The Free Speech Clause as a Deregulatory Tool

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The U.S. Supreme Court increasingly leverages a rigid interpretation of the Free Speech Clause to strike regulations that address campaign financing, health care warnings, tax disclosures, collective bargaining agreements, and consumer protections. History has become little more than a slogan that the majority periodically invokes but seldom accurately evaluates. That lack of nuance augments the justices' authority to articulate absolutist-sounding rules to the detriment of legislatures' exercise of traditional governmental functions. Jurists would do better to rely on a more proportionate and less categorical approach to decide whether laws impose direct or peripheral burdens on communications. The level of safeguards enjoyed by expressions should be gauged by their value to political self-determination, personal development, or informational contribution. The degree of protections that speech enjoys should be balanced against countervailing government interests, alternatives available to speakers, fit between law and public ends, and relevant history.

The language of the Free Speech Clause is not self-definitional. Almost all human activities involve communications; even criminality can be infused with expressiveness, but that does not mean that conspiracy, assault, and hate crimes are protected by the First Amendment. The Supreme Court of the United States is tasked with explaining the scope of its coverage. In recent years, the Court has taken a decidedly libertarian approach to laws that impose even nominal restrictions on communications.

That approach has proven strategically beneficial to special interests who challenge laws meant to secure labor rights, to restrict corporate expenditures on political campaigns, to prevent protestors from standing too close to the entrances of clinics where abortions are performed, and to compel the posting of health notices. The Court's reasoning has become increasingly formalist, adopting judicial categories of interpretation to strike legislation without giving adequate consideration to countervailing government interests.

The Supreme Court's free speech jurisprudence has relied increasingly on a categorical understanding of free speech that purports to have historical pedigree. Close examination, however, reveals absolutist statements and historical inaccu-

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racies. A series of recent cases have strictly construed the Free Speech Clause to strike various regulations. The predominant framework of analysis strengthens the Court's hand at the expense of legislative initiative. As the power of the judiciary has waxed, the ability of legislators to pass laws responsive to constituents' demands has waned. The Court's rigid free speech doctrine creates a model of governance that is "incapable of responding to new conditions and challenges."[1]

Judicial formalism lacks transparency, which is essential to litigation and appeal. This essay argues for greater judicial clarity in balancing competing interests and in evaluating surrounding circumstances. It proposes an analytical approach for courts to undertake when assessing First Amendment challenges to traditional government functions. Rather than dismissing lawmakers' concerns, the Court should evaluate whether a law interferes with self-expression, civic participation, or factual assessment. A balance is needed for courts to reflect on speech concerns, how well the law fits with regulatory aims, and alternatives for communication.

Before explaining under what circumstances the Supreme Court invokes the First Amendment to strike regulations, a few words are in order about baseline principles. At its core, the constitutional protection of speech reflects the individual right to express ideas, participate in politics, and gather information. The First Amendment restrains government from imposing autocratic orthodoxy. It secures the marketplace of ideas as an open forum for exchanging ideas that make their way into politics, private life, and education. The flow of information, unencumbered by onerous regulations, is critical to everything from vigorous engagement in federal and local politics to the recitation of poetry.

Determining what communications the First Amendment covers cannot be gleaned from the text alone. Its written terms only prevent Congress from meddling in free expression, but that cannot be its full meaning. Representative democracy could not survive were the executive and judicial branches allowed to censor speakers indiscriminately. Moreover, the prohibition against Congress "abridging the freedom of speech" says nothing of other modes of protected communications that include artistic symbolism, meaningful gestures, expositive gesticulations, and guttural sounds.

Neither do the views of the Bill of Rights' framers provide enough information to construct more than a prohibition against restraints prior to publications, parliamentary privileges, or procedural fairness. However, the historic lens does not suffice to evaluate laws dealing with modern communication tools such as broadcast television, the internet, telephone, or even sound equipment.

Almost all human activities that are subject to laws involve some implicit or explicit communications.[2] The judiciary serves as a bulwark against policies that infringe on the Bill of Rights or Due Process Clause. It determines when speech-protective rules arise and what human activities are outside the range of subjects

that benefit from constitutional status. Speech that enjoys the greatest constitutional safeguards concerns personal, associational, and social matters.

The Court's early forays into free speech appertained to cases in which defendants were charged with inciting opposition to America's role in the First World War and to the administration of conscription. On the whole, during the early decades of the twentieth century, the Court upheld convictions of persons who decried U.S. foreign policy or attempted to interfere with the draft. In those years, judicial opinions tended to be deferential to legislative efforts against the perceived spread of communism. A consensus among American courts and scholars has long recognized that early-twentieth-century cases wrongly upheld government prosecution of nonviolent members of subversive organizations.

The Warren Court altered free speech doctrine in favor of underdogs and politically disfavored groups. For instance, the Supreme Court held that a vague and selectively enforced state law could not prevent the National Association for the Advancement of Colored People (NAACP) from soliciting clients to its civil rights legal practice.[3] The Court began to rely on a developing standard of review, which came to be known as *strict scrutiny*, requiring the prosecution to prove that there was a compelling government reason for suppressing politically disfavored speech and that the law was narrowly tailored to that end.

Other cases in the 1960s likewise relied on the strict scrutiny test to strike down laws that required NAACP branches to divulge membership lists and that demanded public employees to reveal their membership in expressive organizations. The use of this rigorous test to review regulations limited the power of government to intrude on political representation and dissent. During the same period, the Court also expanded the relevance of the First Amendment to prevent politically motivated efforts to censor speakers, for instance, requiring public officials who sue for defamation to prove that the challenged false statements were motived by actual malice. That rule assured parties engaged in vigorous political debate that they would not be subject to litigation for inadvertently making mistakes. As historian Morton Horwitz pointed out, at the close of the Warren Court in 1969, the typical beneficiary of the Court's readings of First Amendment doctrine was "a member of some weak, dissident, and unpopular political or cultural minority." The First Amendment was then understood to be a preferred right that required any statute that imposed restrictions on expression to be narrowly drawn in order to be the least restrictive available method to achieve a compelling public objective.[4]

So, too, in the first years of the Burger Court, a variety of cases continued to weigh litigants' speech interests against various social, military, safety, and educational concerns, although balancing sometimes proved to be ad hoc in its application. The Supreme Court's most rigorous review was reserved for political speech. Moreover, the Court determined that the First Amendment prevents government

from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content."[5] Yet the Burger Court, just as its predecessor, articulated no overarching doctrine to determine whether a law with only an incidental effect on speech, such as a prohibition against destroying a military draft card, or one that restricts unprotected expression, such as obscenity, falls outside the coverage of the First Amendment.

Despite this similarity, legal scholar Thomas Emerson goes too far in saying that the Burger Court made "little change in the position" taken by the Warren Court as to the role of free expression in national life.[6] By the mid-1970s, special interest groups opportunistically invoked strict scrutiny to challenge ordinary regulations. The First Amendment then became an effective tool for challenging legal restrictions on political expenditures that were meant to prevent corruption and the appearance of corruption. Reliance on the First Amendment as a deregulatory instrument has reached new heights under the Roberts Court. The recent pattern of invoking the Free Speech Clause in opinions that expand judicial authority, Justice Kagan has said, resembles "black-robed rulers overriding citizens' choices."[7]

At its core, the First Amendment prevents government from imposing punishments on persons because of their abstract or concrete ideas. By mandating official neutrality, the Constitution prevents the imposition of any secular creed on private persons. Its roots are planted in anti-autocratic statecraft born of a revolution against British monarchy. The First Amendment prevents government actors from censoring discussions about ideas, topics, and perspectives. Those principles preserve autonomy, political self-determination, and science. Difference exists, as writes First Amendment scholar Geoffrey Stone, between the suppression of political perspectives and the neutral enforcement of "legitimate governmental interests" that do not implicate "first amendment interests." That dichotomy assures that sensible regulatory responses are subject to "content-neutral balancing" rather than the most rigorous judicial review.[8]

In recent years, however, the Roberts Court has not followed such a fine distinction. It has expanded the array of regulations subject to the content-neutral, strict scrutiny standard of review. Corporate litigants increasingly invoke the First Amendment in lawsuits that seek to strike legislation that so much as brushes up against expression, such as pricing notifications on credit card sales.[9]

Several opinions form a corpus of First Amendment jurisprudence that consistently adopts distinctly deregulatory interpretations. Those holdings typically rely on strict construction of the Free Speech Clause and often lack sufficient nuance to differentiate protected speech from reasonable regulations on workplace harassment, consumer disclosure, and medical patient privacy. Some justices wish to broaden the reach of the First Amendment still further, scarcely distinguishing commercial advertisements from scientific knowledge, pricing noti-

fications from philosophic propositions, and signage ordinances from political debates. In its benighted hands, the Supreme Court recently struck down states' laws that required pregnancy crisis centers to disclose public health information and charitable organizations to identify their top donors.[10]

The current Court has taken it in hand to invalidate economic, safety, and health regulations. These decisions have augmented judicial authority while thwarting states' capabilities to exercise traditional powers. The danger is one of selective decision-making, what legal theorist Pierre Schlag points out incentivizes activist judges to prepackage "justifications for particular outcomes."[11] Lack of contextualization, Justice Stephen Breyer rightly noted in a dissenting opinion, "threatens significant judicial interference with widely accepted regulatory activity."[12] Litigants have strategically taken to attacking ordinary regulations by relying on an increasingly expansive definition of what qualifies for First Amendment protection.

Justice Antonin Scalia set a pattern for strict categorical formalism with his reasoning in *R.A.V. v. St. Paul*, which found unconstitutional a vaguely drafted cross-burning ordinance. More important than that specific holding was Scalia's use of the strict scrutiny standard for all content and viewpoint regulation, except for certain categories of low-value speech. The list of unprotected expressions, Scalia claimed, already existed when the Bill of Rights was ratified in 1791.[13]

Upon examination, however, his claim to the mantle of history and tradition turns out to be spurious. Current historical categories, as the late legal scholar and advocate Steven Shiffrin pointed out, "are entirely different than at the time of the framing; indeed their most recent definitions have been refined in a line of cases beginning in the late 1960s."[14] Similarly, legal scholar Toni Massaro questions the possibility of compiling any definitive enumeration of historical or traditional exceptions to free speech protections.[15] The Court ignored criticism and self-assuredly plowed on with a doctrine of its creation.[16] Even on his originalist terms, Scalia's claim is demonstrably false. Among the categories he listed, two – obscenity and "fighting words" – were judicial constructs of the mid-twentieth century, not categories that existed at the founding of the nation.[17] In the words of Justice Amy Coney Barrett, "tradition is not an end in itself. . . . Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is itself a judge-made test."[18]

Chief Justice John Roberts, the author of the majority opinion in *United States v. Stevens*, reiterated Scalia's historically groundless claim that all legitimate content-based restrictions of speech were fixed in 1791. As Scalia before him, Roberts made no effort to review any primary or secondary sources to substantiate this historical conjecture. The strict scrutiny test again proved of vital importance for striking a law. The Court rejected the Animal Crush Videos Act out of hand, giving virtually no consideration to Congress's intended reasons for enforcing the law to prosecute commercial trade in videos of animal torture.[19]

To add further force to his vacuously originalist claim, the following year Justice Scalia again relied on it in *Brown v. Entertainment Merchants*. He adopted strict scrutiny to reject the State of California's policy of requiring children to get parental permission before buying or renting violent video games. Outside a few forms of speech that had been unprotected from the founding – Scalia listed obscenity, incitement, and fighting words – no regulation was likely to survive rigorous judicial scrutiny. Without reference to any primary source, historical treatise, monograph, article, or even pamphlet, Scalia grandiloquently pronounced that the First Amendment reflected the "judgment [of] the American people," dating back to the year of its drafting.[20]

Other cases likewise picked up on Scalia's originalist conjecture. Contrary to the Court's claims, though, obscenity was a doctrine established in 1973, the current incitement test set in 1969, and "fighting words" was a concept that entered First Amendment jurisprudence in 1942.[21] These remain highly contested doctrines that emerged during the twentieth century through Supreme Court opinions rather than the framers' constitutional vision.

When coupled with the strict scrutiny test for content neutrality, the Court's historical inaccuracy about the early republic bolsters the judicial branch's ability to find laws not to be grounded in a compelling government interest nor narrowly tailored enough to meet five justices' notions of fit.

In addition to historically suspect assertions, the Roberts Court also adopted wooden definitions tinged with absolutist-sounding rhetoric. In *Reed v. Town of Gilbert*, Justice Thomas, writing for the majority, held that all facially content-based regulations should be subject to strict scrutiny.[22] His judicial reasoning is as oversimplified as it is opaque. Taken to its logical conclusion, *Reed*'s absolutist rhetoric could place in constitutional jeopardy content-based regulations on copyright, securities transaction, and consumer protections that heretofore have raised no First Amendment concerns.

Other regulations on expressive content that may become subject to heightened scrutiny are also unrelated to the nation's founding. They include regulations on the labeling of refrigerators, air conditioners, water heaters, and toilets; "Rx only" prescription drugs; alcoholic beverages that may lead to birth defects when consumed by pregnant women; warnings of hazardous substances; markings on commercial vehicles; pharmaceutical products; tobacco cartons; bank titles; and Federal Deposit Insurance Corporation notifications. Hence, any presumption that content regulation automatically triggers strict scrutiny or historical review distorts precedent and puts into doubt the constitutionality of a wide swath of ordinary laws.

The *Reed* Court's absolutism was neither consistent with history nor doctrine. The Court would have done better to find the signage ordinance at issue to have been disproportionately burdensome on the spread of information, such as direc-

tions pointing to church services. What is needed is a more contextual approach that requires judges to consider both the importance of the asserted speech rights and the fit of public policy to reasonable policies. Rather than hard and fast rules, judicially created categories should be "rules of thumb."[23]As things stand, the Court has created formulaic categories that oversimplify the meaning of the First Amendment and grant the judiciary excessive authority to thwart legislative policy. Moreover, review of whether and to what extent laws impact free speech rights would be more in keeping with older precedents that established that the First Amendment is tied to ideas, politics, and information, not to laws that peripherally involve communications.

Opportunistic reliance on the First Amendment to challenge legislation extends well beyond commercial regulations. The Supreme Court continues to invoke it to thwart federal and state efforts to limit corruption and the appearance of corruption from the enormous money flowing into political campaigns.[24] The Court's recurrent equation of money with speech and protection of an unlimited amount of expenditures provided Donald Trump with 20 percent of his financing for a successful run for presidential office in 2016.[25] The Court's refusal to defer to laws that limit money in bloated election campaigns prevents lawmakers from enforcing statutes designed to level the playing field of election campaigns. As a result, plutocratic wealth (personal and corporate) has flooded into American politics.

Even accepting the need to scrutinize closely laws that limit campaign contributions and expenditures, compelling legislative interests exist for regulating government administration of elections. As professor of civil liberties Burt Neuborne points out, "Fostering equal political participation is a sufficiently compelling interest to justify some regulation of campaign spending."[26] The Court's holdings, to the contrary, restrain election reforms under a First Amendment doctrine that views money as speech itself, not simply as facilitating speech.

Neither does judicial deregulation end with natural people. The Court's libertarian streak affects the most critical aspects of representative democracy. The majority in *Citizens United v. Federal Election Commission* concluded that corporations, even though they are artificial persons who can neither be candidates for public office nor vote in elections, have a First Amendment right to expend general treasury funds in support of political candidates who are more likely to favor their businesses' bottom lines.[27] The holding relied on strict scrutiny. The majority's insubstantial understanding of history may explain why it protected corporations to a degree unfathomable to the framers.[28]

The strict scrutiny test has come to be a tool for asserting judicial authority over legislative and administrative policy. The adoption of strict scrutiny often describes no more than the judicial conclusion that a regulation is invalid.[29] The increasing use of the Free Speech Clause to strike regulations extends beyond matters of political self-deliberation to speech that proposes commercial exchange.

Returning to the issue of commercial speech, in the mid-1970s, the Court swerved away from its earlier stance that the First Amendment does not cover "purely commercial speech" and recognized truthful commercial speech to be protected under the Free Speech Clause. From the inception of the doctrine, though, Justice William Rehnquist disagreed with the decision to augment judicial authority to strike advertising regulations, which he would have left outside the purview of the Constitution. Against his continued dissent, in 1980, the Court defined a test to review legal and nonmisleading commercial speech matters. The test requires government to demonstrate that the law in question directly advances a substantial government interest without being unnecessarily extensive in scope.[30]

The Court's rationale for finding that commercial speech enjoys at least limited First Amendment value has been tied ever since its nascence to the rationale that advertisement informs ordinary people through the marketplace of ideas. In more recent cases, however, the majority has shifted the focus of free speech analysis from consumer concerns to those of businesses. Justice Breyer, like Rehnquist before him, regarded the deregulatory direction in the commercial speech area to be as retrogressive as the misguided period during the early twentieth century when the Court regularly struck down health and welfare regulations.[31]

In the recent *Expressions Hair Design v. Schneiderman* case, the Court found that a New York law that regulated surcharges on products raised a First Amendment claim. Merchants asserted that the law forbade them from choosing how to communicate charges. The Court found that the statute was unconstitutional, even though the law was content and viewpoint neutral. The State's legislative aim was to preserve consumer choice. Merchants were neither censored nor were they required to accept some orthodox government perspective. The State statute expurgated no information; neither did it suppress dissent, deliberation, or free thought; nor did it impose state orthodoxy. Rather than treat it as a neutral economic or pricing regulation designed to help customers select their method of payment, the Court found the law interfered with merchants' speech.[32]

The pattern of commercial law deregulation under the auspice of the Free Speech Clause extends far beyond *Expressions Hair Design*. The Court's encroachment on traditional legislative authority is also evident in *Sorrell v. IMS Health, Inc.*, in which the majority found a state privacy protection on confidential medical information to violate the First Amendment. A Vermont law forbade pharmacies to sell prescriber information. Pharmaceutical companies purchased those records from data brokers and used them strategically to influence physicians with a history of prescribing low-cost or generic prescriptions.[33] Pharmaceutical data vendors and pharmaceutical manufacturers filed suit on First Amendment grounds to challenge the States' Prescription Confidentiality Law.

The State statute prevented commercial vendors from profiting from the resale of medical histories to pharmaceutical manufacturers. The *Sorrell* majority labeled

the corporate marketing strategy to be a form of "speech" that warranted heightened scrutiny. However, it gave no serious weight to prescribers' and patients' interests in anonymity. Free speech became a categorical norm to the Court compared to which privacy apparently did not even warrant substantive consideration.

Moreover, as several legal scholars, including Martin Redish and Julie Cohen, have pointed out, the *Sorrell* Court indicated a future willingness to level the free speech value of commercial speech and any other content-based communications, be it political or artistic.[34] This again touches on the approach taken in *Reed* of subjecting all content-based regulation to strict scrutiny.

Scholar and activist Shoshana Zuboff characterizes the Court's deregulatory approach as "flying the banner of 'private property' and 'freedom of contract,' much as surveillance capitalists march under the flag of freedom of speech." The approach taken risks the "conflation of industry regulation with 'tyranny' and 'authoritarianism.'"[35] As during the *Lochner* era, the *Sorrell* Court relied on freedom of contract – entered upon by pharmacies that mine data and corporate pharmaceutical purchasers of the information – to undermine consumer regulation. *Sorrell* weaved deregulatory analysis into a doctrine that lacks interpretive shading and stifles legislative initiative at a time of exponentially increasing commercial exchange in digital data. The Court has added confusion to an already turbid field of law by asserting, in cases such as *R.A.V.* and *Reed*, that strict scrutiny applies to all laws that target communicative content except a few judicially created "low-value" categories. The Court's absolutist-sounding doctrine creates a litigation environment that is rife for exploitation by corporations challenging economic regulations and politicians interested in deregulating campaign expenditures and contributions.

Opportunistic litigants recognize the flexibility of a doctrine that, while it claims to be formal, in practice empowers judges to reject government interests in health care and collective bargaining. Relying on overly simplified categories does not suffice to contextualize challenges to regulations that affect speech. The Court's approach fails to explain why a variety of content-specific laws remain constitutional, ranging from confidential medical recordkeeping to a complex array of disclosure statements concerning securities transactions. Neither does the Court's determinative historical method, which purports to have its roots at the nation's founding, articulate a usable standard.

The meaning of free speech to ordinary people living in 1791 is relevant but unlikely to help us resolve modern questions about communications over the internet, electronic balloting, or broadcasting. We've already seen that Supreme Court claims that free speech formalism is tied to the nation's founding are suspect.

Historical evidence does not bear out the Court's claim that the categorical rule of First Amendment construction has ancient pedigree. The founding gener-

ation's record was mixed. It contained lofty statements about natural rights, but also a record of political censorship. At the time of the Revolution, free speech had a narrower meaning than it enjoys today. Neither were the founders' sentiments on the subject consistent, clear, or pertinent to every case and controversy challenging a law on First Amendment grounds. Modern dilemmas about the regulation of expressive content arising from AI, social media, public education, corporate disclosure statements, and telemarking require judges to rely on contemporary contexts, not the sensibilities of men who had not an inkling about those topics when they proposed and ratified the First Amendment.

History alone cannot resolve contemporary free speech issues. Many scholars, for instance, believe the framers understood freedom of the press to mean nothing other than the liberty to publish without prior restraint.[36] Punishment after publication was permitted. Others think of free speech at the founding in broader terms. They turn to Thomas Jefferson's and James Madison's opposition to the infamous Sedition Act of 1798 to draw the inference that the framers opposed political censorship.

In truth, the record is mixed at best. There was certainly a tradition, dating prior to the Revolution, that regarded speech to be a natural right. Colonists were born of a tradition that considered public debate about matters of politics and criticism of rulers to be among the most important privileges of citizenship. The Third Marquess of Huntly, for example, regarded political dissent to be an ancestral right that predated the first English Civil War. The right to speech protected Englishmen's ability to express opinions without prior penalty for engaging ideological opponents with thrusts and parries. A Federalist jurist and the first chief justice of the Supreme Court, John Jay, asserted that citizens are free to "think and speak our Sentiments."[37]

The same ideal of open debate for representative governance informed state guarantees of free speech. In 1776, the same year that the Second Continental Congress adopted the Declaration of Independence, the Pennsylvania Constitution recognized that "the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." The reference to the people's sovereign place atop government indicated that ordinary citizens enjoyed a similar privilege of voicing their views about matters of public concerns as did legislators expostulating arguments in the heat of debate.[38]

Even before adoption of the First Amendment into the Constitution, several states secured the people's right to express "sentiments" through expressive channels, especially via the press, and to thereby engage in the controversial deliberations about American democracy.[39] A rare point of agreement between American Revolutionaries and British Loyalists was a sentiment voiced by the Loyalist Samuel Stearn in a column that appeared in the *Philadelphia Magazine* in 1791. "That

the *freedom of speech*, and the *liberty* of the *press*, are the natural rights of every man, providing he doth not *injury himself* nor *others* by his *conversation* or *publications*."[40] The early history of the Republic indicates widespread recognition that representative democracy cannot function without people enjoying the security to articulate views orally, in print, or pictorially.[41]

That principled conviction, however, did not halt Federalists from adopting the Sedition Act in order to suppress Republican opposition to President John Adams's administration. The Court's recent claim that the framers believed all manner of political speech to be protected outside of a few categories existing in 1791 is belied by Congress's enactment of a law just seven years later to stifle political debate. The Sedition Act criminalized "false, scandalous and malicious writing or writings against the government of the United States." Ever since Jefferson's presidency, when he pardoned fellow Republicans who had been convicted under the Act, that law has been understood to have been a mistake of historic magnitude. The passage of the statute, its subsequent enforcement by the Adams administration, and its later repudiation led the Supreme Court in 1964 to conclude that "the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[42]

The differing strands of thought about free speech at the time of the nation's founding render the framers at best inconclusive guides, not the determinate scions that Justice Scalia envisioned in *R.A.V.*[43] As we have seen, the Roberts Court has repeated and compounded that erroneous rendition of history.

Many questions about the meaning of free speech come down to context and determinations of the value of speech for personal, associational, and informational purposes. The most stringent protections are reserved for communications with "serious literary, artistic, political, or scientific value."[44] That affirmative statement is matched by its negative formulation: some utterances play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[45] History is a starting point of interpretation, but its mischaracterization has become an instrument of deregulation.

The Roberts Court's approach to free speech restrictions purports to recognize only historical exceptions to the otherwise absolutist-sounding rule against content-based regulations. Its interpretive rhetoric claims an ancient pedigree dating back to 1791. Upon closer examination, however, the list of categories is not grounded in core principles of the First Amendment, but a patchwork of doctrines that define low-value speech, such as incitement and obscenity.

What strict formalism lacks by way of judicial rigor it makes up for with overgeneralizations and underexamined conclusions. The Court invokes it to strike a wide variety of ordinary laws without closely reviewing whether the regulated

communications advance any of the values commonly associated with free speech. The Court's dismissiveness of ordinary legislative priorities continues along a path that Horwitz characterizes as "a Lochnerization of the First Amendment."[46]

When a regulation under review abridges autonomous, deliberative, and informative communications, content neutrality is indeed at the core of First Amendment inquiry. But knee-jerk adoption of the most rigorous review for economic disclosure requirements and for commercial regulations encroaches on legislative authority. Rather than simple categories, free speech adjudication of these and other ordinary regulations should be decided within the context of speakers' interests, government policy, fit of the law to the regulatory objective, and availability of alternative communicative channels. A rigorously balanced judgment renders transparent a judge's reasoning. Ideals that anchor the First Amendment should ground standards of scrutiny, not formalistic assertions of judicial authority or unexamined claims purporting historical clarity where the record is at best ambiguous.

Proportionate analysis of policies need not be ad hoc. Rather, it can be reflective of the constitutional values of self-expression in the framework of deliberative democracy, economic liberty, and social order. The personal will to speak is not absolute, but subject to limited policies that do not enforce government orthodoxy or censorship. Laws against horizontal collusion, other restraints of trade or commerce, and employment discrimination are examples of legitimate regulations not subject to heightened judicial review that pose no harm to free speech rights, even though they limit expressive content. All three are reasonable regulations, even though they are not found among the Court's lists of low-value categories. Restricting supply, fixing prices, or exchanging and acting on insider information are unprotected forms of communications, as are words that create a hostile work environment based on sex, religion, or nationality. Regulations in these areas as well as those on commercial advertising are infused with legislative purposes that a formalist doctrine, even one buttressed by wooden historical claims, cannot adequately represent.

Speech is inevitably variegated and diverse; content and viewpoint are indefinitely malleable. Flexibility is necessary for adjudication. Adjudicators must balance principled conflicts between and among public and private interests. Justice Aharon Barak points out that the rules of proportionality must reflect on "the complexity of human life, which is full of contradicting values and rights."[47] Justice Breyer memorably put it in the context of the U.S. Constitution: "The First Amendment is not the Tax Code."[48] The Court's categorical formalism relies on strict scrutiny to fatally strike government policies, even when there remain ample alternative channels for communication. The complexity of discerning and articulating relevant speech concerns and countervailing government purposes is not thereby eviscerated but strategically disguised.

Cases with political, economic, and social implications require a balance of constitutional concerns. For example, in cases like *Sorrell*, free speech and privacy issues should be understood as two weighty constitutional interests. The strict scrutiny test in free speech law should not be a bludgeon for judicial activism. Rather, judicial reasoning should be consistent with the First Amendment's core values of personal, political, and educational autonomy. Judicial opinions that categorically thwart social policy will likely be viewed by the public with distrust and uncertainty.

The appropriate role of courts is to determine, decide, compare, analogize, and distinguish the values of free speech and the priorities of challenged regulations. Static tests that are categorical in their approaches are unlikely to provide the context necessary to describe the values at stake in litigation that challenges laws that directly or indirectly affect speech. A formalistic approach leads to result-oriented decisions rather than rationales grounded in First Amendment values of personal speech, self-government, and informational acquisition. Categorical doctrines rely on absolute-sounding tests. We have seen that judicially enumerated categories are neither historical nor particularly effective in providing focused reasoning for adjudicating modern-day claims filtered through an ancient text.

The Roberts Court has taken the First Amendment in a deregulatory direction on matters ranging from campaign financing, collective bargaining, health care information, and charitable disclosure. Opinions too often rely on frameworks that favor corporate interests, wealthy donors, anti-abortion activists, and libertarian causes.[49] Such politically charged judicial decisions increase the difficulty of passing laws pursuant to traditional government functions.

AUTHOR'S NOTE

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ENDNOTES

[1] See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2226 (2020) (Elena Kagan, concurring and dissenting in part, asserting that the unitary theory of executive power "commits the Nation to a static version of governance, incapable of responding to new conditions and challenges").

[2] *United States v. United Foods, Inc.*, 533 U.S. 405, 424 (2001) ("Nearly every human action that the law affects, and virtually all governmental activity, involves speech").

[3] *NAACP v. Button*, 371 U.S. 415 (1963).

[4] *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964) (holding that a showing of actual malice is required in defamation cases brought by public figures about public matters); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that the "intentional lie . . . '[is] no essential part of any exposition of ideas,"' quoting *Chaplinksy v. New Hampshire*, 315 U.S. 568, 572 [1942]); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–761 (1985) (plurality opinion, finding that in those defamation cases involving private parties and private matters, the First Amendment does not require proof of a speaker's actual malice); Morton J. Horwitz, "The Constitution of Change: Legal Fundamentality Without Fundamentalism," *Harvard Law Review* 107 (1) (1993): 30, 109; and *Presidents Council District 25 v. Community School Board No. 25*, 409 U.S. 998, 1000 (1972) (William O. Douglas, dissenting).

[5] *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

[6] Thomas I. Emerson, "First Amendment Doctrine and the Burger Court," *California Law Review* 68 (3) (1980): 422.

[7] *Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al.*, 138 S. Ct. 2448, 2502 (2018) (Elena Kagan, dissenting).

[8] Geoffrey R. Stone, "Content Regulation and the First Amendment," *William & Mary Law Review* 25 (2) (1983): 189, 193.

[9] *Expressions Hair Designs v. Schneiderman*, 581 U.S. 37 (2017) (holding unconstitutional a state disclosure requirement on credit card sales).

[10] *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); and *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).

[11] Pierre J. Schlag, "An Attack on Categorical Approaches to Freedom of Speech," *UCLA Law Review* 30 (1983): 671.

[12] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 590 (2011) (Stephen Breyer, dissenting).

[13] *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382–383 (1992).

[14] Steven H. Shiffrin, "The Dark Side of the First Amendment," *UCLA Law Review* 61 (5) (2014): 1480, 1490.

[15] Toni M. Massaro, "Tread on Me!" *University of Pennsylvania Journal of Constitutional Law* 17 (2) (2014): 365, 400.

[16] Rather than being a static set, low value categories of speech are composed of those utterances with "no essential part of any exposition of ideas" that are of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*,

315 U.S. 568, 572 (1942). That statement of judicial review is a form of "reasoned judgement" in which courts engage, especially where there is another constitutional right, such as privacy, in addition to expression at stake in the litigation. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion), overruled on other grounds by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (discussing the judicial role in interpreting personal autonomy); and *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (same).

[17] *R.A.V. v. City of Saint Paul, Minnesota*, 505 U.S. 383.

[18] *Vidal v. Elster*, 602 U.S. 286, 323–334 (2024) (Amy Coney Barrett, concurring). History and tradition are often mentioned in passing and without elaboration, as in a case decided in 2022 that upheld the speech and free exercise right of a coach to pray at a public-school event. *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022); and Alexander Tsesis, "Establishment of Religion in Schools," *Stanford Law Review* 76 (forthcoming 2024) (critiquing history and tradition test).

[19] *United States v. Stevens*, 559 U.S. 460, 467, 468 (2010) (affirming the Court of Appeals' reliance on strict scrutiny review).

[20] *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 790–791 (2011) ("Without persuasive evidence that a novel restriction on content is part of a long [if heretofore unrecognized] tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs'").

[21] *Miller v. California*, 413 U.S. 15 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); and *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

[22] *Reed v. Town of Gilbert*, 576 U.S. at 156 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech"). See also *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 457 (2015) (relying on strict scrutiny analysis to uphold a content-based limitation on judicial candidate speech).

[23] *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) (Stephen Breyer, concurring in part and dissenting in part).

[24] *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (holding that statutory limits on a candidate's use of personal funds for independent expenditures or a campaign's overall expenditures are "substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate"); and *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014) (finding that a federal aggregate limit on candidate contributions and other contributions to party committees violated the First Amendment).

[25] Open Secrets, 2016 Presidential Race, "Donald Trump (R): Winner," https://www.opensecrets.org/pres16/candidate?id=n00023864 (accessed July 8, 2024).

[26] Burt Neuborne, "*Buckley*'s Analytical Flaws," *Journal of Law and Policy* 6 (1) (1997): 111, 117.

[27] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 349–351 (2010).

[28] Ibid., 425–432 (John Paul Stevens, concurring and dissenting in part, contrasting narrow references to corporations at the nation's founding from contemporary general incorporations statutes). But see also ibid., 386–387 (Antonin Scalia, concurring).

[29] See Peter J. Rubin, "Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw," *University of Pennsylvania Law Review* 149 (1) (2000): 1, 3–4 ("Strict scrutiny has become something of a talisman. While some commentators score debating points by identifying those rare cases in which governmental actions have survived it, most have concluded that a judicial determination to apply 'strict scrutiny' is little more than a way to describe the conclusion that a particular governmental action is invalid").

[30] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (overturning *Valentine v. Chrestensen*, 316 U.S. 52 [1942]); ibid., 783–784, 787 (1976) (William Rehnquist, dissenting); and *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 566 (1980).

[31] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 585 (2011) (Stephen Breyer, dissenting), quoting *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 557, 589 (William Rehnquist, dissenting). The reference to the early twentieth century alludes to jurisprudence named after a case that is representative of an era during which the Supreme Court regularly struck economic and health care regulations based on libertarian reasoning. *Lochner v. New York*, 198 U.S. 45 (1905). See also *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 260 (1978) ("The Due Process Clause . . . during the heyday of substantive due process largely supplanted the Contract Clause in importance and operated as a potent limitation on government's ability to interfere with economic expectations").

[32] *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 ("In regulating the communication of prices rather than prices themselves, § 518 regulates speech"). Before *Reed*, content-neutrality referred to a doctrine that prohibited government from favoring some statement and being hostile to others. Justice Stevens for the Court wrote that "absolute neutrality by the government" is required in respect to content. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976). Whether a regulation on speech is neutral is determined by whether "the government has adopted" it "because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[33] *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). The Court discounted out of hand the state's extensive legislative record that demonstrated that "if prescriber-identifying information were available . . . then detailing would be effective in promoting brand-name drugs that are more expensive and less safe than generic alternatives." Ibid., 576. See also ibid., 597 (Stephen Breyer, dissenting) ("Vermont compiled a substantial legislative record to corroborate this line of reasoning").

[34] Martin H. Redish and Kyle Voils, "False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle," *William & Mary Bill of Rights Journal* 25 (3) (2017): 765, 776; and Julie E. Cohen, "The Zombie First Amendment," *William & Mary Law Review* 56 (4) (2015): 1119, 1121.

[35] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: Public Affairs, 2019), 106–107.

[36] Compare Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, Mass.: Harvard University Press, 1960), 68, with David M. Rabban, "The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History," *Stanford Law Review* 37 (3) (1985): 795, 799. William Blackstone in his famous *Commentaries* argued that while an official could not place prior restraints on publication, they could punish speech after its publication to preserve "peace and good order, of government and religion, the only solid foundations of civil liberty." William

Blackstone, *Commentaries on the Laws of England*, ed. William G. Hammond (San Francisco: Bancroft-Whitney Co., 1890 [1778]), 189–190 (emphasis added).

[37] George Bishop, *Mene Tekel, or The Council of the Officers of the Army against The Declaration &c. of the Army* (London: Tho. Brewster, the Three Bibles, 1659), 30. Personal conscience was identified with a free mind. Ibid., 31. Pennsylvania General Assembly, House of Representatives, *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania, Met at Philadelphia, on Tuesday the Fourteenth of October, anno Dom. 1729* (Philadelphia: B. Franklin, 1730), 4; *The Votes and Proceedings of the General Assembly of the Province of New-Jersey Held at Amboy on Thursday the fourth of April 1745* (Philadelphia: William Bradford, 1745), 22; *A Letter to the Freeholders, and Qualified Voters, Relating to the Ensuing Election* (Boston: Rogers and Fowle, 1749), 8; *An Appeal to the World; or A Vindication of the Town of Boston, from many False and Malicious Aspersions* (Boston: Edes and Gill, 1769), 18; George Gordon Huntly, *The Character of a True Subject, Or the Loyall Fidelity of the Thrice Honourable Lord, The Lord Marquesse Huntley Expressed in This His Speech in the Time of His Imprisonment, By the Covenanters of Scotland, Anno 1640* (London: E. Griffin, 1640); Henry Hexham, *A tongue-combat lately happening betvveene tvvo English souldiers in the Tilt-boat of Grauesend* (London: Holland, 1623); and "Draft of John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia" (before April 22, 1793), in *Documentary History of the Supreme Court of the United States, 1789–1800*, ed. Maeva Marcus and James R. Perry (New York: Columbia University Press, 1985), 359, 364.

[38] Pennsylvania Constitution of 1776, Article XII; *Votes and Proceedings of the Senate of the State of New-York, at Their First Session, Held at Kingston, in Ulster County, Commencing September 9th, 1777* (Kingston, New York: John Holt, 1777), 35; and *Votes and Proceedings of the General Assembly of the State of New-Jersey. At a session Begun at Trenton on the 28th day of October, 1777* (Trenton: Matthias Day, 1777), 67.

[39] *Acts and laws of the State of Vermont, in America,* Art. 14, 4.

[40] Samuel Stearns, *American Oracle* (New York: Hodge and Campbell, Berry and Rogers, and T. Allen, 1791), 613 (republishing articles from the *Philadelphia Magazine*).

[41] "Liberty of Speech and of the Press (Grand Jury Charge)," in *No. 25, Reports of Cases in the County Courts of the Fifth Circuit, and in the High Court of Errors & Appeals, of the State of Pennsylvania. And Charges to Grand Juries of Those County Courts*, ed. Alexander Addison (Philadelphia: John Colerick, 1800), 272.

[42] *New York Times Co. v. Sullivan*, 254, 276.

[43] Lucas A. Powe Jr., *The Fourth Estate and The Constitution: Freedom Of The Press In America* (Berkeley: University of California Press, 1991), 50.

[44] The Court articulated these values of expression in the context of the seminal obscenity case *Miller v. California*, 413 U.S. 15, 24 (1973).

[45] *Chaplinsky v. State of New Hampshire*, 568, 572.

[46] Morton Horwitz, "Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism," *Harvard Law Review* 107 (1993): 110.

[47] Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 153.

[48] *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) (Stephen Breyer, concurring); and *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) (Stephen Breyer, concurring).

[49] *McCutcheon v. FEC*, 572 U.S. 185 (2014) (holding the Bipartisan Campaign Reform Act's cumulative aggregation limit to be unconstitutional); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (finding a state's matching campaign scheme to be unconstitutional); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, et al. 2448 (holding that a state violated the First Amendment rights of nonunion members by requiring them to pay public-sector union dues for collective bargaining purposes); *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (striking law on First Amendment grounds that was meant to prevent unlicensed pregnancy crisis centers from misleading pregnant clients who sought prenatal advice); *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2385 (2021) (holding facially unconstitutional a California statute that required tax-exempt charities to report the identities and addresses of their major donors); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (finding unconstitutional a federal restriction on corporate campaign financing); and *McCullen v. Coakley*, 573 U.S. 464 (2014) (finding a law protecting women's access to reproductive services to be unconstitutional).