitutional statutes. Furthermore, the article argues that no-surcharge laws detrimentally affect not only the right of merchants to speak, but also the unenumerated First Amendment right of consumers to receive speech directly affecting their pocketbooks. Finally, the article concludes that no-surcharge laws smack of the worst kind of governmental paternalism—a protection of credit card companies’ corporate interests at the expense of consumers.*

* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California.

** Graduate Research Fellow, Marion B. Brechner First Amendment Project. B.A., 1986, Journalism, University of Wyoming; M.A., 2014, Journalism, University of Arkansas at Little Rock.

*** Graduate Research Fellow, Marion B. Brechner First Amendment Project. B.A., 2013, Criminology, University of Florida; B.S., 2013, Psychology, University of Florida; M.A., 2014, Criminology, Law and Society, University of Florida.

**** Graduate Research Fellow, Marion B. Brechner First Amendment Project. B.A., 2008, Journalism, University of West Florida; M.A., 2015, Mass Communication, University of Florida.

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INTRODUCTION

In November 2015, a divided three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit in *Dana’s Railroad Supply v. Florida*¹ struck down on First Amendment² grounds a Florida

1. 807 F.3d 1235 (11th Cir. 2015), *reh’g en banc denied*, 809 F.3d 1282 (11th Cir. 2016).

2. The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated

statute³ that bans merchants from imposing “a surcharge”⁴ for credit card purchases but that allows them to offer “a discount”⁵ for cash payments. The critical threshold question in the case was whether the statute regulated First Amendment-protected speech or merely economic conduct not subject to free-speech concerns.⁶ The two-judge majority concluded that the statute restricts speech⁷ because it “has the sole effect of banning merchants from uttering the word *surcharge*.”⁸ The majority then declared the law unconstitutional⁹ under the commercial speech doctrine as articulated by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹⁰

Chief Judge Carnes dissented.¹¹ He objected to the majority’s interpretation of “surcharge” as used in the Florida law, dubbing it a “statute-killing definition.”¹² Chief Judge Carnes called for a much narrower, “statute-saving definition”¹³ of surcharge—one not raising First Amendment speech concerns.¹⁴ In January 2016, the Eleventh Circuit denied a petition for a rehearing en banc,¹⁵ thus leaving the November 2015 ruling intact.

In September 2015, the U.S. Court of Appeals for the Second Circuit considered a very similar New York statute and issued an opinion diametrically opposed to that of the Eleventh Circuit majority

more than ninety years ago through the Fourteenth Amendment’s Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

3. FLA. STAT. § 501.0117 (2015).

4. *See id.* (emphasis added) (“A seller or lessor in a sales or lease transaction may not impose a *surcharge* on the buyer or lessee for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller or lessor accepts payment by credit card.”).

5. *See id.* (emphasis added) (providing that the statute “does not apply to the offering of a *discount* for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers”).

6. *See Dana’s R.R. Supply*, 807 F.3d at 1241 (“The fate of Florida’s no-surcharge law hinges on a single determination: whether the law regulates speech—triggering First Amendment scrutiny—or whether it regulates conduct—subject only to rational-basis review as a mine-run economic regulation.”).

7. *Id.* at 1246.

8. *Id.* at 1251.

9. *Id.* at 1249–51.

10. 447 U.S. 557 (1980).

11. *Dana’s R.R. Supply*, 807 F.3d at 1251 (Carnes, C.J., dissenting).

12. *Id.*

13. *Id.*

14. *See id.* at 1257 (writing that neither the Florida statute in question nor a similar New York law “implicates the First Amendment”).

15. 809 F.3d 1282 (11th Cir. 2016).

in *Dana's Railroad Supply*.¹⁶ In *Expressions Hair Design v. Schneiderman*,¹⁷ the Second Circuit considered the validity of a state statute providing that “[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.”¹⁸

A unanimous three-judge panel held that the New York statute “does not regulate speech as applied to single-sticker-price sellers”¹⁹ and, in turn, the Second Circuit had no need to “reach the parties’ arguments under *Central Hudson*.”²⁰ The statute was merely a price-control law that “does not implicate the First Amendment.”²¹ Writing for the appellate court, Judge Livingston reasoned that the New York statute only affects:

[T]he difference between a seller’s sticker price and the ultimate price that it charges to credit-card customers. A seller imposing a surcharge (an additional amount above its sticker price) on credit-card customers could choose to “characterize” that additional charge as whatever it wants, but that would not change the fact that it would be violating Section 518.²²

The Second Circuit’s decision vacated a preliminary injunction against enforcement of the statute that U.S. District Judge Rakoff had issued in 2013.²³ Judge Rakoff had concluded that the New York statute’s “virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment and renders section 518 unconstitutional.”²⁴

The bottom line from *Dana's Railroad Supply* and *Expressions Hair Design* is profound confusion and a split of authority among two federal circuits regarding whether speech and, in turn, the First Amendment, must be considered in testing the constitutionality of anti-surcharge statutes. As Chief Judge Carnes wrote in his dissent in *Dana's Railroad Supply*, “the majority places our circuit in direct conflict with our sister circuit on this issue.”²⁵ This state of judicial disor-

16. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), cert. granted, 137 S. Ct. 30 (2016).

17. *Id.*

18. N.Y. GEN. BUS. LAW § 518 (Consol. 2015).

19. *Expressions Hair Design*, 808 F.3d at 130.

20. *Id.*

21. *Id.* at 131.

22. *Id.* at 132.

23. *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430 (S.D.N.Y. 2013), vacated, 808 F.3d 118 (2d Cir. 2015), cert. granted, 137 S. Ct. 30 (2016).

24. *Id.* at 436.

25. *Dana's R.R. Supply v. Florida*, 807 F.3d 1235, 1257 (11th Cir. 2015) (Carnes, C.J., dissenting), *reh'g en banc denied*, 809 F.3d 1282 (11th Cir. 2016).

der, which the U.S. Supreme Court may resolve in 2017 after it granted a petition for a writ of certiorari in *Expressions Hair Design* in September 2016,²⁶ is troubling for multiple reasons.

First, credit card companies—those with a vested interest in the outcome of prohibiting surcharges—historically had contractually banned “any attempt to differentiate between credit and cash purchases.”²⁷ In 2013, however, “a nationwide settlement agreement with the credit card companies resulted in the removal of these contractual provisions.”²⁸ Specifically, U.S. District Judge Gleeson that year approved a class-action antitrust settlement involving credit card giants Visa U.S.A. and MasterCard International that permits merchants to surcharge credit card purchases and empowers them “to expose hidden bank fees to their customers, educate them about those fees, and use that information to influence their customers’ choices of payment methods.”²⁹ In brief, anti-surcharge statutes that forbid discussion of surcharges are troubling because they may constitute end-runs around the settlement.

Second, the issue affects more than just Florida and New York. At least nine states today have anti-surcharge statutes that forbid surcharges in some manner.³⁰ California’s anti-surcharge statute provides that:

No retailer in any sales, service, or lease transaction with a consumer may impose a *surcharge* on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means. A retailer may, however, *offer discounts* for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, provided that the discount is offered to all prospective buyers.³¹

26. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016). During oral argument in January 2017, “[t]he justices’ view of the case seemed to turn on where they stood in a rolling debate at the court [sic] about how the First Amendment applies to laws regulating economic matters, an issue that generally divides the justices along ideological lines.” Adam Liptak, *Supreme Court Considers Free Speech and Credit Card Fees*, N.Y. TIMES, Jan. 11, 2017, at B3.

27. *Italian Colors Restaurant v. Harris*, 99 F. Supp. 3d 1199, 1203 (E.D. Cal. 2015).

28. *Id.* at 1205.

29. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 218 (E.D.N.Y. 2013).

30. The nine states are: CAL. CIV. CODE § 1748.1 (West 2015); COLO. REV. STAT. 5-2-212 (2015); CONN. GEN. STAT. § 42-133ff (2015); FLA. STAT. § 501.0117 (2015); KAN. STAT. ANN. § 16a-2-403 (2015); MASS. GEN. LAWS ch. 140D, § 28A (2015); N.Y. GEN. BUS. LAW § 518 (Consol. 2015); OKLA. STAT. tit. 14A, § 2-211 (2015); TEX. FIN. CODE ANN. § 339.001 (West 2015).

31. CAL. CIV. CODE. § 1748.1 (emphasis added).

In March 2015, U.S. District Judge England declared California's law an unconstitutional restriction of merchants' First Amendment freedom of speech.³² As Judge England wrote, California's statute "cannot pass the intermediate scrutiny required for a content-based, speaker-specific restriction on consumer speech. The Court must therefore strike down the statute as an unconstitutional restriction on First Amendment rights."³³

In direct contrast to Judge England's decision, however, U.S. District Judge Yeakel upheld the constitutionality of Texas's anti-surcharge statute in February 2015—a decision later affirmed by the U.S. Court of Appeals for the Fifth Circuit in March 2016 in *Rowell v. Pettijohn*.³⁴ Judge Yeakel reasoned "that the Texas Anti-Surcharge law regulates only prices charged, an economic activity that is within the state's police power, and does not implicate First Amendment speech rights."³⁵

Anti-surcharge statutes affect residents in the nation's four most populous states—California, Texas, Florida, and New York.³⁶ Yet in 2015 alone, the statutes in Texas and New York were upheld by federal courts, while the laws in California and Florida were struck down. This clearly is a facet of First Amendment jurisprudence that became thoroughly muddled in 2015, and the Fifth Circuit's affirmation in March 2016 of the Texas statute's constitutionality only compounds the problem.

Third, the split of authority at the federal circuit level illustrates that the distinction between speech and conduct—a fundamental dichotomy in First Amendment jurisprudence—is not always clear to jurists.³⁷ The Eleventh Circuit, as noted above, found that Florida's

32. *Italian Colors*, 99 F. Supp. 3d at 1203.

33. *Id.* at 1210.

34. *Rowell v. Pettijohn*, No. A-14-CA-190-LY, 2015 U.S. Dist. LEXIS 40739 (W.D. Tex. Feb. 4, 2015), *aff'd*, 816 F.3d 73 (5th Cir. 2016).

35. *Id.* at *8–9.

36. See Press Release, U.S. Census Bureau, Florida Passes New York to Become Nation's Third Most Populous State, Census Bureau Reports (Dec. 23, 2014), <https://www.census.gov/newsroom/press-releases/2014/cb14-232.html> ("By adding an average of 803 new residents each day between July 1, 2013 and July 1, 2014, Florida passed New York to become the nation's third most populous state, according to U.S. Census Bureau state population estimates California remained the nation's most populous state in 2014, with 38.8 million residents, followed by Texas, at 27.0 million").

37. See Martin H. Redish, *Fear, Loathing, and the First Amendment: Optimistic Skepticism and the Theory of Free Expression*, 76 OHIO ST. L.J. 691, 700 (2015) (discussing "the fundamental distinction between speech and conduct"); Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV.

statute involved speech,³⁸ while the Second Circuit held that a similar New York statute did not affect expression.³⁹ Although conduct certainly may rise to the level of speech in some instances under the symbolic speech doctrine,⁴⁰ such symbolism was not at issue in either *Dana's Railroad Supply* or *Expressions Hair Design*.

Fourth and finally, the questions raised in these cases affect not only the right to speak, but also the unenumerated First Amendment right to receive speech.⁴¹ Specifically, merchants seek to speak freely with customers about credit-card surcharges, while customers have a right to receive such information directly affecting how their money is spent. Data suggest that consumers are affected by language differences in laws such as those at issue in *Dana's Railroad Supply* and *Expressions Hair Design*. Professor Derek Bambauer, for example, points out that:

[W]hen considering the relative costs of two forms of payment, consumers readily accept a “discount for cash” but are offended by a “surcharge for credit card use.” The critical difference is selecting either the higher or lower price as the anchor for evaluation, particularly since consumers value avoiding losses more than potential gains. Thus, commercial entities can influence our behavior as consumers by framing how we perceive their actions.⁴²

1191, 1216–20 (2011) (analyzing the speech-conduct dichotomy in First Amendment jurisprudence).

38. See *supra* notes 7–8 and accompanying text.

39. See *supra* notes 19–22 and accompanying text. The Fifth Circuit in *Rowell* followed the Second Circuit’s lead in holding that Texas’ anti-surcharge law regulates only economic activity and not expression. 816 F.3d at 82. Because the majority opinion in *Rowell* largely tracks the reasoning of the Second Circuit in *Expressions Hair Design*, this article focuses on *Expressions Hair Design*—rather than *Rowell*—as an exemplar of an economic-activity, non-speech conclusion.

40. See *Virginia v. Black*, 538 U.S. 343, 360 n.2 (2003) (“[I]t is equally true that the First Amendment protects symbolic conduct as well as pure speech.”); *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (observing that symbolic speech requires “an intent to convey a particularized message” on the part of the actor and a great likelihood, under the circumstances surrounding the conduct, “that the message would be understood by those who viewed it”).

41. See generally *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (emphasis added) (“[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, [and] the right to read.”); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (emphasis added) (citation omitted) (asserting that the First Amendment “freedom embraces the right to distribute literature and necessarily protects *the right to receive it*”).

42. Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 684 (2006).

This article thus addresses the First Amendment free speech concerns and related issues of statutory construction raised by the anti-surcharge statutes, concentrating on the contrasting 2015 decisions in *Dana's Railroad Supply* and *Expressions Hair Design*. Part I provides an overview of the history, policies, and goals behind the implementation of the statutes, as well as examples of statutes from the four states whose laws were challenged in federal court in 2015: California, Florida, New York, and Texas.⁴³ Additionally, Part I briefly explores psychological research regarding consumer perception of terms such as surcharge and discount.⁴⁴

Part II then introduces three key concepts directly at issue in the quartet of 2015 cases challenging the constitutionality of such statutes, namely: 1) the traditional First Amendment dichotomy between speech and conduct; 2) the unenumerated right to receive expression, as well as the right to speak; and 3) the metes and bounds of statutory construction and, specifically, how far courts should go when they attempt to provide a narrowing interpretation of a statute to save it from judicial demise.⁴⁵ Part III analyzes both *Dana's Railroad Supply* and *Expressions Hair Design* in greater depth and focuses on the trio of concepts addressed in Part II.⁴⁶ Finally, Part IV concludes by arguing that anti-surcharge statutes go well beyond merely affecting economic conduct to directly impacting First Amendment speech interests.⁴⁷ Part IV also asserts that these laws inappropriately cabin individual decision-making and should be struck down by the Supreme Court when it rules in 2017 in *Expressions Hair Design*.

I.

PAYING WITH CASH OR CREDIT CARD? AN OVERVIEW OF ANTI-SURCHARGE STATUTES AND PSYCHOLOGICAL RESEARCH ON FRAMING PRICES

This part of the article has two sections, the first of which addresses the history and policy behind the anti-surcharge statutes at issue in cases such as *Dana's Railroad Supply* and *Expressions Hair Design*. The second section then reviews literature from the field of psychology that demonstrates how framing prices in terms of either discounts or surcharges does, in fact, affect consumer choices.

43. See *infra* notes 48–84 and accompanying text.

44. See *infra* notes 85–108 and accompanying text.

45. See *infra* notes 109–210 and accompanying text.

46. See *infra* notes 211–293 and accompanying text.

47. See *infra* notes 294–312 and accompanying text.

A. *History, Terms and Policies of Anti-Surcharge Statutes*

When merchants accept a customer's credit card, they are contractually obligated to pay a percentage of the transaction total—a swipe fee—to the credit card company (e.g., Visa, MasterCard, or American Express).⁴⁸ Part of this fee is then passed on to the company that processes the transaction and to the card-issuing bank.⁴⁹ Thus, the profit merchants collect on a credit card transaction is less than on a cash sale of the same amount.

According to the Merchants Payments Coalition, an advocacy group for merchants, fees in the United States generally range from two to four percent of the transaction total and are the highest in the world—seven times what European merchants pay.⁵⁰ Merchants cannot negotiate these fees; if they want to accept a particular brand of credit card, they must pay the fee that the credit card issuer sets.⁵¹ Critics of swipe fees complain they amount to a hidden tax on consumers, who often are blissfully ignorant of the fact that merchants incur higher costs by accepting credit cards.⁵² Merchants only have three ways to recoup the fees. They can raise sticker prices to make up the difference; pass on some or all of the swipe fee directly to their customers via a surcharge for credit card purchases; or offer an incentive, such as a discount, to encourage customers to pay with cash.

Prior to 1974, the second and third options—imposing a surcharge on credit card purchases and offering a discount for cash customers—were forbidden by rules imposed on merchants by the credit card companies.⁵³ Then, in 1974, the federal Truth in Lending Act⁵⁴ was amended to provide that “a card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar

48. Joseph L. Mulvey, *An Overview of Recent Developments in Merchants' Ability to Surcharge Credit Cards*, RUBIN-LEVIN (Mar. 4, 2014), <http://www.rubin-levin.com/news/index.cfm?view=detail&item=390>.

49. *Id.*

50. *Reforming Credit Card Swipe Fees to Grow Our Economy*, MERCHANTS PAYMENTS COALITION (Aug. 2014), https://web.archive.org/web/20160316092642/http://21353cb4da875d727a1d-ccea4d4b51151ba804c4b0295d8d06a4.r8.cf1.rackcdn.com/Reforming_Credit_Card_Swipe_Fees_To_Grow_Our_Economy_2015.pdf.

51. *Id.*

52. See Complaint at 13, *Dana's R.R. Supply v. Bondi*, No. 1:14-cv-00025 (N.D. Fla. 2014) (“[C]onsumers are unaware of how much they pay for credit and have no incentive to reduce their credit-card use because they will pay the same price regardless.”).

53. *Id.* at 14.

54. This federal statute was passed in 1968 to require consistent disclosure of rules and regulations regarding consumer credit and interest. See 15 U.S.C. § 1601 (1968).

means rather than use a credit card.”⁵⁵ The question, then, became whether the word “discount,” as used in the statute, allowed only *discounts* for cash purchases or allowed merchants to impose *surcharges* on credit card purchases. In 1976, after lobbying by the credit card industry, Congress enacted an explicit, albeit temporary, ban on surcharges.⁵⁶ Under this measure, credit card fees had to be absorbed into the cost of the item or service being sold, and a discount was explicitly defined as a “reduction made from the regular price.”⁵⁷

After significant wrangling in Congress between the credit card industry and consumer groups, the federal ban on surcharges expired in 1984.⁵⁸ This freed merchants to impose surcharges for credit card prices, provided the merchant informed customers of the surcharges prior to purchase.⁵⁹

Credit card lobbyists fought hard to extend the ban, arguing that surcharges make their product less popular; consumer groups countered that the swipe fees paid by merchants were being subsidized by consumers, leading to increased costs for everyone.⁶⁰ Railing against efforts to extend the prohibition on surcharges, Senator William Proxmire of Wisconsin proclaimed that “[n]ot one single consumer group supports the proposal to continue the ban on surcharges. The nation’s giant credit card companies want to perpetuate the myth that credit is free.”⁶¹

Unable to persuade Congress, credit card companies began turning to state lawmakers in their quest to ban credit card surcharges. Thus, soon after the expiration of the federal ban on two-tier pricing systems, states began enacting their own laws to outlaw or restrict credit card surcharges.

As noted earlier, nine states currently have anti-surcharge statutes that forbid or restrict surcharges in some manner.⁶² These statutes took on new importance after a federal 2013 antitrust settlement with Visa U.S.A. and MasterCard International removed the last vestiges of con-

55. 15 U.S.C. § 1666f(a) (1974).

56. Act of Feb. 27, 1976, Pub. L. No. 94-222, 90 Stat. 197.

57. *Id.*

58. D. Edwin Schmelzer, *Truth in Lending Developments in 1985*, 41 *BUS. LAW.* 1057, 1058 (1986).

59. *Id.*

60. Stephen Engleberg, *Credit Card Surcharge Ban Ends*, *N.Y. TIMES* (Feb. 29, 1984), <http://www.nytimes.com/1984/02/27/business/credit-card-surcharge-ban-ends.html>.

61. Irvin Molotsky, *Extension of Credit Surcharge Ban*, *N.Y. TIMES* (Feb. 29, 1984), <http://www.nytimes.com/1984/02/29/business/extension-of-credit-surcharge-ban.html>.

62. *See supra* note 30 (identifying the nine states).

tractual restraints that kept merchants from imposing surcharges,⁶³ leaving state anti-surge laws as the last line of defense for the credit card companies. Attorney General Eric Holder blasted the credit card companies' practices in 2010 when the settlement was first proposed, asserting that they "put merchants and consumers in a no-win situation: accept our card, pay our fees and don't even think about trying to get a discount."⁶⁴

The four most populous states with the largest gross domestic products—California, Texas, New York, and Florida—all have anti-surge statutes⁶⁵ that have been challenged in court. The next subsections briefly describe the history of the statutes in those four states.

1. *The Florida Statute*

Florida passed its anti-surge statute in 1987, amid complaints that hoteliers were slapping surcharges on unsuspecting guests who were not warned upon checking in that the fees would be imposed.⁶⁶ The measure was touted as protecting consumers, but most consumer advocacy groups opposed anti-surge statutes.⁶⁷ One group that lobbied for the measure, Consumers Against Penalty Surcharges, was actually created and paid for by the credit card industry.⁶⁸

The Florida statute, which makes it a misdemeanor to impose a surge, reads in key part:

A seller . . . in a sales . . . transaction may not impose a surge on the buyer . . . for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller . . . accepts payment by credit card. A surge is any additional amount imposed *at the*

63. See *supra* note 29 and accompanying text (discussing the settlement).

64. Andrew Martin, *Visa and MasterCard Settle Antitrust Suit*, N.Y. TIMES, Oct. 5, 2010, at B1.

65. *Gross domestic product (GDP) by state (millions of current dollars)*, U.S. DEP'T OF COM. BUREAU OF ECON. ANALYSIS, <http://www.bea.gov/iTable/drilldown.cfm?reqid=70&stepnum=11&AreaTypeKeyGdp=5&GeoFipsGdp=XX&ClassKeyGdp=NAICS&ComponentKey=200&IndustryKey=1&YearGdp=2015Q2&YearGdpBegin=-1&YearGdpEnd=1&UnitOfMeasureKeyGdp=Levels&RankKeyGdp=1&Drill=1&nRange=5> (last visited Feb. 2, 2017).

66. *Resolution Urges Buffer for Oil Drilling*, ST. PETERSBURG TIMES, May 5, 1987, at 8B.

67. See Complaint at 20, *Dana's R.R. Supply v. Bondi*, No. 1:14-cv-00025 (N.D. Fla. 2014) ("[T]he overwhelming majority of the real consumer groups—including Consumers Union and Consumer Federation of America—opposed state no-surge laws because they discouraged merchants from making the costs of credit transparent, which resulted in an enormous hidden tax paid by all consumers whenever they made a purchase.").

68. *Id.*

time of a sale or lease transaction that increases the charge to the buyer . . . for the privilege of using a credit card payment.⁶⁹

It should be noted that Florida's law does not totally ban credit card surcharges; rather, merchants are free to impose surcharges as long as they post both the cash and credit prices on their products to make consumers aware of the difference prior to making a purchasing decision.⁷⁰

2. *The New York Statute*

Following the expiration of the federal ban on credit card surcharges, New York enacted one of the first anti-surcharge statutes in 1984,⁷¹ after lobbying from the credit card industry.⁷² The statute, which makes imposing a surcharge a misdemeanor, reads in part:

No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means. Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.⁷³

Enforcement of the New York law, however, has been exceedingly rare.⁷⁴ That is largely because until the antitrust settlement was reached in 2013, credit issuers' contracts with merchants already prohibited surcharges.⁷⁵

Only one prosecution has been reported, that of Bronx gas station owner Eugene Fulvio, who was arrested in 1986 after a customer complained about the station's dual pricing—Fulvio was charging five cents more per gallon for credit card users—and refused to pay.⁷⁶ At trial, Fulvio was acquitted of criminal mischief but found guilty of violating the anti-surcharge law.⁷⁷ However, a court later dismissed the charge, ruling that the law created a distinction without a differ-

69. FLA. STAT. § 501.0117 (2015) (emphasis added).

70. *Dana's R.R. Supply v. Florida*, 807 F.3d 1235, 1252 (11th Cir. 2015) (Carnes, C.J., dissenting), *reh'g en banc denied*, 809 F.3d 1282 (11th Cir. 2016).

71. N.Y. GEN. BUS. LAW § 518 (Consol. 2015).

72. *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 438 (S.D.N.Y. 2013), *vacated*, 808 F.3d 118 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016) (noting that the statute "is the product of a decades-long battle between credit card companies on the one hand and retailers and consumer advocates on the other").

73. N.Y. GEN. BUS. LAW § 518.

74. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 125, *cert. granted*, 137 S. Ct. 30 (2016).

75. *Id.*

76. *New York v. Fulvio*, 517 N.Y.S.2d 1008, 1009–10 (N.Y. Crim. Ct. 1987).

77. *Id.* at 1009.

ence between the terms “discount” and “surcharge” and that it impermissibly restricted speech.⁷⁸

3. *The Texas Statute*

Texas also adopted a civil anti-surcharge statute in 1985, one year after the federal ban on dual-pricing expired.⁷⁹ The law allows merchants to implement discounts for using cash, but it forbids any surcharges for credit card use.⁸⁰ Unlike Florida and New York, Texas does not impose a criminal penalty for violators; rather, infractions are handled as administrative actions by the State Consumer Credit Commissioner, and violators cannot be sued for damages.⁸¹

4. *The California Statute*

The California statute took effect in 1986.⁸² As explained by its terms, the law is intended to:

[P]romote the effective operation of the free market and protect consumers from deceptive price increases for goods and services by prohibiting credit card surcharges and encouraging the availability of discounts by those retailers who wish to offer a lower price for goods and services purchased by some form of payment other than credit card.⁸³

78. *Id.* at 1015.

79. TEX. FIN. CODE ANN. § 339.001 (West 2015).

80. The full text of the law provides that:

(a) In a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment.

(b) This section does not apply to:

(1) a state agency, county, local governmental entity, or other governmental entity that accepts a credit card for the payment of fees, taxes, or other charges; or

(2) a private school that accepts a credit card for the payment of fees or other charges, as provided by Section 111.002, Business & Commerce Code.

(c) The consumer credit commissioner has exclusive jurisdiction to enforce this section.

(d) The Finance Commission of Texas may adopt rules relating to this section. Rules adopted pursuant to this section shall be consistent with federal laws and regulations governing credit card transactions described by this section.

(e) This section does not create a cause of action against an individual for violation of this section.

Id.

81. *Id.*

82. Jimmy Thornton, *Law Bans Credit Surcharges, Not Cash Discounts*, SAN DIEGO UNION-TRIB., Oct. 31, 1985, at E2.

83. CAL. CIV. CODE § 1748.1 (West 2015).

Unlike in Florida and New York, California's law does not impose a criminal penalty. Instead, consumers subjected to surcharges can go to court to collect three times their actual damages—treble damages—plus attorney's fees.⁸⁴

B. A Primer on Psychological Evidence of Framing Prices

The split of authority described in the introduction of this article was likely one key reason why the U.S. Supreme Court in September 2016 granted a petition for a writ of certiorari in *Expressions Hair Design*.⁸⁵ Specifically, the Court granted certiorari on the question of whether “state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate economic conduct (as the Second and Fifth Circuits have held)?”⁸⁶

One facet of this issue that the Court may address is whether use of the words “surcharge” and “discount” provoke different psychological responses in consumers that benefit credit card companies and disadvantage merchants and consumers, thereby buttressing the assertion that these laws are, at their core, an effort to regulate speech rather than conduct.

In exploring the psychological effects anti-surcharge laws have on consumers, it is first useful to understand how these laws actually work. When a customer brings a product costing \$100 to the cash register and pays with a credit card, a merchant cannot impose a surcharge (for example, \$2) on the final price to make up for what is being transferred to the credit card company.⁸⁷ However, the merchant is legally allowed to offer a discounted price (for example, \$98) to encourage the customer to use cash, as long as all customers are afforded the same discount.⁸⁸ If the cash discount equals the swipe fee, the merchant comes out even—but only for those customers who opt to forgo using a credit card in order to get the discount.

In order to recoup fees from customers not sufficiently persuaded by a discount, merchants would need to price the product at \$102 and offer a discount at the register. This would have the same net effect on

84. *Id.*

85. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016).

86. Petition for Writ of Certiorari at i, *Expressions Hair Design*, 808 F.3d 118 (No. 15-1391), 2016 WL 3383878.

87. See Plaintiff's Reply in Support of Motion for Summary Judgment at 1, *Dana's R.R. Supply v. Bondi*, No. 4:14-cv-00134 (N.D. Fla. 2014) (explaining how the laws work).

88. *Id.*

customers (\$102 for a credit card purchase and \$100 for a cash purchase) as would the explicit surcharge. In this last scenario, merchants have hiked prices for everyone, yet they cannot describe those higher prices as a “surcharge” without violating state law.⁸⁹

In Florida, where surcharges are banned only at the “point of sale,”⁹⁰ merchants can legally post both a cash price (\$100) and a credit price (\$102) on every product, making consumers aware of the difference before they get to the cash register. This, too, has the same net effect on consumers as a surcharge imposed at checkout (\$102 for credit, \$100 for cash), while imposing on merchants the additional burden of affixing two different prices to everything in the store.

While there is no practical difference between a discount and a surcharge in terms of how much consumers actually end up paying, people behave differently when offered a discount as opposed to being faced with the unhappy prospect of surcharge.

In 1979, Daniel Kahneman and Amos Tversky developed prospect theory, which hypothesizes that people make decisions based on the potential for losses or gains rather than on the actual outcome.⁹¹ Furthermore, people often evaluate the potential losses or gains differently depending on how a question is framed.⁹² The framing hypothesis suggests that human decision-making is affected by the way an issue is formulated or presented to a person.⁹³

In Tversky and Kahneman’s 1981 study, participants were given a scenario in which they had to choose treatments for 600 people affected by a deadly disease, framed between positive and negative choices.⁹⁴ When a treatment was described as saving 200 lives, seventy-two percent of the participants chose it, even though it failed to save 400 people.⁹⁵ But when participants were told that the same treatment would not save 400 of the 600 people, only twenty-two percent selected it, even though the same 200 lives were saved.⁹⁶ This phenomenon is easily explained by prospect and framing theories. In Kahneman and Tversky’s experiment, people who heard the positively

89. *Id.*

90. FLA. STAT. § 501.0117 (2015).

91. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 42 *ECONOMETRICA* 263, 263–91 (1979).

92. *Id.* at 287.

93. Edmund W. Kitch, *Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price*, 1 *J.L. ECON. & ORG.* 217, 218 n.2 (1990).

94. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCI.* 453 (1981).

95. *Id.* at 453.

96. *Id.*

framed outcome were likely to perceive the gains from the treatment, whereas people who heard the negatively framed outcome saw the losses from the treatment—despite the fact that the outcomes were exactly the same.⁹⁷

Examples of the framing hypothesis and prospect theory appear across a variety of disciplines.⁹⁸ In the legal field, University of Pennsylvania Professor Stephanos Bibas suggests defendants' likelihood of taking a plea deal depends on whether they were either detained or remained free prior to trial. Bibas suggests that defendants in pretrial detention are more likely to accept a plea deal because it signifies a gain—namely, freedom—whereas defendants who are free prior to trial view a plea deal as a loss because they would be losing their freedom.⁹⁹

The framing hypothesis and prospect theory have also been implemented in the health field. Professor Pragya Mathur and her colleagues studied the effects of framing health messages aimed at disease prevention and detection.¹⁰⁰ Other studies have found framing effects on detection behaviors such as breast self-exams,¹⁰¹ HIV testing,¹⁰² and gum disease.¹⁰³ Another study found that individual characteristics play a role in how a person reacts to a frame,¹⁰⁴ specifically how a person views a message promoting flossing.¹⁰⁵ Avoidance-oriented people are more likely to floss after being given a loss-framed message, and approach-oriented people reported flossing more after viewing a gain-framed message.¹⁰⁶

97. *Id.*

98. See Pragya Mathur et al., *The Influence of Implicit Theories and Message Frame on the Persuasiveness of Disease Prevention and Detection Advocacies*, 122 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 141 (2013); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004); Alexander J. Rothman et al., *The Systematic Influence of Gain-and-Loss-Framed Messages on Interest in and Use of Different Types of Health Behavior*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1355, 1355 (1999); Seth Kalichman & Brenda Coley, *Context Framing to Enhance HIV-Antibody-Testing Messages Targeted to African American Women*, 14 HEALTH PSYCHOL. 247 (1995); Beth E. Meyerowitz & Shelly Chaiken, *The Effect of Message Framing on Breast Self-Examination Attitudes, Intentions, and Behavior*, 52 J. PERSONALITY & SOC. PSYCHOL. 500 (1987).

99. Bibas, *supra* note 98, at 2514.

100. Mathur et al., *supra* note 98, at 142.

101. Meyerowitz & Chaiken, *supra* note 98, at 500–10.

102. Kalichman & Coley, *supra* note 98 at 250–52.

103. Rothman et al., *supra* note 98, at 1355–69.

104. See Traci Mann et al., *Dispositional Motivations and Message Framing: A Test of the Congruency Hypothesis in College Students*, 23 HEALTH PSYCHOL. 330 (2004).

105. *Id.* at 332.

106. *Id.* at 333.

The framing hypothesis and prospect theory apply directly to anti-surcharge laws.¹⁰⁷ These laws are purposefully constructed so customers are subject to a framed scenario in which they are exposed to discounts rather than surcharges. When people are asked to pay a surcharge, they view it as losing money from their pockets, whereas when people are subjected to a discount, they view it as a gain of money they were prepared to spend.¹⁰⁸ Therefore, people are more likely to purchase an item if the outcome is framed as a gain (a discount) rather than a loss (a surcharge).

For example, if a banana was \$2 when paid for with cash and \$2.03 when paid for with a credit card, the price of the banana would be \$2 with a surcharge of three cents or the price would be \$2.03 with a discount of three cents. The outcomes are exactly the same; the only difference is how the scenario is framed—and customers have less cognitive resistance to receiving the discount than they do to paying the surcharge. Anti-surcharge laws essentially take advantage of the framing hypothesis and prospect theory to make customers more likely to purchase products by avoiding psychological resistance to surcharges and playing to their preference for discounts. Put differently, people are more likely to forgo using a credit card if it costs them more (a negatively framed surcharge) than if not using it will cost them less (a positively framed discount). This is undoubtedly why credit card companies champion laws banning surcharges.

Although psychological factors are key to understanding the rationale underpinning anti-surcharge statutes, the determination of whether they will rise or fall in the face of constitutional challenges is based on larger considerations. These include the First Amendment dichotomy between speech and conduct, the right to express oneself and to receive speech from others, and how narrowly courts should construe statutory language in order to save a statute from being struck down. These considerations are addressed in Part II.

II.

EXPLORING KEY CONCEPTS AFFECTING THE ANTI-SURCHARGE CASES: POINTS OF CONTENTION AND DISPUTE

This part provides a primer on three crucial legal considerations affecting litigation of anti-surcharge statutes. The trio of topics explored here is then later applied in Parts III and IV.

107. See generally Kitch, *supra* note 93.

108. *Id.* at 218.

Section A analyzes the dichotomy between speech and conduct. This distinction is important because the Eleventh Circuit in *Dana's Railroad Supply* concluded that Florida's statute raised fatal First Amendment speech concerns,¹⁰⁹ while the Second Circuit in *Expressions Hair Design* determined that New York's law affected only conduct, rendering free speech claims nugatory.¹¹⁰

Section B examines the unenumerated First Amendment right to receive speech. Recognition of this right is important because if anti-surcharge statutes do, in fact, raise First Amendment issues, then two sets of speech rights are at stake—the right of merchants to speak and the right of consumers to receive speech.

Section C provides an overview on the issue of courts adopting or rejecting saving constructions of statutes, in light of separation of powers concerns between the judicial and legislative branches. This is important because the dissent in *Dana's Railroad Supply* accused the majority of adopting a statute-killing construction of Florida's anti-surcharge law and argued that a saving construction was possible.¹¹¹

A. *The Implied First Amendment Right to Receive Speech*

The First Amendment provides an explicit, unequivocal right to speak,¹¹² while the corollary right to receive speech is merely implicit. Yet, as described in this section, legal scholars have long maintained that the explicit right is hollow without its implicit counterpart. This unenumerated right is relevant in the anti-surcharge cases because customers may argue that they have a right to receive information from merchants about surcharges imposed by credit card companies.

As articulated by Professor Marc Blitz, a listener's right to receive information "is simply the mirror image of the speaker's right to express it. And the First Amendment cannot protect one without meaningfully protecting the other."¹¹³ Without both a listener and a speaker, the free speech guarantee is, in the words of First Amendment scholar and current Delaware Law School Dean Rodney Smolla, "as empty as the sound of one hand clapping."¹¹⁴ Although courts

109. *See supra* notes 7–8 and accompanying text.

110. *See supra* notes 19–22 and accompanying text.

111. *See supra* notes 11–14 and accompanying text (addressing Chief Judge Carnes' dissent in *Dana's R.R. Supply*).

112. *See supra* note 2 (setting forth the relevant portion of the text of the First Amendment).

113. Marc J. Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 809 (2006).

114. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 198 (1992).

historically focused on protecting speakers, the Supreme Court gradually extended protection to recipients.¹¹⁵

The Court first articulated the right to receive speech in the 1943 case of *Martin v. City of Struthers*,¹¹⁶ which struck down an ordinance that outlawed knocking on doors of private homes to distribute religious literature.¹¹⁷ Writing for the majority, Justice Black found that freedom of speech not only embraces the right to distribute literature, but also “necessarily protects the right to receive it.”¹¹⁸

The right to receive speech was further articulated in a pair of 1965 rulings.¹¹⁹ In *Lamont v. Postmaster General*,¹²⁰ the Court struck down a law that allowed postal officials to refuse to deliver “communist political propaganda” mailed from overseas unless the addressee specifically requested delivery in writing.¹²¹ Concurring, Justice Brennan directly linked the right to speak with the right to receive speech, opining that “the dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”¹²² *Lamont* was also noteworthy because the plaintiff was a recipient of the material targeted by the law, rather than the sender.¹²³

That same year, the Court in *Griswold v. Connecticut*¹²⁴ struck down a state law that, among other things, made it a crime for physicians to provide information about contraception to married couples.¹²⁵ Writing for the majority, Justice Douglas reasoned that Connecticut could not “contract the spectrum of available knowledge” for married couples and that receiving information was a “peripheral”

115. See Blitz, *supra* note 113, at 800 (explaining that a right to receive speech has been well established by the courts); Philip J. Cooper, *Rusty Pipes: The Rust Decision and the Supreme Court's Free Flow Theory of the First Amendment*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359, 360 (1992) (noting that the Supreme Court has moved away from emphasizing speakers' rights and towards emphasizing the free flow of information); Thomas J. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 7 (1976) (noting that the Supreme Court “has normally recognized the right of the recipients to seek direct vindication of their right to know”).

116. 319 U.S. 141 (1943).

117. *Id.*

118. *Id.* at 143.

119. *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

120. *Lamont*, 381 U.S. at 301.

121. *Id.* at 302.

122. *Id.* at 308 (Brennan, J., concurring).

123. *Id.* at 304 (majority opinion).

124. 381 U.S. 479 (1965).

125. *Id.* at 481.

right to the First Amendment without which “the specific rights would be less secure.”¹²⁶

These three cases—*Martin*, *Lamont*, and *Griswold*—all addressed speech that is clearly protected by the First Amendment, including political and religious messages and communication between a doctor and a patient. However, the Court later extended the right to receive speech into the less-protected commercial sphere in *Virginia Pharmacy Board v. Virginia Consumer Council*.¹²⁷ In that case, the Court struck down a state law prohibiting pharmacists from advertising prices for prescription drugs.¹²⁸ The Court held that recipients of purely economic speech also have First Amendment protection.¹²⁹ Interestingly, the successful plaintiffs were not pharmacists who wanted to advertise, but consumers who objected to being unable to receive drug advertisements.¹³⁰ In the majority opinion, Justice Blackmun held that this distinction did not matter: “Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and recipients both.”¹³¹

Two traditional First Amendment theories—democratic self-governance¹³² and the marketplace of ideas¹³³—explain why the right to receive speech deserves as much protection as the right to speak. Democracy requires collective decision-making, which in turn requires citizens to receive the information they need to be well-informed.¹³⁴ If the value of free speech lies in promoting democratic order, then the ability of listeners to receive messages and react to them is as important, if not more important, than the right of the speaker to expati-

126. *Id.* at 482–83.

127. 425 U.S. 748 (1976).

128. *Id.*

129. *Id.* at 763–70.

130. *Id.* at 748.

131. *Id.* at 756.

132. The democratic self-governance theory was first articulated by philosopher and educator Alexander Meiklejohn, who posited that free speech provides the necessary framework for democracy to function effectively. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

133. The marketplace of ideas theory, first articulated by philosopher John Stuart Mill, posits that truth may ultimately emerge from the competition of ideas in free and transparent public discourse. JOHN STUART MILL, *ON LIBERTY* 76 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859). This theory was initially applied to First Amendment jurisprudence by Justice Holmes in his dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919).

134. Emerson, *supra* note 115, at 7.

ate.¹³⁵ Indeed, as Professor David Strauss notes, the democratic self-governance justification for free speech is inherently listener-based.¹³⁶

In addition to its democratic function, the right to receive information allows people unfettered access to explore the marketplace of ideas.¹³⁷ In the marketplace, messages are paramount, as is the ability to communicate; thus, transmissions between sender and receiver must be shielded from government interference.¹³⁸ Preserving the ability to send and receive messages also ensures a robust stock of information is available in the marketplace.¹³⁹ And that stock is not limited to political speech. In *Virginia Pharmacy*, the Supreme Court held that a consumer's interest in the free flow of commercial information "may be as keen . . . [as] his interest in the day's most urgent political debate"¹⁴⁰—a conclusion directly applicable to the constitutional contretemps over no-surcharge statutes.

B. *The Speech-Conduct Dichotomy in First Amendment Law*

University of Iowa professor Randall Bezanson emphasizes in a recent article that the First Amendment guarantee of free speech traditionally "has rested on two fundamental boundaries: speech versus conduct and liberty versus utility."¹⁴¹ The first of those boundaries—the one separating speech from conduct—is pivotal in the anti-surcharge cases. While the Eleventh Circuit in *Dana's Railroad Supply* held "that Florida's no-surcharge law triggers First Amendment scrutiny as a restriction on speech,"¹⁴² the Second Circuit in *Expressions Hair Design* concluded that a remarkably similar New York statute "does not regulate speech."¹⁴³

Given these disparate outcomes, a fundamental question arises: how, in general, do courts distinguish speech from conduct? As a threshold matter, the text of the First Amendment prohibits restrictions

135. David A. Strauss, *Rights and the System of Freedom of Expression*, 1993 U. CHI. LEGAL F. 197, 202 (1993).

136. *Id.*

137. Blitz, *supra* note 113, at 803.

138. Cooper, *supra* note 115, at 365.

139. *Id.*

140. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 763 (1976).

141. Randall P. Bezanson, *Is There Such a Thing as Too Much Free Speech?*, 91 OR. L. REV. 601, 601 (2012).

142. *Dana's R.R. Supply v. Florida*, 807 F.3d 1235, 1246 (11th Cir. 2015), *reh'g en banc denied*, 809 F.3d 1282 (11th Cir. 2016).

143. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 131 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016).

on speech and makes no mention of conduct.¹⁴⁴ Yet the Supreme Court has “long . . . protected conduct that communicates under the First Amendment.”¹⁴⁵

In *Spence v. Washington*,¹⁴⁶ the Court held in 1974 that conduct rises to the level of speech when there is both “[a]n intent to convey a particularized message”¹⁴⁷ via the conduct and when, “in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it.”¹⁴⁸ Under this two-part test, burning the American flag as a form of symbolic protest outside a political convention constitutes speech within the ambit of the First Amendment.¹⁴⁹ Even nude dancing “is expressive conduct within the outer perimeters of the First Amendment,”¹⁵⁰ at least when it occurs in the context of a performance at a sexually oriented business.

As Justice O’Connor wrote in 2003, “the First Amendment protects symbolic conduct as well as pure speech.”¹⁵¹ The meaning of “speech,” in turn, is expanding. A federal appellate court in 2013, for example, held that the act of “liking” on Facebook constitutes both pure speech and symbolic expression.¹⁵² More recently, in December 2015 the U.S. Court of Appeals for the Eleventh Circuit in *Buehrle v. City of Key West*¹⁵³ joined a growing number of courts in recognizing that the act of “tattooing is protected artistic expression.”¹⁵⁴ What is key here is that it is not just the tattoo (the end product) that courts are protecting, but also the tattooing process.¹⁵⁵

144. The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment’s Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

145. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1117 (5th ed. 2015).

146. 418 U.S. 405 (1974).

147. *Id.* at 410–11.

148. *Id.* at 411.

149. *Texas v. Johnson*, 491 U.S. 397, 406 (1991).

150. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

151. *Virginia v. Black*, 538 U.S. 343, 360 n.2 (2003).

152. *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

153. 813 F.3d 973 (11th Cir. 2015).

154. *Id.* at 975. In 2010, the Ninth Circuit recognized tattooing as a form of expression in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010).

155. See *Anderson*, 621 F.3d at 1060 (“The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment.”).

Yet “symbolic speech is an area that has continued to give courts difficulty in interpretation and application.”¹⁵⁶ Furthermore, the anti-surcharge statutes do not remotely involve any type of “conduct” that would fall under the traditional symbolic expression analysis of *Spence*. For example, *Dana’s Railroad Supply* and *Expressions Hair Design* are not akin to cases where a person burns a cross to express a message of racial intimidation¹⁵⁷ or where the very act of marching by a particular group of individuals in a parade is expressive.¹⁵⁸ The symbolic speech doctrine from *Spence* thus offers little guidance for analyzing the anti-surcharge statute cases, where merchants simply want to use the spoken word—what is best characterized as “pure speech”¹⁵⁹—to describe to customers a fee imposed upon credit card transactions.

The U.S. Supreme Court’s 2011 opinion in *Sorrell v. IMS Health, Inc.* offers guidance that is more relevant to the anti-surcharge cases.¹⁶⁰ In *Sorrell*, the Court reasoned that “restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive [sic] conduct. It is also true that *the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.*”¹⁶¹

A key question in the *Sorrell* line of cases, as the U.S. Court of Appeals for the Ninth Circuit wrote in 2015, is whether the law at issue constitutes “an economic regulation that does not target speech or expressive conduct.”¹⁶² Similarly, Judge Kaplan of the U.S. District Court for the Southern District of New York cited *Sorrell* in July 2015 to support the proposition that laws directed “at ‘commerce or conduct,’ fall outside the purview of the First Amendment even if they impose ‘incidental burdens on speech.’”¹⁶³ Therefore, “[t]he notion that there is a distinction between laws that regulate speech and laws

156. David Mangone, Article, *Speech at a Crossroads: The Intersection of Symbolic Speech, Government Speech, and the State License Plate*, 8 FED. CTS. L. REV. 97, 101 (2014).

157. See *Virginia v. Black*, 538 U.S. 343, 360 (2003) (“[T]he burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else’s lawn, is that the burning cross represents the message that the speaker wishes to communicate.”).

158. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995).

159. See Eberle, *supra* note 37, at 1216 (noting that pure speech is “devoid of conduct”).

160. 564 U.S. 552 (2011).

161. *Id.* at 567 (emphasis added).

162. *Int’l Franchise Ass’n v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015).

163. *Jacoby & Meyers, LLP v. Presiding Justices*, 118 F. Supp. 3d 554, 571 (S.D.N.Y. 2015) (quoting *Sorrell*, 564 U.S. at 567).

that regulate conduct with merely an incidental effect on speech is well established.”¹⁶⁴

Under *Sorrell* and its progeny, the question becomes whether anti-surge laws like those in Florida, New York, California, and Texas are directed at economic conduct and have only an incidental effect on free speech or whether they regulate expression in a more significant way and trigger First Amendment scrutiny. To determine if they do so, courts must engage in statutory construction. Section C provides a brief primer on statutory and saving constructions.

C. Saving Statutory Constructions

*“The cardinal principle of statutory construction is to save and not to destroy.”*¹⁶⁵

Those were the words of Chief Justice Hughes back in 1937.¹⁶⁶ Nearly eighty years later, they remain vital because, as the Supreme Court recently observed, “[t]he text of a statute can sometimes have more than one possible meaning.”¹⁶⁷ Today, the consensus among judges has not changed from Hughes’ time regarding their role in statutory construction—judges should save statutes, if possible, before declaring them unconstitutional.¹⁶⁸

For example, Chief Justice Roberts wrote in 2012 that “it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”¹⁶⁹ Similarly, as the late Justice Scalia wrote in 2009, “[t]he so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.”¹⁷⁰ Furthermore, the California Supreme Court opined in 1995 that it even “is appropriate in some situations for courts to reform—i.e., ‘rewrite’—enactments in order to avoid consti-

164. Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 188 (2015).

165. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

166. *Id.*

167. *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (2012).

168. *See, e.g., United States v. Brune*, 767 F.3d 1009, 1023 (9th Cir. 2014) (noting that “as between multiple reasonable interpretations of a statute, we will always prefer one that sustains constitutionality to one that does not under the presumption of constitutional validity,” and quoting language from *Jones & Laughlin Steel Corp.* to support this proposition). *See generally* Peter D. Webster et al., *Statutory Construction in Florida: In Search of a Principled Approach*, 9 FLA. COASTAL L. REV. 435, 439–42 (2008) (setting forth the views of multiple judges who agree with this sentiment by suggesting that judges should fill gaps in statutes where needed).

169. *Nat’l Fed’n Indep. Bus.*, 132 S. Ct. at 2593.

170. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

tutional infirmity, when doing so ‘is more consistent with legislative intent than the result that would attend outright invalidation.’”¹⁷¹ In brief, then, there is much courts can do to provide a “saving construction”¹⁷² that rescues a statute from demise.

Balanced against the desire to save statutes, however, is judicial fear of encroaching into legislative territory. The separation of powers doctrine¹⁷³ thus remains central in statutory construction debates. As Florida Appellate Court Judge Webster writes, “when judges stray beyond the realm of construing statutes and into that of rewriting them, they are exercising powers granted to the legislative branch of government and, thereby, violating the separation of powers doctrine.”¹⁷⁴ A further problem with statutory construction is that it is not always clear which method of construction courts should use to determine if saving a statute is possible.¹⁷⁵

Questions of statutory and saving constructions are critical in both *Dana’s Railroad Supply* and *Expressions Hair Design*. Specifically, the dissent in *Dana’s Railroad Supply* rebuked the Eleventh Circuit majority for rejecting the Florida “statute’s narrow definition of the term ‘surcharge’ in favor of what it perceives to be the more colloquial meaning of the word,” stating it was “wrong to do so.”¹⁷⁶ The majority opinion of the Second Circuit in *Expressions Hair Design* arguably employed the statutory construction facet of constitutional avoidance¹⁷⁷ to dodge First Amendment scrutiny of the statute and, in turn, save it.¹⁷⁸ This section thus provides a brief overview of statutory construction.

171. *Kopp v. Fair Political Practices Comm’n*, 905 P.2d 1248, 1270 (Cal. 1995) (quoting *Arp v. Workers Comp. Appeals Bd.*, 563 P.2d 849, 856 (Cal. 1977)).

172. *Ashcroft v. ACLU*, 542 U.S. 656, 691 (2004) (Breyer, J., dissenting) (emphasis added) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (“[W]here a *saving construction* of the statute’s language ‘is fairly possible,’ we must adopt it.”).

173. See Webster et al., *supra* note 168, at 494 (noting that separation of powers “is generally understood as referring to a division of the principal functions of government among three coordinate branches—the legislative, the executive, and the judicial—no one of which is to be superior to the others”).

174. *Id.* at 498.

175. *Id.* at 488–90.

176. *Dana’s R.R. Supply v. Florida*, 807 F.3d 1235, 1252 (11th Cir. 2015) (Carnes, C.J., dissenting), *reh’g en banc denied*, 809 F.3d 1282 (11th Cir. 2016).

177. See *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (emphasis added) (noting that when the validity of a law “is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will *first ascertain whether a construction of the statute is fairly possible by which the question may be avoided*”).

178. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 118 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016).

Statutory construction, as the term suggests, involves courts construing statutes to determine their exact meaning.¹⁷⁹ Typically, statutory construction issues arise in two scenarios: 1) when a statute's language is unclear as applied to the given facts; and 2) when a statute's language may be clear, but the given factual scenario was not envisioned when the statute was enacted.¹⁸⁰ Ultimately, "when construing statutes, the courts' obligation is to determine what the legislature 'intended' the statutes to mean."¹⁸¹

At the broadest level, when the parsing of a statute renders multiple possible interpretations, courts should choose the one that saves it from unconstitutionality—a saving construction.¹⁸² A narrowing construction is employed when a court finds a law unconstitutional, but does so on narrow grounds so as to limit unforeseen effects on future cases.¹⁸³

Sometimes courts opt for narrowing constructions, specifically when statutes are suspected of being unconstitutionally vague or overbroad.¹⁸⁴ Instead of declaring such laws unconstitutional, courts may limit their meaning to a scenario that *is* constitutional.¹⁸⁵ Yet, this power is not absolute. As the Supreme Court wrote in *Reno v. ACLU*, it "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction."¹⁸⁶ The Court has found that susceptibility to such a construction exists when "the text or other source of congressional intent identified a clear line that [the] Court could draw."¹⁸⁷

When courts engage in statutory construction, they can employ several different techniques. Justice Sotomayor, for instance, recently wrote that "traditional tools of statutory construction" include a "statute's text, structure, drafting history, and purpose."¹⁸⁸ Ultimately, as Professor Wilson Huhn recently wrote, the text of the statute and a

179. OTIS H. STEPHENS, JR. & JOHN M. SCHEB II, *AMERICAN CONSTITUTIONAL LAW: SOURCES OF POWER AND RESTRAINT* 51 (4th ed. 2008).

180. Webster et al., *supra* note 168, at 498.

181. Jack L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 47 (1997).

182. STEPHENS & SCHEB, *supra* note 179, at 51–52.

183. *Id.* at 52.

184. Robert Batey, *The Vagueness Doctrine in the Roberts Court: Constitutional Orphan*, 80 UMKC L. REV. 113, 128–29 (2011–12).

185. *Id.*

186. 521 U.S. 844, 884 (1997).

187. *Id.*

188. *FAA v. Cooper*, 132 S. Ct. 1441, 1456 (2012) (Sotomayor, J., dissenting).

search for legislative intent are “standard forms of statutory construction.”¹⁸⁹

The starting point—and sometimes end point—in statutory construction is the text of a statute,¹⁹⁰ with courts searching for its plain meaning. As Justice Thomas wrote for the majority in *Carciere v. Salazar*,¹⁹¹ “[t]his case requires us to apply settled principles of statutory construction under which we must *first determine* whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms.”¹⁹² Thus, as Chief Justice Roberts recently wrote, “[i]f the statutory language is plain, we must enforce it according to its terms.”¹⁹³

This sounds simple, but the determination of “[w]hether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words.”¹⁹⁴ Indeed, Justice Ginsburg recently observed that consideration of the surrounding context in which an ostensibly plain term is used is critical.¹⁹⁵ As Justice Ginsburg artfully noted, “[o]rdinarily, a word’s usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.”¹⁹⁶ The key, as Justice Thomas wrote for a unanimous Court in *McNeill v. United States*,¹⁹⁷ is that “in all statutory construction cases, we begin with ‘the language itself [and] the specific context in which that language is used.’”¹⁹⁸ In a nutshell, language plus context are the crucial building blocks of statutory construction.

This comports with the canon of textualism famously championed by Justice Scalia.¹⁹⁹ Textualists, as the name suggests, focus on the text of the statute, but also keep in mind the specific context, mak-

189. Wilson Huhn, *Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts’ Opinion Upholding the Individual Mandate*, 46 AKRON L. REV. 117, 126 (2013).

190. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (“As in any statutory construction case, we start . . . with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.”).

191. 555 U.S. 379 (2009).

192. *Id.* at 387 (emphasis added).

193. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

194. *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015).

195. *Id.* at 1081–82.

196. *Id.* at 1082.

197. 131 S. Ct. 2218 (2011).

198. *Id.* at 2221.

199. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 353 (2010).

ing sure to construe the text not strictly but reasonably.²⁰⁰ In fact, Justice Scalia wrote in 1997 that “[i]n textual interpretation, context is everything.”²⁰¹ This is dubbed “new textualism”, with Professor Robert Martineau writing that, while “a strict textualist considers only the language of the statute, a new textualist examines not only the specific statutory language which is the subject of litigation, but the entire statute as reflected by other legislation enacted by the same legislature.”²⁰²

If ambiguity still exists after considering text and context, then some jurists search for meaning via legislative history. As NYU Law Professor Adam Samaha writes, “a statute’s plain meaning (somehow ascertained) is said to trump any other consideration that might be relevant to interpretation, such as the lessons of legislative history. Consistent with a lexically inferior ranking, legislative history is not available to create ambiguity in statutory text—only to resolve it.”²⁰³

Use of legislative history in statutory interpretation, however, constitutes “one of the most intense jurisprudential debates in modern American law,”²⁰⁴ and a complete discussion of this controversy is far beyond the scope of this article. Perhaps Justice Stevens captured it best when he wrote that if ambiguity persists after reviewing the text and context of a statute and “[i]f you are desperate, or even if you just believe it may shed some light on the issue, consult the legislative history.”²⁰⁵

A fundamental limit on how far courts can go to save a statute rests in the separation of powers doctrine. It holds that there is a division of key functions of government among the three branches—judicial, legislative, and executive—to ensure no one group retains all the power.²⁰⁶ As is relevant here, the legislative branch has the power to create laws, while the judiciary wields the power to interpret and void

200. *Id.*

201. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37 (1997).

202. Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 *GEO. WASH. L. REV.* 1, 12 (1993).

203. Adam M. Samaha, *On Law’s Tiebreakers*, 77 *U. CHI. L. REV.* 1661, 1708 (2010).

204. Mark DeForrest, *Taming a Dragon: Legislative History in Legal Analysis*, 39 *DAYTON L. REV.* 37, 38 (2013).

205. John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 *U. PA. L. REV.* 1373, 1381 (1992).

206. See Webster et al., *supra* note 168, at 494.

unconstitutional ones.²⁰⁷ In relation to statutory construction, Justice Frankfurter advised:

[T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it.²⁰⁸

In summary, when engaging “in statutory construction, the Court walks a fine line between restraint and activism.”²⁰⁹ Although there is no clear answer on when judges go too far in trying to save a statute, it is helpful to keep in mind the specific role of the judiciary. Additionally, because judges use multiple statutory construction canons, it is difficult to determine where the line is between merely interpreting statutes and changing their meaning.²¹⁰ This fine line distinction is a key issue in *Dana’s Railroad Supply* and *Expressions Hair Design*.

III.

SPEECH V. CONDUCT IN THE ANTI-SURCHARGE CASES: EXPLORING HOW THE ELEVENTH AND SECOND CIRCUITS REACHED CONTRASTING CONCLUSIONS IN 2015

This part compares and contrasts the reasoning and the application of principles of statutory construction in *Dana’s Railroad Supply* and *Expressions Hair Design* to decipher how the Eleventh and Second Circuits reached opposite conclusions regarding whether similar anti-surcharge statutes address speech or conduct. Section A examines *Dana’s Railroad Supply*, comparing the logic of the majority with the reasoning of the dissent. Section B then analyzes the unanimous appellate court opinion in *Expressions Hair Design*.

Some fundamental principles of statutory construction addressed above in Part II.C, along with the Supreme Court’s discussion in *Sorrell* of the dichotomy between speech and economic conduct covered in Part II.A, play important roles in explaining the rift between the majority and dissent in *Dana’s Railroad Supply*.

207. *Id.* at 495 (citing the Constitution’s articulation of the responsibilities of each branch).

208. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

209. RICHARD PACELLE, JR., THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS: THE LEAST DANGEROUS BRANCH? 102 (2002).

210. Webster et al., *supra* note 168, at 498.

A. Dana's Railroad Supply v. Florida:
The Fractured Views of the Eleventh Circuit

This section separately examines, in subsections one and two, respectively, the majority and dissenting opinions in *Dana's Railroad Supply*.²¹¹ The statute at issue upon which they fractured provides that:

A seller may not impose a surcharge on the buyer . . . for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller . . . accepts payment by credit card. A surcharge is any additional amount imposed at the time of a sale . . . by the seller . . . that increases the charge to the buyer . . . for the privilege of using a credit card to make payment. . . . This section does not apply to the offering of a discount for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers.²¹²

The statute was challenged by several Florida merchants who sought to describe “to their customers the price difference as an additional amount for credit-card use rather than a lesser amount for paying in cash.”²¹³ In other words, they sought to call it a surcharge. The merchants argued in their March 2014 complaint “that Florida’s no-surcharge law violates the First Amendment as an unjustified restriction on speech.”²¹⁴

1. *The Majority: A Matter of First Amendment Protected Speech*

Writing for the two-judge majority, Judge Tjoflat initially framed the pivotal question by remarking that “[t]he fate of Florida’s no-surcharge law hinges on a single determination: whether the law regulates speech—triggering First Amendment scrutiny—or whether it regulates conduct—subject only to rational-basis review as a mine-run economic regulation.”²¹⁵ Judge Tjoflat began his analysis by examining the text of the statute.

Judge Tjoflat’s initial step of examining the text comports squarely with well-settled principles of statutory construction addressed earlier in this article.²¹⁶ Furthermore, Judge Tjoflat acknowl-

211. *Dana's R.R. Supply v. Florida*, 807 F.3d 1235 (11th Cir. 2015), *reh'g en banc denied*, 809 F.3d 1282 (11th Cir. 2016).

212. FLA. STAT. § 501.0117 (2015).

213. *Dana's R.R. Supply*, 807 F.3d at 1239.

214. *Id.* at 1240.

215. *Id.* at 1241.

216. *See supra* Part II.C.

edged the importance of what he called “saving interpretations,”²¹⁷ writing that “before holding that a statute violates the Constitution we therefore look to ‘reasonable’ alternative constructions.”²¹⁸ Yet, perhaps foreshadowing the ultimate rejection of such a saving construction here, Judge Tjoflat cautioned that the court would not “contort, disfigure, or vitiate a law’s plain meaning and readily discerned purpose merely for the sake of statutory preservation.”²¹⁹

The majority ultimately concluded “that no saving effort, however valiant, can overcome the clear thrust of the statute’s plain meaning,”²²⁰ which was to target “expression alone”²²¹ and to apply “only to how a merchant may frame the price difference between cash and credit-card payments.”²²² In brief, they found that the statute “has the sole effect of banning merchants from uttering the word *surcharge*.”²²³ Although the majority acknowledged the statute “clearly touches on economic activity,”²²⁴ the burden it imposed on speech was more than the acceptable “incidental” variety permitted under *Sorrell* for economic regulations.²²⁵ Indeed, Judge Tjoflat wrote that the statute imposed “a *direct and substantial burden on disfavored speech*—by silencing it.”²²⁶

The majority reached this conclusion by adopting a dictionary definition for the term discount,²²⁷ which was left undefined by Florida lawmakers; minimizing the importance of the clause “at the time of a sale”²²⁸ in the statute’s definition of the term surcharge;²²⁹ and employing a “glass half-full” analogy to drive home its conclusion that the terms surcharge and discount were, practically speaking, identical in meaning.²³⁰

The two critical words at the heart of the Florida statute are “surcharge” and “discount.” The statute defines the former, but fails to do so for the latter. Thus, to understand “discount” and, in particular,

217. *Dana’s R.R. Supply*, 807 F.3d at 1242.

218. *Id.* (quoting *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593–94 (2012)).

219. *Id.* at 1242.

220. *Id.* at 1243.

221. *Id.* at 1245.

222. *Id.* at 1248.

223. *Id.* at 1251.

224. *Id.* at 1247.

225. *Id.* at 1248.

226. *Id.* (emphasis added).

227. *Id.* at 1243.

228. FLA. STAT. § 501.0117 (2015).

229. *Dana’s R.R. Supply*, 807 F.3d at 1244 n.7.

230. *Id.* at 1245.

the phrase “a discount for the purpose of inducing payment by cash,” the majority employed the “plain and ordinary meaning” rule—i.e. it turned to a dictionary.²³¹ This method assumes that lawmakers use “words in a statute as they are commonly understood.”²³² Citing the *Oxford English Dictionary*, the court defined discount as a “deduction (typically a certain percentage) made from a price or an amount due.”²³³

The majority concluded that because the statute allows for discounts, it does not ban dual-pricing altogether and thus it surely must do something else.²³⁴

The majority next turned its attention to the phrase “imposed at the time of a sale,”²³⁵ which is part of the definition of “surcharge.” Judge Tjoflat minimized the importance of “imposed at time of a sale,” finding that adhering to its literal meaning would “narrow the no-surcharge law into nothingness.”²³⁶ He observed that courts must “avoid statutory constructions that render provisions meaningless.”²³⁷

The majority then speculated about the legislative intent behind this language. If lawmakers included the phrase “imposed at time of a sale” to prohibit ambush or bait-and-switch schemes,²³⁸ then as long as merchants made customers aware of surcharges *any time* before actual sales, they would comply with the law.²³⁹ They might do so, the majority suggested, simply by hanging signs on cash registers telling buyers a surcharge is imposed for credit card purchases, accompanied by the statute’s text.²⁴⁰ But if that were the case, the majority reasoned, then the statute would prohibit almost no behavior, which surely could not have been the legislature’s intent.²⁴¹

Additionally, the majority proffered two other reasons why the “imposed at the time of a sale” language does not save the statute. First, the judges noted that Florida’s Attorney General “disavowed such a narrow reading” in her own argument before the court.²⁴² Sec-

231. *Id.* at 1243.

232. *Id.* (quoting *Redus Fla. Commerical, LLC v. Coll. Station Retail Ctr., LLC*, 777 F.3d 1187, 1191 (11th Cir. 2014)).

233. *Id.* at 1243 (quoting *OXFORD ENGLISH DICTIONARY* (2015)).

234. *Id.*

235. *Id.* at 1243–44.

236. *Id.* at 1244.

237. *Id.* at 1243 (quoting *Bouchard Transp. Co. v. Updegraff*, 147 F.3d 1344, 1351 (11th Cir. 1998)).

238. *Id.* at 1243–44.

239. *Id.*

240. *Id.*

241. *Id.* at 1244 n.7.

242. *Id.* at 1254.

ond, plaintiff Dana's Railroad Supply did, in fact, post a sign informing customers of surcharges prior to purchase, yet it still received a cease-and-desist letter for that very behavior.²⁴³ The majority reasoned that if the statute were read narrowly, the plaintiff would not have received that letter.²⁴⁴ Finally, the majority found that Florida's Deceptive and Unfair Trade Practices Act already prohibits bait-and-switch conduct,²⁴⁵ so it was unlikely the legislature would have passed another law as a "backstop to its unfair-competition law."²⁴⁶

To further illustrate why the statute restricts speech, the majority resorted to a hypothetical analogy:

Ostensibly worried about customers' dining experiences being adversely affected by their unquenched thirst, a state makes it a crime for restaurateurs to serve *half-empty* beverages. Restaurateurs are, however, expressly allowed to serve *half-full* beverages. The state has no greater regulatory scheme requiring restaurants to provide beverage refills, nor does it even require that beverages be served at all. Would we say that what the state has done merely regulates the economic affairs of the food-service industry? Of course not.²⁴⁷

The majority argued that, under this reasoning, violating this "glass-half-full mandate" depends "solely on the restaurateur's choice of words."²⁴⁸ Because the words are what matter, the majority wrote, the statute restricts speech and not conduct.²⁴⁹ Furthermore, this restriction pertains to the content of speech because it determines both *what* and *how* restaurateurs communicate to their customers.²⁵⁰

The majority saw no difference between this hypothetical situation—admittedly, a conceptual creation not backed by legal precedent—and Florida's no-surcharge statute because both foist criminal liability for saying something the wrong way.²⁵¹ The Florida law thus restricts speech based on content and therefore presumptively violates the First Amendment.²⁵² Indeed, the majority then struck it down as an unconstitutional regulation of commercial speech.²⁵³

243. *Id.* at 1244.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1245.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *See id.* at 1249–51 (setting forth the majority's analysis under the commercial speech doctrine). A discussion of this analysis is beyond the scope of this article,

2. *The Dissent: A Matter of Economic Conduct*

In a sharply worded dissent, Chief Judge Carnes accused the majority of ignoring the clear meaning of the Florida statute, particularly the portion that defines a surcharge as “any additional amount imposed at the time of a sale,” while expressly allowing a discount.²⁵⁴ In Carnes’ view, the legislature made a vital distinction between permissible discounts and forbidden surcharges based on *when* merchants inform customers about the additional fees, rather than *what* merchants say in characterizing them²⁵⁵: “Prescribing when a business can add an additional amount to its price controls the timing of conduct and not the speech describing that conduct.”²⁵⁶

Chief Judge Carnes maintained that by adopting “a statute-killing definition of ‘surcharge’”²⁵⁷ as merely “a negative discount,”²⁵⁸ rather than following the statutory definition, the majority put “a great big First Amendment bullseye”²⁵⁹ on Florida’s law:

Having redesigned the target so that the only distinction between a “surcharge” and a “discount” is the speech labeling it, the majority opinion has no trouble hitting what it aims at The majority opinion treats the annoying inconvenience of the statutory definition of “surcharge” as nothing more than an “alternative construction,” which it disparages as a “strained reading” of the statute. It is passing strange for a court to dismiss a legislature’s definition of its own words as a strained reading of the legislature’s own words.²⁶⁰

In terms of principles of statutory construction, Chief Judge Carnes criticized the majority for applying the “colloquial meaning”²⁶¹ of “surcharge” rather than the one defined by the legislature. He asserted that “[w]e are to use the ‘common and ordinary meaning’ of a statutory term *only* if there is no ‘statutory or regulatory definition’ of it.”²⁶² Chief Judge Carnes stressed that “the legislature has the right to define the terms it uses, which is why the statutory definition of a statutory term controls statutory construction of the term.”²⁶³

which instead focuses on the threshold and foundational issue of whether anti-surcharge laws even involve speech within the meaning of the First Amendment.

254. *Id.* at 1251 (Carnes, C.J., dissenting).

255. *Id.*

256. *Id.* at 1257.

257. *Id.* at 1251.

258. *Id.* at 1245.

259. *Id.* at 1252.

260. *Id.*

261. *Id.*

262. *Id.* (emphasis added) (quoting *Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1193 (11th Cir. 2010)).

263. *Id.*

In Chief Judge Carnes' view, the majority's assertion that the statute unconstitutionally restricts speech only makes sense if it bans all surcharges.²⁶⁴ However, the Chief Judge maintained that because the law only precludes surcharges imposed "at the time of sale," it is not designed to be a restriction on speech.²⁶⁵ He also chided the majority for placing the Eleventh Circuit in conflict with the Second Circuit, which had previously upheld New York's anti-surcharge law in *Expressions Hair Design*.²⁶⁶

The bottom line from the Eleventh Circuit's November 2015 ruling in *Dana's Railroad Supply* is that the majority and dissent vehemently disagreed in applying principles of statutory construction. The majority applied a dictionary definition of discount and, in Chief Judge Carnes' view, a similarly colloquial, but misguided, definition of surcharge by essentially rendering nugatory the phrase "imposed at the time of a sale." Conversely, the dissent placed critical emphasis on this phrase and, in doing so, embraced the constitutional avoidance canon, under which "a federal court must construe a state statute to avoid a constitutional problem if the statute is 'susceptible of [such] a construction.'"²⁶⁷

*B. Expressions Hair Design v. Schneiderman:
The Second Circuit View*

The challenge to New York's no-surcharge statute was first considered by Judge Rakoff, who struck the law down in October 2013.²⁶⁸ The statute provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means."²⁶⁹ The parties stipulated, in turn, that this language "does not bar sellers from offering an equivalent 'discount' to consumers who use cash."²⁷⁰

Judge Rakoff concluded that the statute, which stemmed from a decades-long battle between credit card companies and consumer advocates,²⁷¹ "clearly regulates speech, not conduct, and does so by ban-

264. *Id.* at 1254 n.2.

265. *Id.* at 1254.

266. *Id.* at 1257.

267. *Id.* at 1253 (quoting *S. Utah Mines & Smelters v. Beaver Cty.*, 262 U.S. 325, 331 (1923)).

268. *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430 (S.D.N.Y. 2013), *vacated*, 808 F.3d 118 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016).

269. N.Y. GEN. BUS. LAW § 518 (Consol. 2015).

270. *Expressions Hair Design*, 975 F. Supp. 2d at 436.

271. *Id.* at 438.

ning disfavored expression.”²⁷² The statute, he reasoned, “draws the line between prohibited ‘surcharges’ and permissible ‘discounts’ *based on words and labels*, rather than economic realities,”²⁷³ making distinctions in how vendors can communicate with their customers “virtually incomprehensible.”²⁷⁴ He emphasized that “the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment,”²⁷⁵ and struck down the statute for failing to pass muster under the commercial speech doctrine.²⁷⁶

A three-judge panel of the Second Circuit, however, unanimously disagreed, finding that the no-surcharge statute “regulates conduct, not speech.”²⁷⁷ Writing for the appellate court, Judge Livingston held that the statute “does not regulate speech as applied to single-sticker-price sellers,” thus eliminating the need to even reach a commercial speech analysis under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.²⁷⁸ Furthermore, the court concluded that the statute is readily susceptible to a narrowing construction since it does not apply beyond the single-sticker-price context to reach dual-price scenarios, thereby avoiding any constitutional, i.e. First Amendment, issues that would be raised in such situations.²⁷⁹ The former conclusion, as described below, is grounded on the speech-conduct dichotomy, while the latter statutory construction fully embraces the constitutional avoidance doctrine.

The court began by emphasizing that “prices, although necessarily communicated through language, do not rank as ‘speech’ within the meaning of the First Amendment.”²⁸⁰ The court cited price-control laws, in which sellers are banned from communicating certain prices in order to protect consumers.²⁸¹ Thus, although price *advertising* is an activity protected by the First Amendment, the *display of prices* is proscribed via economic regulations.²⁸² As Judge Livingston wrote,

272. *Id.* at 444.

273. *Id.* (emphasis added).

274. *Id.* at 436.

275. *Id.* at 445.

276. *See id.* at 445–47.

277. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 135 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016).

278. *Id.* at 130 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980)).

279. *Id.* at 137–40.

280. *Id.* at 130.

281. *Id.* at 130–31.

282. *Id.*

“sticker prices, like any other prices, can be regulated without bringing the First Amendment into play.”²⁸³

Because the New York statute fails to define “surcharge,” the Second Circuit engaged in the “plain and ordinary meaning” facet of statutory construction,²⁸⁴ adopting a dictionary definition of surcharge as “a charge in excess of the usual or normal amount.”²⁸⁵ Using that definition, the judges ruled that the New York statute, unlike Florida’s law, bans the imposition of any credit-card surcharge, no matter how it is worded to the customer.²⁸⁶ Thus, the law merely prevents what sellers can *do*, not what they can *say*.²⁸⁷ The display of prices is a matter of economic regulation, not expression.²⁸⁸

Put differently, the law does not ban merchants “from referring to credit-cash price differentials as credit-card surcharges,” it simply forbids merchants from the act or conduct of “imposing credit-card surcharges.”²⁸⁹ Colloquially put, the statute’s admonition is simply this: “call it what you whatever you want, but just don’t do it.”

The Second Circuit also dismissed the plaintiffs’ policy-based argument that customers may react more negatively to surcharges than to discounts. Judge Livingston reasoned that consumers’ reactions, which flow from the act of the surcharge itself,²⁹⁰ are irrelevant, and a negative reaction from consumers does not automatically mean surcharges qualify as speech.²⁹¹ As Judge Livingston noted, “[w]e are aware of no authority suggesting that the First Amendment prevents states from protecting consumers against irrational psychological annoyances.”²⁹² Cynically put, it is simply “too bad, so sad” for consumers who are duped by their own psychological biases.

The Second Circuit’s decision in *Expressions Hair Design* is directly at odds with the Eleventh Circuit’s reasoning in *Dana’s Railroad Supply* regarding whether anti-surcharge laws involve speech

283. *Id.* at 134.

284. *See supra* notes 191–203 and accompanying text (discussing the plain meaning rule).

285. *Expressions Hair Design*, 808 F.3d at 127.

286. *See id.* at 131 (opining that the statute, “by its terms . . . does not prohibit sellers from referring to credit-cash price differentials as credit-card surcharges, or from engaging in advocacy related to credit-card surcharges; it simply prohibits imposing credit-card surcharges”).

287. *See id.* (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006)).

288. *Id.*

289. *Id.*

290. *Id.* at 132–33.

291. *Id.*

292. *Id.*

and the First Amendment. With the creation of this appellate-level split of authority, the constitutionality of anti-surcharge laws was ripe for Supreme Court consideration, and the Supreme Court granted certiorari in *Expressions Hair Design* in September 2016.²⁹³

The article concludes by arguing that the unenumerated right of consumers to receive information, which was not fully examined in either case, provides the critical tipping point that militates in favor of holding that anti-surcharge laws directly affect expression and thereby raise First Amendment concerns.

IV.

CONCLUSION

A discussion of the constitutional implications of anti-surcharge statutes reveals the long-standing dichotomy in First Amendment jurisprudence between speech and conduct,²⁹⁴ and questions the extent to which courts should go to save a statute from unconstitutionality when its intended meaning is ambiguous.²⁹⁵

Resolving the constitutionality of anti-surcharge statutes is critical, as nine states have adopted such measures.²⁹⁶ Furthermore, the split of authority on this issue between the Second and Fifth Circuits in *Expressions Hair Design* and *Rowell*, respectively, and the Eleventh Circuit in *Dana's Railroad Supply*²⁹⁷ leaves in its wake a tepid mush of jurisprudential porridge, which the Supreme Court now has a chance to clarify after granting a petition for a writ of certiorari in *Expressions Hair Design* in September 2016.

The Eleventh Circuit held that a surcharge and a discount were, essentially, two sides of the same coin. Thus, allowing merchants to call a reduction in price a discount, but prohibiting them from adding a fee and calling it a surcharge, unconstitutionally burdens merchants' ability to communicate with their customers.²⁹⁸ Despite a biting dissent urging it to do so,²⁹⁹ the majority declined to adopt a saving construction that would have protected the handiwork of Florida lawmakers from constitutional attack.³⁰⁰

293. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016).

294. *See supra* Part II.B (analyzing the dichotomy between speech and conduct).

295. *See supra* Part II.C (analyzing the concept of saving statutory construction).

296. *See supra* note 30 (identifying the nine states).

297. *See supra* Part III (analyzing the split of authority between the Eleventh and Second Circuits); *see supra* note 34 and *infra* notes 303–05 (discussing *Rowell*).

298. *See supra* notes 248–53 and accompanying text.

299. *See supra* notes 254–67 and accompanying text.

300. *See supra* notes 220–26 and accompanying text.

A Second Circuit panel, however, unanimously ruled that a similar ban on surcharges in New York merely restricted what merchants could *do*, not what they could *say*, and therefore was not an unconstitutional restriction on speech.³⁰¹ Federal district courts within both the Fifth Circuit also weighed in with discordant rulings in 2015,³⁰² making this nationwide muddle murkier.

The Fifth Circuit split two-to-one in March 2016 in upholding Texas' anti-surcharge ban in *Rowell v. Pettijohn*³⁰³ as a mere economic—rather than speech—regulation. Writing for the Fifth Circuit majority, Judge Hawkins Barksdale reasoned, in accord with the Second Circuit in *Expressions Hair Design*, that “simply speaking about the prices regulated by Texas’ law does not transform it into a content-based speech restriction; the speech is merely incidental to the regulated economic conduct.”³⁰⁴ In contrast, Judge Dennis issued a dissent, finding, in agreement with the Eleventh Circuit in *Dana’s Railroad Supply*, that “the Texas Anti-Surcharge Law makes the legality of a price differential turn on the language used to describe it. This is not a regulation of pricing or of other economic activity, but regulation of protected commercial speech.”³⁰⁵

Because surcharges and discounts operate in nearly identical fashion, this article contends that the Eleventh Circuit’s speech-based reasoning is more compelling than either the Second or Fifth Circuit’s focus on conduct. Critically, two other factors also weigh in favor of finding anti-surcharge statutes unconstitutional—namely, the detrimental psychological effect on consumers and the unenumerated First Amendment right of those consumers to receive speech.

Both courts gave short shrift to the psychological impact. As outlined in Part II.B, consumers are likely to react against a negatively framed surcharge but to accept a positively framed discount—even if the net result is the same. Thus, by banning merchants from imposing surcharges while allowing them to offer discounts, lawmakers tilt the playing field in favor of the biggest and, arguably, only beneficiary of these laws—credit card companies. The Second Circuit blithely dismissed such considerations as mere “irrational psychological annoyances,”³⁰⁶ but clearly real, live consumers are not dissuaded from

301. See *supra* notes 268–93 and accompanying text.

302. See *supra* notes 32–35 and accompanying text.

303. *Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016).

304. *Id.* at 82.

305. *Id.* at 86 (Dennis, J., dissenting).

306. See *supra* note 292.

ringing up more charges than they might otherwise be if they were made aware of swipe fees, a fact that merits judicial consideration.

If the psychological implications were given short shrift, the right of consumers to receive speech was given none at all.³⁰⁷ Neither the Second or Eleventh Circuit considered whether the First Amendment prevents states from depriving consumers of relevant information about the true costs of using credit cards. This is a significant oversight, because there are two parties directly involved in every commercial transaction. Retail transactions involve merchants and consumers. Conversations, in turn, involve speakers and listeners. *Expressions Hair Design* and *Dana's Railroad Supply* meld both kinds of relationships, involving merchants as otherwise willing speakers and consumers as otherwise willing listeners. Unfortunately, the merchants are not allowed to speak as they wish and the consumers, in turn, are prohibited from receiving important information from merchants. The right to receive speech thus is hindered by anti-surcharge laws.

Indeed, the Supreme Court's holding in *Virginia Pharmacy Board v. Virginia Consumer Council*—that a state could not prevent pharmacists from advertising prices for prescription drugs—is both relevant and analogous to the contretemps over anti-surcharge statutes.³⁰⁸ Surely, if a state cannot regulate information about prescription drugs, carrying the potential of life or death, it cannot control information about the purchase of a model choo-choo train (*Dana's Railroad Supply*) or a hair weave (*Expressions Hair Design*). In other words, it would seem far more important and justifiable for the government to regulate speech affecting one's life and health than to regulate speech affecting the purchase of all other goods and services, yet the Court rejected this in *Virginia Pharmacy*.³⁰⁹

Finally, it is worth considering whether the purported purpose of anti-surcharge statutes—to protect consumers from being ambushed at the cash register—can be fulfilled in some way short of banning surcharges. For instance, both Florida and New York already provide such protection with statutes outlawing bait-and-switch tactics.³¹⁰ The

307. See *supra* Part II.B (analyzing the right to receive speech).

308. See *supra* notes 127–31 and accompanying text (analyzing *Va. Pharm. Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976)).

309. See *Va. Pharm. Bd.*, 425 U.S. at 770–71.

310. See FLA. STAT. §§ 501.201–501.213; N.Y. GEN. BUS. LAW § 396 (Consol. 2015). For example, the applicable text of the New York statute reads as follows:

No person, firm, partnership, association or corporation, or agent or employee thereof, shall, in any manner, or by any means of advertisement, or other means of communication, offer for sale any merchandise, com-

federal law that authorized credit card surcharges also requires merchants to disclose them in advance.³¹¹ Thus, consumers are already adequately protected, making anti-surcharge statutes superfluous and the protection argument an artful mirage. Instead, this misguided outbreak of government paternalism prevents merchants from passing along to their customers the fees they are forced to pay to credit card companies, and keeps them from educating customers about those fees.

It is no doubt true that a consumer, if confronted with a credit card surcharge, might very well decide to pay with cash instead. But that disadvantages only the credit card company, neither the consumer nor the merchant. So why should state power be brought to bear on behalf of these companies, particularly when the First Amendment implications are so readily apparent? Why, indeed.

The Supreme Court has now stepped into the breach in *Expressions Hair Design* to decide whether anti-surcharge prohibitions pass constitutional muster.³¹² In doing so, it should consider not only the speech-versus-conduct dichotomy in First Amendment jurisprudence, but also the right of credit card users to receive information and the psychological constructs inherent in anti-surcharge laws that disadvantage consumers. A careful consideration of these factors will render these statutes unconstitutional and will ultimately liberate consumers now trapped in a vortex of government-enforced ignorance.

modity, or service, as part of a plan or scheme with the intent, design, or purpose not to sell the merchandise, commodity, or service so advertised at the price stated therein, or with the intent, design or purpose not to sell the merchandise, commodity, or service so advertised. Nothing in this section shall apply to any television or sound radio broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising, who broadcasts, publishes, or prints such advertisement.

311. See *supra* notes 58–59 and accompanying text.

312. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016). During oral argument in January 2017, several justices, including Justice Kagan and Justice Sotomayor, reportedly seemed skeptical that New York's statute restricted speech. Robert Barnes, *Court Weighs Credit Card 'Swipe Fees'*, WASH. POST, Jan. 11, 2017, at A3. The Supreme Court had not issued a ruling in the case when this article went to press.

