FREE SPEECH, STRICT SCRUTINY, AND A BETTER WAY TO HANDLE SPEECH RESTRICTIONS

Aaron Pinsoneault*

INTRODUCTION

When it comes to unprotected speech categories, the Roberts Court has taken an amoral and inaccurate approach.[1] When the Court first created unprotected speech categories—defined categories of speech that are not protected by the First Amendment—it was unclear what rendered a category of speech unprotected.[2] One school of thought argued that speech was unprotected if it provided little or no value to society.[3] The other school of thought argued that speech was unprotected if it fell into a certain category of speech that was simply categorically unprotected.[4] Then, in 2010, the Court strongly sided with the latter approach, with the added twist that unprotected speech categories would be determined solely by reference to American history and traditions.[5] It held that unprotected speech categories were defined solely with reference to American history, and language that appeared related to interest balancing was merely "descriptive."[6]

This approach was wrong both descriptively and normatively. Descriptively, in the past, when the Court decided the cases in which it created the modern definitions of many of the current unprotected speech categories, the Court was consciously departing from American history and tradition for moral reasons; the moral considerations were more than descriptive.[7] Normatively, by basing unprotected speech categories solely on history and tradition, the Court has written out mechanisms for revising ill-considered decisions of the past, which threatens to perpetuate decisions that would be considered immoral by modern standards.[8]

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* JD Candidate, William & Mary Law School, 2021. I would like to thank my parents, whose ongoing love and support made this Note (and everything else I have ever achieved) possible.

[1] *See infra* Parts II–III.

[2] *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 384–86 (2009); John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 11–13 (2014).

[3] *See* Blocher, *supra* note 2, at 384–86; Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 422–23 (2013); Moore, *supra* note 2, at 9–11, 17–18.

[4] *See* Blocher, *supra* note 2, at 384; Moore, *supra* note 2, at 11–13.

[5] *See* United States v. Stevens, 559 U.S. 460, 468–72 (2010).

[6] *Id.* at 470–71.

[7] *See infra* Part II.

[8] *See infra* Part III.

Fortunately, these historical-categorical analyses are not the only analyses applied to content-based speech restrictions. When a statute would restrict speech based on the content of that speech, that statute may still withstand constitutional review if it satisfies a strict scrutiny analysis.[9] To pass a strict scrutiny analysis, a law must be narrowly tailored to serve a compelling government interest.[10] This analysis is flexible, and it takes into account contemporary-moral interests.[11]

This Note argues that strict scrutiny is the superior approach—both descriptively and normatively. It argues that the Court should abandon the historical-categorical approach, and use only strict scrutiny to analyze content-based speech restrictions.

Part I of this Note describes in detail the various approaches the Court has taken toward content-based restrictions. It describes how unprotected speech categories currently interact with a strict scrutiny analysis and details the shift in the Court's approach to unprotected speech categories. Part I argues further that unprotected speech categories are currently determined only by history.

Part II argues that the Roberts Court's view of unprotected speech categories does not comport with the actions of prior Courts, specifically the Court throughout the 1960s and 1970s. Focusing on defamation and commercial speech, Part II shows that past Courts were willing to depart from tradition for moral reasons.

Part III argues that strict scrutiny is normatively superior to any form of categorical approach. It argues that strict scrutiny ensures a values-driven normative analysis of laws, while the historical-categorical approach simply assumes that American history and tradition will render morally justifiable decisions. It further argues that as long as the Court thinks in terms of unprotected speech categories, the Court is at risk of allowing history alone to justify modern law.

I. THE CATEGORICAL APPROACHES AND STRICT SCRUTINY

The Supreme Court has developed two general methods of analysis to deal with First Amendment challenges to content-based speech restrictions. In the first method, the categorical approach, the Court attempts to determine whether the type of speech the government is seeking to regulate falls into a category of speech that the First Amendment does not protect.[12] In the second approach, strict scrutiny, the Court will uphold a speech restriction only when it is "justified by a compelling government interest and is narrowly drawn to serve that interest."[13] This Part will lay out the

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[9] *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 724 (2012) (plurality opinion); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011).

[10] *E.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992)); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)); *Brown*, 564 U.S. at 799.

[11] *See infra* notes 178–92 and accompanying text.

[12] *E.g.*, *Alvarez*, 567 U.S. at 717; *Brown*, 564 U.S. at 791; Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[13] *Brown*, 564 U.S. at 799 (citing *R.A.V.*, 505 U.S. at 395).

subcomponents and precedents that govern the modern formulation of each method of analysis.[14]

A. Yesteryear's Trend Toward the Balancing-Categorical Approach

The categorical approach traces its origins to *Chaplinsky v. New Hampshire*.[15] There, in dicta, the Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are 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.[16]

These three sentences gave rise to two competing views of unprotected speech.[17] The first approach, the balancing-categorical approach, relies on the final sentence above.[18] Under the balancing-categorical approach, the Court weighs the harm caused by low-value speech against the benefits that that type of speech provides.[19] Under the balancing-categorical approach, "[i]f a certain kind of speech lack[s] . . . normative values, then it c[an] easily be added to any list of unprotected speech."[20] Such a list would essentially be a list of categories of speech that were pre-balanced (i.e., a balancing analysis had already been done when the category was first added).[21]

The competing categorical approach, the absolutist-categorical approach, relies on the first two sentences of the *Chaplinsky* quote.[22] Under this approach, there are categories of speech that the First Amendment simply does not protect, and these types of speech can be regulated at will.[23] Under the absolutist approach, it was not

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[14] *See infra* notes 15–79 and accompanying text.
[15] *See* 315 U.S. at 571–72.
[16] *Id.*
[17] *See* Collins, *supra* note 3, at 415–24; Moore, *supra* note 2, at 7–14.
[18] *See* Moore, *supra* note 2, at 9–11, 17–18; *see also* Collins, *supra* note 3, at 422.
[19] *See* Collins, *supra* note 3, at 417–22; Moore, *supra* note 2, at 9.
[20] Collins, *supra* note 3, at 422.
[21] *See* Moore, *supra* note 2, at 15.
[22] *See* Blocher, *supra* note 2, at 384; Collins, *supra* note 3, at 417; Moore, *supra* note 2, at 11–12.
[23] *See* Blocher, *supra* note 2, at 384; Moore, *supra* note 2, at 11–13.

clear exactly why some categories of speech were unprotected.[24] This approach was the less-popular approach, and it largely survived in a hybridized form as part of the aforementioned pre-balancing approach.[25]

The original list of unprotected categories of speech enumerated in *Chaplinsky* included, "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[26] It is not entirely clear how many of these categories currently exist.[27] The Supreme Court appears to have recognized at least nine categories: incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has the power to prevent."[28] In addition, commercial speech appears to be a defined category receiving only partial protection.[29] By one count, there may be at least forty-eight categories of speech that fall outside the First Amendment's protection.[30]

B. The Court Creates the Historical-Categorical Approach

As discussed above, the balancing-categorical approach and the absolutist-categorical approaches appeared to be merging into a hybrid approach largely dominated by the balancing-categorical approach.[31] However, beginning in 2010, the Court changed course sharply, eliminating the balancing-categorical approach and adopting an absolutist-categorical approach in which American history and tradition would be the sole justification for the unprotected status of certain types of speech.[32]

This current approach, the historical-categorical approach, was created in *United States v. Stevens*.[33] In *Stevens*, the Supreme Court struck down a criminal statute designed to punish the "commercial creation, sale, or possession of certain depictions of animal cruelty."[34] The law in question, 18 U.S.C. § 48, defined a depiction of animal cruelty as "one 'in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,' if that conduct violates federal or state law where 'the

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[24] *See* Moore, *supra* note 2, at 13.

[25] *See* Blocher, *supra* note 2, at 386; Moore, *supra* note 2, at 15–16.

[26] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[27] *See* Collins, *supra* note 3, at 422.

[28] *Id.* at 441 (citing United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion)).

[29] *See* VICTORIA L. KILLION, CONG. RESEARCH SERV., IF11072, FIRST AMENDMENT: CATEGORIES OF SPEECH (2019).

[30] *See* Collins, *supra* note 3, at 417–22.

[31] *See* Blocher, *supra* note 2, at 386; Moore, *supra* note 2, at 15–16.

[32] *See* Collins, *supra* note 3, at 426–28; Moore, *supra* note 2, at 17–18.

[33] *See* 559 U.S. 460, 470–72 (2010); Moore, *supra* note 2, at 18–24.

[34] *Stevens*, 559 U.S. at 464.

creation, sale, or possession takes place.'"[35] The statute was passed in order to eliminate the interstate market for "crush videos," in which women would slowly crush live animals to death with their feet, often while speaking in "a kind of dominatrix patter."[36] The respondent, Stevens, had distributed videos of pit bulls engaged in dog fights and videos of pit bulls attacking other animals.[37] Stevens moved to dismiss, arguing that the statute was "facially invalid under the First Amendment."[38]

In response, the government argued that depictions of animal cruelty are devoid of expressive value and therefore constitute a category of speech that falls outside of the protection of the First Amendment.[39] The government contended that proposed categories of unprotected speech did not require a long history of regulation in order to be considered unprotected.[40] Instead, the government contended that new categories of unprotected speech could be justified by a determination that the speech is "of such minimal redeeming value as to render [it] unworthy of First Amendment protection."[41] The government argued that a categorical exclusion could be made by a "simple balancing test," in which the speech would be protected only if the value of the speech exceeded its cost.[42] To support its claim, the government noted instances in past cases where the Supreme Court stated that unprotected speech was "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."[43]

The Court rejected the government's "free-floating test," stating that when the Court has "identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis."[44] The Court characterized the aforementioned statements as "descriptive" only.[45] It held that such statements "do not set forth a test that may be applied as a general matter to permit the government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."[46]

Although the Court left open the possibility that it has not yet recognized some categories of unprotected speech, the Court indicated that these categories must have

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[35] *Id.* at 465 (citing 18 U.S.C. § 48(c)(1) (1999)).
[36] *Id.* at 465–66.
[37] *Id.* at 466.
[38] *Id.* at 467.
[39] *Id.* at 469.
[40] *Id.*
[41] *Id.* at 469–70 (citation omitted).
[42] *Id.* at 470.
[43] *Id.* (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))).
[44] *Id.* at 470–71.
[45] *See id.* at 471.
[46] *Id.*

been "historically unprotected."[47] In such cases, the identification of such a category would merely formally acknowledge a preexisting historical practice.[48]

In cases that followed, the Court cemented this change to its doctrine.[49] In *Brown v. Entertainment Merchants Ass'n*, California attempted to regulate the sale of violent video games to minors, using language in its statute reminiscent of the Court's obscenity jurisprudence.[50] However, the Court declined to stretch its obscenity doctrine to cover depictions of violence and held instead that California was attempting to create a new category of unprotected speech.[51] Then, finding no longstanding tradition of restricting children's access to depictions of violence, the Court found that the statute regulated protected speech.[52]

The next year, in *United States v. Alvarez* the Court struck down the Stolen Valor Act, which punished people for lying about receiving military honors.[53] Writing for the four-justice plurality, Justice Kennedy adopted the *Stevens* Court's view of unprotected categories as "confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'"[54] He reaffirmed that unprotected categories exist because they "have a historical foundation in the Court's free speech tradition,"[55] and—just as the Court did in *Stevens*—provided little further explanation for how these categories initially came into existence.[56] Finding no tradition of prohibiting false statements based purely on the fact that they are false, Justice Kennedy declined to find that false statements constituted unprotected speech.[57] Although Justice Kennedy engaged with the government's argument that false statements are valueless and

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[47] *See id.* at 472.

[48] *See id.* ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.").

[49] *See generally, e.g.*, United States v. Alvarez, 567 U.S. 709 (2012); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).

[50] *Brown*, 564 U.S. at 789, 792.

[51] *See id.*

[52] *See id.* at 795–99. The Court went on to find that the law could not pass a strict scrutiny analysis either, and struck it down. *Id.*

[53] *Alvarez*, 567 U.S. at 715–16, 729–30 (plurality opinion). This Note focuses on the plurality opinion of Justice Kennedy, joined by Justices Ginsburg and Sotomayor and Chief Justice Roberts. *See generally id.* The concurring opinion of Justice Breyer, joined by Justice Kagan, would have struck the law down using a strict scrutiny analysis, finding that the law was not the least restrictive means to achieve the government's objective. *See id.* at 730 (Breyer, J., concurring).

[54] *Id.* at 717 (plurality opinion) (quoting United States v. Stevens, 559 U.S. 460, 468 (2010) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)) (alteration in original)).

[55] *Id.* at 718.

[56] *See* Moore, *supra* note 2, at 21–23. *Compare Alvarez*, 567 U.S. at 717–22, *with Stevens*, 559 U.S. at 468–72 (neither opinion describing the historical basis for the existing categories, instead articulating only that it exists).

[57] *See Alvarez*, 567 U.S. at 722.

therefore unprotected, he ultimately rejected that argument for lack of historical tradition rather than falsity of premise.[58]

From this line of cases, it appears that, barring another dramatic change, new categories of unprotected speech will only be recognized if the country has a long history of having regulated that type of speech. Moreover, the Court has dismissed many of its prior decisions as "just . . . descriptive" rather than reflecting any sort of cost-benefit analysis.[59] That view is further reinforced by the lack of any justification outside of history and tradition to explain why the Court originally accepted these exempted categories.[60] Thus, it appears that the Court considers historical tradition both necessary and sufficient to justify an unprotected category of speech.

C. The Alternative: Strict Scrutiny

In addition to the various categorical approaches to content-based speech restrictions, the Supreme Court may employ a strict scrutiny analysis.[61] In this analysis, a content-based speech restriction will be upheld only if it is "justified by a compelling government interest and is narrowly drawn to serve that interest."[62] Under this theory, the speech remains protected even though it has been restricted.[63] In this way, strict scrutiny exists parallel to and separate from the categorical approaches.

Eugene Volokh has identified four "general principles" that the Court employs when analyzing whether a government interest is compelling.[64] First, the government may not "privileg[e] particular subclasses of core protected speech."[65] Second, the "[a]voidance of offense and restriction of bad ideas are not compelling interests

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[58] *See id.* at 719–22.

[59] *See Stevens*, 559 U.S. at 471.

[60] *See Alvarez*, 567 U.S. at 717–22; *Stevens*, 559 U.S. at 468–71; *see also* Moore, *supra* note 2, at 21–22.

[61] *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011).

[62] *Brown*, 564 U.S. at 799 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992)); *see also Reed*, 135 S. Ct. at 2226. Formally, content-based speech restrictions will be subjected to the same level of strict scrutiny, but in practice, there is evidence suggesting that the Court applies varying levels of scrutiny depending on the type of speech sought to be regulated. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV 793, 844–57 (2006). *See generally* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291 (2016).

[63] *See Brown*, 564 U.S. at 799.

[64] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2419–20 (1996). Although this Note employs aspects of Volokh's analysis, this Note argues the exact opposite of the thesis of Volokh's article. *See id.* at 2460–61. Volokh believes that the Court ought to "[r]eject strict scrutiny, and operate through categorical rules and categorical exceptions." *Id.* at 2460. This disagreement in views does not stem from a disagreement over whether his descriptive framework is accurate.

[65] *Id.* at 2419.

by themselves."[66] Third, "[a] law's underinclusiveness . . . may be evidence that an interest is not compelling."[67] Fourth, "[t]he government . . . may not assert a compelling interest in fighting one particular ill, and then refuse to deal with other ills that seem almost indistinguishable."[68] In addition to those principles, Volokh identifies a variety of interests that the Court has or has not found to be compelling.[69]

Volokh also finds four components in a narrow tailoring analysis.[70] First, "the government must prove to the Court's satisfaction that the law actually advances the interest."[71] Second, the law may not be overinclusive (i.e., it may not "restrict[] a significant amount of speech that doesn't implicate the government interest").[72] Third, the law must be the least restrictive means to accomplish that interest.[73] Fourth, and finally, the law may not be underinclusive (i.e., it may not "fail[] to restrict a significant amount of speech that harms the government interest to about the same degree as does the restricted speech").[74]

It is unclear precisely when the Supreme Court first applied strict scrutiny to a content-based speech regulation. In 1972, in *Police Department of Chicago v. Mosley*, the Court applied strict scrutiny to a restriction on all non-labor picketing near schools, but did so using the Equal Protection Clause.[75] In 1987, the Court applied strict scrutiny to strike down a sales tax meant to promote fledgling newspapers, but did so because the tax was an impermissible restriction on the freedom of the press.[76] It seems to have taken until 1991 for the Court to formally apply strict scrutiny as a test under the First Amendment's Free Speech Clause.[77] In any case, strict scrutiny is significantly newer than the categorical approach, which began in 1942 with *Chaplinsky*[78] and continued to be acknowledged and developed long before even the earliest use of strict scrutiny in the free speech context.[79]

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[66] *Id.*

[67] *Id.* at 2420.

[68] *Id.*

[69] *Id.* at 2420–21.

[70] *Id.* at 2421–23.

[71] *Id.* at 2422.

[72] *Id.*

[73] *Id.* ("A law is not narrowly tailored if there are less speech-restrictive means available that would serve the interest essentially as well as would the speech restriction.").

[74] *Id.* at 2423.

[75] *See* 408 U.S. 92, 101 (1972) (first citing Williams v. Rhodes, 393 U.S. 23 (1968); and then citing Dunn v. Blumstein, 405 U.S. 330, 342–43 (1972)). *Mosley* has often been cited in cases considering free speech challenges. *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 477 (2014); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 579 (1995); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983).

[76] *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 223, 231 (1987).

[77] *See* Kelso, *supra* note 62, at 296; *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

[78] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[79] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (defining the

II. DESCRIPTIVE SUPERIORITY

Much of the modern First Amendment law on unprotected speech categories is derived from cases decided from the early 1960s through the mid-1970s (hereinafter "the early modern period").[80] These include definitional cases regarding defamation,[81] incitement,[82] obscenity,[83] and commercial speech.[84] During the early modern period, the Court readily abdicated traditional common law regarding these speech categories in order to protect valuable speech.[85]

These changes were driven by normative considerations rather than a change in the way the Court interpreted American traditions respecting these categories.[86] Therefore, the historical-categorical approach—which takes history and tradition as determinative[87]—poorly explains these decisions. The policy considerations in these cases were determinative, not merely "descriptive."[88]

The decisions in the early modern period are better viewed as containing nascent strict scrutiny analyses. Decisions made during the early modern period were motivated by the Court's desire to protect—and avoid incidentally burdening—high-value speech.[89] Although the Court did not explicitly use the terms "narrowly tailored"[90] or

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unprotected speech category of "inciting or producing imminent lawless action"). *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (setting forth many of the requirements of modern libel law).

[80] *See generally* John Seigenthaler, *First Amendment Timeline*, https://www.mtsu.edu/first-amendment/page/first-amendment-timeline (last visited Oct. 22, 2020) (laying out a timeline of significant First Amendment historical events, cases, and concepts).

[81] *See generally, e.g.*, *Sullivan*, 376 U.S. 254 (constitutionalizing libel law); Garrison v. Louisiana, 379 U.S. 64 (1964) (finding that false statements made "knowingly" or "with reckless disregard of the truth" are not protected under the Constitution).

[82] *See generally, e.g. Brandenburg*, 395 U.S. 444 (describing the distinction between constitutionally protected expression and imminent threats to public safety).

[83] *See generally* Miller v. California, 413 U.S. 15 (1973) (holding that obscenity is not constitutionally protected and setting forth the framework for classifying content as obscene or not obscene).

[84] *See generally* Bigelow v. Virginia, 421 U.S. 809 (1975) (holding that Virginia could not censor or criminalize the promulgation of advertisements for abortion services in New York).

[85] *See infra* notes 96–175 and accompanying text.

[86] *See infra* notes 96–175 and accompanying text.

[87] *See* Moore, *supra* note 2, at 21–22 ("Now, speech could only be categorically excluded from the First Amendment if a historical-categorical analysis showed that the speech category had been unprotected in the past. History, not balancing, would be the guide for identifying unprotected low-value speech.").

[88] *See infra* notes 96–175 and accompanying text. *Contra* United States v. Stevens, 559 U.S. 460, 471 (2010).

[89] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72; *see also infra* notes 96–175 and accompanying text.

[90] *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992)).

"compelling government interest,"[91] one would not necessarily expect it to; these cases were decided long before the Court had an explicit First Amendment strict scrutiny doctrine.[92] The important thing is that the Court was deeply concerned with the policy considerations underlying the strict scrutiny analysis.[93] These considerations led the Court to depart radically from traditional common law, especially with regard to defamation and commercial speech.[94] These radical changes are easily explicable as the result of a nascent strict scrutiny analysis, but they are inexplicable under the historical-categorical approach.[95]

A. Libel

In its canonical defamation cases, *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*, the Supreme Court greatly expanded protections for speech criticizing government officials.[96] These cases marked the first time in which the Court explicitly condemned the concept of seditious libel.[97] In doing so, the Court displayed a marked shift from the attitudes of the founding-era Supreme Court Justices, in which four of six Justices on the Supreme Court in 1798 and 1799 endorsed the Sedition Act while trying cases in circuit courts.[98]

In *Sullivan*, the Supreme Court expressed a great deal of concern for allowing would-be critics of the government sufficient "breathing space" to make allegations against the government that the critics believed to be true.[99] Under Alabama law,

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[91] *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011).

[92] *See supra* notes 75–79 and accompanying text.

[93] *See infra* notes 107–75 and accompanying text.

[94] *See infra* notes 96–175 and accompanying text.

[95] *See infra* notes 96–175 and accompanying text.

[96] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that false statements would be protected unless a plaintiff could demonstrate "actual malice"); Garrison v. Louisiana, 379 U.S. 64, 73–75 (1964) (holding that true statements are not libelous, regardless of the motive for which they were published).

[97] *See* Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 272 (1986).

[98] *Id.* at 274. The Sedition Act "imposed criminal penalties on anyone who published false, scandalous, and malicious writing against the federal government, Congress, or the President with the intent to defame them." *Id.* at 273 (citing ch. 74, § 1, 1 Stat. 596 (1798)). Gibson attributes the Justices' support for the Sedition Act to the Justices' partisan support for President John Adams and the Federalist Party, to which all six belonged. *Id.* at 274–75. Although the Justices may not have been motivated by a legalistic analysis of the scope of the First Amendment, their support for the Sedition Act at the very least demonstrates that the early Justices were untroubled by a conflict between such a law and the First Amendment. The government continued to punish seditious libel into the early twentieth century. *See* Seigenthaler, *supra* note 80.

[99] *Sullivan*, 376 U.S. at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

speech was libelous per se if it brought a public official "into public contempt."[100] Once established, the defendant had the burden to prove that his allegations were "true in all their particulars."[101]

The Supreme Court held that the First Amendment required greater protections than the limited affirmative defense provided under Alabama common law.[102] It held that the "true in all their particulars" requirement was unconstitutionally burdensome because it would deter good-faith critics from voicing their complaints, doubting their ability to prove their critiques in court or fear of the cost of doing so.[103] The Court required that, in addition to the burden of showing the falsehood of the libelous statements, the plaintiff had the burden to show that the defendant had acted with "actual malice."[104] The Court imposed the "actual malice" requirement because it believed incorrect statements are inevitable in free speech, and allowing public officials to hold their critics liable would stifle free and open debate.[105]

Sullivan was a marked departure from the earliest practices of Supreme Court libel law.[106] In its nineteenth century jurisprudence, the Court ignored federal and state constitutions, instead basing its decisions on treatises, English cases, and state court cases.[107] Whatever developments that were made in early Supreme Court libel cases were due to state law developments.[108] Thus, the *Sullivan* Court departed from America's historical traditions by even considering the First Amendment in a libel case.[109] Striking down Alabama common law on First Amendment grounds was a serious coup.[110]

Just as importantly, the Supreme Court deviated from tradition due specifically to concerns about burdening valuable speech.[111] Although the Court did not describe the common law as an invalid, overinclusive, content-based speech regulation, it viewed the common law as such.[112] Thus, the Court altered the common law due to

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[100] *Id.* at 263 (quoting N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 37 (Ala. 1962)).

[101] *Id.* at 267 (first citing Ala. Ride Co. v. Vance, 178 So. 438 (Ala. 1938); and then citing Johnson Publ'g Co. v. Davis, 124 So. 2d 441, 457–58 (Ala. 1960)).

[102] *See id.* at 279.

[103] *See id.* at 267, 279.

[104] *Id.* at 279–80. Actual malice is defined as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." *Id.* at 280.

[105] *See id.* at 271–72, 280.

[106] *See* Gibson, *supra* note 97, at 280.

[107] *See id.*

[108] *See id.* at 279–80.

[109] *See id.* at 280.

[110] *Compare Sullivan*, 376 U.S. at 279–80, *with* Gibson, *supra* note 97, at 280–81.

[111] *See Sullivan*, 376 U.S. at 279 ("[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true *and even though it is in fact true*, because of doubt whether it can be proved in court or fear of the expense of having to do so." (emphasis added)).

[112] *See id.*

a nascent concern for narrow tailoring, a telltale marker of a strict scrutiny analysis.[113]

In *Garrison v. Louisiana*, the Supreme Court further modified the common law by invalidating the "good motives" element for an affirmative defense of truth.[114] Under Louisiana's criminal libel law, it was not sufficient that the statements in question were true; they also had to be made "'with good motives and for justifiable ends.'"[115] This historical limitation reflected the belief that a person should not have to tolerate their dirty laundry being aired in public simply because the facts alleged were true.[116] In *Garrison*, the Court instead adopted a view that the public had an overwhelming interest in true information regarding public officials, regardless of the motive for which that information was made public.[117]

In rejecting the common law "good motives" requirement, the Court consciously departed with the majority common law rule.[118] Moreover, the "good motives" requirement was often the predominant concern of historical defamation cases, and the Court still thought it was appropriate to abrogate the rule entirely.[119] Such an action is entirely inconsistent with the historical-categorical approach in which unprotected speech categories are merely the result of historical tradition.[120]

If, instead, one reads *Garrison* as containing a nascent strict scrutiny analysis, the jurisprudential shift becomes explicable. Under a strict scrutiny analysis, the "good motives" requirement was not narrowly tailored because it burdened speech that the government did not have a compelling interest in regulating.[121] Alternatively, the "good motives" requirement can be viewed as having failed the "compelling interest" prong of the analysis; that is, the government has no compelling interest in suppressing true statements about public officials merely to avoid giving offense to those officials.[122]

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[113] *See* Volokh, *supra* note 64, at 2421–24.

[114] *See* 379 U.S. 64, 72–75 (1964).

[115] *Id.* at 70.

[116] *See id.* at 72. The rule stemmed from "abhorrence that 'a man's forgotten misconduct, or the misconduct of a relation, *in which the public had no interest*, should be wantonly raked up, and published to the world, on the ground of it[] being true.'" *Id.* (quoting 69 Parl Deb HC (3d ser.) (1843) col. 1230 (UK) (Report of Lord Campbell)).

[117] *See id.* at 72–73 ("'If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. . . .'" (quoting State v. Burnham, 9 N.H. 34, 42–43 (1837))).

[118] *See id.* at 70–72 n.7 (finding a "good motives" requirement in the law of twenty-seven states whereas truth was a complete defense in, at most, twelve states).

[119] *See* Gibson, *supra* note 97, at 280–81.

[120] *See* United States v. Stevens, 559 U.S. 460, 468–72 (2010).

[121] *See Garrison*, 379 U.S. at 72, 77 ("The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant."); *see also* Volokh, *supra* note 64, at 2422.

[122] *See Garrison*, 379 U.S. at 73 ("If there is a lawful occasion—a legal right to make a

In either case, a strict scrutiny analysis better explains why the Court amended the historical common law of defamation to bring it in line with the Court's modern, speech-protective values.

Because strict scrutiny analyses are not inherently tethered to historical traditions, the nascent strict scrutiny approach can explain why some defamation cases appear to have faded out of the Supreme Court's canons. In 1952 (before many of the marquee cases discussed in this Note were decided), the Court decided *Beauharnais v. Illinois*, where it upheld Illinois's anti-hate speech law as a form of group-level criminal libel law.[123] There the Court combined a historical analysis of the constitutionality of criminal libel laws[124] with the pressing concern of racial tension and violence in Illinois to uphold the law.[125]

Twenty-six years later, the Village of Skokie, Illinois relied on *Beauharnais* to support the constitutionality of ordinances designed to prevent neo-Nazis from demonstrating in the Village.[126] The Seventh Circuit rejected Skokie's argument.[127] In doing so, it both differentiated the Skokie case and questioned whether, in light of more recent jurisprudence, *Beauharnais* remained good law.[128] The Supreme Court refused to grant certiorari in the case.[129] In his dissent, Justice Blackmun argued that the Skokie case was in conflict with the *Beauharnais* decision, and he would have seen the Court actively take up the question of whether *Beauharnais* remained good law.[130] By allowing the Seventh Circuit to apparently disregard Supreme Court precedent,[131] the Court indicated that the *Beauharnais* decision was no longer worthy of protection.

Notably, at no point did the Seventh Circuit suggest *Beauharnais* had misapplied the traditional analysis; rather, it suggested that the traditional analysis was no longer applicable.[132] To the extent that the Court acquiesced to this analysis, the

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publication—and the matter [is] true, the end is justifiable, and that, in such case, must be sufficient." (quoting *Burnham*, 9 N.H. at 42–43)). *See also* Volokh, *supra* note 64, at 2419–20.

[123] *See* 343 U.S. 250, 258 (1952). The statute punished any "publication . . . [which] portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . exposes the citizens . . . to contempt, . . . which is productive of breach of the peace or riots." *Id.* at 251 (quoting Ill. Rev. Stat. ch. 38, ¶ 471 (1949)).

[124] *See id.* at 256–58. The Court employed a historical-categorical approach to conclude that criminal libel laws had been constitutionally recognized since "time out of mind." *Id.* However, the Court noted that the issue was not "concluded by history and practice." *Id.* at 258.

[125] *Id.* at 258–61 (noting Illinois's history of violence caused by racial animus).

[126] *See* Collin v. Smith, 578 F.2d 1197, 1204–05 (7th Cir. 1978) (citing *Beauharnais*, 343 U.S. at 250).

[127] *See id.* at 1204.

[128] *See id.* Notably, the Seventh Circuit was not the first circuit to challenge the continued validity of *Beauharnais*. *See* Tollett v. United States, 485 F.2d 1087, 1094–95 (8th Cir. 1973).

[129] Smith v. Collin, 439 U.S. 916 (1978).

[130] *Id.* at 919 (Blackmun, J., dissenting from denial of certiorari).

[131] *See id.*

[132] *See Collin*, 578 F.2d at 1204.

Supreme Court, too, allowed its own modern free speech values to supersede its precedent.[133] Thus, the Supreme Court allowed *Beauharnais* to fall by the wayside for reasons other than a changed understanding of America's history and traditions regarding hate speech. As such, the historical-categorical approach cannot explain why the Court allowed *Beauharnais* to fade away.[134]

However, a nascent strict scrutiny approach explains this decision easily. The *Beauharnais* decision did not reflect the types of concerns the Court expressed in modern libel cases.[135] Therefore, because *Beauharnais* could not be supported by deference to history, and because it appeared to conflict with modern libel jurisprudence, it was no longer canonical.[136]

The shift in the Supreme Court's defamation jurisprudence is wholly inconsistent with *Stevens*'s historical-categorical description of unprotected categories of speech.[137] Although there may have been some speech restrictions called "libel" throughout American history,[138] the Supreme Court altered those laws in such a way that little but the designation remains unaltered in modern jurisprudence.[139] In the past, libel did not even need to be false, much less actually maliciously so.[140] Moreover, far from granting extra protection to critics of public officials,[141] early justices expressed support for laws punishing sedition.[142] Thus, it is hardly correct to say there is any tradition "[f]rom 1791 to the present"[143] to support the modern conception of libel laws.

If, instead, one looks for a nascent strict scrutiny analysis, one will find a robust explanation for the change. During the early modern period, the Supreme Court revisited common law defamation decisions—it found that the common law was not narrowly tailored and that some aspects of the common law may not even have been motivated by a compelling government interest.[144] Therefore, the Supreme Court altered the defamation law to better protect what it currently recognizes as valuable speech. Because of this value shift, some cases, like *Beauharnais*, needed to fade

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[133] *See Smith*, 439 U.S. at 919.

[134] *See supra* notes 31–60 and accompanying text.

[135] *See Collin*, 578 F.2d at 1205.

[136] *See id.*

[137] *See* United States v. Stevens, 559 U.S. 460, 468–72 (2010); *see also* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011) (citing *Stevens*, 559 U.S. at 470) (requiring "persuasive evidence" that a proposed unprotected category of speech be "part of a long (if heretofore unrecognized) tradition of proscription").

[138] *See* Gibson, *supra* note 97, at 272.

[139] *See supra* notes 96–121 and accompanying text.

[140] *See* Gibson *supra* note 97, at 280–82.

[141] *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964).

[142] *See* Gibson, *supra* note 97, at 274–75.

[143] United States v. Stevens, 559 U.S. 460, 468 (2010) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)).

[144] *See supra* notes 96–121 and accompanying text.

from the Supreme Court canons.[145] Thus, a nascent strict scrutiny explanation describes the current state of defamation laws.

B. Commercial Speech

During the early modern period, the Court also began to protect commercial speech under the First Amendment.[146] This departure from the common law, in which commercial speech was unprotected,[147] was a step beyond even the major alterations to the law of defamation. Here, the Court did not merely redefine commercial speech to better protect valuable aspects of advertising; instead, the Court removed commercial speech from the list of unprotected speech categories.[148]

Initially, states concluded that commercial speech was unprotected because of the 1942 Supreme Court case *Valentine v. Chrestensen*.[149] In *Valentine*, the Court heard a challenge to a New York City ordinance that forbade the distribution of "commercial and business advertising matter" in the street.[150] In a perfunctory opinion, the Court held that the Constitution did not place a "restraint on government as respects purely commercial advertising."[151] Without further explanation, the Court simply held that regulation of commercial speech was a "matter[] for legislative judgment."[152]

In 1975, the Court changed its tune. In *Bigelow v. Virginia*, the Court considered Virginia's ban on advertising by abortion providers.[153] Relying on the *Valentine* decision, the Virginia Supreme Court held that the First Amendment did not affect the statute because it affected commercial speech.[154] The Virginia Supreme Court upheld the ban as a valid exercise of the police power.[155]

The United States Supreme Court reversed, holding that the First Amendment protects even paid commercial advertisements.[156] The Court held that cases subsequent to *Valentine* indicated that the case did not have as broad of an effect as the Virginia courts suggested.[157] The Court distinguished *Bigelow* from *Valentine* on the grounds that the advertisements in *Valentine* "simply propose[d] a commercial transaction,"

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[145] *See supra* notes 122–44 and accompanying text.
[146] *See generally* Bigelow v. Virginia, 421 U.S. 809 (1975).
[147] *See generally* Valentine v. Chrestensen, 316 U.S. 52 (1942).
[148] *See generally id.*
[149] *See Bigelow*, 421 U.S. at 818–19; *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64 n.6 (1983) (explaining that before *Bigelow*, 421 U.S. at 809, commercial speech was unprotected under *Valentine*, 316 U.S. at 54).
[150] *Valentine*, 316 U.S. at 53.
[151] *Id.* at 54.
[152] *Id.*
[153] *Bigelow*, 421 U.S. at 812.
[154] *Id.* at 814 (citing *Valentine*, 316 U.S. at 54).
[155] *Id.* at 814 (citing Bigelow v. Virginia, 191 S.E.2d 173, 176 (Va. 1972)).
[156] *Id.* at 818.
[157] *Id.* at 820.

whereas the advertisement in *Bigelow* "contained factual material of clear 'public interest.'"[158] Therefore, the Court found that the Virginia courts had misapplied *Valentine*.[159] Just eight years later, however, the Court would correctly come to view *Bigelow* as having overruled *Valentine*.[160]

The Court in *Bigelow* took a remarkable approach to commercial speech.[161] Unlike in the Court's defamation doctrine, the Court did not view itself as protecting the *speakers'* right to participate in public discussion.[162] Instead, the Court saw itself as protecting *readers'* right to consume information that might benefit them.[163] Thus, the Court recognized a cognizable First Amendment interest in the speech of another due to a strong interest in the consumption of information.[164] In subsequent cases, the Court continued to protect commercial speech on the grounds that the public had a discernable interest in consuming information contained in commercial speech.[165]

Just as in the defamation cases discussed in Section II.A,[166] *Bigelow* was decided on the basis of normative interest–based concerns rather than a thorough analysis of America's historical treatment of commercial speech.[167] Although the *Bigelow* Court suggested that state courts had been misreading its holding in *Valentine*,[168] the Court acknowledged later that commercial speech had in fact been unprotected until *Bigelow*.[169] Thus, the shift in Supreme Court doctrine cannot be based on a new

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[158] *Id.* at 822. The advertisement in *Bigelow* would have informed readers that abortions were legal in New York without a residency requirement. *Id.* at 812. The advertisement in *Valentine* solicited visitors to view a former Navy submarine. Valentine v. Chrestensen, 316 U.S. 52, 52–53 (1942).

[159] *Bigelow*, 421 U.S. at 825.

[160] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64 n.6 (1983).

[161] *See generally Bigelow*, 421 U.S. 809.

[162] *Compare* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278–79 (1964) (discussing the speaker's right to voice criticism of a public official), *with Bigelow*, 421 U.S. at 822 (discussing the right of the reader to learn information).

[163] *Bigelow*, 421 U.S. at 822 ("[T]he advertisement conveyed information of potential interest and value to a diverse audience not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.").

[164] *See id.*

[165] *See* Bates v. State Bar of Ariz., 433 U.S. 350, 365–66 (1977) (striking down a rule barring attorneys from advertising the cost of their services because it "serv[ed] to inhibit the free flow of commercial information and to keep the public in ignorance"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 754 (1976) (striking down a ban on the advertisement of drug prices by pharmacies because "the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means concerning the prices of such drugs.").

[166] *See supra* notes 96–145 and accompanying text.

[167] *See generally Bigelow*, 421 U.S. 809; *Sullivan*, 376 U.S. 254; Garrison v. Louisiana, 379 U.S. 64 (1964).

[168] *See Bigelow*, 421 U.S. at 825.

[169] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64 n.6 (1983).

understanding of historical tradition. Therefore, just as with the defamation cases, a historical-categorical approach offers little to explain this development.[170]

However, if one views the Court as having undertaken a nascent strict scrutiny analysis, one will find that the Court found that Virginia failed to assert a compelling government interest.[171] The Court found that Virginia did not have a compelling interest in regulating its citizens' consumption of information about activities in other states; therefore, it could not restrict speech to further that interest.[172] Although Virginia also asserted an interest in protecting the quality of its medical services, the Court found that the statute in question did nothing to advance that interest.[173] Thus, the statute failed the narrow tailoring prong with respect to that interest.[174] The Court essentially decided to protect commercial speech after undertaking a strict scrutiny analysis.[175] As such, the nascent strict scrutiny explanation again has far more descriptive power than the historical-categorical approach.

C. When to Start the Clock

To have descriptive validity, especially with respect to defamation and commercial speech, the historical-categorical approach needs to start the clock on American traditions after the early modern period.[176] While those espousing the historical-categorical approach claim they trace unprotected speech categories back to 1791, a historical-categorical approach that explicitly starts examining tradition since the early modern period may more accurately describe how it actually operates.[177]

Moreover, this corrective measure would collapse under its own weight. Although proponents of the historical-categorical approach would more accurately describe their beliefs by starting the clock after the early modern period, they still would not actually follow the tradition set by the Court in this period. As shown above, the early modern Courts did not see themselves as bound rigidly to prior practice. Rather, these Courts based their decisions in policy considerations that aligned closely with a modern strict scrutiny analysis. Therefore, even a time-corrected historical-categorical approach would fail to accurately mirror the traditions of the early

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[170] *See supra* notes 31–60 and accompanying text.

[171] *See Bigelow*, 421 U.S. at 827–28 ("[Virginia] is . . . advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest . . . was entitled to little, if any, weight under the circumstances.").

[172] *See id.*

[173] *See id.* at 827.

[174] *See* Volokh, *supra* note 64, at 2422 ("For a law to be narrowly tailored, the government must prove to the Court's satisfaction that the law actually advances the interest.").

[175] *See* Bigelow, 421 U.S. at 827–29.

[176] *See supra* notes 96–175 and accompanying text. As these cases have now been law for over half a century, the practice they lay out could credibly be called a tradition.

[177] *See* United States v. Stevens, 559 U.S. 460, 468 (2010).

modern Courts, which it would purport to follow. As such, the historical-categorical approach cannot merely be fine-tuned to more accurately reflect the tradition that its proponents actually follow. The more descriptively accurate approach is to view the early modern period Courts as having undertaken nascent strict scrutiny analyses.

III. NORMATIVE SUPERIORITY

Strict scrutiny analyses are better situated to render ethical decisions than the historical-categorical approach. A strict scrutiny analysis requires that the Court undertake a flexible, value-driven analysis, which in turn helps to ensure that decisions regarding content-based speech restrictions will be reasonable in light of contemporary values.[178] The historical-categorical approach, however, merely continues traditional practices without regard for whether those traditions are justified in light of contemporary values. Moreover, even if the Court were to allow for a balancing analysis as part of a categorical approach—eschewing the historical-categorical approach—it will likely still render many decisions based on value judgments made by past Courts without regard for whether those decisions were justified. Therefore, both the historical-categorical approach and the balancing-categorical approach ultimately trade quality for often-arbitrary certainty.

A. Strict Scrutiny Is Driven by Moral Values

Strict scrutiny is a value-driven, interest-balancing approach weighted heavily in favor of protecting individual speech, while allowing for the possibility of precise, justified, and minimal governmental encroachment when necessary.[179] Strict scrutiny is driven by moral values, and a strict scrutiny analysis forces the Court to argue in terms of fairness and equality, with heavy emphasis on protecting individuals' speech rights.[180] By forcing the Court to make careful value-based judgments, strict scrutiny is designed to produce ethically justified decisions.

The first prong of a strict scrutiny analysis is self-evidently value-based; the government must be actually motivated by (as opposed to merely asserting) a compelling interest.[181] Subject to some guiding principles, the Court ultimately makes a

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[178] *See infra* notes 179–93 and accompanying text.

[179] *See* Volokh, *supra* note 64, at 2418–19 ("The Court makes a normative judgment about the ends: Is the interest important enough to justify a speech restriction? And the Court makes a primarily empirical judgment about the means: If the means do not actually further the interest, are too broad, are too narrow, or are unnecessarily burdensome, then the government can and should serve the end through a better-drafted law."). Although Volokh believes the Court's analysis is primarily a factual inquiry into whether a law is, in fact, narrowly tailored, *see id.* at 2424, each factual inquiry he describes is driven by normative concerns. *See* Kelso, *supra* note 62, at 302–03.

[180] *See* Kelso, *supra* note 62, at 302 (referring to fairness and equality in terms of Due Process and Equal Protection Clauses).

[181] *See* Volokh, *supra* note 64, at 2418–19.

normative judgment regarding whether the government's actual interest is compelling enough to warrant a content-based speech restriction.[182] This inquiry is flexible, and the government does not need to assert any historical tradition supporting its asserted interest.[183] Thus, the Court is more likely to govern content-based speech restrictions in a manner that reflects contemporary, rather than historical, values, just as it did in the early modern period nascent strict scrutiny analyses.[184] Granted, it is not certain that contemporary values are superior to past values, but because this approach is flexible, it allows for readjustment toward past values upon a realization that contemporary values have led the Court away from a wiser path. Thus, in the long run, strict scrutiny likely ensures that the government may only pass content-based restrictions pursuant to aims that Americans who are subject to the challenged laws would view as legitimate.

The second prong is less obviously value-based—to the point that Volokh asserts that it is a factual inquiry[185]—but it is nonetheless an inquiry motivated by ethical concerns.[186] Each narrow-tailoring consideration Volokh lists[187] helps to ensure that the government pursues its compelling interest only while preserving fairness and equality.[188] By ensuring that the law actually advances the compelling interest, the Court ensures that the law will actually achieve the purported benefits justifying the speech restriction.[189] By ensuring the law is not overinclusive, the Court ensures that the government is not accidentally regulating individuals who are not part of the problem.[190] By ensuring the statute is the least restrictive alternative, the Court ensures that the law does not oppress the individuals who are the focus of the statute.[191] Finally, by ensuring the law is not underinclusive, the Court promotes equality by ensuring that the government regulates all individuals who are part of the problem.[192]

Through this systematic process, a strict scrutiny analysis forces the Court to identify important values, and it forces the Court to in turn force the government to pursue those values only in such a way that is precise, fair, and minimally invasive.[193] In this way, strict scrutiny provides a structured process by which the Court can render carefully considered judgments that reflect American values.

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[182] *See id.* at 2418–21.

[183] *See supra* notes 61–79 and accompanying text; *see also* Volokh, *supra* note 64, at 2418–21.

[184] *See supra* Part II.

[185] *See* Volokh, *supra* note 64, at 2424.

[186] *See* Kelso, *supra* note 62, at 302.

[187] *See* Volokh, *supra* note 64, at 2422–23.

[188] *See* Kelso, *supra* note 62, at 302.

[189] *See id.*

[190] *See id.*

[191] *See id.*

[192] *See id.*

[193] *See id.*

B. The Historical-Categorical Approach Is an "Is-Ought" Fallacy

The historical-categorical approach renders constitutional decisions without any explicit consideration of the moral values underlying a challenged, content-based speech restriction or unprotected speech categories. Instead, the historical-categorical approach renders decisions as to how a certain type of speech ought to be treated by determining how it has been treated.[194] In this way, the Court outsources ethical considerations to courts of the past, regardless of the reasoning underlying those courts' decisions.[195] Therefore, the historical-categorical approach does little to ensure that the Court's decisions will be ethical. Such an approach risks cementing bad decisions for no better reason than that those decisions were at one time deemed correct.

Nothing in the historical-categorical approach requires that the Court render moral judgments when evaluating content-based speech restrictions. On the contrary, as argued in Part I, the Supreme Court now almost exclusively considers history and tradition as the standards by which unprotected speech categories will be judged.[196] Although the Supreme Court indicated that it may expand its list of unprotected speech categories, it also indicated that it will make such alterations only if it is presented with an adequate historical record to support the expansion.[197] From this, one can infer that the Court may similarly be willing to alter its definitions of existing unprotected speech categories if it is presented with adequate historical evidence.[198] However, the Court has indicated that it will not alter its unprotected speech categories for purely moral reasons.[199]

There is no reason to believe that an approach that focuses exclusively on a factual analysis of American history will render morally justifiable judgments. The historical-categorical approach focuses on what "[was], and [was] not," but then the approach

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[194] *See supra* notes 31–60 and accompanying text (arguing that the historical-categorical approach views tradition as necessary and sufficient to justify an unprotected speech category).

[195] *See supra* notes 31–60 and accompanying text.

[196] *See supra* notes 31–60 and accompanying text.

[197] *See* United States v. Alvarez, 567 U.S. 709, 722 (2012) (plurality opinion) ("Before exempting a category of speech from the normal prohibition on content-based restrictions, . . . the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.'" alteration in original) (quoting Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011)); United States v. Stevens, 559 U.S. 460, 472 (2010) ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.").

[198] *See Alvarez*, 567 U.S. at 722; *Stevens*, 559 U.S. at 472.

[199] *See Alvarez*, 567 U.S. at 717 ("[T]his Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.'" (alterations in original) (quoting *Stevens*, 559 U.S. at 470)); *Brown*, 564 U.S. at 791 ("[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."); *Stevens*, 559 U.S. at 471 (stating that there is no "test that may be applied as a general matter to permit the Government to imprison any speaker so long as . . . an ad hoc calculus of costs and benefits tilts in a statute's favor.").

makes a subtle shift to "an *ought*, or an *ought not*."[200] In this manner, the Court would commit the is-ought fallacy;[201] it would make an "evaluative conclusion . . . from . . . purely factual premises."[202] However, a mere analysis of facts, devoid of reference to moral considerations, cannot rationally lead to a conclusion about morality.[203]

The historical-categorical approach outsources "*ought*, or *ought not*" considerations to Americans of the past.[204] The Court tacitly accepts the moral judgment of past Courts and prior generations by determining speech rights with reference to traditions dating back to 1791.[205] Proponents of the historical-categorical approach argue that this anchoring to the past adds a degree of certainty that restrains the government from simply declaring a category of speech as too harmful to be protected by the First Amendment.[206] Although it is correct that the historical-categorical approach is more certain than the free speech approach, it does not necessarily follow that the historical-categorical approach is therefore more speech-protective.

The historical-categorical approach is only speech-protective if past generations were speech protective with respect to a certain type of speech. For instance, from 1791 to 1917, Americans were typically less free to criticize public figures than Americans today.[207] The modern, speech-protective defamation law arose because the Court consciously broke from that tradition.[208] Moreover, throughout the years, the Supreme Court has developed a robust anti-canon, which includes decisions expanding slavery,[209] upholding Jim Crow segregation,[210] upholding flagrantly sexist laws,[211] striking down protections for workers,[212] and affirming Japanese internment.[213] Clearly, traditions are not inherently rights-protective.

Under the historical-categorical approach, the Court does not appear able to overturn prior bad decisions because the decisions and their impacts are no longer

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[200] *See* DAVID HUME, A TREATISE OF HUMAN NATURE 302 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000).

[201] *See Is Ought*, TEX. ST. DEP'T OF PHIL., https://www.txstate.edu/philosophy/resources/fallacy-definitions/Is-ought.html [https://perma.cc/6JV9-ZV5K] (last visited Oct. 22, 2020).

[202] *Hume's Moral Philosophy*, STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/entries/hume-moral/#io [https://perma.cc/T9JG-S8RQ] (last visited Oct. 22, 2020).

[203] *See* HUME, *supra* note 200, at 302.

[204] *See id.*

[205] *See* United States v. Stevens, 559 U.S. 460, 468 (2010) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)).

[206] *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion); *Stevens*, 559 U.S. at 470.

[207] *See* Gibson, *supra* note 97, at 272–93.

[208] *See supra* notes 96–143 and accompanying text.

[209] *See generally* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[210] *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896).

[211] *See generally* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

[212] *See generally* Lochner v. New York, 198 U.S. 45 (1905).

[213] *See generally* Korematsu v. United States, 323 U.S. 214 (1944).

morally tolerable.[214] In this way, the historical-categorical approach puts too much faith in the moral judgment of past generations. In doing so, it risks permanently instantiating past decisions rendered based on moral judgments that no longer comport with modern conceptions of free speech, such as the lack of protection for commercial speech.[215] The Court would, under the historical-categorical approach, accept the good judgments along with the bad ones.

This is the ultimate flaw with attempting to render ethical decisions with reference only to factual considerations. The state of the world may or may not be just. The Court must consider modern values if it hopes to ensure that modern speech restrictions are ethical. Strict scrutiny considers values.[216] The historical-categorical approach does not.[217] Therefore, strict scrutiny is more likely to render ethical judgments.

C. A Constant Temptation

A categorical approach is not inherently unable to take into account moral value judgments.[218] Under the now-disregarded balancing-categorical approach, the Court would weigh the harms and benefits of a particular type of speech to determine whether that type of speech was protected by the First Amendment.[219] This approach to unprotected speech categories readily allows for change.[220] In fact, the nascent strict scrutiny analysis that birthed modern defamation law could also be seen as having taken place under the balancing-categorical approach.[221] Thus, one can envision a categorical approach that attempts to derive an ought from an ought.[222]

In practice, however, the Court has struggled to alter unprotected speech categories once they have been identified, even when the Court was utilizing a more flexible

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[214] *See supra* notes 31–61 and accompanying text.

[215] *Compare* Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (holding that commercial speech is constitutionally protected), *with* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that commercial speech was not constitutionally protected).

[216] *See supra* notes 179–93 and accompanying text.

[217] *See supra* notes 31–60 and accompanying text.

[218] *See* Moore, *supra* note 2, at 10.

[219] *See id.*

[220] *See* Collins, *supra* note 3, at 423.

[221] *See* Moore, *supra* note 2, at 10.

[222] *See, e.g.*, Volokh, *supra* note 64, at 2455–58. Volokh advocates for a categorical approach in which the Court would make determinations in reference to primarily normative questions:

> Does some interpretive theory—whether tied to the constitutional text, to broader constitutional or moral values, to the caselaw, or to something else—support this distinction? Is the proposed rule likely to lead to good results in most cases? Is the rule likely to be properly administered by courts and other government officials?

Id. at 2458.

categorical approach.[223] The Court, for instance, has not shown a willingness to protect any of the original unprotected speech categories identified in *Chaplinsky*.[224] Even a more flexible balancing approach appears damaged by historical inertia.[225]

For instance, in the early modern period, the Court heard the obscenity case *Miller v. California*.[226] *Miller* was decided at a time when the Supreme Court had labeled obscenity as unprotected speech, but had since failed to render a majority opinion setting forth a clear standard to govern obscenity.[227] The Court in *Miller* successfully produced a majority opinion setting forth such standards, although it did so without deciding the underlying case.[228]

Before *Miller*, the only definition of obscenity that rendered a majority came from *Roth v. United States*.[229] There, the Court adopted the following test to determine if material was obscene: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[230] After *Roth*, in *Memoirs v. Massachusetts* a three-Justice plurality added a third prong to the *Roth* test, requiring that the material be "*utterly* without redeeming social value."[231] In just seven years, however, the Court was ready to alter its definition yet again.

In *Miller*, the Court developed three "basic guidelines" for a trier of fact in an obscenity case.[232] To be obscene, first, an "'average person, applying contemporary community standards' [must] find that the work, taken as a whole, appeals to the prurient interest."[233] Second, the work must "depict[] or describe [], in a patently

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[223] *See* Collins, *supra* note 3, at 417 (listing the categories of unprotected speech named in *Chaplinsky* and citing relevant modern cases that apply these categories).

[224] *See id.* (listing lewd expression, obscene expression, profane expression, libelous expression, and fighting words as the specific categories of unprotected speech).

[225] *See infra* notes 226–62 and accompanying text.

[226] 413 U.S. 15 (1973).

[227] *See id.* at 20–23.

[228] *See id.* at 36–37. The underlying case involved a misdemeanor conviction for knowingly distributing obscene matter. *Id.* at 16 (citing CAL. PENAL CODE § 311.2(a) (1969)). The defendant distributed unsolicited advertising brochures for books entitled "*Intercourse*," "*Man-Woman*," "*Sex Orgies Illustrated*," and "*An Illustrated History of Pornography*," all of which contained "very explicit[]" pictures of people engaging in sexual activities. *Id.* at 18. Notably, commercial speech would not become protected until two years after *Miller*, so there was no argument that the defendant's speech was protected commercial speech rather than obscenity. *See generally* Bigelow v. Virginia, 421 U.S. 809 (1975).

[229] 354 U.S. 476 (1957).

[230] *Id.* at 489.

[231] *Miller*, 413 U.S. at 22 (quoting Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (plurality opinion)). Although the *Miller* Court believed that the *Memoirs* plurality's test "drastically altered" the *Roth* test, making it virtually impossible to declare anything obscene, *see id.* at 21–22, the plurality in *Memoirs* believed itself to be simply applying the test from *Roth* and its progeny. *See Memoirs*, 383 U.S. at 418–19.

[232] *Miller*, 413 U.S. at 24.

[233] *Id.* (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting *Roth*, 354 U.S. at 489)).

offensive way, sexual conduct specifically defined by the applicable state law."[234] Third, "the work, taken as a whole, [must] lack[] serious literary, artistic, political, or scientific value."[235] This third prong loosened the *Memoirs* test, while the second prong established that the states would now have the primary role in regulating and defining obscenity.[236] In this way, the Court was able to assemble a new test, while largely avoiding attempting to construct a true, functional definition.[237] Instead, it left that task to the states.[238]

Throughout the *Miller* decision, both the majority and the dissent indicate that the Court has encountered serious difficulty in defining obscenity.[239] One might think that this difficulty—and the accompanying threat of stifling expression—would make the Court question whether it is necessary to regulate obscenity. After all, the focus of obscenity is largely on whether material is sexual and offensive,[240] and regulation of such material is not typically thought to be a compelling government interest.[241] Instead, the *Miller* majority simply took for granted that obscenity was unprotected, without delving into why that is.[242]

Instead, the Court cited three cases, which had also held that obscenity was unprotected.[243] One case was *Roth*.[244] The other two cases justify their conclusion that obscenity is unprotected by citing *Roth*.[245] Thus, it would appear that the *Miller* Court found the rationale in *Roth* to be sufficient.

Roth relied primarily on an analysis of laws in effect at the time of the ratification of the First Amendment.[246] Finding a long history of prohibiting obscene and profane speech from the adoption of the First Amendment to the time of its decision, the Court concluded that obscenity was not protected.[247] The *Roth* Court did not undertake a balancing analysis, nor did it undertake any other kind of normative

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[234] *Id.*

[235] *Id.*

[236] *See id.* at 24–25.

[237] *See id.* at 37 (Douglas, J., dissenting) ("The Court has worked hard to define obscenity and concededly has failed.").

[238] *See id.*

[239] *See generally id.* (majority and dissenting opinions).

[240] *See id.* at 24 (majority opinion).

[241] *See* Volokh, *supra* note 64, at 2419.

[242] *See Miller*, 413 U.S. at 23 (first citing Kois v. Wisconsin, 408 U.S. 229 (1972); then citing United States v. Reidel, 402 U.S. 351, 354 (1971); and then citing Roth v. United States, 354 U.S. 476, 485 (1957)).

[243] *Id.* (first citing *Kois*, 408 U.S. 229; then citing *Reidel*, 402 U.S. at 354; and then citing *Roth*, 354 U.S. at 485).

[244] *Id.* (first citing *Kois*, 408 U.S. 229; then citing *Reidel*, 402 U.S. at 354; and then citing *Roth*, 354 U.S. at 485).

[245] *See Kois*, 408 U.S. at 230; *Reidel*, 402 U.S. at 354.

[246] *See Roth*, 354 U.S. at 482–85.

[247] *Id.* at 485.

assessment.[248] Thus, the *Roth* decision was made under a historical-categorical analysis.[249] The *Miller* Court accepted *Roth* as valid without providing further justification, thereby accepting *Roth* as sufficient to justify a categorical First Amendment exception for obscene speech.[250] Even a Court that was willing to deviate from historical traditions—such as when it protected commercial speech soon after *Miller*[251]—was still tempted by a historical-categorical analysis.

Likely, this is because the idea of unprotected speech categories—regardless of whether formulated under the historical-categorical approach or the balancing-categorical approach—is rooted in *Chaplinsky*.[252] It would be difficult to justify the central idea of the relevant passage in *Chaplinsky*—that some categories of speech are categorically unprotected—without accepting the list of examples that follows the passage.[253] None of the unprotected speech categories in the original *Chaplinsky* list have since become protected.[254]

The problem with relying on *Chaplinsky* is that the Court offered little in the way of justification for its holding in that case.[255] The decision itself is only seven pages long, and the first three pages are devoted to the syllabus and a summary of the facts.[256] Over the next two pages, the Court stated that the First Amendment is not absolute and that there are narrow exceptions to the First Amendment.[257] The Court described the unprotected speech categories and explained the rationale relied on for both the historical-categorical and balancing approaches to unprotected speech.[258] The Court then went on to define "fighting words" as statements that "men of common intelligence would understand would be words likely to cause an average addressee to fight," and justified the exception as protecting against a "breach of the peace."[259] Each step in the Court's analysis was only justified perfunctorily, if at all.[260]

With such little justification for such a decision, a proponent of unprotected speech categories has two options: (1) try to keep the concept of unprotected speech categories in *Chaplinsky* without the list; or (2) search for justifications for the list. The first option leaves *Chaplinsky* open to a good deal of criticism; once one starts

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[248] *See generally id.*

[249] *See supra* Section I.B.

[250] *See* Miller v. California, 413 U.S. 15, 20 (1973).

[251] *See* Bigelow v. Virginia, 421 U.S. 809, 819 (1975).

[252] *See* Collins, *supra* note 3, at 415–17; Moore, *supra* note 2, at 8.

[253] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (listing lewd expression, obscene expression, profane expression, libelous expression, and fighting words); *accord* Collins, *supra* note 3, at 415–17.

[254] *See* Collins, *supra* note 3, at 417; KILLION, *supra* note 29.

[255] *See generally Chaplinsky*, 315 U.S. 568.

[256] *Id.* at 568–74.

[257] *Id.* at 571–72.

[258] *See id.*

[259] *Id.* at 573.

[260] *See id.* at 571–73.

eliminating those parts of *Chaplinsky* that were justified only weakly or not at all, little will be left of the case.[261] The second option is likely more palatable to those who generally like the holding in *Chaplinsky*; it allows the case to stand in its entirety. Thus, there is a clear temptation to try to find justifications for the *Chaplinsky* decision in its entirety, and one tempting justification is evidently history and tradition.[262]

CONCLUSION

The Supreme Court needs to allow itself to change so that it can leave bad laws in the past. Some of the Court's brightest moments came when it rejected bad laws of the past in favor of a more just future. "Separate but equal" was the law of the land until the Court held that it was not.[263] The Equal Protection Clause was interpreted as allowing sexist discrimination until the Court held that it did not.[264] It would be hubris to think that somehow the Court is doing nothing today that subsequent generations will not look back upon with scorn.

By adopting a framework that encourages a continuing normative analysis and rejecting a framework that outsources those considerations to the past, the Supreme Court will better protect against rigid enforcement of unjust laws. In the First Amendment context, strict scrutiny mandates that the Court engages in an ongoing value-driven analysis, while the historical-categorical approach would encourage blind faith in the practices of past generations.[265] During the 1960s and 1970s, the Court was able to reject the artificial rigidity of the historical-categorical approach to better protect Americans' speech rights.[266] In light of both the descriptive frailty and normative failure of the historical-categorical approach, the Court ought to abandon it in favor of a First Amendment jurisprudence centered on strict scrutiny.

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[261] *See generally id.*

[262] *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 717–18 (2012) (plurality opinion); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790–93 (2011); United States v. Stevens, 559 U.S. 460, 468–72 (2010); Roth v. United States, 354 U.S. 476, 481–85 (1957).

[263] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[264] *See* Reed v. Reed, 404 U.S. 71, 77 (1971).

[265] *See supra* Part III.

[266] *See supra* Part II.