

Against Strict Scrutiny: The Supreme Court's Quiet Degradation of First Amendment Speech Protection

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I. INTRODUCTION

Suppose you are approached by a twenty-two-year-old aspirant for federal office. Article I, Section 2, Clause 2 of the United States Constitution reads: “No Person shall be a Representative who shall not have attained to the Age of twenty five Years.”² Do you suggest she run for the U.S. House of Representatives? Likely not. Whether you ask a constitutional scholar or layman, the answer would likely be the same. The Constitution is clear. “You’ll have to wait a few years.” Now suppose that Congress, under the belief that there is a crisis of youth disengagement from politics, passes a law allowing twenty-two-year-olds to become members of the House. No matter how compelling the interest in generating youth involvement in politics may be, nor how narrowly tailored the law was to achieve this purpose, your response would be the same. “Still out of luck” you say, “this law is unconstitutional. This is why the framers gave us the amendment process in Article V.”

Now imagine you were told that our protagonist decided to run anyway, and would have a more than one out of five chance of prevailing if she brought her claim to court. Many would be shocked. And this disbelief would be spot-on . . . with regard to Article I, Section 2, Clause 2. Yet, surprisingly, this is precisely where we find ourselves today with the most straightforward of free speech challenges. Such claims might apply constitutional language—“Congress shall make no law . . . abridging the freedom of speech”³—that appears as clear and unequivocal

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2. U.S. CONST. art. I, § 2, cl. 2.

3. U.S. CONST. amend. I.

as the language found in Article I, Section 2, Clause 2. Yet, application of the strict scrutiny doctrine to content-based laws suggests that courts may uphold plain vanilla censorship in direct contravention of the text of the First Amendment as long as that court is persuaded by its backers' policy arguments. In doctrinal terms, a court must simply determine that the speech suppression is a narrowly tailored law serving a compelling governmental interest.⁴ This approach, converting baseline free speech claims into questions of policy to be determined by the judiciary, has quietly become the new norm. In this essay, I challenge this interpretive convention.

To be clear, this is not an argument for absolutism. It has long been uncontroversial to reject rigid free speech absolutism.⁵ Even the most ardent defenders of a broadly protective First Amendment have long understood and accepted that there are practical limits to the amendment's application: whether it be a threat of violence,⁶ an incitement of an insurrection,⁷ a malicious slander,⁸ or a bullhorn blaring at 2 AM,⁹ "no law" cannot truly mean "no law." Indeed, the argument I will make is not inconsistent with those who claim that the First Amendment has been inappropriately "weaponized"¹⁰ or *Lochnerized*¹¹ to extend far too broadly—to contexts where speech interests may be too attenuated or indirect to justify its application. This "weaponization" language was famously used in a scathing dissent by Justice Kagan in 2018, criticizing the majority for applying free speech protection to those who did not want to pay public union dues.¹² It is one thing to acknowledge a need for a limited number of clearly circumscribed and doctrinally calibrated First Amendment exceptions or to conclude that the First Amendment simply doesn't apply in certain settings; it is quite another to argue that *all* laws

4. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

5. *See, e.g.*, Wayne Batchis, *On the Categorical Approach to Free Speech – And the Protracted Failure to Delimit the True Threats Exception to the First Amendment*, 37 PACE L. REV. 1, 8 (2016) [hereinafter Batchis, *Categorical Approach*].

6. *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (distinguishing a true threat from constitutionally protected speech).

7. *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (permitting a state to forbid advocacy that is directed to inciting or producing imminent lawless action).

8. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 283 (1964) (requiring plaintiff to show actual malice to recover for defamation).

9. *Kovacs v. Cooper*, 336 U.S. 77, 88–89 (1949) (upholding ordinance barring sound trucks from broadcasting on streets).

10. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

11. *See generally* Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020).

12. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

“abridging the freedom of speech” should be balanced against the social interests at stake in order to determine whether such law may stand.

Yes, the Constitution *does* mean what it says. But there are some narrow contexts in which it cannot be quite as simple as “Congress shall make no law.” In those discrete settings—whether it be a disruptive government employee speaking her mind in the workplace, a pharmaceutical drug representative making unsubstantiated claims about the safety of his wares, or a child pornographer sharing images of exploited children—a different set of rules applies. These are categorical exceptions, built of necessity. The Court, however, has gradually moved toward an approach that casts doubt on the clarity and certitude of the First Amendment in *all* settings, not just narrow areas where such special rules apply. It has made strict scrutiny, rather than per se unconstitutionality, the default standard.

Granted, free speech jurisprudence has turned out to be remarkably complex. Over time it has become clear that there is a need for a good number of special categories, and each such category is subject to its own doctrinal rules. Why? Commercial speech is not the same as child pornography which is not the same as defamation. The distinctive harm inflicted on sexually exploited minors—associated with allowing explicit images to spread—is distinct from the harm that might be caused by a misleading advertisement for shampoo. The societal importance of the free flow of expression when it involves criticism of public officials is quite different from the interest in protecting speech falsely criticizing a private individual. Categorical rules, established over time through evolving court doctrine, accommodate these truths. Justifiable complexity in certain realms, however, does not merit muddying the waters that should remain clear.

This is also an essay about insidious doctrinal creep. It may be counter-intuitive to read a First Amendment-based critique of a Court that has been characterized as one of the most speech-protective Supreme Courts in American history.¹³ But, I argue that the Court has indeed, with minimal attention and no clear justification, moved toward a much less speech-protective default approach, a cost-benefit analysis as a baseline for *all* free expression questions. Justice Kennedy, in a brief cautionary concurrence, once acknowledged this unfortunate and little-observed transformation, opining that the Court “adopted this formulation in First

13. WAYNE BATCHIS, *THE RIGHT’S FIRST AMENDMENT: THE POLITICS OF FREE SPEECH & THE RETURN OF CONSERVATIVE LIBERTARIANISM* 44 (2016).

Amendment cases by accident rather than as the result of a considered judgment.”¹⁴ But otherwise, the phenomenon has received almost a complete absence of attention. Justice Kennedy himself would implicitly retract his position just a few years later.¹⁵ As I shall argue, the Court has adopted a standard of review in First Amendment cases that was intended for other purposes.

The Supreme Court sets the rules. For this reason, many scholars focus almost exclusive attention on the decisions of the nine justices that comprise America’s highest court. But lower courts are where the rules and standards the Supreme Court establishes are applied. And although the strict scrutiny test has a reputation for being rigorous and difficult to satisfy, it invites judicial discretion, where a strict prohibitory rule would not. A default strict scrutiny test has broad implications. One study, looking at all free speech First Amendment cases decided under the strict scrutiny standard in federal courts from 1990 through 2003, determined that in twenty-two percent of the cases the offending government regulations were upheld.¹⁶ Decisions allowing for speech suppression in charitable solicitation cases reached as high as fifty percent.¹⁷

Even if we were to put aside this strikingly high rate in which courts affirm speech suppressive laws, and conclude that the overall trajectory of the judiciary’s approach to the First Amendment is speech protective, there is reason to be concerned. A strict scrutiny balancing test may be weighted in favor of speech protection, but it still opens the door to ad hoc judicial discretion and politicized decision making. A look at the speech-protective Roberts Court’s less-frequent decisions *upholding* censorious laws reveals a Court that is more likely to assent to speech suppression when the outcome correlates with the majority justices’ conservative ideology.¹⁸ And one could just as easily anticipate the reverse dynamic, in which a Court made up of predominantly liberal justices would disproportionately uphold speech suppression when it serves left-wing

14. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring).

15. *See Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 784–85 (1996) (Kennedy, J., concurring in part); *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000).

16. 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 (2006).

17. *Id.* at 845.

18. *See* Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment* (2013) (Am. Pol. Science Ass’n 2013 Annual Meeting Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300572 [<https://perma.cc/LHF2-KRXS>]; Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 236 (2014).

values. When every decision asks judges to assess how “compelling” the case for speech suppression is, judicial ideology will naturally play a larger role.

The strict scrutiny test and its partner, the rational basis test, do a lot of work in constitutional law. This tiered doctrinal formulation—sometimes with an intermediate level of scrutiny added for good measure—arose in the Fourteenth Amendment equal protection setting,¹⁹ and serves an important and valuable function. The tests provide a framework for a distinctive class of constitutional questions that demand flexible balancing. However, this tiered system is not a good fit for all constitutional tasks. I posit that the utilization of the strict scrutiny framework in general content-based First Amendment jurisprudence was a doctrinal misstep. This test is not merely an awkward fit in this area, it risks distorting and diminishing the potency and neutrality of the First Amendment.

This essay has three parts. It begins by exploring the origins of the strict scrutiny test in the context of the Equal Protection Clause and Due Process Clause, explaining why this doctrine, and the tiered levels of scrutiny with which it would become associated, was a specific tool designed for very specific constitutional challenges. Next, it addresses and critiques the application of strict scrutiny in the First Amendment context, arguing that strict scrutiny is a poor fit as the default standard for content-based speech suppression. Finally, the essay traces the misguided (and largely unnoticed) evolution in First Amendment doctrine that over half a century gradually transitioned from a rule of per se unconstitutionality for content-based censorship, to a more flexible default rule that gives courts much more discretion to uphold speech suppression on an ad hoc basis.

II. THE ORIGINS OF STRICT SCRUTINY

The pragmatic realization that some exceptions are essential to even the clearest of constitutional rules means the Court has a crucial, but delicate task: it must fashion appropriate doctrinal tests to determine when and how constitutional principles must at times bend. The premise of this essay is not a radical one. It is, quite simply, that some doctrinal tests are better than others. Courts are fallible. And even when a Court succeeds in establishing an elegant doctrinal solution, we must concede that a constitutional test that is an excellent fit for some constitutional problems,

19. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 786–87 n.14 (2007).

may be a terrible fit for others. I contend that the strict scrutiny test is, quite simply, not designed to serve the interests of robust speech protection, and should be discarded in many areas of First Amendment adjudication.

There is always a risk that constitutional doctrines designed for one purpose may bleed into other areas, where the fit is poor. First Amendment absolutism, of the sort advocated by the late Justice Black, has never been widely accepted.²⁰ Black famously emphasized that the First Amendment “is composed of plain words, easily understood. [The] language [is] absolute.”²¹ Yet, while Black’s unbending approach proved untenable, the spirit of Black’s absolutism reflects a perspective that is not controversial at all. At its heart, it is the simple acknowledgment that the Constitution’s aspiration is a rule of law, rather than a rule of man.

There is certainly no reason to believe that the only alternative to absolutism is a balancing-in-all-cases approach. Indeed, the underlying premise of the categorical method, which has become foundational to the Court’s First Amendment jurisprudence since the 1942 case of *Chaplinsky v. New Hampshire*,²² would seem antithetical to such an approach. Carving out discrete categorical exceptions from an otherwise applicable rule implies that the largely non-discretionary rule is the default (outside of these few categories). However, by assigning a strict scrutiny test to all content-based abridgments of speech that do not qualify for a more lenient standard (such as a low-value speech category, public employee speech . . . etc.), the Court makes balancing the default. Rather than applying the quite straight-forward rule that “Congress shall make no law . . . abridging the freedom of speech,”²³ the Court’s use of the strict scrutiny test converts clear-cut constitutional infractions into opportunities for judicial balancing. In the classic jurisprudential formulation, the Court might be understood to have moved to a regime of *standards*, whereas previously it relied upon a regime of *rules*. This distinction between standards versus rules answers the question, as Kathleen Sullivan has explained, of “whether to cast legal directives in more or less discretionary form.”²⁴

20. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1290 (2007).

21. GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 1009 (8th ed. 2018).

22. Batchis, *Categorical Approach*, *supra* note 5, at 11.

23. U.S. CONST. amend. I.

24. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992).

Granted some might argue that the strict scrutiny test comes very close to an absolute—a presumption of unconstitutionality that almost always means constitutional failure. Strict scrutiny is contrasted with rational basis review—which arose in the aftermath of the *Lochner* era in the economic substantive due process arena—a deferential standard that imposes “a strong presumption of constitutionality.”²⁵ Resting as it does at the most rigorous end of the scale, Gerald Gunther famously pronounced in 1971 that although the strict scrutiny test may be “‘strict’ in theory,” it is “fatal in fact.”²⁶ For some time, this was indeed largely the case. A declaration by a court that strict scrutiny applied meant almost-certain death for the targeted governmental action. However, in recent years this conventional wisdom has increasingly been thrown into question. As discussed, between twenty and twenty-five percent of strict scrutiny free speech cases uphold the speech suppression at issue.²⁷

It is important to recognize that the three-tiered method the Court adopted was one of varying *standards* rather than a simple *rule*, a dimmer rather than a light switch. It was not “if *x* then *y*,” it was “if *x*, then here is the test that applies, and this test makes *y* more likely.” When strict scrutiny applies there is a *presumption* of unconstitutionality. Unconstitutionality may be the most likely outcome, but a fact-dependent and highly subjective assessment must first be applied to reach that conclusion. For judicial minimalists wary of excessive judicial power this all may seem quite dubious—an attempt to subvert the clear meaning of the constitution in favor of judicial whim, or at minimum, giving judges *some* discretion where they should have *none*. Indeed, the Court’s tiered approach was not preordained. As the Court has explained:

[T]he Constitution makes no mention of the rational-basis test, or the specific verbal formulations of intermediate and strict scrutiny . . . these tests or standards are not, and do not purport to be, rights protected by the Constitution. Rather, they are judge-made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government.²⁸

But, there is nothing nefarious here. This approach was a logical and

25. Bhagwat, *supra* note 19, at 786.

26. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

27. Winkler, *supra* note 16, at 844.

28. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 548 (1989) (Blackmun, J., concurring in part).

sensible product of the unique challenge inherent in interpreting particular parts of the Constitution. When applied in an appropriate context the tiers of scrutiny approach may ultimately mean less judicial intrusion into legislative affairs by establishing a more rigorous strict scrutiny test as the exception, and the less-interventionist rational basis test as the default. It was, after all, in the equal protection case of *Skinner v. Oklahoma* in 1942, that the Court first invoked the concept of strict scrutiny.²⁹ The Equal Protection Clause, as many scholars and justices have acknowledged, is impossible to apply as a straightforward rule. Doing so would mean swallowing our entire system of justice, one based on a rule of law.³⁰ Because a rule-based system of law is premised upon inequality between law-breaker and law-abider, the Equal Protection Clause must, of necessity, preclude inequalities only of a particular kind and degree. In short, the equal protection concept must be a *standard*, or, to be more precise, multiple *standards*, with a rule first determining which standard applies.

It was this acknowledgment by Justice Douglas in *Skinner*, which led the Court to articulate a distinct strict scrutiny test, a test that was only to apply in narrow circumstances.³¹ The language of the Equal Protection Clause might read like a rule: it commands that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”³² But the framers of this amendment could not have intended it to rid law of all inequality. The clause’s language is distinctive for its inherent tension—the inevitable contradiction of guaranteeing equal protection in a system of law demanding justifiable inequality. A rule of law regime must by definition distinguish between legality and illegality and treat parties differently in accordance with their actions or attributes.³³ This is why in *Skinner*, the Court forthrightly conceded that the Equal Protection Clause “is ‘the usual last resort of constitutional arguments.’”³⁴ The *Skinner* Court confirmed what common sense might suggest:

[A] State is not constrained in the exercise of its police power to ignore

29. Bhagwat, *supra* note 19, at 786–87 n.14; Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM’N. L. & POL’Y 349, 355 (2011).

30. STONE ET AL., *supra* note 21, at 509.

31. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

32. U.S. CONST. amend. XIV, § 1.

33. Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J. L. & PUB. POL’Y 401, 403 (2016).

34. *Skinner*, 316 U.S. at 539.

experience which marks a class of offenders of a family of offenses for special treatment. Nor is it prevented by the equal protection clause from confining “its restrictions to those classes of cases where the need is deemed to be the clearest.”³⁵

Such differential treatment is fundamental to a rule of law.

What then was the Court to do with this distinctive constitutional provision? On one hand there is the risk of reducing it to a nullity. Because it must acknowledge this most basic truth that virtually all lawmaking requires making distinctions resulting in variable (and unequal) legal consequences, it might be tempted to simply walk away, declaring Equal Protection Clause issues unresolvable due to a lack of “judicially discoverable and manageable standards.”³⁶ On the other extreme, the courts could opt to become “virtually continuing monitors of the wisdom and soundness”³⁷ of the political branches of our democratic government, with vast power and unrelenting discretion to tear down the work of America’s democratically elected leaders. Neither option is desirable, nor consistent with the spirit or intention of the Fourteenth Amendment.

Enforcing the Constitution’s general provision of “equal protection of the laws” thus required courts to cabin those forms of inequality deemed least tolerable (applying strict scrutiny), while otherwise generally permitting legislators to establish and maintain the justifiable inequalities necessary in a system of law (applying rational basis). As Erwin Chemerinsky explains, “levels of scrutiny are simply rules for how the weights are to be placed on the balancing scales.”³⁸ In the seminal *Skinner* decision, it was the Court’s determination that “[m]arriage and procreation are fundamental,” that led it to apply strict scrutiny to an Oklahoma law imposing sterilization as a penalty for some crimes but not others.³⁹ It was this trigger of a fundamental right that allowed the Court to diverge from the default deference it generally affords to lawmakers. This innovation—this rule that determines what standard applies—made judicial enforcement of the equal protection clause manageable.

Of necessity, this doctrinal scheme entails more than just one step. It is a rule that (1) tells a court what kind of balance applies, so it can (2)

35. *Id.* at 540 (quoting *Miller v. Wilson*, 236 U.S. 373, 384 (1915)).

36. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

37. *Allen v. Wright*, 468 U.S. 737, 760 (1984).

38. Chemerinsky, *supra* note 33, at 403.

39. *Skinner*, 316 U.S. at 541.

move forward and apply that standard. The need for a second step was a product of the peculiar constitutional conundrum the Court faced in equal protection cases. As Chemerinsky reminds us, “balancing is inevitable.”⁴⁰ If courts are to maintain allegiance to the equal protection principle, even in a setting where the lowest level of scrutiny applies, they need a test that still provides the requisite flexibility to allow for—albeit in rare occasions—the striking down of unusually intolerable distinctions. On the other hand, there are narrow circumstances where strict scrutiny is appropriate, yet a state will nonetheless survive the demand that it have a compelling state interest for its law and that it be narrowly tailored to effectuate that purpose.⁴¹ In equal protection jurisprudence, to remain faithful to the constitutional principle against inequality, balancing is essential at both ends of the spectrum.

In the vast majority of cases, where neither a suspect class nor a fundamental right is at issue, the government must have a great deal of discretion to fashion laws that mete out unequal consequences to achieve its ends. Yet, even under the rational basis standard that applies in these circumstances, courts must have the power to intervene where an egregious inequality results, for example, one rooted in animus or “a bare . . . desire to harm a politically unpopular group.”⁴² And even in cases where inequality is imposed on the basis of race—triggering strict scrutiny because it is the very form of discrimination that motivated the framing of the Fourteenth Amendment—there must still be some room for distinctions to be upheld. This was the rationale behind *Grutter v. Bollinger*, in which the Court upheld a narrowly tailored affirmative action plan at the University of Michigan Law School.⁴³ In equal protection cases, the strict scrutiny standard must still account for the government’s indispensable lawmaking role, a power that is essential in a democratic republic. It is difficult to escape the inevitability of balancing in equal protection jurisprudence. The system of tiered review imposing rational basis, strict scrutiny (or in some cases, intermediate scrutiny) evolved just for this task.

A similar claim may be made in the due process context. Under the Due Process Clause, government is prohibited from “depriv[ing] any person of life, liberty, or property, without due process of law.”⁴⁴ A substantive due process infringement may turn on a deprivation of liberty,

40. Chemerinsky, *supra* note 33, at 405.

41. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

42. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

43. *Grutter*, 539 U.S. at 343.

44. U.S. CONST. amend. XIV, § 1.

but like *unequal* protection, *some* deprivation of liberty is an element of almost all laws—whether it is a restriction on one’s ability to park in a disabled spot, to ingest certain drugs without a doctor’s prescription, or to marry multiple spouses. Thus, like in the equal protection setting, it becomes essential to distinguish those circumstances that merit significant governmental discretion from those that demand more rigorous scrutiny, while at the same time giving courts the power on both ends to balance the interests of liberty against the interests of democratic governance and lawmaking. Over time, the Court has determined that certain personal liberties, such as marriage⁴⁵ and parental decision-making,⁴⁶ are fundamental and thus demand strict scrutiny. With the close of the *Lochner* era in roughly 1934, the Court came to conclude that economic interests do not.⁴⁷ Thus, there are important reasons why, with both equal protection and due process, the Court chose to employ what was once a novel approach—one that resolves constitutional questions using a tiered doctrine that demands a graduated form of balancing at all levels.

Nevertheless, the fact that the graduated scrutiny approach is particularly useful and appropriate in the equal protection and due process context does not suggest that this doctrinal formulation is ideal in other settings. The Presentment Clause, for example, is not subject to a strict scrutiny test. The government cannot avoid the requirement that “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.”⁴⁸ This is true regardless of whether or not there is a compelling interest in avoiding presentment or whether the law circumventing it is narrowly tailored. The same black or white rule-based logic would apply if a President saw fit to dub his son-in-law and daughter the Duke and Duchess of the West Wing in contravention of Article I, Section 9, Clause 8, which commands that “No Title of Nobility shall be granted by the United States.”⁴⁹ Compelling or not, and even in the case of the most narrowly-tailored grant, for the federal government to begin conferring titles of nobility, the Constitution would need to be amended under Article V (the constitutional provision setting out the rules for amending the Constitution by a two-thirds majority vote of Congress and three-quarters of the states).⁵⁰ In other words, the strict scrutiny test, and the tiered

45. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

46. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

47. See *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

48. U.S. CONST. art. I, § 7, cl. 2.

49. U.S. CONST. art. I, § 9, cl. 8.

50. U.S. CONST. art. V.

system of which it is a part, was an acknowledgment that certain constitutional commands are uniquely imbued with inherent tension between Congress' constitutional power to make law and the President's power to execute the law that cannot realistically be resolved without judicial balancing. But a constitutional command is still a constitutional command where such inherent tension is not present.

III. STRICT SCRUTINY AND THE FIRST AMENDMENT

Unlike the equal protection and due process setting, a straightforward, content-based application of the free speech and press clauses does not demand such balancing. Yet, recent Court decisions increasingly suggest that strict scrutiny should apply as the default approach. Why? There is no *prima facie* need to balance speech protection against lawmaking the way there is, for example, when a law makes a race-based distinction to promote the interests of diversity.⁵¹ There are, of course, very real costs associated with protecting free speech. As Justice Black observed, “[of] course the decision to provide a constitutional safeguard for [free speech] involves a balancing of conflicting interests. [But] the Framers themselves did this balancing when they wrote the [Constitution]. Courts have neither the right nor the power [to] make a different evaluation.”⁵²

There are costs to all rules in the Constitution, including missing out on governance by a remarkably impressive, exceedingly popular, twenty-two-year-old aspirant to the House of Representatives. But the fact that there are costs should not transform clear-cut constitutional rules into *ad hoc* discretionary matters destined for judicial policymaking. Twenty-five years-old means “twenty-five years-old”—and the Constitution is unequivocally clear that in order to qualify as a member of the House one must “have attained to the Age of twenty five Years.”⁵³ Some principles in the Constitution present as rules, while others must be given meaning as standards. Admittedly, the line between these two may not always be as clear and defined as we may like it to be. However, the inherent tensions that exist in equal protection and due process jurisprudence—where the Court has opted for a strict scrutiny test—are simply absent in large swaths of First Amendment law.

Granted, there are areas of First Amendment jurisprudence that do call

51. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 327, 333–34 (2003).

52. STONE ET AL., *supra* note 21, at 1009.

53. U.S. CONST. art. I, § 2, cl. 2.

out for a balancing approach. Just as law inherently involves inequality (making a rigid rule-based application of the Equal Protection Clause unrealistic), punishing conduct (an essential element of any system of law) might impair First Amendment expression. This conundrum might likewise justify use of a tiered balancing approach. After all, much criminal behavior, when visible to others, could be said to be sending a symbolic message deserving of First Amendment protection. Absolutism, unless we are comfortable exempting broad categories of criminality from accountability, clearly would not work here. However, for the circumstances where these tensions between proscribable conduct and protected expression exist, when, in other words, the government regulates conduct that has a significant expressive component, the Court has devised a suitable First Amendment test.⁵⁴ In *United States v. O'Brien* the Court established a four-part intermediate scrutiny test to resolve cases in which criminalized conduct acts at the same time as a form of symbolic communication.⁵⁵

Symbolic speech is just one example of many. The Supreme Court has taken great pains to lay out other exceptional categorical areas where a straight-forward reading of the First Amendment will not do, such as with true threats⁵⁶ or the speech of public employees.⁵⁷ Making strict scrutiny a default in what remains, however, has never been adequately justified or explained. It is also potentially dangerous. By reframing all First Amendment free speech questions as mere cost/benefit assessments courts put themselves in the role of censorship review committee. They give themselves the power in every case to judge the value of ideas—a dynamic the framers were presumably seeking to avoid. By design, the Constitution is intended to act as a bulwark against abuse—ensuring a degree of stability when the passions of the times risk upending core foundations of the democratic order. Thus, it is a cardinal principle of constitutional interpretation that, wherever realistically feasible, constitutional principles should be understood as rules, not as mere malleable policy suggestions. As Vincent Blasi famously pointed out in his influential and enduring *Columbia Law Review* article, *The Pathological Perspective and the First Amendment*, this principle is particularly urgent in the First Amendment setting.⁵⁸

54. *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

55. *Id.* at 377.

56. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

57. *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

58. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV.

History has shown how vulnerable free speech can be to impassioned pleas of compelling governmental need. This might be said to be the lesson of the protracted, and to most scholars and thinkers, regrettable, period in which the Supreme Court's First Amendment jurisprudence was marked by inconsistent and often paltry protection of free expression.⁵⁹ This rocky first half-century of Supreme Court engagement with the First Amendment, a period that arguably did not come to a close until the 1960s, was also a time of recurrent backsliding, especially during times of perceived national crisis—perhaps best illustrated by cases such as *Dennis v. United States*.⁶⁰

As Blasi argued:

[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment, in other words, should be targeted for the worst of times.⁶¹

And, as we have seen, the danger of disregarding critical First Amendment principles during “pathological” times does not just come from the political branches of government, the judiciary is also susceptible. Blasi explains that “the repressive dynamics may penetrate the judicial psyche and cause judges to interpret the first amendment restrictively.”⁶² Like Odysseus’ clever choice to tie himself to the mast of his ship to keep himself from acting on the Sirens’ seductive call, a rule-based doctrine constrains courts, making it less likely that they will diverge from core First Amendment principles, even when the passions of the times serve up compelling reasons to do otherwise.

There are, of course, many compelling reasons to suppress speech, even in non-“pathological” times. The communication of ideas can have unfortunate consequences. Few would deny that. Listeners are inspired by both good and bad ideas to act in both good and bad ways. Such is the power of ideas. Some of those “bad” actions may be “bad” because social norms or medical science suggest they are undesirable, and some of those “bad” actions may also be violations of the law. But it is a premise of the

449, 449–50 (1985).

59. See, e.g., Louis Michael Siedman, *Can Free Speech be Progressive?*, 118 COLUM L. REV. 2219, 2226–27 (2018).

60. 341 U.S. 494, 497, 516–517 (1951).

61. Blasi, *supra* note 58, at 449–50.

62. *Id.* at 450.

First Amendment that there is a critical distinction between ideas and action, and that while the former may inspire the latter, only the latter may be criminally sanctioned.⁶³ This principle is essential to the vitality of liberal democracy.

One of the earliest lessons of the Supreme Court's First Amendment jurisprudence has been to reject a "bad tendency" test as a guideline for interpreting when freedom of speech may bend.⁶⁴ It became clear that virtually any governmental suppression of speech could be justified on grounds of its "bad tendency." Such a test also left little room to challenge, question, or reformulate the norms and laws that define what is currently understood to be "bad." Without the ability to criticize the prevailing orthodoxy of the times, democracy cannot self-correct or evolve. As the people increasingly find themselves without the freedom to affect change in their own government, the eventual result may be a loss of democracy itself. Although the balance is more heavily weighted in favor of free speech, the modern strict scrutiny test arguably has much in common with the rejected early twentieth century "bad tendency" test. Both make judicial discretion the default.

The risks also extend well beyond moments of extreme historic pathology; they may reach ordinary policy issues that elicit natural human reactions of disgust or compassion. Take for example, depictions of animal cruelty. Such expression sparks understandable revulsion. In *United States v. Stevens*, the courts addressed a federal law that criminalized such images.⁶⁵ The Supreme Court rejected the government's argument that depictions of animal cruelty should be added to the list of categories of lesser-protected, low value speech.⁶⁶ Thus, having determined that the speech at issue did not fall under one of the Court's narrow exceptions such as obscenity, fraud or child pornography, the issue in *Stevens* looked like a plain-vanilla content-based restriction on expression.

While acts of cruelty to animals can be criminally prohibited, conveying images of such acts constitute straight-forward expression. Before the Court's adoption of strict scrutiny as a default approach, the response would be that under these circumstances the Constitution is quite clear—a content-based restriction such as this is simply impermissible,

63. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.").

64. *STONE ET AL.*, *supra* note 21, at 1026–27.

65. 559 U.S. 460, 464 (2010).

66. *Id.* at 468–72.

case closed. Not only did this not fall under a low-value speech exception, it did not occur in a government controlled forum, it was not a form of government speech, it was not government funded expression or the speech of a public employee, and it was not targeted at the non-expressive attributes of criminal behavior. The Third Circuit, however, relied upon the strict scrutiny test to strike down the law.⁶⁷ The Court neatly outlined the problematic two-step approach that has become the go-to doctrine for free speech matters: “First, we show how [the law] regulates protected speech. Second, because [the law] regulates protected speech, we must subject the statute to strict scrutiny.”⁶⁸

Many would likely agree with the government’s claim in *Stevens*—that “preventing cruelty to animals” is compelling.⁶⁹ Again, this is a natural human reaction. And animal cruelty is, after all, a crime in most jurisdictions. Perhaps they would thus conclude that a challenge to this law should fail under strict scrutiny. The Third Circuit disagreed. But it had gone out of its way to minimize the significance of the strict scrutiny review stage, emphasizing that when it applies, restrictions are “presumed invalid,” and noting “that ‘a majority of the [Supreme] Court has never sustained a regulation that was strictly scrutinized for content discrimination reasons.’”⁷⁰ However, we might question why, if strict scrutiny were truly comparable to a per se constitutional prohibition, a second-step would be necessary at all. Why proceed with an analysis that gives courts the discretion to uphold a law that on its face violates the First Amendment? Why establish a baseline doctrine that forces courts to make independent value judgments where the constitution is remarkably clear? Leaving a crack in the door makes it much more likely that the wind will blow it wide open. And, as we have seen, when given the chance, lower courts have shown a significant willingness to uphold incursions into free expression under strict scrutiny.⁷¹

Upon review, the Supreme Court avoided the tiered review approach utilized by the Third Circuit, instead deciding the case on overbreadth grounds.⁷² Justice Alito, the single dissenter, nonetheless agreed that suppressing expression was a compelling way to prevent the underlying crime of animal cruelty.⁷³ Had a handful of additional justices arrived at

67. *United States v. Stevens*, 533 F.3d 218, 232–35 (3d Cir. 2008).

68. *Id.* at 223.

69. *Id.* at 233.

70. *Id.* at 232.

71. Winkler, *supra* note 16, at 844–45.

72. *United States v. Stevens*, 599 U.S. 460, 482 (2010).

73. *Id.* at 493 (Alito, J., dissenting).

the same conclusion as Alito, this expression would have been allowed to be criminalized. Alito's position may be perfectly defensible. But should the baseline in all core First Amendment questions turn on whether there are simply enough Justice Alitos—judges who just happen to be convinced that there are compelling enough reasons to allow for the suppression of speech? A categorical approach, as we shall see with the example of child pornography, allows for a speech suppressive outcome where societal needs require it, but without reliance on an unpredictable, case-by-case policy judgment that turns on the idiosyncratic worldview of the particular judges that happen to be hearing the case.

The Third Circuit, in following through with its application of the strict scrutiny test—which it suggested was necessary—chose not even to defend the notion that preventing animal cruelty was not compelling. Instead, it went out of its way to reframe the question as one informed by federalism concerns, making what could have been seen as a cold-hearted position appear defensible.⁷⁴ There was, quite simply, not a compelling governmental interest in “preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce.”⁷⁵

Courts should not have to engage in such an exercise—painstakingly second guessing the policy justifications of the government in every routine encounter with the First Amendment. The Court's categorical approach is more than sufficient to account for those types of speech that cannot reasonably receive the full protection conferred by the First Amendment. Otherwise, the rule is clear. Indeed, the analogy drawn to one such unprotected area, child pornography, is telling. The Supreme Court declared child pornography to be a low value category of speech in 1982.⁷⁶ The reasons are in some respects analogous to the arguments made for suppressing depictions of animal cruelty. The Court emphasized not just the harm child pornography imposes on its victims, but the need to close the distribution network and reduce the economic incentives to commit the underlying abuse.⁷⁷ It also noted that alternatives were possible: simulated depictions (by, for example, young looking adults) offer a viable expressive substitute for scientific, educational or artistic purposes.⁷⁸ However, despite some commonalities, as mentioned above, the Supreme Court ultimately declined to carve out an excepted category

74. *Stevens*, 533 F.3d at 233.

75. *Id.*

76. *New York v. Ferber*, 458 U.S. 747, 762 (1982).

77. *Id.* at 756–63.

78. *Id.* at 763.

for depictions of animal cruelty.⁷⁹

Its reticence is understandable. It is rare for the Supreme Court to declare a new low-value category. Once it does so, an entire category of content becomes a stranger to the protections the Constitution otherwise affords. Making this declaration is a clear statement to courts, legislatures and the people for whom “ignorance of the law is no excuse.” It is a chilling message; and it is reserved for those few areas such as incitement to lawbreaking, true threats and defamation, where sending such an extraordinary speech-chilling message is arguably necessary and desirable.

In 1982 the Court declared that child-pornography aficionados must beware. The Court was pulling no punches. Establishing an entire category of expression as unprotected was an act of judicial courage that, ironically, is quite a speech protective act. It promotes transparency so all can know with reasonable certainty when the First Amendment will, and will not, protect them. Where there is remaining uncertainty, it is circumscribed to clearly established categories where a discretionary balancing test is appropriate or necessary. The effect of drawing clear lines around these discrete categories in which speech is not fully-protected should be to preclude speech-chilling uncertainty in all of the remaining areas.

Thus, as the Court explains in *Ferber*, a categorical approach to a particular content-based area of speech “has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”⁸⁰ As the categorical approach to content-based speech restrictions has evolved, the Court developed tests tailored for each particular category. So, for example, commercial speech is subject to a kind of intermediate review designed to accommodate its unique attributes: disclosure of the particular risks of pharmaceutical drugs in advertisements may be compelled, but such advertisements may not be entirely prohibited.⁸¹ Likewise, the low-value speech category of defamation is provided with differing levels of protection depending upon whether or not the defamed victim is a public official.⁸²

In contrast to this clearly defined and justified categorical approach, a

79. *United States v. Stevens*, 559 U.S. 460, 472 (2010).

80. *Ferber*, 458 U.S. at 763–64.

81. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976).

82. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

strict scrutiny default standard in cases of ostensibly fully-protected content sews confusion and muddies the doctrinal waters. This is evidenced by the way the Third Circuit in *Stevens* distinguished the *Ferber* decision not just to support its conclusion that animal cruelty depictions are not unprotected low-value speech, but to establish more broadly the circumstances where there is *not a compelling governmental interest* to suppress certain speech under a default strict scrutiny test.⁸³ The Third Circuit effectively conflates two different lines of analysis, serving two distinct purposes. The justifications provided by the Court in *Ferber* were used to deny an entire category of speech protection; they were not intended as tools for courts to make ad hoc judicial determinations that otherwise fully protected content is not protected in one case or another. Maintaining that a strict scrutiny test applies even to fully protected content encourages this blurring of the lines. It also puts courts in the awkward position of having to justify a holding that should need no additional justification other than a straight-forward application of the free speech principle in the First Amendment.

Nonetheless, by 2015 the Supreme Court would seem to leave little question that the default approach with content-based restrictions was to be the application of a standard not a rule: “distinctions drawn based on the message a speaker conveys . . . are subject to strict scrutiny.”⁸⁴ In *Reed v. Town of Gilbert*, the Court addressed a municipal signage law that regulated the size, permissible location and timing of signs posted in the city according to various attributes—such as whether the signs were “ideological,” “political” or “directional.”⁸⁵ The *Reed* Court explains: “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.”⁸⁶ And, some might be inclined to commend the Court for its insistence on articulating a clear rule—arguably the culmination of decades of precedent suggesting, but not directly laying out, such a categorical default rule for all content-based speech restrictions. Indeed, two concurrences, by Justices Breyer and Kagan fault the Court for being *too* rigid.⁸⁷

Unfortunately, the Court never explains why—or even, for that matter, reveals self-awareness that—it has over time moved from a straightforward reading of the First Amendment that simply prohibits

83. *United States v. Stevens*, 533 F.3d 218, 228 (3d Cir. 2008).

84. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015).

85. *Id.* at 164.

86. *Id.* at 165.

87. *Id.* at 175–79 (Breyer, J., concurring); *Id.* at 179–85 (Kagan, J., concurring).

abridgment of speech, to one that allows abridgment if sufficiently justified and supported by a well-crafted law. This transformation of First Amendment law seems to escape the Court's notice. In an early paragraph of Justice Thomas' opinion for the Court in which he ostensibly lays out the basic principles applicable to the case, this logical jump becomes vividly, and troublingly, evident. The Court tells us that "[u]nder [the Free Speech Clause of the First Amendment], a government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"⁸⁸ The following sentence, however, qualifies this rule, suggesting the Court was really only kidding about that "no power" assertion.

This jarring retraction is not just a reference to discrete categorical exceptions to an otherwise applicable rule; this is a wholesale power to override the freedom of speech in any case where a court is convinced that the government can make a sufficiently convincing policy argument for doing so in the form of a tightly-drawn law. Justice Thomas continues: "Content-based laws—those that target speech based on its communicative content—are *presumptively* unconstitutional and *may be justified* only if the government proves that they are narrowly tailored to serve compelling state interests."⁸⁹ Yes, this standard is framed to sound speech protective. But keeping the door open to speech suppression weakens First Amendment protection. It invites lower courts to treat free speech as just another policy consideration (albeit heavily weighted) to be balanced alongside other concerns. Why is such a law "presumptively" unconstitutional rather than simply, "unconstitutional?" The Court does not tell us. If there is a need for a categorical exception, the Court has an appropriate tool at the ready, as seen above in the child pornography example.

Instead, the Court explains that as with all high-value content-based discrimination, it is up to the municipality to marshal its best argument to meet the strict scrutiny standard. "[I]t is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs . . . furthers a compelling governmental interest."⁹⁰ Ultimately, the Court concluded that the town failed to meet that burden,

88. *Id.* at 163 (majority opinion).

89. *Id.* (emphasis added).

90. *Id.* at 171.

making this decision appear speech-protective.⁹¹ But to Justice Breyer in concurrence, it was perhaps too speech-protective. According to this concurring view, the rule requiring the application of the strict scrutiny test does not give the judiciary *enough* discretion. Breyer argues that content discrimination “cannot and should not *always* trigger strict scrutiny.”⁹² Such a rule is too rigid, Breyer suggests. Instead, the suspect nature of content-based distinctions should be a mere “rule of thumb.”⁹³

On its face, Breyer’s rationale may seem utterly defensible. He points to the fact that “virtually all government activities involve speech Regulatory programs almost always require content discrimination.”⁹⁴ He provides a long list of examples—areas in which applying strict scrutiny would unreasonably hamper the ability of government to adequately fulfill its regulatory function: the content required in the securities registration statements, labels on consumer electronics, confidentiality of medical records, required income tax disclosures, mandated passenger safety briefings on commercial airlines, and even obligatory signs in petting zoos informing visitors of health concerns.⁹⁵ All of these reasonable and arguably necessary government regulations might be thrown into question under an automatic strict scrutiny regime.

This is not a trifling concern. As the breadth of the Court’s First Amendment jurisprudence has expanded under the Roberts Court, there is arguably great potential for First Amendment incursions into government regulatory power, once unimaginable. The answer to this quandary, however, is not to cluster all core free speech questions together, as if they are all on the same plane, and to permit the judiciary to perform an ad hoc case-by-case balancing as each issue arises—even if the standard is the relatively stringent strict scrutiny test. And the answer certainly is not, as Breyer suggests, to lower the bar even further so something like intermediate scrutiny could apply wherever a justice, judge, or panel of judges sees fit to apply a lower standard. The better approach would be to use the tools the Court has already established within the low-value categorical speech rubric to both clarify, refine, and perhaps even newly identify categories of speech that should not be entitled to full protection.

Indeed, some of the examples Breyer provides would arguably fall within the preexisting category of commercial speech, which already does

91. See *id.* at 173.

92. *Id.* at 176 (Breyer, J., concurring).

93. *Id.*

94. *Id.* at 177.

95. *Id.* at 177–78.

not receive full protection. Professional speech, an area of emerging interest to both scholars and courts⁹⁶, is another category that could be potentially cabined to allow for necessary regulation under the federal government's commerce clause power and the states' police power. Laws regulating the words a doctor uses when providing medical advice, or the mandated safety instructions provided by a flight attendant, may indeed be content-based restrictions on (or compulsions to) speech, but a reasonable categorical regime should be able to clearly distinguish such regulations from, for example, restrictions on core individual expression. There is, in other words, no reason to have two parallel doctrines governing content-based distinctions. The categorical method evolved in service of making unnecessary the case-by-case balancing method appropriate in certain other areas of constitutional adjudication.

Of course, all doctrinal tests are subject to some skepticism, both as to how and when they should reasonably apply, and in some cases, whether they should be utilized at all. The justices frequently find themselves in disagreement on these questions—such that a reasonable degree of uncertainty may remain about the nature of the test that is to apply in any particular set of circumstances. Justice Breyer is not alone in questioning whether a rigid tiered system is always a good fit. Justice Stevens has, for example, even in the equal protection setting, questioned whether the tiered method is “a completely logical method of deciding cases.”⁹⁷ The categorical method, originating in dictum for the Court's 1942 *Chaplinsky v. New Hampshire* decision,⁹⁸ has itself not been immune to criticism. Some commentators, for example, have questioned the very premise that it is appropriate for courts to judge entire categories of speech as “low-value.”⁹⁹

Yet, the categorical method remains a dominant approach when a court is confronted with content-based discrimination.¹⁰⁰ It emerged as a needed dose of clarity in an era when the idea of a First Amendment with teeth was still a relatively novel concept. The early to mid-twentieth century was a period in which the constitutional protection of free speech was just beginning to gain its footing, after having been largely ignored since the amendment was first penned by America's founders.¹⁰¹ The

96. See generally Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016).

97. *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring).

98. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

99. See Batchis, *Categorical Approach*, *supra* note 5, at 16–20.

100. *Id.* at 1.

101. David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 44 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

categorical approach offered the promise of replacing ad hoc speech jurisprudence with greater certainty and speech protectiveness. By enumerating and circumscribing the rare categorical exceptions to full speech protection, this approach confirmed that the First Amendment means what it says. Today, by insisting upon a default strict scrutiny test layered atop its categorical approach, the Court is effectively utilizing two systems at the same time. The Court has reinjected, perhaps unwittingly, some of the very same chilling uncertainty and ad hocery in First Amendment jurisprudence that was once dominant. But how did we get here? The next section traces the emergence of the strict scrutiny default.

IV. TRACING THE EMERGENCE OF THE STRICT SCRUTINY DEFAULT

The first direct assertion by a Supreme Court majority of a generally-applicable, explicitly-named “strict scrutiny” test in a straight-forward content-based speech-restrictive case did not come until the year 2000 in the case of *United States v. Playboy Entertainment Group*.¹⁰² However, if we focus our gaze just a few decades earlier, to the Warren Court, it is clear that the dual approach—one that is simultaneously categorical and default strict scrutiny—was not originally imagined. In *Brandenburg v. Ohio*, the 1969 case that is perhaps most emblematic of the modern Supreme Court’s turn toward a highly speech protective First Amendment, there is no mention of strict scrutiny. There was only one question to be answered: Was the prohibited speech “directed to inciting or producing imminent lawless action and is [it] likely to incite or produce such action[?]”¹⁰³ If the answer is “no”—if, in other words, the law targets more than just the narrowly defined low-value category of incitement—then it “intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.”¹⁰⁴ It is per se unconstitutional. It is that simple.

A compelling interest test, stacked atop this demanding rule defining the incitement category, would have been foreign to this landmark

102. See *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 814 (2000). This first appearance of a broad assertion of a strict scrutiny default test is concededly subject to interpretation. I exclude from this establishment of a default strict scrutiny test, for example, campaign finance cases where the purported speech restriction is an indirect result of laws regulating financial transactions, governmental forum and public employment cases, associational speech, compelled speech, and all “low-value” categories of speech such as obscenity or fighting words.

103. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

104. *Id.* at 448.

decision. Once it became clear that the law was not limited to proscribable incitement, the Court declared that the “Act cannot be sustained.”¹⁰⁵ There was not a second level of review which asked: “[E]ven though this is not incitement, does the state of Ohio nevertheless have a really, really good reason for its broadly speech-suppressive law?” It does not proceed to balance Ohio’s interests against the interests of free expression as is effectively required by a strict scrutiny test. Indeed, doing so would seem to defeat the very purpose of carving out a precisely drawn doctrinal exception in the first place. If every First Amendment question is just an open-ended opportunity for court discretion, why bother to take care and craft thoughtful and predicable rules for specific narrow categorical exceptions? Nonetheless, in recent years the Court would come to normalize just such an approach.

Early instances of a strict or high level scrutiny standard of review in the First Amendment context generally appeared not where a First Amendment issue was central, but where an equal protection claim was made and the alleged fundamental rights unequally deprived were First Amendment interests.¹⁰⁶ In 1968, for example, the Court rejected the constitutionality of an Ohio regulation that made it “virtually impossible” for third party candidates to be placed on the ballot.¹⁰⁷ Because the law burdened the fundamental First Amendment right of association, the Court demanded that the state show a “‘compelling interest’ which justifies imposing such heavy burdens on the right.”¹⁰⁸ But it was the Equal Protection Clause formulation, not First Amendment doctrine, that guided the Court.

In 1983, the Court addressed the equal protection argument against selective access to an “interschool mail system and teacher mailboxes” in public schools.¹⁰⁹ Holding that this was a nonpublic forum, the Court declared that there was no First Amendment right to utilize this expressive venue. Granting access to select groups, we were told, “need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the Constitution.”¹¹⁰ Indeed, the Court

105. *Id.*

106. *See, e.g.,* *Regan v. Tax’n With Representation of Wash.*, 461 U.S. 540, 545 (1983); *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 n.14 (1985). As mentioned earlier, according to standard equal protection methodology an unequal deprivation of a fundamental interest triggers strict scrutiny.

107. *Williams v. Rhodes*, 393 U.S. 23, 24, 34 (1968).

108. *Id.* at 31.

109. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 39 (1983).

110. *Id.* at 54.

could be quite clear that unlike in the equal protection context, utilizing strict scrutiny is simply not the appropriate test for pure First Amendment questions. In a case addressing state taxation of the press that very same year, the majority retorted in a footnote that “Justice Rehnquist’s dissent analyzes this case solely as a problem of equal protection, applying the familiar tiers of scrutiny. . . . We, however, view the problem as one arising directly under the First Amendment.”¹¹¹ In other words, because it saw this as a First Amendment question, it rejected the use of tiered scrutiny.¹¹²

Outside of the equal protection setting and decisions addressing derivative First Amendment rights such as freedom of association and the right not to speak,¹¹³ invocations of a strict-scrutiny-like standard by the Supreme Court in the content-based First Amendment context would not arise until the mid to late 1970s. And here it was in the narrow areas of campaign finance law, distinct circumstances where the incursions on expression were arguably indirect, and the very extent to which the restrictions were even content-based (addressing as they did, the flow of money) were up for debate. Indeed, in its seminal campaign finance case, *Buckley v. Valeo*, the Court implied that the Court’s campaign finance jurisprudence represents its own discrete doctrinal area.¹¹⁴

In *Buckley*, the Court rejected the characterization of restrictions on campaign expenditures and contributions as regulating either conduct—which would be governed by the Court’s *O’Brien* test—or as a content-neutral time, place and manner regulation—because campaign finance restrictions “impose direct quantity restriction on political speech.”¹¹⁵ Notably, the Court did not distinguish the latter by arguing that campaign finance limits are content-based.¹¹⁶ If they are to be understood as content-based, they are only in the sense that such regulations specifically relate to money used in a *political* campaign, not in the traditional sense of a free speech incursion that targets certain messages. Finally, the *Buckley* Court referred to its new test as requiring “exacting scrutiny,” seemingly going out of its way to avoiding the doctrinal language of “*strict* scrutiny” used in other constitutional contexts.¹¹⁷ In 2021 the Court would clarify that

111. *Minneapolis Star & Trib. v. Minneapolis Comm’r of Revenue*, 460 U.S. 575, 585 n.7 (1983).

112. *Id.*

113. *See, e.g., Pac. Gas & Elec. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 7 (1986).

114. *Buckley v. Valeo*, 424 U.S. 1, 18 (1976).

115. *Id.* at 17–18.

116. *Id.*

117. *Id.* at 16 (“[T]his Court has never suggested that the dependence of a communication on the

“exacting” scrutiny is indeed a level of review that is distinct from “strict” scrutiny, and that, having originated in *Buckley*, it applies to certain categories of election-related regulations and disclosure rules.¹¹⁸

The Court’s novel use of a high level of scrutiny in this particular First Amendment setting was arguably quite sensible, and perhaps strategic, for it allowed a conflicted Court—in confronting what was a highly complex and multi-faceted piece of legislation—to uphold some component parts of the law and strike down others. This doctrinal device facilitated the Court’s holding that spending limitations on political candidates did not pass “exacting scrutiny,” while contribution limitations to political candidates did.¹¹⁹ The explicit balancing the Court engaged in throughout the *Buckley* decision—and the test utilized to justify this approach—might be understood as a product of the unusual and distinctive expressive incursion at issue. Two years later, in *First National Bank of Boston v. Bellotti*, the Court once again utilized the “exacting scrutiny” standard in a narrow case addressing a Massachusetts law that prohibited corporate expenditures used to influence voters on referendum proposals.¹²⁰

One of the early indications that the Court might apply strict scrutiny, as a baseline, to plain vanilla content-based restrictions appeared in 1986. However, it was found in a dissent, and simply contrasted a higher level of scrutiny with the distinctive intermediate level review that applies to commercial speech.¹²¹ Justice Brennan’s dissent in *Posadas de Puerto Rico v. Tourism Company of Puerto Rico*, a case addressing a prohibition on casino advertising, asserted that “[t]he Court, *rather than applying strict scrutiny*, evaluates Puerto Rico’s advertising ban under the relaxed standards normally used to test government regulation of commercial speech.”¹²² While there is no indication that the dissenters had intended a radical makeover of basic First Amendment doctrine, the implication of this unassuming language was that the Court might apply strict scrutiny as a default standard of review in ordinary content-based cases where a categorical exception does not apply.

Of course, the justices on the Court—whether writing for the majority,

expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”).

118. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021).

119. *Buckley*, 424 U.S. at 23–59.

120. 435 U.S. 765, 786 (1978).

121. *Posadas de P.R. v. Tourism Co. of P.R.*, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting), *abrogated by* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

122. *Id.* (emphasis added).

or not—are not completely consistent in the language they use to describe doctrinal tests and standards. Justice White, delivering an opinion for the Court just two years earlier, had reasserted the traditional bright-line rule, with no equivocation. In *Regan v. Time, Inc.*, the government had been given broad discretion to disallow the dissemination of photographic images based on an assessment of the message they convey.¹²³ In the Court’s words, “[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”¹²⁴ Justice Stevens, writing for himself in a separate opinion, describes the majority’s language as a “sweeping statement that regulations permitting the Government to discriminate on the basis of content are *per se* violative of the First Amendment.”¹²⁵ It was that simple. No strict scrutiny balancing was called for.

During this period the Court was clearly sending a mixed message. However, it would be a mistake to suggest that the new rule articulated in the *Posadas* dissent—a default strict scrutiny test—appeared from nowhere. Although such a rule in all cases of a non-low-value, content-based law was indeed new, one might argue that the Court had been gradually moving in this direction, albeit inconsistently. For example, just three years before *Posadas*, Court dicta in a commercial speech case asserted that “[w]ith respect to noncommercial speech, this Court has sustained content-based restrictions *only in the most extraordinary circumstances*.”¹²⁶ Granted, acknowledging the possibility of exceptions to speech protection under extraordinary circumstances is not the equivalent of a strict scrutiny test (one that potentially results in the upholding of—as mentioned earlier—over twenty-percent of litigated content-based speech restrictions). However, the camel’s nose had pushed itself under the tent. The single case the Court cited to support this “most extraordinary circumstances” claim was a 1980 decision by Justice Powell that broadened the applicability of the heightened scrutiny rule originating in *Buckley*.¹²⁷

The 1980 *Consolidated Edison Co. of N.Y. v. Public Service Commission* decision did not refer by name to a strict scrutiny test, but restated the heightened scrutiny rule from the campaign finance cases as if it were a rule of general applicability. Like campaign finance, the

123. *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

124. *Id.* at 648–49.

125. *Id.* at 698 (Stevens, J., concurring) (emphasis added).

126. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (emphasis added).

127. *Id.*

context in *Consolidated Edison* was distinctive and narrow; a heavily regulated private utility corporation was arguing for a First Amendment right to print its views on “controversial issues of public policy” in billing envelopes mailed to customers.¹²⁸ The Court emphasized the corporate status of the “speaker” and cited *Bellotti* for the proposition that such expression may be protected.¹²⁹ As discussed above, *Bellotti* was an extension of the campaign finance cases; but it was also a corporate/associational speech case. The Court in *Belotti* laid out a First Amendment test applicable to these narrow factual circumstances.¹³⁰ Yet, when Court restated the rule in *Consolidated Edison*—one that in many respects mimicked the strict scrutiny test—it did so using language that implied that it was broadly applicable, even outside of the narrow confines of the campaign finance and corporate speech setting.¹³¹

The doctrinal creep would progress into the late 1980s. Two years after *Posadas*, the Court applied what it called “exacting scrutiny” to “a content-based restriction on political speech in a public forum.”¹³² The requirement that content-based discrimination in a public forum serve a compelling interest and be narrowly drawn was a standard that emerged from the Court’s line of public forum cases.¹³³ Regulating expression on government owned property, whether it be a quintessential public forum like a public park or nonpublic forum like a county jail, comes with its own set of First Amendment considerations that are quite distinct from a straight-forward curtailment of expression. What is noteworthy about *Boos v. Barry* is that the Court, while ostensibly applying the public forum doctrine, addresses a law that applied to both public fora and purely private speech.

The law at issue “prohibit[ed] the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into ‘public odium’ or ‘public disrepute.’”¹³⁴ Within a 500-foot radius of an embassy there would likely be both public fora and private residences and other private property where a display of signage would not fall within

128. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 533 (1980).

129. *Id.*

130. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

131. The Court stated that “Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.” *Consol. Edison*, 447 U.S. at 540.

132. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

133. *See United States v. Grace*, 461 U.S. 171, 177 (1983).

134. *Boos*, 485 U.S. at 315.

the public forum doctrine.¹³⁵ The Court conflated the two expressive contexts and struck down the provision under heightened review.¹³⁶ This marked a further step in the blurring of doctrinal boundaries, and in effect applied a balancing test without justifying that choice. Under the traditional bright-line rule, outside of a public forum, a content-based restriction on high-value speech was per se impermissible—compelling interest or narrow tailoring notwithstanding.

By the late 1980s and into the 1990s it would become clear that the Court increasingly saw a strict scrutiny-like test as the default in content-based cases. Strikingly however, as we have seen, Court majorities would studiously avoid calling it by name until the year 2000.¹³⁷ The less-speech-protective implications of this new approach would also become evident in subtle, and not so subtle ways. For example, in *Sable Communications of California, Inc. v. FCC*, a unanimous Court struck down a federal ban on indecent telephone dial-a-porn communications.¹³⁸ The Court acknowledged that merely “indecent” content that does not fall under the low-value category of obscenity is protected by the First Amendment.¹³⁹ It then went on, albeit without using the phrase “strict scrutiny,” to make a broad claim: “The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”¹⁴⁰ The First Amendment had transformed from a straightforward prohibition against censorship to a demand that governments make their best case for speech suppression.

In order to justify a vast new grant of power to the courts to judge the merits of each and every act of speech suppression by the government, the *Sable* Court distorts its own precedents. It explains that it has in the past, “recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”¹⁴¹ But this is a clever slight-of-hand. The two cases it cited to support this assertion addressed established categories of low-value speech—obscenity and child pornography—not fully protected content-based suppression like what was at stake in

135. *Id.* at 317.

136. *Id.* at 334.

137. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 814 (2000).

138. 492 U.S. 115, 131 (1989).

139. *Id.* at 126.

140. *Id.*

141. *Id.*

Sable.¹⁴²

Again, it might be common to retort that strict scrutiny is a highly protective test—because it is so demanding. Yet, three years later, in *Burson v. Freeman*, the Court would find that a restriction on speech *passed* that rigorous test.¹⁴³ Granted, because the case involved a public forum, in *Burson* the stakes were arguably lower. The case addresses a mere 100-foot buffer zone around polling places.¹⁴⁴ Public fora, while afforded significant First Amendment protection, have historically allowed for somewhat greater levels of regulation. They are governmentally owned and managed. Indeed, the Court in *Burson* took care to explicitly qualify its rule as one that specifically applies in a public forum. It asserted: “As a facially content based restriction on political speech in a public forum, §2-7-111(b) must be subjected to exacting scrutiny[.]”¹⁴⁵ It referred to the applicable test as “strict scrutiny” just a few paragraphs later,¹⁴⁶ suggesting that the “exacting” language—although recently clarified as distinct from “strict scrutiny”¹⁴⁷—was at the time increasingly seen as synonymous.

Nevertheless, this is another illustration of why imposing a strict scrutiny test on ordinary content-based regulations makes so little sense. One would reasonably assume that governments must justifiably have a somewhat greater ability to regulate expression that occurs on government property than private speech communicated in the private sphere. Government property, whether it is a sidewalk, a courthouse, or a capitol building, must be maintained, regulated, and managed. Yes, public fora are afforded significant protection for free speech. But some content-based restrictions on speech may in rare circumstances be necessary in public fora—which justifies the Court’s sliding scale of standards when it comes to government owned property. It applies differing balancing standards depending upon whether the forum is a “limited public forum,” a “nonpublic forum,” or a “quintessential public forum.” Such a rationale simply doesn’t apply to ordinary content-based restrictions on speech.

One month after *Burson*, a concurrence in the watershed decision *R.A.V. v. City of St. Paul*, would cite *Burson* for the proposition that the

142. The Court cited *Ginsberg v. New York*, 390 U.S. 629 (1968) and *New York v. Ferber*, 458 U.S. 77 (1982).

143. 504 U.S. 191, 195 (1992).

144. *Id.* at 193–94.

145. *Id.* at 198.

146. *Id.* at 199.

147. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021).

strict scrutiny balancing standard applies generally to content-based regulations of protected expression.¹⁴⁸ The concurrence also takes the next step and suggests that a punitive ordinance directed at fully-protected racist, misogynistic or bigoted speech would be permissible, because “it would survive under strict scrutiny applicable to other protected expression.”¹⁴⁹ Although the city anti-bias law at issue was directed only at fighting words, an unprotected low-value category of speech, the concurrence opines on an alternative scenario: “Assuming, *arguendo*, that the St. Paul ordinance is a content-based regulation of protected expression, it nevertheless would pass First Amendment review under settled law upon a showing that the regulation ‘is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.’”¹⁵⁰

The concurrence faults the Court for “discarding our firmly established strict scrutiny analysis.”¹⁵¹ As we have seen, this ostensibly “firmly established” approach was rejected in favor of a *per se unconstitutional* approach in cases appearing less than a decade earlier.¹⁵² Nonetheless, four justices joining the concurrence were now apparently comfortable with this characterization. While many would agree with the dissenters that “ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination”¹⁵³ is a compelling interest, the notion that otherwise fully-protected speech may lose its protection simply because it is bigoted and thus hurtful to certain vulnerable groups would reverse decades of precedent firmly protecting expression of *the ideas we hate*. Such a holding would turn *Brandenburg*—which famously protected noxiously racist speech because it did not rise to the level of incitement—on its head. The concurrence’s analysis belies the notion that a default strict scrutiny test is highly speech protective.

Nonetheless, at times justices have expressed skepticism of a broadly applicable strict scrutiny test for content-based regulations. Justice Thomas, in his 1995 concurrence in *McIntyre v. Ohio Elections Commission*, provided an alternative understanding of the Court’s “settled approach to interpreting the Constitution.”¹⁵⁴ Acknowledging that the

148. 505 U.S. 377, 404 (1992) (White, J., concurring).

149. *Id.* at 403.

150. *Id.*

151. *Id.* at 406.

152. *See, e.g.,* *Regan v. Time, Inc.*, 468 U.S. 641, 659 (1984).

153. *R.A.V.*, 505 U.S. at 395.

154. 514 U.S. 334, 370 (1995) (Thomas, J., concurring).

Court was applying strict scrutiny because the law was characterized as a content-based speech restriction, he asserted: “[W]e need not undertake this analysis when the original understanding provides the answer.”¹⁵⁵ However, Thomas’s critique of the strict scrutiny test extends well beyond the First Amendment sphere, and has only strengthened in vigor in recent years.¹⁵⁶ It is also worth noting that *McIntyre* did not address a typical content-based restriction by prohibiting anonymous campaign literature—the law at issue in fact *compelled* speech (the disclosure of identifying information on all such literature).¹⁵⁷

The strongest statement opposing default strict scrutiny came from Justice Kennedy in his concurrence in the 1991 case addressing New York’s “Son of Sam” law. This law required income from works describing a crime to be turned over to the criminal’s victims and creditors rather than to the criminal him or herself.¹⁵⁸ Kennedy’s concurrence recalled the era when the Court applied a bright line rule to content-based laws, one that was in itself determinative and not dependent upon a second stage balancing test. To Kennedy, the fact that the law targeted fully protected content was

itself full and sufficient reason for holding the statute unconstitutional. In my view it is both unnecessary and incorrect to ask whether the State can show that the statute ‘is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.’ . . . That test or formulation derives from our equal protection jurisprudence . . . and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from any consideration of time, place, and manner or the use of public forums.¹⁵⁹

However, by 2000, Justice Kennedy authored a majority opinion that would retract this principled stance. In *United States v. Playboy Entertainment Group*, it was ironically Justice Kennedy, the one justice who nine years earlier had called out the Court for quietly adopting an ill-

155. *Id.*

156. In his dissent in *Whole Woman’s Health v. Hellerstedt*, Justice Thomas asserted that “the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it ‘rational basis,’ intermediate, strict, or something else—is increasingly a meaningless formalism The illegitimacy of using ‘made-up tests’ to ‘displace longstanding national traditions as the primary determinant of what the Constitution means’ has long been apparent.” 136 S. Ct. 2292, 2326–27 (2016) (Thomas, J., dissenting).

157. *McIntyre*, 514 U.S. at 338 n.3.

158. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108–09 (1991).

159. *Id.* at 124 (Kennedy, J., concurring) (internal citations omitted).

fitting strict-scrutiny-like approach, who would pen the decision that would solidify, by name, a “strict scrutiny” standard as a default for ordinary content-based speech restrictions.

V. CONCLUSION

Perhaps there are valid reasons for using a strict scrutiny balancing test for ordinary content-based First Amendment questions. But if there are, the Court has never sufficiently explained itself. More likely, the Court simply became accustomed to using the tiered framework in other constitutional contexts like equal protection, and without much notice, gradually adopted it elsewhere. In other words, simple inertia may explain the Court’s move toward a tiered scrutiny approach—doctrinal creep from other areas of jurisprudence that over time became the established standard under the First Amendment. However, this is not a harmless syntactical choice. The phrase strict scrutiny in the First Amendment setting may trigger a knee jerk reaction: this standard *must be* extraordinarily speech protective. But this is incorrect. “Strict scrutiny” may be frequently associated with the words “fatal in fact,” and an almost certain determination that the law at issue will be ruled unconstitutional. But as we have seen, this is simply not true.

Some may find it odd to frame the strict scrutiny approach as a *balancing test* at all. But how else should we characterize a test that, by its terms, asks a court to resolve whether a state’s choice to censor speech is based on “compelling” policy grounds? In determining what is or is not “compelling,” a court must weigh the state’s concerns against the countervailing interests in free expression. The scales may be weighted in favor of speech by virtue of the strict scrutiny standard, but a one out of five chance that expression will be suppressed or criminally penalized is hardly a slam dunk. It is certainly not the level of confidence a Court that has repeatedly expressed concern about the chilling effect of vague or overly broad laws¹⁶⁰ should feel comfortable accepting. It turns out that America’s guarantee of free speech is no guarantee at all. With strict scrutiny as the default standard, rather than per se unconstitutionality, the Court has weakened America’s defenses against a pathological speech-suppressive historical moment.

Perhaps the Court’s comfort for articulating the doctrinal “what” (strict scrutiny is to be applied to content-based speech restriction) but disconcerting silence about the doctrinal “why” (what is the reason for

160. See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972).

applying this standard?) is simply a matter of judicial expediency. But is this sufficient? Should we not expect the Court to explain itself—to provide a persuasive theoretical basis for applying tiered scrutiny in the First Amendment context? Constitutional doctrine is a product of the courts—not the Constitution itself. The Court’s doctrinal choices should be convincingly justified.

It is also worth recognizing that there may be self-dealing present here. A strict scrutiny balancing test—rather than a clear-cut prohibitory rule—empowers courts. Every First Amendment issue becomes *a question* for the court to decide, rather than *a clear answer* it must provide. Governmental institutions, including courts, can be loath to cede power voluntarily. Nonetheless, a more courageous and speech-protective approach, one more consistent with the Constitution’s text and spirit, would continue the work of carefully carving out categorical exceptions in narrow cases where it is necessary, but otherwise comply with the Constitution’s explicit prohibition on speech suppression. Where new categorical exceptions are appropriate, doctrinal rules may be tailored to the particular need—perhaps *this* might come in the form of a strict scrutiny test. Instead, a blunt, all-purpose balancing applied as a default to all content-based suppression has masqueraded as a speech-protective approach.

As I have argued, the strict scrutiny test plays a critical and appropriate role in constitutional law, particularly in equal protection and due process jurisprudence. But the wrong test in the wrong place, is no less wrong simply because it is right elsewhere. As Justice Kennedy once argued, “[b]orrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction.”¹⁶¹ Adopting strict scrutiny as the default in First Amendment cases weakens the judicial commitment to free speech. It is all the more insidious because strict scrutiny is typically understood as a test that does the very opposite. Strict scrutiny migrated from other areas of constitutional law where a sliding scale of balancing tests is essential; in that context, strict scrutiny carries the strongest of prohibitory messages. But outside of certain discrete categories, the First Amendment calls for a very different approach. It calls for certainty and clarity, not flexibility and balance. With regard to content-based speech suppression, the Court has ventured down the wrong doctrinal path.

161. *Simon & Schuster*, 502 U.S. at 124 (Kennedy, J., concurring).