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Transparency in First Amendment Doctrine

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ABSTRACT

The broad tension between rule-like categorical approaches and standard-like balancing approaches to doctrinal design has been a longstanding issue within First Amendment jurisprudence. Since each approach has its benefits and costs, First Amendment doctrine has sensibly evolved into a hybrid framework that incorporates both approaches in different contexts. This Article evaluates the extent to which current doctrine has successfully integrated the two approaches. In other words, does our doctrinal framework optimally maximize the benefits associated with abstract rule-like approaches and open-ended balancing approaches?

This Article focuses on one particular dimension of this broad theoretical question: the idea of doctrinal transparency. When doctrine is transparent, it encourages or forces courts to analyze cases openly, in a fashion that elicits direct discussion of foundational speech value and speech harm issues. Such transparency is particularly valuable within the First Amendment context, where difficult or novel questions of speech value and harm are often avoided or distorted by doctrinal formalities and empty sloganeering. Tough First Amendment cases are valuable opportunities for forthright discussions—amongst courts and within society at large—that seek to clarify in nuanced terms why exactly we value speech and the extent to which we are willing to tolerate speech-based harms. At the same time, however, doctrinal transparency cannot be the sole consideration in designing First Amendment doctrine, since such transparency often carries costs in the form of diminished predictability and consistency.

Through this lens of doctrinal transparency, this Article analyzes two distinct areas of First Amendment doctrine touched upon in recent Supreme Court cases: the historical test for low-value speech set forth in United States

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v. Stevens *and its progeny, and the longstanding default rule that strict scrutiny applies to content-based speech restrictions that underlay the Court's decisions last Term in* Williams-Yulee v. Florida Bar *and* Reed v. Town of Gilbert*. I argue that the Court has struck the wrong doctrinal balance in these areas, sacrificing the substantial benefits of doctrinal transparency in exchange for a comparatively lesser gain in predictability and consistency. I then suggest some doctrinal adjustments that would better capture the significant benefits associated with doctrinal transparency at limited cost.*

INTRODUCTION

Designing First Amendment doctrine[1] is a tricky business. On the one hand, the doctrinal framework can be broadly conceptualized as a set of foundational balancing judgments. The Free Speech Clause is ultimately rooted in a longstanding, constitutionally enshrined intuition that speech has special value that affords it greater protection than other types of conduct.[2] But at the same time, speech can cause a wide variety of social harms, ranging from hurt feelings to criminal violence.[3] One of the fundamental goals of First Amendment doctrine is to reconcile these two aspects of speech: to capture our basic intuitions as to what exactly makes speech constitutionally valuable and how that value ought to be weighed against different types and degrees of social harm.[4] And these intuitions are, in turn, driven by the foundational rationales for extending special protection to speech, such as speech's role in uncovering truth, its necessity as a means of effectuating democratic self-governance, and its status as a significant aspect of individual autonomy.[5]

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[1] I use the term "First Amendment" throughout this Article to refer specifically to the First Amendment's protection of free speech, not the First Amendment as a whole.

[2] *See, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 8 (1982) ("When there is a Free Speech Principle, a limitation of speech requires a stronger justification, or establishes a higher threshold, for limitations of speech than for limitations of other forms of conduct. This is so even if the consequences of the speech are as great as the consequences of other forms of conduct.").

[3] *See* Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1106 (1979) (observing that speech can "offend, injure reputation, fan prejudice or passion, and ignite the world").

[4] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 792–93 (2d ed. 1988) ("[D]eterminations of the reach of first amendment protections . . . presuppose some form of 'balancing' whether or not they appear to do so. The question is whether the 'balance' should be struck for all cases in the process of framing particular categorical definitions, or whether the 'balance' should be calibrated anew on a case-by-case basis."); Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 276 (2009) ("[W]e built First Amendment doctrine backwards—not from theory to doctrine to results, but from intuited results to doctrine, with only passing attention to theory.").

[5] *See* Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 4–5 (1989) ("The protection of freedom of speech can be seen instrumentally as furthering some background justification,

On the other hand, the practical imperatives of designing effective First Amendment doctrine dictate that courts cannot simply apply this foundational balancing judgment in an ad-hoc manner to every individual First Amendment case. Such limitless balancing would leave judicial discretion unchecked, which could lead to unpredictable and inconsistent results, which could in turn lead to significant chilling effects.[6] Abstract, categorical rules that are simpler, more predictable, and easier to apply work to constrain not only the inconsistency driven by the judges attempting to apply open-ended standards in good faith, but also the conscious and unconscious biases that might affect such judges, particularly amidst strong majoritarian pressures.[7]

This broad tension between rule-like categorical approaches and standard-like balancing approaches has been recognized since the earliest days of modern First Amendment jurisprudence.[8] The result of this tension has been a First Amendment jurisprudence that mixes categorical approaches with more open-ended balancing approaches—a hybrid framework that makes practical sense, since each approach has its benefits and costs, and certain contexts are more amenable to one approach over the other.[9] The practical question that I explore in this Article is whether current First Amendment doctrine has done a good job of integrating the two approaches. That is, does our doctrinal

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or rationale, or goal. . . . Whatever the goal may be, . . . the special protection for speech fosters something, some justification." (emphasis omitted)).

[6] *See* Stone, *supra* note 4, at 275–76 (characterizing ad-hoc balancing as "fatally unpredictable" because "its application would produce a highly uncertain, unpredictable, and fact-dependent set of outcomes that would leave speakers, police officers, prosecutors, jurors, and judges in a state of constant uncertainty").

[7] *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450 (1985) (observing that "repressive dynamics may penetrate the judicial psyche and cause judges to interpret the first amendment restrictively"); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 73–74 (1987) ("There is a danger . . . that judges and jurors may be influenced by their own conscious or unconscious biases, which may undermine their ability to evaluate accurately and impartially the extent to which particular content-based restrictions actually impair the communication of specific, often disfavored, messages.").

[8] This tension was most notably encapsulated in the debate between Justice Hugo Black, who argued for an absolutist approach to free speech, and Justice Felix Frankfurter, who favored a balancing approach. *Compare* Konigsberg v. State Bar of Cal., 366 U.S. 36, 67 (1961) (Black, J., dissenting) (arguing that a balancing approach "undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed, our entire structure of government rest"), *with* Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring) ("The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.").

[9] *See, e.g.*, Stone, *supra* note 7, at 72–77 (outlining why evaluating content-neutral speech restrictions is more amenable to balancing approaches than evaluating content-based restrictions).

framework optimally maximize the benefits associated with abstract, rule-like approaches and open-ended, balancing approaches?

This Article focuses on one particular dimension of this broad theoretical question—the idea of "doctrinal transparency"[10]—and it analyzes a number of recent Supreme Court decisions through this lens. When doctrine is transparent, it encourages or forces courts to analyze cases openly, in a fashion that elicits direct discussion of foundational speech value and speech harm issues. Thus, doctrinal transparency can be viewed as a countervailing force against abstract rule creation, trading off simplification and abstraction for a direct foundational analysis of speech value and harm.

Doctrinal transparency is particularly valuable within the First Amendment context, where difficult or novel questions of speech value and harm are often avoided or distorted by doctrinal formalities and empty sloganeering.[11] Tough First Amendment cases are valuable opportunities for forthright discussions—amongst courts and within society at large—that attempt to clarify in nuanced terms why exactly we value speech and the extent to which we are willing to tolerate speech-based harms. While transparent approaches may not necessarily guarantee a clearer or more coherent doctrinal framework, they establish the conditions under which such clarity and coherence can emerge, as they lay bare the fundamental value judgments and empirical assumptions underlying courts' decisions. At the same time, however, the substantial value of doctrinal transparency must be measured against its costs in terms of predictability and consistency. If doctrinal transparency were the sole consideration, then courts would presumably adopt an individualized, ad hoc balancing approach in every case, which would be practically unmanageable and, to most, philosophically undesirable.[12]

Through this lens of doctrinal transparency, this Article analyzes two distinct areas of First Amendment doctrine touched upon in recent Supreme Court cases: the historical test for low-value speech set forth in *United States v.*

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[10] I use the term "doctrinal transparency" for the sake of simplicity and consistency; the idea itself is a well-established one. *See, e.g.*, *Dennis*, 341 U.S. at 524–25 (Frankfurter, J., concurring) (describing the value of "candid and informed weighing of the competing interests" in First Amendment doctrine); *see also* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2225–26 (2015) (stating that a purpose-based approach to delineating low-value speech "would ensure much greater doctrinal transparency by allowing courts to articulate the value judgments that in fact inform their decisionmaking").

[11] *See, e.g.*, Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853, 866 (1992) ("With numbing frequency, the same platitudes and slogans substitute for argument whenever the subject of free speech arises within those institutions dependent on free speech for their existence.").

[12] *See infra* text accompanying notes 36–47.

Stevens[13] and its progeny, and the longstanding default rule that strict scrutiny applies to content-based speech restrictions that underlay the Court's decisions last Term in *Williams-Yulee v. Florida Bar*[14] and *Reed v. Town of Gilbert*.[15] In these two areas, the Court has adopted largely opaque doctrinal approaches that discourage courts from participating in candid, direct discussions of fundamental free speech values. I argue that the Court has struck the wrong doctrinal balance in these areas, sacrificing the substantial benefits of doctrinal transparency in exchange for a comparatively lesser gain in predictability and consistency. I then suggest some doctrinal adjustments that would better capture the significant benefits associated with doctrinal transparency at a limited cost.

This Article proceeds in four parts. In Part I, I lay the theoretical foundation for my discussion by describing the interplay between foundational balancing and abstract rule-creation in First Amendment doctrine. I then outline the substantial benefits associated with transparent First Amendment doctrine, which provides courts—and, by extension, society at large—with valuable opportunities to discuss difficult foundational questions of speech value and harm in a frank and open manner. As I observe, however, there are also costs associated with transparent doctrinal approaches, which must always be taken into account in identifying the contexts in which transparent doctrine can be most valuably deployed.

In Part II, I examine a set of recent Supreme Court decisions addressing two distinct areas of First Amendment doctrine: the test for identifying unprotected low-value speech, and the longstanding default rule that strict scrutiny applies to content-based restrictions on speech. In analyzing these cases, I outline the significant costs associated with the Court's adoption of largely opaque doctrinal approaches in these areas. In Part III, I argue that the Court's chosen doctrinal approaches in these areas fail to capture the optimal balance between doctrinal transparency and opacity; in other words, the Court has sacrificed, to some extent, the substantial value of doctrinal transparency for comparatively small or nonexistent gains in predictability and consistency. As such, I propose some doctrinal adjustments that would better capture the benefits of such transparency at limited cost. Part IV concludes.

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[13] 559 U.S. 460 (2010).
[14] 135 S. Ct. 1656 (2015).
[15] 135 S. Ct. 2218 (2015).

I. THE VALUE OF DOCTRINAL TRANSPARENCY

A. The Foundational Balancing Inquiry Underlying First Amendment Doctrine

The First Amendment's protection of free speech represents a constitutionally enshrined recognition of the idea that speech carries special value. Practically speaking, the Free Speech Clause has meaning only insofar as speech is entitled to a greater degree of protection than non-speech conduct.[16] So the root of understanding the First Amendment—and, in turn, the root of all First Amendment doctrine—is the various theoretical reasons as to *why* speech is entitled to such special protection.

Scholars and commentators have long offered a multitude of rationales for granting special protection to speech. Three particular rationales have generally dominated debates regarding First Amendment theory.[17] The first—most commonly associated with John Stuart Mill—is the idea that free speech is valuable as a means of pursuing truth.[18] This theory is perhaps most famously encapsulated by Justice Holmes's statement that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[19] The second rationale—most commonly associated with Alexander Meiklejohn—is that free speech is a necessary component of democratic self-governance.[20] Under this view, citizen-sovereigns in a democracy must have the freedom to propose and debate public issues in order to govern themselves effectively.[21] The third rationale is that freedom of expression is a good in itself, simply because it is an essential aspect of individual autonomy and personhood.[22] This rationale is built on the idea that "[o]ur ability to deliberate,

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16 *See* SCHAUER, *supra* note 2, at 8.

17 *See, e.g.*, GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 15–16 (2d ed. 2003).

18 JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

19 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

20 *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22–27 (1948); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) ("In my view, the best possible explanation of the shape of First Amendment doctrine is the value of democratic self-governance.").

21 *See* MEIKLEJOHN, *supra* note 20, at 26 ("When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.").

22 *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV.

to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons."[23]

Other rationales for protecting speech have been proposed as well, including promoting tolerance, checking government abuse, and acting as a "safety valve" to vent anger and frustration.[24] And scholars have long debated whether the First Amendment should be conceptualized—either descriptively or prescriptively—as advancing a single rationale for protecting speech, or whether it is better understood as encompassing an eclectic set of overlapping and sometimes conflicting rationales.[25]

The theoretical underpinnings of the First Amendment have been the subject of extensive scholarly debate, and my purpose here is not to argue for or against any particular theory or overarching conception of the First Amendment. But these fundamental rationales for protecting speech—whether viewed individually or in combination—ultimately represent the foundation for delineating the scope of First Amendment coverage and protection. They are the starting point for answering the basic question underlying much of First Amendment jurisprudence: how exactly should we value speech in delineating the scope of First Amendment protection?

The fundamental First Amendment calculus, however, does not focus on the value of the speech alone. On the other side of the ledger, the value of speech must be balanced against the social harm that is caused by the speech.[26] This harm can take many forms, from hurt feelings to moral offense to financial loss to criminal violence, and the ways in which we evaluate and measure the social harms resulting from speech are also rooted in our underlying normative rationales for protecting speech. For example, under the democratic self-governance theory, we might completely discount listeners' moral offense to the content of another person's speech as a valid speech-based

225, 233 (1992); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213–15 (1972).

[23] Fried, *supra* note 22, at 233.

[24] STONE ET AL., *supra* note 17, at 15–16.

[25] *See* David S. Han, *The Value of First Amendment Theory*, 2015 U. ILL. L. REV. SLIP OPINIONS 87, 88–91 (describing this debate).

[26] I do not mean to imply that the First Amendment must be conceptualized in purely consequentialist terms. A rights-based theory of free speech does not necessarily require that such rights trump regulatory interests at all costs; consequences may still be taken into account. *See, e.g.*, Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 52–53 (1998) ("Rights . . . are not trumps in the sense that they exclude all consideration of consequences. Instead, they are at most 'shields' against weak or unacceptable reasons for government action." (footnote omitted)).

harm to be weighed in the balancing calculus. Recognizing such offense as a "harm" offsetting the value of speech would be incompatible with the underlying premises of the self-governance theory, which emphasizes the need to hear out all ideas, whether broadly offensive or not[27]—even though, in a broader sense, moral offense does constitute a form of social disutility.

Once the value and the harms associated with speech are identified, there is the matter of calculating the *scope* of speech value or speech harm associated with particular speech. These determinations are often premised on broad empirical judgments and assumptions that rest on intuition rather than data or hard facts. For example, in *New York Times Co. v. Sullivan* and its progeny, the Supreme Court determined that robust constitutional protection in the area of libel was necessary to prevent crippling chilling effects on the press.[28] Whether the Court's empirical judgment on this question was correct or not, it was premised solely on the Court's intuition rather than "hard facts," as Justice White observed in a later dissent.[29] These sorts of intuition-based empirical judgments abound throughout First Amendment doctrine, from broad judgments like the Court's assumption that speakers confronted with offensive and potentially hurtful speech can limit the harm caused to them by simply "averting their eyes"[30] to case-specific judgments as to how audiences would respond to a particular instance of speech.[31]

It is worth clarifying, however, that the "value" and "harm" sides of the equation often blend together, both on an abstract level and in the context of formal First Amendment doctrine. For example, all of the designated "low-value" categories of speech—such as fraud, true threats, and obscenity—are defined, at least in part, in terms of the social harm that they cause.[32] When we conceive of certain speech as more or less valuable, some aspects of that determination may rest on innate characteristics of that speech,[33] while others

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[27] *See* MEIKLEJOHN, *supra* note 20, at 26.

[28] 376 U.S. 254, 271–72 (1964); *see, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

[29] *Gertz*, 418 U.S. at 390 (White, J., dissenting) ("I know of no hard facts to support [the Court's] proposition, and the Court furnishes none."). Indeed, Justice White adopted a different empirical assumption, observing that "[t]he press today is vigorous and robust" and finding it "quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth." *Id.*

[30] *See* David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 WM. & MARY L. REV. 1647, 1705–10 (2014).

[31] *See id.* at 1680–82.

[32] *See id.* at 1672.

[33] For example, valuing political speech above commercial speech because of political speech's singular importance in promoting democratic self-governance.

may rest on the speech's association with socially harmful consequences.[34] Thus, throughout this Article, when I discuss the "value" of speech, I am often referring to value in a broad sense—that is, as a synthesized judgment taking into account both the innate characteristics of the speech that render it more (or less) worthy of protection and the speech's association with socially harmful consequences.

Thus, the scope of First Amendment protection—and First Amendment doctrine in general—largely rests on a set of fundamental intuitions. These are basic intuitions as to why exactly we value speech, the extent to which certain speech generates different types and degrees of social harm, and how willing we are to tolerate the social harms associated with speech when measured against the value of speech. Although this foundational balancing analysis is not the only relevant inquiry in First Amendment analysis,[35] the "correct" results in many First Amendment cases are broadly driven by this foundational balancing analysis, and all of these fundamental intuitions are ultimately rooted in the underlying rationales for protecting speech—the reasons why we attribute special value to speech—and the underlying empirical judgments we make regarding the scope of the value and harm associated with speech.

B. Rules and Standards in Doctrinal Design

If First Amendment doctrine can largely be conceptualized as balancing the value we attribute to speech against the social harms associated with speech, then why not simply design First Amendment doctrine to apply this foundational balancing analysis in each individual case? The obvious answer is that this sort of ad hoc balancing would be practically unworkable: balancing in every case would lead to unchecked judicial discretion, which would lead to unpredictable and inconsistent results, which would in turn lead to significant chilling effects on speech.[36] As a result, First Amendment doctrine has evolved

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[34] For example, valuing true threats less than political speech because true threats create harmful social consequences in the form of particularized fear and terror.

[35] Other considerations, such as the motive of the government in enacting a speech regulation, might come into play as well, and may in fact be of paramount importance in certain doctrinal contexts. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 426 (1996) (stating that under a motive-based view of the First Amendment, "an action may violate the First Amendment because its basis is illegitimate, regardless of the effects of the action on either the sum of expressive opportunities or the condition of public discourse"); *id.* at 422 (observing that in *R.A.V. v. City of St. Paul*, "the crux of the dispute between the majority and the concurring opinions concerned the proper understanding of St. Paul's motive in enacting its hate-speech law"). Although motive analysis is not my primary focus in this Article, I touch on it below. *See infra* Section II.B.

[36] *See* Stone, *supra* note 4, at 275–76.

into a mix of rule-like approaches, like the default rule that content-based speech restrictions are evaluated under strict scrutiny,[37] and standard-like approaches, like the intermediate scrutiny standard applied to content-neutral speech restrictions.[38]

There are of course good reasons for courts to adopt this mixed approach in crafting First Amendment doctrine. Such design reflects a series of judgments based on the trade-offs that always exist when deciding between clear and easy-to-apply rules on the one hand and open-ended standards on the other. Under the basic narrative of the rules versus standards framework, rules, in the abstract, premise legal outcomes on clear, objective, and easy-to-apply criteria. Thus, they do more to cabin judicial discretion, leading to more predictable and consistent outcomes; these predictable and consistent outcomes, in turn, allow people to conform their behavior accordingly.[39] On the other hand, rules are by nature over- or under-inclusive, and they are rigid, leading to anomalous outcomes in certain cases.[40]

Standards, on the other hand, premise legal outcomes on more open-ended and evaluative considerations.[41] Standards thus allow for equitable flexibility: they allow decision-makers to exercise discretion in considering the context and circumstances of each case and to make tailored judgments.[42] Such

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[37] *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[38] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[39] *See, e.g.*, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 384–85 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–63 (1992).

[40] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689 (1976) ("The choice of rules as the mode of intervention involves the sacrifice of precision in the achievement of the objectives lying behind the rules."); Sullivan, *supra* note 39, at 58 ("A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result."). For example, a hard speed limit of 65 miles per hour is easy to administer and apply. Its administrability, however, is a product of its rigidity; such a law would not account for other relevant factors such as weather conditions, the amount of traffic on the road, or emergency circumstances, and thus would be either over- or under-inclusive in different situations.

[41] *See, e.g.*, Schlag, *supra* note 39, at 400.

[42] *See, e.g.*, *id.* at 385 ("By describing the distinction between permissible and impermissible conduct in evaluative terms, standards allow the addressees to make individualized judgments about the substantive offensiveness or nonoffensiveness of their own actual or contemplated conduct."); Sullivan, *supra* note 39, at 58–59 ("Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances.").

flexibility, however, sacrifices predictability and consistency, which may deter risk-averse people from partaking in socially useful activities.[43] It also challenges the rule-of-law ideal, which "incorporate[s] some notion of constraint, of rules fixed in advance which guide decisions and behavior."[44]

Adopting administrable rules rather than foundational balancing in First Amendment cases therefore ensures a greater degree of predictability and consistency, which is of particular importance given the costs associated with chilling effects in the speech context.[45] If speech provides special social value beyond that associated with other types of conduct—such as revealing truth or promoting democratic self-governance—then a general move towards a rule-based approach makes sense, since such rules, even if they are by nature over- or under-inclusive, nevertheless limit the extent to which speakers may be chilled from partaking in valuable speech.[46] Furthermore, a rule-based approach, at least in theory, constrains judges from succumbing to personal biases or majoritarian pressures, particularly in "pathological" times "when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."[47]

In order for a rule to work effectively in a First Amendment context, however, it has to walk a fine line. On the one hand, it must largely track our intuitions regarding foundational questions of speech value and harm, such that it produces correct answers in most cases.[48] On the other hand, a good rule

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[43] *See* Schlag, *supra* note 39, at 385; Sullivan, *supra* note 39, at 62 ("Standards produce uncertainty, thereby chilling socially productive behavior."). If, for example, drivers are told merely that they cannot drive at a "speed no greater than is reasonable"—an actual standard used in Montana in the 1990s, *see* MONT. CODE ANN. § 61-8-303 (1995)—such a law would theoretically lead to more correct outcomes on a case-by-case basis, since a decision-maker could take into account all relevant factors: the driver's speed, weather conditions, traffic congestion, and so forth. On the other hand, it would give decision-makers broad discretion, which would lead to unpredictable results, which might in turn deter risk-averse drivers from driving fast even when it is useful and proper for them to do so.

[44] Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 991 (1998).

[45] *See* David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1160–61 (describing the mechanics of chilling effects).

[46] *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 306 (1981) ("We must sacrifice the advantages of dealing with the full variety of cases in optimum fashion in order to achieve the advantages, in terms of learnability, of general principles.").

[47] Blasi, *supra* note 7, at 449–50.

[48] *See* Schauer, *supra* note 5, at 9 ("When we instantiate a justification, whether with a rule or with a right, we believe that the instantiation will indicate, at least probabilistically, the results that direct application of the background justification would generate."); Stone, *supra* note 4, at 278 (discussing courts' adoption of targeted First Amendment rules, in the hope that such rules "would approximate the results of ad hoc balancing"). For example, a rule establishing absolute protection for all speech produced by people whose last

should also depart sufficiently from the underlying balancing inquiry such that it can be applied more easily and predictably. In other words, a good rule must provide a good fit such that it produces largely correct results, but it cannot be a *perfect* fit—otherwise, it would simply be replicating the underlying foundational balancing analysis with no gains in predictability or consistency.[49] Rules can collapse into the background justifications underlying them in many different ways: perhaps the rule was poorly crafted and provided courts with substantial discretion;[50] perhaps what started as a simple rule became riddled with so many formal exceptions that it now effectively resembles the underlying standard;[51] or perhaps decision-makers found ways to surreptitiously avoid enforcing the rule in situations where it seemed unwise to do so.[52]

Adopting a rule or a standard in designing doctrine thus necessarily requires making a trade-off. A rule sacrifices case-by-case flexibility for simplicity, predictability, and consistency of application, while a standard makes the opposite trade-off. An administrable rule thus always produces some degree of formal arbitrariness, since faithful application of it will necessarily lead to some incorrect outcomes, while a standard always produces the arbitrariness inherent to more open and unconstrained judicial discretion. The choice between a rule or a standard is, at its root, a judgment as to which form of arbitrariness poses the greater danger in a given doctrinal context.[53]

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names begin with the letter "C" is both predictable and easy to apply, but we would of course deem it a poor rule, since it would do a bad job of producing the correct answers we would theoretically reach by applying the foundational balancing analysis in all such cases.

[49] *See* Schauer, *supra* note 5, at 17 (observing that in crafting rules, "we accept the benefits of comparative closeness of getting it right in exchange for the aspirations of getting it right all the time . . . for that aspiration can be served only by avoiding the rule and applying the background justification directly to the diversity of experience").

[50] *See infra* Section II.A (discussing the Supreme Court's historical approach to identifying low-value speech categories).

[51] For example, the extremely rigid traditional rule of contributory negligence—under which the plaintiff's own negligence forfeited any recovery—was softened by a number of exceptions and sub-rules before the majority of states simply adopted the far more standard-like comparative negligence regime. *See, e.g.*, McIntyre v. Balentine, 833 S.W.2d 52, 54 (Tenn. 1992) (listing multiple doctrinal exceptions to contributory negligence); *id.* at 55–56 (abandoning contributory negligence to become the forty-sixth state to adopt comparative negligence).

[52] *See infra* Section II.B.2 (describing ways in which courts have distorted doctrine in order to avoid applying true strict scrutiny to certain content-based speech restrictions).

[53] *See, e.g.*, Kennedy, *supra* note 40, at 1689 ("If we adopt the rule, it is because of a judgment that this kind of [formal] arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the standard of 'free will' directly to the facts of each case."); Sullivan, *supra* note 39, at 62 ("A decision favoring rules thus reflects the judgment that the danger of unfairness from official

C. The Value of Transparency in First Amendment Doctrine

Tied into this broad rules-versus-standards narrative is the idea of doctrinal transparency. This Article uses this term to describe the extent to which doctrine encourages or forces courts to analyze cases openly, in a fashion that elicits direct discussion of foundational speech value and speech harm issues. Thus, in a rough sense, doctrinal transparency can be viewed as a countervailing force against abstract rule-creation.

In delineating what I mean by doctrinal transparency, it's worth clarifying a couple of points. First, doctrinal transparency, as I frame it, is not a binary quality; transparency and opacity describe two different directions on a broad spectrum.[54] A doctrinal framework can be fully transparent, partially transparent, not transparent at all, or anywhere in between.[55] So in discussing transparent versus opaque doctrinal approaches, I am generally describing different frameworks in terms of relative degrees of transparency rather than on a simplified binary basis.

Second, doctrinal transparency in the First Amendment context is broadly associated with the "standards" side of the rules-versus-standards debate, since standards generally "make visible and accountable the inevitable weighing process that rules obscure."[56] Theoretically speaking, however, it may not *always* track the rules–standards distinction, since the degree of transparency—at least as I conceptualize it—ultimately rests simply on the extent to which courts directly discuss foundational questions of speech value and harm. Courts might adopt a standard that is opaque in operation, in that it allows them to ignore fundamental questions of speech value and harm,[57] or they could craft a rule such that its application is directly and openly linked to

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arbitrariness or bias is greater than the danger of unfairness from the arbitrariness that flows from the grossness of rules.").

[54] The same is true of the rules-versus-standards distinction. *See* Sullivan, *supra* note 39, at 61 ("These distinctions between rules and standards, categorization and balancing, mark a continuum, not a divide.").

[55] *See infra* note 153 (observing that a categorical balancing approach is relatively transparent compared to a strict rule-based approach, but less transparent than an ad-hoc balancing approach).

[56] Sullivan, *supra* note 39, at 67.

[57] Consider, for example, the standard that "speech is protected if that is the right thing to do." This is, in essence, a completely open-ended and unconstrained balancing inquiry that gives courts ample room to avoid the sorts of foundational speech value and harm judgments described above. *Cf.* Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 LAW & ETHICS HUM. RTS. 34, 36–37 (2010) ("There is a difference between the structured inquiry of proportionality review and an open-ended mandate simply to 'do the right thing,' or 'take everything into account,' or make the best decision on the 'balance of reasons.'").

an underlying judgment of speech value and harm.[58] For practical purposes, however, I will treat the opacity–transparency spectrum as broadly reflecting the rules–standards spectrum; in other words, I will assume that any balancing approaches proposed are appropriately crafted to focus courts' attention on foundational questions of speech value and harm, along with any other theoretically relevant considerations.[59]

The value of doctrinal transparency[60] lies in the fact that it pushes courts to directly articulate and wrestle with the foundational intuitions regarding speech value and speech harm that underlie their decisions in speech cases.[61] This value is particularly important in the First Amendment context, where rigorous analysis is often sidestepped in favor of hollow abstractions and empty sloganeering.[62] Doctrinal transparency thus represents a vital means for driving the evolution and development of these fundamental intuitions, particularly as

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[58] Consider, for example, the Supreme Court's broad rule that speech on matters of public concern is entitled to greater protection than speech on matters of private concern—a value judgment that flows directly from the democratic self-governance theory of free speech. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1215–16 (2011); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion).

[59] *See, e.g.*, Kagan, *supra* note 35, at 427–37 (discussing the significance of illicit government motive in First Amendment analysis).

[60] To be clear, my focus here is *solely* on the value of doctrinal transparency in the First Amendment context—that is, crafting doctrine that encourages or forces courts to discuss foundational speech value and speech harm issues directly. Although my discussion of transparency here reflects some of the broader arguments made in favor of judicial candor in the abstract, *see, e.g.*, David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("[J]udges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail."), I do not purport to make any broad theoretical arguments or claims regarding the overarching value (and possible limits) of candor in judicial decision-making—an issue that has been the subject of extensive academic debate. *See, e.g.*, Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297–98 (1990) (distinguishing between candor and introspection and exploring "whether judges ought to decide candidly but nonintrospectively"); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1310 (1995) (arguing that judges "may regularly forgo candor under the principles of logic and prudence"); Shapiro, *supra*, at 750 ("[A] good case can be made that the obligation to candor is absolute."); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994) ("Courts and judges always lie. Lying is the nature of the judicial activity. . . . Judges necessarily lie because that is the nature of the activity they engage in."). This far more expansive and abstract question involves additional considerations that lie beyond of the scope of this Article. For present purposes, it suffices to say that in *this* specific and limited context, the abstract value of doctrinal transparency is, I think, largely apparent, even if one might have qualms as to the *extent* to which such transparency ought to be deployed within the doctrinal framework. *See infra* text accompanying notes 89–90.

[61] *See* Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 825 (1962) ("Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them . . . .").

[62] *See id.* (observing that "[o]pen balancing" produces analyses that are "more particularized and more rational" than "the familiar parade of hallowed abstractions, elastic absolutes, and selective history").

social and cultural norms shift and novel speech issues arise. It is, in other words, an essential means for courts—and, by extension, society in general—to test and work out the basic intuitions as to why we value speech and how that value compares to the different harms associated with speech.

By forcing courts to visit (or revisit) these fundamental questions, transparent doctrine spurs courts to continuously review the efficacy of existing rules by reevaluating the extent to which they fit our normative and empirical intuitions regarding speech value and harm.[63] Transparent approaches also ensure that courts have the opportunity to deliberate and think through these foundational intuitions in the abstract, particularly when novel issues arise. They provide courts with the opportunity to directly scrutinize and shape the foundational intuitions that, in the end, are a prerequisite for good First Amendment doctrine, whether that doctrine is in the form of strict rules or more open-ended standards.

The value of doctrinal transparency can therefore be conceived as tracking the traditional First Amendment principle that open deliberation is both the best means of arriving at truth and an essential requirement for making reasoned collective decisions.[64] If First Amendment rules are only as good as the foundational intuitions of speech value and speech harm underlying them, then what is the best way to capture and work through these intuitions? Based on the underlying premises of the truth-seeking theory of free speech, perhaps the best way for courts to work out these intuitions is to openly discuss them in deciding difficult cases; this sort of open clash of differing ideas may well lead to a general consensus, as sounder views survive in the marketplace of ideas and weaker ones fall away.

Similarly, if working out these fundamental intuitions regarding speech value and harm is conceptualized as a form of collective decision-making, then

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[63] *See id.* at 825–26 (stating that an "open balancing" approach "should make it more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason" and "also make their accounts more rationally auditable").

[64] The broad value of open deliberation, whether in the development of social norms or in aiding the discovery of truth, is most notably propounded in the work of deliberative democracy theorists like Jurgen Habermas. *See generally* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996). As Richard Schragger has noted, "The literature that arguably fits under the umbrella of deliberative democracy is varied and has been given a number of names, such as proceduralist-deliberative democracy, participatory democracy, communicative democracy, and civic republicanism." Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 399 n.101 (2001) (listing theorists that fall under this umbrella, such as Habermas, Benjamin Barber, Frank Michelman, and Cass Sunstein).

an open, direct debate regarding these intuitions is the best means by which to make such judgments. As Meiklejohn has observed, effective collective decision-making requires that "unwise ideas . . . have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American."[65] Good collective decisions require open discussion of a broad range of views—views that can only be aired amongst courts, in this context, if First Amendment doctrine allows them (or forces them) to be discussed.

Furthermore, the broad discussion of foundational First Amendment values promoted by doctrinal transparency reaches beyond the courts themselves. If courts' decision-making is premised on frank and open articulation as to why society values speech and how that measures up against speech-based harm, then this can trigger a further conversation not only within a court or amongst other courts, but also amongst society at large.[66] Take, for example, the Supreme Court's decision in *Snyder v. Phelps*, where the Court deemed the Westboro Baptist Church's highly offensive protest at the funeral of a U.S. Marine to be protected speech immune from liability for intentional infliction of emotional distress.[67] Both the majority opinion and Justice Alito's dissent in *Snyder* directly addressed, in a relatively transparent manner, the difficult questions of speech value and harm posed in the case.[68] And after it was decided, the decision sparked significant public discussion, with some bemoaning the court's decision and others celebrating it as an important reaffirmation of the immense value we impute to unfettered speech.[69]

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[65] *See* MEIKLEJOHN, *supra* note 20, at 26.

[66] *See, e.g.*, Bhagwat, *supra* note 44, at 1002 ("[T]he decisions and opinions of the Court do not merely decide cases, . . . they also announce values and shape the public's understanding of the contents of our common constitutional culture, a culture which forms the core of the sense of political community that comprises the United States."); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 69–70 (1996) (observing that statements from the Supreme Court "communicate social commitments and may well have major social effects just by virtue of their status as communication"). Seana Shiffrin has observed that on a broader level, open-ended approaches can induce "moral deliberation" amongst the public, which "is important for our moral health and for an active, engaged democratic citizenry." Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1217 (2010).

[67] 131 S. Ct. 1207, 1220 (2011).

[68] *See, e.g.*, *id.* at 1215–19 (explicitly basing its analysis of the case on the democratic self-governance theory of speech protection and describing, in a step-by-step manner, how that theory leads to the result in the present case); *id.* at 1222–29 (Alito, J., dissenting) (describing the "severe and lasting emotional injury" suffered by the plaintiff and concluding that "[i]n order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like [the plaintiff]").

[69] *Compare* Editorial, *Even Hurtful Speech*, N.Y. TIMES (Mar. 2, 2011), http://www.nytimes.com/2011/03/03/opinion/03thu2.html (opining that *Snyder* "provided an admirable reminder of how broad the protection of free speech is under the Constitution's First Amendment, including hurtful and hateful speech"), *with* Brian

Thus, by pushing courts into a frank, open discussion regarding foundational First Amendment values and assumptions, doctrinal transparency not only assists courts in developing a sharper and more nuanced sense of these values and assumptions; it also guides and promotes open discussion of them amongst society at large.[70] Doctrinal transparency thus helps to create a positive feedback loop in which courts, by openly working through their judgments regarding speech value and speech harm, drive the public discussion, which may in turn shape the judgments made by courts down the road in similar cases.[71]

Of course, one might reject the optimistic assumption that open debate will necessarily lead to truth, better collective decision-making, or—at least—some sort of social consensus.[72] To the more critically inclined, these assumptions might be little more than Pollyannaish naiveté; as critics of the truth-seeking theory of speech have observed, speech markets may be subject to the same sorts of market failures as economic markets,[73] and the broad assumption of reasoned evaluation that underlies the theory may not actually be accurate.[74] So perhaps open discussion and dialogue in fact do little to get us closer to the

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Broker, Letter to the Editor, *Free Speech: Where to Draw the Line?*, N.Y. TIMES (Mar. 3, 2011), http://www.nytimes.com/2011/03/04/opinion/l04scotus.html ("[I]t is the wrong place to put public speech above the family's right to privacy. Shame on our Supreme Court justices for doing so.").

[70] *See* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 931–43 (2003) ("Reasoning alone, no one individual can create political judgment, or even acquire knowledge of the world. Through social interaction and discourse, individuals come together to discover facts and generate norms." (footnote omitted)).

[71] *See* Bhagwat, *supra* note 44, at 1002 ("Ideally, the Court is merely one participant (albeit, an especially authoritative one) in an ongoing debate or dialogue about constitutional values with the other political branches and with other interested actors, including the public and the press."); Sunstein, *supra* note 66, at 70 ("By communicating certain messages, law may affect social norms.").

[72] *See* Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 31 (1986) ("Behind this approach is an implicit, perhaps optimistic, postulate of something very like a human essence: that is, people's capacity for reasonableness, suggesting the possibility of reaching agreement through mutual dialogue and discourse.").

[73] *See, e.g.*, Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17 ("Due to developed legal doctrine and the inevitable effects of socialization processes, mass communication technology, and unequal allocations of resources, ideas that support an entrenched power structure or ideology are most likely to gain acceptance within our current market."); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1041 (describing the truth theory's failure to account for "the different access speakers have to means for influencing truth seeking discourse").

[74] *See, e.g.*, SCHAUER, *supra* note 2, at 30 (observing that the pursuit of truth theory "presupposes a process of rational thinking" and therefore "weakens or dissolves when the process does not obtain"); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1281 (1983) (observing that the truth theory "calls up the picture of a rational individual making informed choices, and downplays the extent to which the inputs in a culture influence the beliefs of the persons within that culture").

truth, or to our best intuitions regarding the value and harms associated with speech, or even to any sort of social consensus. Perhaps there are no "best intuitions"—just eternally conflicting normative commitments competing for legal enshrinement.[75]

Yet even if one were to fully reject the idea that open dialogue and deliberation will somehow produce better doctrinal results or social consensus, doctrinal transparency still produces the significant benefits that transparency generally brings. Frank discussion of foundational judgments of speech value and harm, including any empirical assumptions made, will at least set the stage for open and honest social debate, both within and outside of the courts. Even if no consensus is reached, this sort of discussion is a valuable one to have, as it would continuously highlight the differing foundational judgments being made by all sides as First Amendment doctrine develops. In other words, even if the search for social consensus, or for unearthing our "best" intuitions to guide doctrinal development, is ultimately futile, doctrinal transparency will at least reveal to all parties involved the fundamental bases and assumptions underlying any intractable disagreements regarding the scope of First Amendment protection.

Furthermore, even if doctrinal transparency will not lead to consensus or better judgments, it forces courts to bear responsibility for their decisions while subjecting them to constant scrutiny. As Frank Michelman has observed, transparent doctrine "affirm[s] rather than den[ies] . . . [a judge's] responsibility—in company with her colleagues—for the decision of the parties' case."[76] Such doctrine thus encourages a reflective, circumspect, holistic, and reasoned approach to judicial decision-making.[77] It encourages judges to clearly articulate why they made the decisions they did, while providing them with constant opportunities—amidst both external and internal

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[75] *Cf.* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 66 (1983) ("In our own complex *nomos*, however, it is the manifold, equally dignified communal bases of legal meaning that constitute the array of commitments, realities, and visions extant at any given time. The judge must resolve the competing claims of the redemptive constitutionalism of an excluded race, on one hand, and of insularity, the protection of association, on the other.").

[76] Michelman, *supra* note 72, at 35.

[77] *See* Mendelson, *supra* note 61, at 825–26; Michelman, *supra* note 72, at 34 (observing that an open balancing test "invite[s] the expression and examination of doubts and disagreements, not just about formulation of a standard for cases like this, but about *this case* and how its resolution will, given the context, affect the meanings of the whole complex of governing standards").

scrutiny—to revisit their underlying judgments of speech value and harm,[78] which in turn allows them to hone existing rules or formulate new rules to govern novel situations. By contrast, adopting strict, opaque rules allows courts to sidestep this sort of direct articulation of foundational speech values, allowing them to decide cases in a rote, unreflective, and distant manner.[79] Furthermore, adopting rigid and opaque rules increases the risk of doctrinal calcification, even if changing technological or cultural conditions might call for a reexamination of the foundational judgments of speech value and speech harm underlying the present doctrine.

This basic articulation of the value of transparent doctrine has been most notably reflected in the writings of legal pragmatist scholars who have emphasized the value of open and transparent dialogue as a means of constitutional adjudication. Michelman, for example, praised Justice O'Connor's use of an open-ended balancing test in *Goldman v. Weinberger*,[80] observing that adopting this test "commits her . . . to the Court's and the country's project of resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit."[81] As Michelman writes, "The test's open categories invite the expression and examination of doubts and disagreements, not just about formulation of a standard for cases like this, but about *this case* and how its resolution will, given the context, affect the meanings of the whole complex of governing standards."[82] Similarly, Daniel Farber and Philip Frickey have advocated for the use of "practical reason" in judicial decision-making, which involves "a concern for history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation of the complexity of life; some faith in dialogue and deliberation; a tolerance for ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and an overall humility."[83]

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[78] *See* Mendelson, *supra* note 61, at 825–26 (observing that open balancing approaches "should make it more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason" and "make their accounts more rationally auditable").

[79] Of course, from the standpoint of a rules advocate, this can be viewed as a positive rather than negative trait, since rules that can easily be applied in a rote manner promote predictability and consistency in judicial decision-making. *See supra* text accompanying notes 45–47.

[80] 475 U.S. 503 (1986) (evaluating the constitutionality of an Air Force regulation that prohibited the petitioner from wearing a yarmulke indoors); *see id.* at 528–33 (O'Connor, J., dissenting).

[81] Michelman, *supra* note 72, at 34.

[82] *Id.*

[83] Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1646 (1987).

Other scholars, however, have challenged the idea that transparent, open-ended approaches spur valuable dialogue regarding foundational values and judgments. Alexander Aleinikoff, for example, has argued that although transparent balancing approaches can potentially bring such benefits, they "seem[] more often to have the opposite effect of distancing us from the discourse,"[84] since courts tend to apply balancing tests with a pseudoscientific precision that obscures actual discussion of fundamental values and principles.[85] And Ashutosh Bhagwat has argued that although "[o]ne might think that the use of explicit interest balancing would enhance constitutional dialogue,"[86] it tends to obscure matters insofar as it "does not distinguish between instances where the Court is defining the scope of an underlying constitutional norm, and instances where it is justifying noncompliance with that norm because of exigent circumstances."[87]

Although courts may sometimes—perhaps often—apply transparent doctrinal approaches in a less-than-ideal manner, I disagree that balancing approaches are somehow categorically less effective than rule-like approaches in articulating fundamental constitutional values and promoting social debate. Take, for example, Aleinikoff's claim that "[s]cientifically styled" balancing opinions render the weighing process "a mystery" and transform the public into "spectators" that cannot engage in meaningful dialogue regarding constitutional values and assumptions.[88] Even when such analysis is presented in a falsely objective and "scientific" manner, the fact that balancing analyses, by definition, *require* the court to recite and analyze the interests on both sides of the scale provides ample opportunity for broad public engagement with the court's analysis. And given the relative accessibility of basic balancing approaches to laypeople—as compared to formal doctrinal analysis—there is less reason to assume that the public will credulously accept the court's answer (or framing of the answer) as objectively or scientifically calculated.

In other words, even less-than-ideal analyses under a balancing framework introduce some degree of valuable transparency, simply because the doctrine

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84 T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 993 (1987).

85 *Id.* at 992–93.

86 Bhagwat, *supra* note 44, at 1003 n.185.

87 *Id.* at 1003. Bhagwat also argues that courts are not institutionally suited for these types of "ad hoc policy judgments." *Id.* at 1003 n.185. However true that may be in the abstract, courts' decisions in First Amendment cases are often driven by these sorts of judgments, despite rules that appear to suggest otherwise. *See infra* Part II. In such instances, it seems clear that we would prefer them to decide cases in an open and transparent manner rather than by *sub rosa* doctrinal manipulation. *See infra* Part III.

88 Aleinikoff, *supra* note 84, at 993.

requires courts to provide some meaningful justification for their decisions—unlike, say, a completely opaque or practically non-constraining rule. Even when courts apply balancing tests imperfectly, they must still center their arguments around central First Amendment values and intuitions, and their reasoning will still reveal—either explicitly or implicitly—any key empirical assumptions they are making. This is far more meaningful transparency than would usually be expected from a court applying—or purporting to apply—a formal rule in a purely mechanical manner.

To be clear, this accounting of the value of doctrinal transparency is not meant to be a categorical defense of transparent approaches. Nor is my intent here to opine on the merits of any particular approach to constitutional decision-making, or to delve into the longstanding theoretical debate as to whether rules or standards are broadly preferable. There are plenty of reasons to be wary of transparent approaches in First Amendment doctrine—most notably, such approaches might hamper judges from "mak[ing] unpopular decisions in times of stress."[89]

But in the abstract, the value of doctrinal transparency—at least as I have described it—can I think be generally acknowledged regardless of whether one's sympathies lie with legal pragmatism or traditional legal theory, and regardless of whether one might be skeptical of any particular argument for its value outlined above. Even if one is broadly critical of transparent approaches based on philosophical or practical considerations, few will likely argue that doctrinal transparency is *never* valuable in any circumstance,[90] just as one would be similarly hard-pressed to argue that doctrinal transparency is the *only* relevant consideration in crafting effective doctrine.

D. Transparency as a Practical Component of Doctrinal Design

To say that doctrinal transparency is valuable is not to say that it ought to be maximized at all costs; as discussed above, applying ad hoc balancing in

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[89] Bhagwat, *supra* note 44, at 1001; *see also* Blasi, *supra* note 7, at 474 ("In crafting standards to govern specific areas of first amendment dispute, courts that adopt the pathological perspective should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense.").

[90] *See, e.g.*, Bhagwat, *supra* note 44, at 1000 ("It is not my position that balancing types of analysis, even *ad hoc* balancing, always weaken constitutional rights."); Blasi, *supra* note 7, at 485 ("The realistic goal must be to contain such balancing, not eliminate it; even Justice Black recognized in disputes over the timing and location of demonstrations an appropriate sphere for a case-by-case judicial comparison of communicative and regulatory interests.").

every individual case would create a system that is far too unpredictable to be practically manageable.[91] As a matter of doctrinal design, the benefits of doctrinal transparency must be weighed against its costs. Although we want courts to articulate and grapple with their fundamental intuitions regarding speech value and harm in deciding cases, we also value the predictability and consistency associated with easy-to-apply rules, since they serve to limit harmful chilling effects on protected speech. And the constraint on judicial decision-making provided by rules is particularly important in the First Amendment context, in which courts act as protectors of speech values against majoritarian pressures; under a more transparent but less constraining doctrinal framework, judges have more room to succumb to such pressures.[92]

Thus, transitioning from the realm of abstract theory to doctrinal design opens up a set of more concrete, practical questions. Given both the value and the costs of doctrinal transparency, when is transparent doctrine most usefully deployed? And how can courts maximize the value of transparency in a particular doctrinal context while minimizing its associated costs? In the remainder of this Article, I will shift to these more practical questions regarding the integration of transparency into existing First Amendment doctrine by closely examining a number of recently decided Supreme Court cases.

II. SOURCES AND COSTS OF DOCTRINAL OPACITY IN CURRENT FIRST AMENDMENT DOCTRINE

In this Part, I will explore two particular doctrinal contexts that the Supreme Court has touched upon in recent cases: the establishment of a purely historical test for identifying categories of low-value speech in *Stevens* and its progeny, and the longstanding rule that content-based regulations of speech are evaluated under strict scrutiny, which came into play in the Court's decisions in *Williams-Yulee* and *Reed*. As I observe, the Court has designed the doctrine in these areas to be largely opaque, and I will outline the substantial costs associated with such doctrinal design in these areas. In Part III, I will outline why the Court's doctrinal approaches in these areas have failed to capture the

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[91] *See* Stone, *supra* note 4, at 275–76 (calling ad hoc balancing "fatally unpredictable"); *supra* text accompanying notes 36–38.

[92] *See* Bhagwat, *supra* note 44, at 988 (observing that because "judges are often part of the majority which the Constitution seeks to restrain[,] . . . there will be an inevitable tendency for judges to permit a governmental action and to redefine a right, based on *ad hoc* balancing, in precisely those cases where constitutional protection is most needed").

optimal balance between doctrinal transparency and opacity—that is, why the substantial costs of the approaches adopted by the Court outstrip the limited benefits associated with them—and I will propose some doctrinal adjustments that would capture a more effective doctrinal balance.

A. Stevens *and the Purely Historical Test for Low-Value Speech*

1. The Development and Stated Rationales of the Test

In a set of cases starting with *United States v. Stevens*,[93] the Supreme Court has clarified—or radically reframed, depending on one's perspective—the means by which courts are to determine whether a certain category of speech is deemed to be low-value, such that it is effectively entitled to no First Amendment protection. At stake in *Stevens* was the constitutionality of a federal statute that "criminalize[d] the commercial creation, sale, or possession of certain depictions of animal cruelty."[94] The *Stevens* Court was thus directly confronted with the question of whether depictions of animal cruelty constituted protected speech for First Amendment purposes.

Chief Justice Roberts, writing for the Court, began the analysis by delineating the "historic and traditional categories" of speech that are "fully outside the protection of the First Amendment," "including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct"—categories "the prevention and punishment of which have never been thought to raise any Constitutional problem."[95] The Court then noted the government's argument that "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal cost."[96] As the Court observed, the government's formulation reflected the Court's frequent and longstanding characterization of existing low-value speech categories,[97] dating back to its description of low-value speech in *Chaplinsky v. New Hampshire* as speech "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[98]

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93 559 U.S. 460 (2010).
94 *Id.* at 464.
95 *Id.* at 468–69 (citations omitted).
96 *Id.* at 470.
97 *Id.*
98 315 U.S. 568, 572 (1942).

The Court, however, rejected the government's proposed balancing test, characterizing it as "startling and dangerous."[99] Explicitly disclaiming any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," the Court instead suggested that the test for low-value speech is purely historical, based *solely* on whether the category of speech in question "ha[s] been historically unprotected."[100] Noting the lack of evidence that depictions of animal cruelty represented a historically unprotected category of speech, the Court declined to carve out a new low-value speech exception and held that the statute was unconstitutionally overbroad.[101]

The Court reaffirmed this purely historical approach to low-value speech in later cases. In *Brown v. Entertainment Merchants Ass'n*,[102] the Court struck down a California ban on selling or renting violent video games to minors. In finding the speech in question protected, the Court stated that speech cannot be deemed unprotected "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[103] And in *United States v. Alvarez*,[104] the Court struck down the Stolen Valor Act, which criminalized lying about having received military honors. In doing so, the four-Justice plurality observed that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'"[105]

The Court's recent adoption of this purely historical approach to low-value speech was by no means mandated by *Chaplinsky* and its progeny—indeed, the Court's earlier decisions strongly suggest the categorical balancing approach advocated by the government in *Stevens*.[106] Why, then, did the *Stevens* Court—

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99 *Stevens*, 559 U.S. at 470.

100 *Id.* at 472.

101 *Id.*

102 131 S. Ct. 2729 (2011).

103 *Id.* at 2734.

104 132 S. Ct. 2537 (2012).

105 *Id.* at 2544 (plurality opinion) (alteration in original) (quoting *Stevens*, 559 U.S. at 468).

106 *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763–64 (1982) ("[I]t is not rare that a content-based classification 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."); *see also* Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and the Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1347–48 (2015) (observing that most of the Court's low-value speech decisions "have

in an 8–1 decision—so readily embrace a purely historical test? The opinion makes clear that this decision was driven by the Court's strong discomfort with the idea that legislatures or courts could modify the scope of First Amendment protection based on cost-benefit analysis. As the Court stated,

> The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."[107]

The Court thus conceives of the First Amendment as having a determinate, historically delineated scope. In evaluating whether a particular instance or category of speech is protected, then, the Court's sole responsibility is to determine whether the speech falls within this historical scope of the First Amendment, with the understanding that an answer to this question is (at least theoretically) objectively ascertainable through historical analysis and inquiry. As the Court sees it, although the traditionally recognized categories of low-value speech *reflect* categorical judgments as to speech value and harm, such judgments were effectively made and set in stone when the First Amendment was ratified,[108] and neither courts nor legislatures are free to revise this initial understanding.[109]

2. The Test's Inherent Lack of Objectivity and Constraint

What are we to make of this test? As an initial matter, the fundamental premise of the Court's approach—that the exclusion of traditional low-value speech categories from First Amendment protection extends back to the ratification of the First Amendment—might simply be inaccurate. In a recent article, Genevieve Lakier persuasively argues that "eighteenth- and nineteenth-century courts did not in fact consider low-value speech to be

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said little or nothing about tradition, concentrating almost entirely on substantive justifications for excluding certain speech from First Amendment protection").

[107] *Stevens*, 559 U.S. at 470.

[108] *See id.* at 468 ("'From 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'").

[109] *See Brown*, 131 S. Ct. at 2734 ("But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'" (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992))).

categorically unworthy of constitutional protection"; indeed, "[i]t was only in the New Deal period that courts began to link constitutional protection to a judgment of the value of different kinds of speech."[110] Lakier thus observes that the Court has essentially "invented [a] tradition" that "made it possible for the government to punish speech . . . not only when it threatened serious violence or disorder, but also when it violated dominant norms of civility, decency, and piety."[111]

Even assuming the underlying premises of the Court's analysis, however, the purely historical approach fails on its own terms, since the Court's fundamental assumption that such a test will prevent courts and legislatures from using value judgments to "revise" the scope of the First Amendment is untenable. The purely historical approach, in practice, offers little more than a veneer of objectivity, predictability, and constraint that primarily works to obscure the sorts of value judgments that the *Stevens* Court so emphatically rejected.[112] As I have previously written, this lack of constraint is ultimately rooted in the broad flexibility by which courts can frame particular subsets of speech and draw analogies.[113] For present purposes, it is worth exploring in greater detail why exactly this is the case.

Under the *Stevens* approach, a court confronted with the question of whether a particular subset of speech is excluded from First Amendment protection can take one of two approaches. The first approach is to analyze whether the regulated speech in question falls within an existing historical category of low-value speech. This inquiry focuses on the boundaries of the existing low-value speech categories; in other words, are currently recognized categories of low-value speech sufficiently broad to encompass the speech in question?

This sort of boundary inquiry necessarily operates by analogical reasoning: the court must discern whether the regulated speech is sufficiently similar to a historically recognized category of low-value speech to warrant the same treatment.[114] But in order to undertake this analysis, the court must first

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110 Lakier, *supra* note 10, at 2169.

111 *Id.* at 2168.

112 *See* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 88 (2012) ("In the end, the relative value and harm associated with the speech in question remains central to the analysis, since it is a court's sense of these values that will influence how it conducts the historical analysis.").

113 *Id.* at 84–88.

114 *Id.* at 87.

identify which characteristics of the historically excluded speech are analytically significant.[115] And, of course, one cannot identify analytically significant characteristics without making an underlying value judgment as to *why* the historically excluded category of speech has been excluded from First Amendment protection. I cannot determine, for example, whether lying about being awarded a military medal falls within the historically excluded category of "fraud" unless I have a sense of what exactly makes fraudulent speech so innately worthless or socially harmful; in other words, I cannot properly define the boundaries of the low-value category of "fraud" without some value-laden judgment as to why exactly fraud is unprotected.[116] It is only after making such value judgments regarding the significant characteristics of historically excluded speech that courts can complete the analysis; to properly classify the subset of speech in question, courts must determine whether that speech shares these significant characteristics of the historically unprotected speech.[117]

Thus, courts cannot avoid value-based analysis under this application of *Stevens*: they cannot analogize the speech in question to a historically recognized category of low-value speech without assessing the speech's "social value" measured against "the social interest in order and morality."[118] And if that is the case, there is nothing stopping courts from using this underlying value judgment to intentionally or unintentionally dictate the manner in which they conduct historical analyses.[119]

Alvarez vividly illustrates this point. In *Alvarez*, both the plurality and the dissent basically agreed on the relevant history: they both recognized a longstanding tradition of proscribing things like defamation, perjury, and fraud, all of which involve false statements of fact.[120] From this same starting point, however, the plurality and the dissent offered completely different views on how they define the relevant category of historically excluded speech,

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115 *Id.*

116 Many thanks to Ash Bhagwat for suggesting this formulation.

117 *See* Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. FORUM 346, 351 (2015) ("[W]hen we try to ask whether violent video games or animal crush videos would have been regulable in the past we are engaged in the same dicey business of picking the features of these acts that do or do not resemble past forms of regulation and nonregulation, and in doing so we are simply expressing our current view about what we think should be regulated and what not.").

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

119 *See* Lakier, *supra* note 10, at 2218 (stating that the *Stevens* Court's analysis suggests "how unpredictable, perhaps even incoherent, the historical test can be, given the difficulty of determining at what level of generality it should be applied," and observing that "[t]his leaves . . . a great deal of room for value judgments to intrude into the analysis, albeit in cloaked form").

120 *See Alvarez*, 132 S. Ct. at 2544 (plurality opinion); *id.* at 2561 (Alito, J., dissenting).

which in turn dictated the way in which they analogized the subset of speech in question.

The plurality defined the relevant historically excluded categories of speech narrowly. That is, it rejected the notion that falsity alone is determinative of speech's protected status, choosing instead to characterize defamation, perjury, and fraud as specific *pockets* of false statement of fact that share a particular set of characteristics: they involve "legally cognizable harm associated with a false statement" and "knowing or reckless falsehood[s]."[121] In other words, to the plurality, the falseness of speech, by itself, does not render it unprotected; it is falseness in conjunction with other factors.[122] The history therefore did not indicate that false statements of fact *in general* are excluded from First Amendment protection, but only that certain *subsets* of such speech are excluded. This characterization drove the plurality's conclusion that the speech regulated by the Stolen Valor Act did not constitute the particular type of false statement of fact historically recognized to fall outside of First Amendment protection.[123]

By contrast, the dissent, working from the exact same historical background, deemed the historical proscription of false statements of fact like defamation, perjury, and fraud as reflecting a broad historical assumption that *all* false statements of fact are generally unprotected by the First Amendment[124]—a position reflected in numerous Supreme Court opinions prior to *Alvarez*.[125] Unlike the plurality, the dissent implicitly viewed the well-settled subsets of unprotected false speech—like defamation, perjury, and fraud—as merely the specific areas where the government chose to regulate. That is, the mere fact that the government *chose* to regulate in these particular areas did not mean that, as a historical matter, it could *not* have regulated false statements of fact more broadly if it had wanted to do so. The dissent thus deemed the speech regulated by the Stolen Valor Act to fall within the relevant category of historically excluded speech.[126]

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[121] *Id.* at 2545 (plurality opinion); *see also id.* at 2547 (stating that the statute suppresses all false statements "entirely without regard to whether the lie was made for the purpose of material gain").

[122] *Id.* at 2545 (observing that in prior cases, "the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative").

[123] *See id.* at 2547.

[124] *See id. at* 2560–61 (Alito, J., dissenting) ("Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.").

[125] *See id*. (citing cases).

[126] *Id.* at 2563.

How could the plurality and dissent reach such diametrically opposing results based on the same history? Each side's interpretation of the history was driven by a particular set of value judgments regarding the speech in question. The plurality opinion assumed that at least *some* false statements have sufficient value such that they are entitled to First Amendment protection in their own right[127]—an assumption articulated more directly by Justice Breyer in his concurrence.[128] Thus, falsity by itself does not make speech valueless; only particular subsets of false speech lack constitutional value. By contrast, the dissenting opinion assumed—and stated explicitly—that factual falsity alone is enough to render speech valueless and thus unprotected by the First Amendment.[129]

Analyzing whether the speech in question falls within an existing category of historically unprotected speech, however, is not the only way that courts can apply the *Stevens* test. Although the Court presumably could have closed off all expansion of the presently delineated categories of low-value speech,[130] it chose not to do so, explicitly recognizing the possibility that the current list of historically excluded speech categories may not be complete.[131] Thus, courts applying *Stevens* can also analyze whether the speech in question represents a *novel* category of low-value speech that should nevertheless be recognized because it is supported by "a long (if heretofore unrecognized) tradition of proscription."[132]

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[127] *See id.* at 2547 (plurality opinion) ("[T]he sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings."). The plurality opinion also evinced concerns over the possibility of government abuse should all false statements of fact be deemed unprotected. *See id.* at 2547–48 (observing that such a holding "would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition").

[128] *Id.* at 2553 (Breyer, J., concurring in the judgment) (observing that "[f]alse factual statements can serve useful human objectives," like in situations where false statements "prevent embarrassment," "protect privacy," or "stop a panic or otherwise preserve calm in the face of danger").

[129] *Id.* at 2560 (Alito, J., dissenting) ("Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.").

[130] Indeed, if taken in its narrowest possible form, the *Stevens* test would "leave[] the law in a chaotic state in which some categories are protected for no better reason than that the technology giving rise to them was not in existence at an earlier point in our history." Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1491 (2014).

[131] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 470 (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."); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011) (indicating that a new category of low-value speech may be recognized given "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription").

[132] *Brown*, 131 S. Ct. at 2734.

Unlike the first approach, which focuses on the boundaries of existing historically unprotected categories of speech, this approach focuses directly on history—that is, does a "long (if heretofore unrecognized) tradition of proscription" exist for this particular subset of speech? This approach, however, suffers from a similar lack of meaningful constraint. Courts' decisions as to how they frame both the speech in question and the relevant history will often dictate the outcome, and these decisions are similarly driven by underlying value judgments made by the court regarding the speech in question.

Take, for example, the opinions in *Brown*, the case in which the Court struck down California's ban on selling or renting violent video games to minors.[133] The opinions in *Brown* set forth a wide range of different historical narratives leading to different results. The majority opinion characterized the California statute as targeting "speech about violence,"[134] focusing its historical narrative on the narrow question of whether a longstanding tradition existed for "restricting children's access to depictions of violence."[135] The Court thus deemed its decision in *Ginsberg v. New York*[136]—in which it upheld a similar statute regulating the sale of sexual materials to minors—to be irrelevant to the present question.[137] Observing that minors have long been exposed to depictions of violence in works ranging from *Grimm's Fairy Tales* to the *Odyssey*, the Court found that no such tradition existed and struck down California's statute.[138]

Justice Thomas's dissenting opinion, by contrast, framed the historical inquiry around the likely historical understanding of the "founding generation," marshalling evidence indicating that they "believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children."[139] Justice Thomas thus deemed it "absurd to suggest that such a society understood 'the freedom of speech' to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents."[140]

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133 *Id.* at 2741–42.
134 *Id.* at 2734.
135 *Id.* at 2736.
136 390 U.S. 629 (1968).
137 *Brown*, 131 S. Ct. at 2735.
138 *Id.* at 2735–36.
139 *Id.* at 2752 (Thomas, J., dissenting).
140 *Id.*

Justice Breyer, in his dissenting opinion, suggested a third approach, stating, "[T]he special First Amendment category I find relevant is not (as the Court claims) the category of 'depictions of violence,' but rather the category of 'protection of children.'"[141] In Justice Breyer's narrative, the longstanding general tradition of state regulation aimed at protecting children by controlling their conduct—rather than a particularized tradition of speech laws aimed at depictions of violence—ought to carry substantial weight in the analysis.[142] Justice Alito's opinion concurring in the judgment[143] echoed Justice Breyer's and Justice Thomas's approaches to a certain extent, observing that "the California law reinforces parental decisionmaking in exactly the same way as the New York statute upheld in *Ginsberg*."[144] Justice Alito then went on to question the majority's view that "violent video games really present no serious problem,"[145] observing that "the experience of playing video games . . . may be very different from anything that we have seen before" and recounting in detail the interactive nature and often gruesome content of certain video games that he found troubling.[146]

This multiplicity of historical narratives vividly illustrates the openness of pure historical analysis and the extent to which value judgments drive such analyses. Both the relevant category of speech and the historical record can be characterized in different ways to form divergent legal narratives that lead to different outcomes.[147] Is the relevant historical narrative a narrow one focused

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[141] *Id.* at 2762 (Breyer, J., dissenting) (citation omitted); *see also id.* at 2771 ("[W]hat sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman—bound, gagged, tortured, and killed—is also topless?").

[142] Justice Breyer, however, did not argue that the speech in question constituted low-value speech on this basis; he merely took this into account in applying "a strict standard of review" to the regulation, ultimately deeming it to be constitutional. *Id.* at 2765–71. He identified both "the basic parental claim to authority in their own household to direct the rearing of their children" and the "State's independent interest in the well-being of its youth" as compelling interests supporting the California law. *Id.* at 2767.

[143] Justice Alito would have decided the case narrowly based on vagueness grounds and thus saw "no need to reach the broader First Amendment issues addressed by the Court." *Id.* at 2742–43 (Alito, J., concurring in the judgment). He did, however, outline a number of "reasons for questioning the wisdom of the Court's approach." *Id.* at 2746.

[144] *Id.* at 2747.

[145] *Id.* at 2742.

[146] *Id.* at 2748–51 (describing the possibility of "games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence").

[147] *See* Han, *supra* note 112, at 86 ("Any analysis premised on a historical inquiry can operate in radically different ways based on the level of generality taken.").

solely on a tradition of regulating children's access to depictions of violence? Or is it a broad one focused on a tradition of protecting parents' ability to control the speech to which their children have access, or a tradition of generally protecting children from engaging in conduct that might be harmful to them?

This narrative framing, in turn, rests on value judgments, since there must be some basis for evaluating the relative significance of particular characteristics of the speech in question or of different aspects of the historical record.[148] Some of these judgments might involve, to some extent, broader structural or procedural commitments unrelated to the value of the speech or its harmful effects.[149] But they all reflect at least some baseline conception about what makes speech valuable and how that value should be balanced against different types and degrees of social harm.[150] One cannot select the categorical framing and historical narrative that best fits a particular instance or subset of speech without some normative perspective on what, if anything, makes the speech in question valuable and/or harmful. Indeed, in critiquing the majority's approach, Justice Alito's opinion—which was notably joined by Chief Justice Roberts, the author of *Stevens*—largely eschewed historical analysis in favor of a value-oriented discussion regarding the potentially harmful nature of violent video games.[151] It implicitly recognized that it is these fundamental judgments regarding speech value and harm—rather than an appeal solely to history, which is broad and amorphous enough to encompass divergent legal narratives—that drive the outcomes in these cases.

Thus, whether courts apply *Stevens* by analogizing to historically recognized categories of low-value speech or by seeking "a long (if heretofore unrecognized) tradition of proscription," the underlying idea of a meaningfully objective, purely historical analysis is illusory. Historical analysis under either

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[148] This dynamic is also reflected in the Court's substantive due process jurisprudence, which is similarly premised on history and tradition. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The selection of a level of generality necessarily involves value choices."); Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2802–04 (2005).

[149] For example, Justice Thomas's strong focus on the intent of the founding generation in *Brown*. *See supra* text accompanying notes 139–40.

[150] This conception may be reflected in courts' judgments regarding the potential for government abuse should regulation of certain speech be permitted. *See supra* note 127.

[151] *See, e.g.*, *Brown*, 131 S. Ct. at 2750 ("If the technological characteristics of the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will be games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.").

approach requires some baseline judgment of what makes speech valuable and/or how that value ought to be compared to the social harms associated with speech. Thus, the sorts of open-ended value judgments that the *Stevens* Court condemned so vociferously are inevitable; no historical analysis can be conducted without underlying value judgments, and these judgments can easily influence the means by which courts conduct historical analysis. As I discuss below, this is not to say that history and tradition cannot play *any* meaningful role in the analysis; they might perhaps constrain judicial discretion to a certain extent.[152] But the Court's apparent assumption that a *purely* historical approach can consistently bring meaningful, value-neutral objectivity and constraint into the analysis does not hold up to scrutiny.

3. *The Costs of the* Stevens *Test's Opacity*

The categorical balancing approach advanced by the government in *Stevens*—an approach that had long been inferred in the Court's prior cases involving low-value speech—is a quintessential example of transparent doctrine.[153] A court asked to undertake a "categorical balancing of the value of speech against its social cost" has little room to hide. It must directly articulate and grapple with the fundamental questions of what exactly makes speech valuable and how that value ought to be measured against the social harms caused by it. It must set forth its intuitions on the matter and *explain* them in light of its understanding as to why speech is entitled to special protection. It necessarily lays the court's value judgments and empirical assumptions bare and subjects them to scrutiny by other members of the court, reviewing courts, and society at large.

By adopting a purely historical approach to low-value speech, however, the *Stevens* Court swapped this broadly transparent approach for one that is largely opaque. As I discussed in detail above, the idea of a value-neutral, purely historical analysis is illusory; one simply cannot perform such analysis without fundamental baseline judgments as to the value and social harms associated with speech. The problem, however, is that an analysis characterized as purely historical on its face exempts courts from articulating these underlying value judgments. Because the test purports to be historical, courts are free to gloss

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152 *See infra* text accompanying note 256.

153 Of course, ad hoc, case-by-case balancing would represent the *most* transparent doctrinal approach. Because categorical balancing operates based on categories of speech rather than individual instances of speech, it is a slightly more rule-like approach. Nevertheless, the categorical balancing approach to low-value speech resides solidly on the transparent side of the spectrum, particularly in comparison to the *Stevens* test.

their decisions with a façade of neutrality and constraint—a façade that allows them to disclaim the very idea of making value-based judgments in First Amendment cases as "startling and dangerous."[154] It obfuscates, rather than illuminates, the fundamental value judgments that drive courts' analyses.[155]

This is not to say that courts applying the *Stevens* test necessarily do so *intending* to hide the ball. Courts might apply the test in good faith, motivated solely by a focus on historical tradition; indeed, their particular application of the historical analysis might rest, to some extent, on structural or philosophical commitments unrelated to fundamental questions of speech value and harm.[156] Yet this does not change the fact that value judgments are fundamentally inseparable from historical analysis, whether courts are aware of this or not. On the flipside, savvy courts can easily translate strongly held value judgments regarding the speech in question into facially neutral historical analysis by framing the speech in a particular manner, selecting one particular historical narrative over others, and/or drawing analogies broadly or narrowly. In the end, whether a court is acting in good or bad faith in a given case might well be impossible to discern; there is simply too much play in the joints of the *Stevens* test. Whether consciously or unconsciously, courts applying the *Stevens* test can obscure the fundamental value judgments driving their analyses behind a supposedly neutral, "purely historical" analysis.[157]

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154 United States v. Stevens, 559 U.S. 460, 470 (2010).

155 *See* Han, *supra* note 112, at 88 ("There is no purely 'neutral' means of historical analysis. . . . [T]he relative value and harm associated with the speech in question remains central to the analysis, since it is a court's sense of these values that will influence how it conducts the historical analysis."); Lakier, *supra* note 10, at 2225 (arguing that the *Stevens* rule "threatens to create a set of doctrinal distinctions that rest . . . on hidden value judgments").

156 *See, e.g.*, *Brown*, 131 S. Ct. at 2751 (Thomas, J., dissenting) ("When interpreting a constitutional provision, 'the goal is to discern the most likely public understanding of [that] provision at the time it was adopted.'" (alteration in original)).

157 *See* Lakier, *supra* note 10, at 2224–25 ("[T]he *Stevens* framework provides no vocabulary or set of standards courts can use to evaluate whether the existing categories of low-value speech pose a threat to democracy, or social progress, or any of the other purposes associated with the First Amendment."). Compare, for example, Justice Kennedy's plurality opinion in *Alvarez* with Justice Breyer's concurrence. In analyzing whether lies about receiving military honors constitute low-value speech, the plurality opinion merely went through the motions of a purely historical analysis, with little discussion of the fundamental speech value judgments underlying this analysis. United States v. Alvarez, 132 S. Ct. 2537, 2543–47 (2012) (plurality opinion). By contrast, Justice Breyer, in deeming regulations of such speech subject to intermediate scrutiny, forthrightly detailed his value assumptions regarding false statements of fact. *See, e.g.*, *id.* at 2552–53 (Breyer, J., concurring in the judgment) (observing that false statements of fact are "less likely than true factual statements to make a valuable contribution to the marketplace of ideas" and thus can be subject to some government regulation, but that they also "can serve useful human objectives").

The *Stevens* test thus allows courts to use the façade of objectivity provided by a purely historical approach to distance themselves from their holdings. Framing the analysis as purely historical bolsters the illusion that such an approach is, to a meaningful extent, more objective, constraining, and neutral than an approach that is forthrightly value-based. In doing so, courts can limit the extent to which their decisions are meaningfully scrutinized; it would obviously be more difficult for other courts or the public to challenge the value judgments driving a particular decision if those judgments play no formal role in the analysis and thus remain unarticulated. As Lakier has observed, value judgments are inescapable in this area of First Amendment doctrine, and "[a]ttempting to hide these judgments under the cloak of history does not make them go away; it merely makes them harder to understand, engage with, and critique."[158]

The purely historical approach thus hamstrings courts from revisiting, questioning, and developing their own underlying intuitions regarding speech value and harm. When courts are forced to articulate these fundamental intuitions openly, they are effectively subjecting themselves to internal scrutiny; they must work through their value-based and empirical intuitions and reconcile them with the case at hand. For example, the present facts might spur deeper reflection as to what exactly makes speech valuable, or they might require the court to make an empirical assumption as to the social harms that will likely be caused by the speech. In working through these intuitions in light of the case at hand, courts have the opportunity to reflect critically upon them and clarify, revise, or reaffirm them as necessary—and these renewed or revised intuitions can, in turn, affect the way in which they approach future cases.[159] A lack of doctrinal transparency limits courts' capacity to develop a sharper and more nuanced sense of the fundamental value judgments that ultimately drive the low-value speech analysis.

Furthermore, because the opacity of the *Stevens* test obscures the fundamental sources of disagreement—the underlying normative and empirical intuitions regarding speech value and harm—behind a formal façade, it limits the opportunities for meaningful discussion, debate, and possible reconciliation

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158 Lakier, *supra* note 10, at 2232.

159 *See* Han, *supra* note 30, at 1700–13; Michelman, *supra* note 72, at 34 (observing that an open balancing test "invite[s] the expression and examination of doubts and disagreements" both with respect to the case in question and with respect to the doctrine as a whole).

between courts and their external critics.[160] As discussed above, frank and open discussions regarding fundamental speech values serve to guide and promote open discussion of such values amongst society at large—a public discussion that might, in turn, eventually shape courts' intuitions and judgments in later cases.[161] The opacity of the *Stevens* test, however, disrupts this virtuous cycle of internal and external deliberation, dialogue, critique, and reformulation. And on a purely practical level, it is valuable and useful to know whether the actual root of a particular disagreement over low-value speech is normative or empirical in nature. After all, new data or studies might bridge any empirical disagreements, whereas normative disagreements would fall more squarely into the realm of persuasion and dialogue. Even if no common ground is ever reached, this sort of frank discussion is valuable in itself, since it at least reveals the actual fault lines that separate the different sides of an issue—a value that is lost when opaque approaches like the *Stevens* test are adopted.

The *Stevens* test thus leaves courts less prepared to deal effectively with new types of speech or novel speech regulation contexts—a particularly vital concern given the rapid rate of social and technological change surrounding our communications culture. In recent years, for example, courts have confronted First Amendment cases premised on search engine results,[162] cyber-bullying,[163] and pervasive image and video capture[164]—issues that were largely unfathomable twenty-five years ago.[165] In the face of such rapid and pervasive change, a transparent doctrinal approach allows courts to constantly reexamine—and, if necessary, recalibrate—their conceptions of speech value and harm in a systemic manner. It would thus give space for First Amendment doctrine to evolve in a coherent manner in response to these significant social and technological changes, with continuous reexamination of the underlying

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160 *See* Lakier, *supra* note 10, at 2218 (observing that the test "forces whatever value judgments may in fact motivate these decisions to remain silent and hidden," thus "undermin[ing] the transparency of judicial decisionmaking that, by making courts' reasoning vulnerable to popular critique, helps limit the antimajoritarian power of the courts").

161 *See supra* Section I.C.

162 *See, e.g.*, Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

163 *See, e.g.*, People v. Marquan M., 19 N.E.3d 480 (N.Y. 2014).

164 *See generally* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335 (2011) (describing the technological rise of pervasive image capture and discussing a wide range of cases touching on such issues).

165 As Lakier observed in discussing the Court's decision in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), "Given how recently the technology to store personal information on a mass scale emerged, the absence of a tradition of regulating speech of this kind tells us very little about whether courts and legislatures would have believed it constitutionally permissible to do so." Lakier, *supra* note 10, at 2220.

foundational intuitions and judgments that ultimately drive the analysis. The opacity of the *Stevens* test, however, does not afford courts this sort of flexibility. Rather, by obscuring courts' foundational judgments of speech value and harm under a formal façade, it creates the conditions for doctrinal stagnation and confusion. Understanding new speech contexts necessarily requires testing them against these foundational judgments and determining the extent to which those judgments ought to be reaffirmed or revised, and the *Stevens* test hamstrings courts from undertaking this process.

Thus, the opacity of the *Stevens* test ultimately restricts the common law process of doctrinal evolution that is vital in producing a well-tailored First Amendment jurisprudence. If courts—and, by extension, the public—do not have opportunities to articulate, revisit, and question our fundamental intuitions and assumptions regarding speech value and harm, then those intuitions and assumptions are unlikely to sharpen and evolve over time. And it is particularly important for this sort of broad discussion to occur in doctrinal contexts like defining low-value speech categories. Our foundational intuitions as to why we value speech and how we balance this against the various social harms associated with speech ultimately underlie nearly all of First Amendment jurisprudence, and no other area of First Amendment doctrine forces us to confront these intuitions in such a stark and direct manner. Low-value speech analyses are thus particularly valuable opportunities for courts—and society as a whole—to articulate, debate, and develop the fundamental intuitions that drive First Amendment doctrine as a whole.

B. The Default Rule of Strict Scrutiny for Content-Based Restrictions on Speech

The general rule that content-based restrictions on speech are evaluated under strict scrutiny[166] stands as one of the cornerstones of First Amendment jurisprudence. The Court has crafted this rule as a default rule with exceptions: as discussed above, the Court has identified certain categories of low-value speech that are entitled to no First Amendment protection at all,[167] and it has also identified a few narrow categories of speech to which the First Amendment offers only limited protection, such that government regulation of such speech is evaluated under some form of intermediate scrutiny.[168] But

166 *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

167 *See supra* text accompanying notes 93–98.

168 *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) (truthful commercial speech).

unless the regulated speech is explicitly identified as falling within one of these designated categorical exceptions, the default rule is that strict scrutiny applies to any content-based regulation.

This doctrinal structure, however, severely limits meaningful transparency in two different ways. First, the default strict scrutiny standard of review is, at least in operation, a relatively opaque one, particularly in comparison to the more balancing-oriented intermediate scrutiny standard. Second, doctrinal transparency is compromised significantly by the doctrinal distortion that has resulted from the ill-fitting nature of the rule in a variety of cases—a distortion that played a prominent role in *Williams-Yulee v. Florida Bar* and *Reed v. Town of Gilbert*, two cases decided by the Supreme Court this past term. I will address each of these issues in turn.

1. Transparency and Opacity in Strict Scrutiny Analysis

On its face, the strict scrutiny standard of review involves a form of balancing analysis. Under strict scrutiny, a speech regulation is upheld only if it is "narrowly tailored to promote a compelling Government interest," and the regulation must represent the least restrictive means of promoting that interest.[169] In essence, strict scrutiny, when applied in the First Amendment context, assumes the highest value for the speech in question and requires a showing that the government's interest is sufficiently compelling—and its means of promoting it optimally tailored—to outweigh the value of the regulated speech. Thus, at least on its face, the strict scrutiny standard offers some degree of doctrinal transparency, insofar as it invites courts to openly discuss their intuitions and assumptions regarding the social harm caused by the speech and weigh these against the presumed high value of the speech in light of the Government's chosen regulatory approach.

Strict scrutiny, however, is applied in a varied range of doctrinal contexts, and the Supreme Court has applied the standard in different ways. As Richard Fallon has observed, the Court sometimes applies strict scrutiny as a "nearly categorical prohibition" that "will permit infringements of preferred rights only to avert rare, catastrophic harms"[170]—an approach captured by Gerald Gunther's oft-quoted observation that strict scrutiny is "'strict' in theory and

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169 United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

170 Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1303–04 (2007).

fatal in fact."[171] Sometimes, however, it applies the standard as a "weighted balancing" test in which "the stakes on the rights side of the scale are unusually high and . . . the government's interests must therefore be weighty to overcome them."[172] And finally, strict scrutiny is sometimes applied as "a test of illicit motives, appropriately applied to ensure that the government has not purposely targeted a protected group or burdened a preferred right."[173] That strict scrutiny, generally speaking, is not always applied in its "fatal in fact" form is borne out by Adam Winkler's empirical survey of federal court cases applying strict scrutiny, which found that the challenged law survived in 30% of such applications.[174]

In the specific context of speech, however, courts have broadly applied strict scrutiny in its strictest, nearly categorical form.[175] This approach is reflected in the Supreme Court's frequent use of absolutist-sounding rhetoric in speech cases; in *Mosley*, for example, the Court declared that "the First Amendment means that government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content."[176] Furthermore, based on his empirical analysis, Winkler concluded that "strict scrutiny is . . . most fatal in the area of free speech."[177] Indeed—at least amongst cases that remain good law[178]—a majority of the Supreme Court has

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171 Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Sullivan, *supra* note 39, at 60 ("[T]he Court ties itself to the twin masts of strict scrutiny and rationality review in order to resist (or appear to resist) the siren song of the sliding scale."); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1298 n.222 (2006) ("Strict scrutiny . . . almost always spells death for the speech limitation at issue.").

172 Fallon, *supra* note 170, at 1306.

173 *Id.* at 1308. Such a motive-based approach can be either strict or deferential in nature. *Id*. at 1308 & nn.233–34.

174 Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96 (2006).

175 Fallon, *supra* note 170, at 1313 ("In free speech cases, the Supreme Court most commonly applies a version of strict scrutiny that is '"strict" in theory and fatal in fact.'" (quoting Gunther, *supra* note 171, at 8)).

176 Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (emphasis added); *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."); Regan v. Time, Inc., 468 U.S. 641, 649 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); Fallon, *supra* note 170, at 1304 ("The Court has frequently described the freedom of speech in terms that make its claims sound almost categorically unyielding.").

177 Winkler, *supra* note 174, at 844 (observing that the survival rate in free speech cases is "22 percent, lower than in any other right").

178 Although a majority of the Court in *Austin v. Michigan Chamber of Commerce* upheld, under strict scrutiny, a restriction on campaign-related expenditures from corporate or union treasury funds, 494 U.S. 652,

clearly upheld a content-based speech regulation under strict scrutiny only once, and that case involved prominent national security considerations.[179]

Broadly speaking, the purpose of this "fatal in fact" brand of strict scrutiny—its reason for being—is to largely *preclude* the kind of discretionary balancing suggested on the face of the test. Adopting this form of strict scrutiny represents a decision to adopt a rule-like approach, rather than a standard-like balancing approach, to the regulation in question—that is, a decision to restrict judicial discretion such that the regulation is, in effect, automatically invalidated.[180] It reflects a judgment that the formal arbitrariness flowing from a rigid, categorical rule is less of a concern than the arbitrariness and unpredictability resulting from the open exercise of judicial discretion in each individual case.[181]

In the First Amendment context, the preference for this nearly categorical application of strict scrutiny in cases involving content-based speech restrictions is driven by multiple considerations, such as concerns over potential chilling effects, fear of judicial bias, and the risk that judges will overvalue concrete and immediate state regulatory interests as compared to more generalized and abstract speech-related interests.[182] As Geoffrey Stone has observed, "[I]n analyzing content-based restrictions, the Court has appropriately embraced a 'fortress model' of jurisprudence that gives judges little room to maneuver and that intentionally overprotects speech, in order to minimize the potential harm from legislative and administrative abuse and

660–61 (1990), *Austin* was later overruled by *Citizens United v. Federal Elections Commission*, 558 U.S. 310, 365 (2010).

[179] *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (upholding application of statute prohibiting the provision of material support to foreign terrorist organizations). Last Term, in *Williams-Yulee v. Florida Bar*, five Justices appeared to agree that the content-based speech restriction in question survived strict scrutiny, 135 S. Ct. 1656, 1666 (2015), but only four Justices agreed that strict scrutiny was the applicable standard. *Id.* at 1664–65 (plurality opinion); *id.* at 1673 (Ginsburg, J., concurring in part and concurring in the judgment). A plurality of the Court upheld a content-based speech regulation under strict scrutiny in *Burson v. Freeman*. 504 U.S. 191, 211 (1992) (plurality opinion) (upholding election-day restrictions on speech close to polling places).

[180] *See, e.g.*, Stone, *supra* note 7, at 72 (characterizing the Court's application of strict scrutiny to content-based speech restrictions as a "rejection of balancing"); Sullivan, *supra* note 39, at 60 ("[I]n true categorical fashion, two-tier review generally decides cases through characterization at the outset, without the need for messy explicit balancing. The classification at the threshold cuts off further serious debate: 'this is an x case and therefore the government (or rightholder) wins.' This is a rule-like regime.").

[181] *See* Kennedy, *supra* note 40, at 1689.

[182] *See* Han, *supra* note 30, at 1656 ("[C]ourts may tend to undervalue the usually far-reaching and systemic benefits of speech compared to the typically more immediate social harms produced by that speech, which might call for ex ante doctrinal adjustments."); Stone, *supra* note 7, at 72–76 (describing these and other reasons for the Court's rule-like approach to content-based speech restrictions).

judicial miscalculation."[183] Thus, since strict scrutiny is used "to ensure that the inequities of the moment are subordinated to commitments made for the long run," it means little if it "can be watered down whenever [it] seem[s] too strong."[184] The adoption of full-blooded strict scrutiny in content-based speech regulation cases reflects a broad judgment that the dangers associated with open-ended judicial discretion outweigh the inequities associated with an ill-fitting, overprotective, but easy-to-apply rule.

Because its application is essentially outcome-determinative, the nearly categorical form of strict scrutiny that courts have applied in these cases is a largely opaque standard. As Kathleen Sullivan has observed, although the strict scrutiny formulation technically "require[s] a court to go through the motions of balancing a right against a . . . compelling interest, . . . this is not real balancing," since "the challenged law is never supposed to survive."[185] In other words, although the strict scrutiny standard appears transparent on its face, it is generally opaque in practice, as courts generally do not need to meaningfully articulate and wrestle with their foundational intuitions regarding the value of the right at stake and the relevant regulatory interests in order to reach the preordained outcome.[186]

The opacity of this form of strict scrutiny is highlighted most clearly when compared to intermediate scrutiny.[187] Unlike strict scrutiny or rational basis review, intermediate scrutiny does not preordain victory for one side or the

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183 Stone, *supra* note 7, at 73–74.

184 Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 785 (1996) (Kennedy, J., concurring in part and dissenting in part).

185 Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992).

186 This is not to say that applications of full-blooded strict scrutiny are *always* opaque; a court could still undertake the analysis in a transparent and reasoned manner. The outcome-determinative nature of the standard, however, greatly limits the likelihood that courts will undertake any sort of deep and nuanced analysis. By contrast, if strict scrutiny is applied as a weighted balancing test, it starts to resemble the sort of transparent reasonableness or proportionality inquiry more associated with intermediate scrutiny. Fallon, *supra* note 170, at 1302. This approach to strict scrutiny, however, would still be less transparent than the more open balancing approach associated with intermediate scrutiny to the extent that any thumb on the scale in support of the right gives courts potential leeway to avoid meaningful inquiry into foundational value judgments and assumptions. *See* Winkler, *supra* note 174, at 804 (observing that "[t]he weighted balancing approach to strict scrutiny reflects a compromise between" Justice Black's view that the First Amendment should be read categorically and Justice Frankfurter's preference for open balancing).

187 Although the exact doctrinal formulation of the intermediate scrutiny standard varies in different contexts, one example is the *Central Hudson* test that applies to content-based restrictions on truthful commercial speech, which requires that the government interest be substantial and that the regulation "directly advance[] the government interest asserted" in a way that is "not more extensive than necessary to serve the interest." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

other, nor does it place a thumb on the scale in either direction.[188] Rather, "it establishes a level playing field upon which conflicting state and private interests do battle."[189] As Sullivan noted, "In either its official or de facto form, intermediate scrutiny is a balancing mode"; although all tiers of review "employ[] the vocabulary of weights and measures as a metaphor for justification," intermediate scrutiny is the only standard of review that "really means it."[190] Thus, intermediate scrutiny—unlike strict scrutiny—is designed to be meaningfully transparent. Unlike the nearly categorical nature of true strict scrutiny, intermediate scrutiny actually forces courts to openly confront and grapple with foundational questions and assumptions regarding the value of the rights at stake and the government's regulatory interests, as it leaves courts with little doctrine to hide behind.

2. Reed*,* Williams-Yulee*, and the Distorting Force of Strict Scrutiny*

If strict scrutiny, when applied to content-based speech regulations, translates to near-automatic invalidation, how does this influence the ways in which courts decide speech cases? As I noted above, this rule applies as a *default* to all speech that has not been specifically carved out and identified as low-value speech or speech otherwise entitled to special treatment. In other words, the baseline presumption is that speech is fully protected, such that content-based restrictions of it are subject to strict scrutiny. Thus, the default rule of strict scrutiny technically applies to a vast expanse of speech; as long as speech is deemed to be involved, and as long as the speech does not fall into one of the narrow delineated exceptions to the rule, any content-based regulation of the speech is subject to strict scrutiny and presumed invalidation.

The problem with this broad rule of strict scrutiny, however, lies in the reach of its coverage to *all speech* not explicitly carved out as some form of low-value speech. Even when the recognized categories of low-value speech are excluded, there remains a strong intuition that not all remaining speech ought to be valued equally, and that applying the strict scrutiny default rule is too severe in particular cases. In other words, in some subset of cases, the default rule of strict scrutiny does not fit, in that its application does not match

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188 *See* Sullivan, *supra* note 185, at 298 ("Where intermediate scrutiny governs, the outcome is no longer foreordained at the threshold. Instead of winning always or never, the government may sometimes win or sometimes lose—it all depends.").

189 Note, *supra* note 148, at 2808.

190 Sullivan, *supra* note 185, at 300–01.

our fundamental intuitions regarding the value of speech and the social harms associated with the speech.

The regulated speech in *Alvarez*—false factual statements about having received military medals—exemplifies this disconnect. Even if one agrees—as both the plurality and Justice Breyer's concurrence did—that false statements of fact of this sort are not low-value speech like obscenity, it also seems obvious that such false statements of fact are not as valuable as, say, truthful political speech. If that's the case, one might argue that the same stringent standard of review applied to regulations of the highest-value speech ought not to apply to false statements of fact.

Alvarez thus represents a case dealing with what one might call "middle-value speech"—that is, speech that, for one reason or another, sits somewhere in the hazy middle of the speech-value spectrum between clearly high-value speech (like truthful political speech) and clearly low-value speech (like true threats).[191] Evaluating content-based regulations of middle-value speech under the same onerous strict scrutiny standard that applies to, say, regulations of truthful political speech creates tension with our foundational intuitions about speech value and harm. This is because strict scrutiny is harsh medicine—as discussed above, its mere application in this context generally mandates a finding of unconstitutionality.

How, then, do courts deal with such tension in middle-value speech cases? The plurality opinion and Justice Breyer's concurrence in *Alvarez* illustrate two different approaches that courts could take. The plurality simply applied the default rule, applying strict scrutiny to the Stolen Valor Act and striking it down on that basis.[192] Justice Breyer, on the other hand, explicitly carved out false statements of fact as a distinct category of partially protected speech like commercial speech, the regulation of which would be subject to intermediate scrutiny rather than strict scrutiny.[193]

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[191] I discuss the conceptual category of middle-value speech in great detail in a forthcoming article. *See* David S. Han, Middle-Value Speech (unpublished manuscript) (on file with author). The sorts of speech that might qualify as "middle-value" are of course debatable, and my purpose here is not to designate any particular subsets of speech as such. But possible examples include sexually explicit (but not obscene) speech, panhandling, or detailed instructions regarding dangerous or illegal activities. *See infra* note 281 and accompanying text.

[192] *See* United States v. Alvarez, 132 S. Ct. 2537, 2548–51 (plurality opinion).

[193] *Id.* at 2551–52 (Breyer, J., concurring in the judgment).

These approaches represent two different ways for courts to trade off the value of opaque but determinate rules against the value of transparent and flexible standards in response to such tension. Justice Kennedy's approach implicitly recognizes that effective bright-line rules will by nature involve a lack of perfect fit that will sometimes lead to anomalous results, and it effectively trades off these occasionally anomalous results in return for the gains in predictability and consistency associated with a strict, inflexible rule.[194] Justice Breyer, however, takes the opposite approach: by carving out a formal exception, he incrementally trades off the benefits associated with rigid bright-line rules in favor of more standard-like flexibility. In other words, while his approach theoretically allows for courts to reach more correct results, it also diminishes the predictability and consistency associated with a nearly categorical strict scrutiny default rule.

There is, however, a third approach that courts have taken to resolve this tension between the onerous strict scrutiny default rule and the widely variable value of the speech covered by the rule: doctrinal distortion. That is, rather than simply apply strict scrutiny in the usual manner or carve out an explicit exception to the rule, courts might surreptitiously distort the doctrine to reach the "correct" result in cases where the onerous strict scrutiny standard does not seem to fit.[195]

The Court's recent decisions in *Williams-Yulee* and *Reed* illustrate the high potential for doctrinal distortion introduced by the default rule of strict scrutiny. In *Williams-Yulee*, the Supreme Court evaluated the constitutionality of a Florida Bar rule prohibiting candidates in judicial elections from personally soliciting campaign funds.[196] Observing that the rule constituted a content-based restriction on speech, Chief Justice Roberts—writing only for a

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[194] It is of course impossible to read Justice Kennedy's mind, so it's unclear whether he actually felt any tension in applying strict scrutiny to a category of speech like false statements of fact. It is worth noting, however, that he never explicitly used the term "strict scrutiny," *see, e.g.*, *id.* at 2543 (plurality opinion) (calling the standard "exacting scrutiny"), perhaps indicating some hesitation in applying strict scrutiny in the case.

[195] *See, e.g.*, Bhagwat, *supra* note 44, at 968 ("[T]he phrase 'hard cases make bad law' is a plea to judges and other rulemakers not to deviate from, or to alter, clear and well-established rules because of the equities of a particular case. 'Bad law' in this context is understood as the distortion or even the disregard of clear rules for the sake of a 'just' result."). A similar distorting dynamic is often cited in describing the effects of the exclusionary rule. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) ("The exclusionary rule renders the Fourth Amendment contemptible in the eyes of judges and citizens. Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated.").

[196] Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1662–64 (2015).

plurality of the Court on this point—deemed strict scrutiny to be the appropriate standard, despite arguments from the Florida Bar that a more permissive standard be used.[197] Despite observing that it is a "rare case" in which a content-based speech restriction is deemed "narrowly tailored to serve a compelling [government] interest," the Court found that the Florida Bar rule met that high standard.[198]

The Court stated that the rule advanced the "vital state interest in safeguarding public confidence in the fairness and integrity of the nation's elected judges."[199] It then deemed the underinclusiveness of the law unproblematic for purposes of narrow tailoring, since the law "aimed squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates."[200] It also stated that the law was not overinclusive, since it restricted only a "narrow slice of speech."[201] Although the Court recognized that certain personal appeals for money—for example, an in-person one-on-one solicitation—created a greater appearance of impropriety than others—for example, an impersonal, mass-mailed solicitation—it held that the law was sufficiently tailored to survive strict scrutiny.[202]

In a scathing dissent,[203] Justice Scalia observed that while the Court purported to apply strict scrutiny, "it would be more accurate to say that it . . . appl[ied] the appearance of strict scrutiny."[204] He contrasted the Court's ready acceptance, "on the basis of its intuition" and without the "slightest evidence," that banning personal requests for contributions will substantially improve public trust in judges, with the strict empirical standards adopted in *Alvarez*, where the plurality applied strict scrutiny to strike down a law prohibiting lies

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197 *Id.* at 1664–65 (plurality opinion). Only four Justices joined the part of the Court's opinion identifying strict scrutiny as the relevant standard, while the remainder of the opinion garnered majority support.

198 *Id.* at 1666.

199 *Id.* (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009)).

200 *Id.* at 1668. The law still permitted, for example, direct solicitations made by the candidate's campaign committee, thank-you notes from the candidate to campaign donors, and direct solicitations from the candidate for personal gifts or loans. *Id.* at 1663, 1669–70.

201 *Id.* at 1670.

202 *Id.* at 1671 ("The First Amendment requires that Canon 7C(1) be 'narrowly tailored,' not that it be 'perfectly tailored.'" (quoting Burson v. Freeman, 504 U.S. 191, 209 (1992))).

203 Justice Scalia's dissent was joined by Justice Thomas, and his views were largely shared by Justices Kennedy and Alito. *See id.* at 1682 (Kennedy, J., dissenting) ("The dissenting opinion by Justice Scalia gives a full and complete explanation of the reasons why the Court's opinion contradicts settled First Amendment principles."); *id.* at 1685 (Alito, J., dissenting) ("I largely agree with what I view as the essential elements of the dissents filed by Justices Scalia and Kennedy.").

204 *Id.* at 1677 (Scalia, J., dissenting).

about receiving military honors because the government failed to meet its "heavy [evidentiary] burden" of proving that "the public's general perception of military awards is diluted by false claims."[205] Justice Scalia also emphasized the rule's clear lack of tailoring, observing that, on the one hand, the rule "prohibits candidates from asking for money from *anybody*," including "an old friend, a cousin, or even [a] parent," while on the other hand, it allows a candidate to ask a lawyer "for a personal loan, access to his law firm's luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar's charges."[206]

The dissenting Justices' argument that the Court applied a watered-down version of strict scrutiny to uphold the Florida Bar rule is highly persuasive. As Justice Alito colorfully noted, the rule was "about as narrowly tailored as a burlap bag," given that it drew no distinctions based on analytically significant factors such as the identity of the people solicited and the method of solicitation.[207] Even if strict scrutiny does not necessarily require "perfect tailoring," the Court in applying strict scrutiny has consistently required tailoring far more precise than that represented by the Florida Bar's extremely blunt rule.[208] The Court, in essence, adopted a standard more akin to an intermediate-scrutiny style balancing test than the near-categorical rule it usually applies in speech cases. In this way, Chief Justice Roberts's opinion closely parallels the plurality opinion in *Burson v. Freeman*—an opinion upon which he relied heavily—in which a plurality of the Court similarly applied a watered-down version of strict scrutiny in a content-based speech restriction case.[209]

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205 *Id.* at 1678.

206 *Id.* at 1679–80.

207 *Id.* at 1685 (Alito, J., dissenting).

208 For example, in *Reno v. ACLU*, 521 U.S. 844, 874–79 (1997), the Court applied strict scrutiny in evaluating a provision of the Communications Decency Act that "prohibit[ed] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." *Id.* at 859. The Court struck down the statute because it found that less restrictive but equally effective alternatives existed, such as "requiring that indecent material be 'tagged' in a way that facilitates parental control of material coming into their homes," *id.* at 879; even though, as Eugene Volokh observed, it was clear that "[n]one of the Court's proposed alternatives . . . would have been as effective as the CDA's more or less total ban." Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 149–56. Similarly, in *Playboy Entertainment Group*, the Court held that a rule requiring cable companies to block adult channels at households upon request constituted a less restrictive alternative to a rule requiring the companies to scramble, block, or limit the transmission hours of such channels, despite the government's reasonable argument that a block-on-request rule would not be an equally effective alternative. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 806, 816–27 (2000).

209 In *Burson*, the Court evaluated a state statute that prohibited campaign speech within 100 feet of polling places on election days. 504 U.S. 191, 193–94 (1992) (plurality opinion). In finding that the statute

What was actually happening in *Williams-Yulee*? One possible explanation is that Chief Justice Roberts effectively viewed the regulated speech in *Williams-Yulee* as "middle-value" speech—speech to which applying strict scrutiny in its usual, near-categorical form does not seem to fit—perhaps because of the nature of the speech itself (personal solicitation from a judicial candidate), the substantial social harm associated with the speech (decreased confidence in the integrity of the judiciary), or some combination of the two. Or, perhaps, he applied strict scrutiny as a highly deferential illicit motive test.[210] Either way, rather than explicitly adopt a less onerous standard of review—as Justice Ginsburg advocated in a concurring opinion[211]—he simply watered down the typical strict scrutiny standard to reach the desired result.[212]

Doctrinal distortion of a different sort can be seen in the Ninth Circuit panel's opinion in *Reed*.[213] At stake in *Reed* was the constitutionality of an ordinance regulating the display of outdoor signs. The ordinance specifically distinguished between "ideological signs," "political signs," and "temporary directional signs," according the most favorable treatment to ideological signs, less favorable treatment to political signs, and the least favorable treatment to temporary directional signs.[214] The ordinance defined ideological signs as signs "communicating a message or ideas for noncommercial purposes" that do not fall into a limited list of exceptions; political signs as signs "designed to influence the outcome of an election called by a public body"; and temporary

survived strict scrutiny, the plurality adopted a similarly diluted version of the standard, requiring only that the regulation constitute a "reasonable" response to "potential deficiencies in the electoral process" and that it not "significantly impinge on constitutionally protected rights." *Id.* at 209 (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 195–96 (1986)). And like the *Williams-Yulee* Court, the *Burson* plurality deferred broadly to the government's judgment regarding the need for the regulation, despite the scant evidence produced to support it. *Id.* at 219 (Stevens, J., dissenting). Indeed, the dissent in *Burson* similarly called out the plurality for applying a "toothless" analysis that was "neither exacting nor scrutiny." *Id.* at 226 (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

210 *See Williams-Yulee*, 135 S. Ct. at 1670 ("We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive."). Justice Scalia, in his dissent, argued that the rule's scope "suggests that it has nothing to do with the appearances created by judges' asking for money, and everything to do with hostility toward judicial campaigning." *Id.* at 1681 (Scalia, J., dissenting).

211 *Id.* at 1673 (Ginsburg, J., concurring in part and concurring in the judgment).

212 The same might be said of *Burson* as well. To the plurality, the near-categorical form of strict scrutiny likely did not fit based on some judgment regarding the limited value of the speech (campaign speech directly outside a polling place on election day) and/or the substantial harms associated with the speech (erosion of electoral integrity).

213 707 F.3d 1057 (9th Cir. 2013), *rev'd*, 135 S. Ct. 2218 (2015).

214 *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224–25 (2015).

directional signs as those "intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'"[215]

A divided panel of the Ninth Circuit upheld the ordinance. The majority held that "the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs are content-neutral" because each category "is based on objective criteria and none draws distinctions based on the particular content of the sign."[216] It also observed that as far as the ordinance is concerned, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted."[217] As a result, the majority upheld the ordinance under the intermediate scrutiny standard applicable to content-neutral speech restrictions.[218] In dissent, Judge Watford argued that the First Amendment "prohibit[s] the government from favoring certain categories of non-commercial speech over others based solely on the content of the message being conveyed," and he observed that this prohibition extends to subject-matter-based distinctions just as much as viewpoint-based distinctions.[219]

The Supreme Court, in reversing the Ninth Circuit decision, agreed with Judge Watford's analysis. Writing for the majority, Justice Thomas stated that "[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."[220] He then confirmed that the strict scrutiny default rule against content discrimination applies equally to subject-matter-based restrictions as it does to viewpoint-based restrictions, and he observed that the ordinance clearly made such distinctions.[221] Applying strict scrutiny, he easily found that the ordinance was not "narrowly tailored to further a compelling government interest."[222]

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215 *Id.*

216 *Reed*, 707 F.3d at 1069.

217 *Id.*

218 *Id.* at 1077.

219 *Id.* at 1078 (Watford, J., dissenting).

220 *Reed*, 135 S. Ct. at 2228 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

221 *Id.* at 2231.

222 *Id.* at 2232. Justice Thomas's opinion therefore parallels Justice Kennedy's plurality opinion in *Alvarez*: to the extent Justice Thomas felt any tension between the onerous strict scrutiny standard and the generally benign sign regulation, he opted to simply bite the bullet and apply strict scrutiny. *See id.* at 2231 (observing that although "[t]his type of ordinance may seem like a perfectly rational way to regulate signs," the default strict scrutiny rule dictates that even seemingly reasonable laws "will sometimes be struck down"). His decision also may have been made easier by the fact that—as Justice Kagan noted in her concurrence—the

As Justice Kagan observed in her opinion concurring in the judgment, however, there is substantial dissonance in applying the severe strict scrutiny standard to, say, sign ordinances that distinguish safety signs, historical site markers, or signs that identify the address of a home from other signs.[223] As she noted, this dissonance is likely driven by the very low likelihood that forbidden governmental motives are involved in these sorts of sign ordinances and the limited extent to which such ordinances are likely to distort the marketplace of ideas.[224] It might also be driven by a broad sense that speech in the form of outdoor signage can be regulated more stringently given municipalities' clearly legitimate safety and aesthetic concerns in limiting the clutter of such signs. As Bhagwat observes, if space for outdoor signage is a scarce resource—due to either physical constraints or safety concerns—then the sorts of subject-matter-based distinctions made in the *Reed* ordinance seem to be an eminently reasonable means of allocating this scarce space.[225] After all, the ordinance effectively valued political and ideological speech more than purely informational speech, which reflected the Court's own longstanding understanding that political speech is generally more valuable than commercial speech[226] and speech on matters of public concern is generally more valuable than speech on matters of private concern.[227]

The Ninth Circuit sidestepped this ill-fitting application of strict scrutiny by stretching the boundaries of the content-neutrality inquiry. Instead of watering down the strict scrutiny standard like the Court in *Williams-Yulee*, the Ninth Circuit shoehorned the facially content-based sign regulation into the category of content-neutral regulations—a holding that contradicted a well-established

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ordinance in *Reed* "[did] not pass strict scrutiny, or intermediate scrutiny, or even the laugh test." *Id.* at 2239 (Kagan, J., concurring in the judgment).

223 *Id.* at 2236 (Kagan, J., concurring in the judgment).

224 *See id.* at 2237. *But see id.* at 2229 ("Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech.").

225 Ashutosh Bhagwat, Who's Afraid of Content Regulation? 20–21 (unpublished manuscript) (on file with author); *see also* Ashutosh Bhagwat, Reed v. Town of Gilbert*: Signs of (Dis)content?*, 9 N.Y.U. J.L. & LIBERTY 137, 146–47 (2015).

226 *Compare, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting Virginia v. Black, 538 U.S. 343, 365 (2003))), *with* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("[W]e . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.").

227 Bhagwat, Who's Afraid of Content Regulation?, *supra* note 225, at 21; *see, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1214–15 (2011).

line of Supreme Court case law.[228] In doing so, the Ninth Circuit ensured that it could evaluate the ordinance under the intermediate scrutiny applicable to content-neutral regulations[229]—a standard of review that represented a better fit given the circumstances of the case in question.

To be fair to the Ninth Circuit, the Supreme Court has sent some mixed signals as to whether facially content-based speech regulations automatically trigger strict scrutiny without any consideration of improper legislative intent or motive.[230] But as Leslie Kendrick has observed, a close parsing of the Supreme Court's cases indicates that apart from two early exceptions,[231] "the Court has never taken up its own invitation to ignore the facial proxy in favor of justification," at least "when it comes to facial classifications by subject matter or viewpoint."[232] In any event, to the extent the Supreme Court has been

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[228] *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993) (rejecting the idea that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas" (ellipsis in original)); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115–17 (1991) (same); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99 (1972) (deeming ordinance content-based because "the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter"). As the *Reed* majority observed, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, 135 S. Ct. at 2228.

[229] Content-neutral speech regulations are permitted "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[230] *See* Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1268–70 (2014) (arguing that the Supreme Court has "cycled among competing definitions of 'content neutrality'"—a "strong" version that categorically deems all facially content-based regulations to be subject to strict scrutiny and a "weak" version that "focuses solely on government motivation and/or justification"); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stating that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys," although the ordinance in that case was deemed content-neutral); Hill v. Colorado, 530 U.S. 703, 719–21 (2000) (adopting the approach set forth in *Ward*); United States v. Kokinda, 497 U.S. 720, 732–36 (1990) (plurality opinion) (deeming an anti-solicitation law content-neutral given the Postal Service's lack of intent to "suppress the views of any disfavored or unpopular political advocacy group").

[231] The exceptions Kendrick identifies are the Court's allowance of subject-matter-based restrictions on "low-value" speech in *FCC v. Pacifica Foundation*, 438 U.S. 726, 746–50 (1978), and its adoption of the secondary effects doctrine in a series of cases dealing with adult-oriented businesses, which I discuss in greater detail below, *see infra* text accompanying notes 233–44. Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 256–62 (2012).

[232] Kendrick, *supra* note 231, at 259. Kendrick argues that seemingly inconsistent cases like *Hill* and *Kokinda* did not involve viewpoint-based or subject-matter-based distinctions, but rather other types of facial distinctions to which the Court has not consistently applied strict scrutiny. *Id.* at 262–74 (discussing communication-related discrimination, message-based discrimination, and persuasion-related discrimination).

less-than-clear in outlining the parameters of content-neutrality analysis, this doctrinal confusion has been driven, to a significant extent, by the exact same attempt to avoid applying full-blooded strict scrutiny in cases where application of such an onerous standard seems dissonant.

The clearest example of this point is the Supreme Court's use of the "secondary effects" doctrine in cases dealing with zoning restrictions on adult businesses. In *City of Renton v. Playtime Theatres*, the city of Renton enacted zoning restrictions that prohibited any "adult motion picture theater" from being located in close proximity to residential housing, parks, churches, or schools.[233] As the dissent noted, the ordinance was content-based on its face, as it singled out adult motion picture theaters for special regulation.[234] Nevertheless, the Court deemed it to be content-neutral, since the regulation "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community," with goals such as preventing crime, preserving property values, and protecting retail trade.[235] As a result, the Court evaluated the ordinance under intermediate scrutiny rather than strict scrutiny and upheld it.[236]

Since *Renton*, the secondary effects doctrine has been subject to withering criticism from all corners. As Mark Rienzi and Stuart Buck have noted, *Renton* "warped" content-neutrality analysis by introducing the idea that a facially content-based regulation can nevertheless be deemed content-neutral, thus giving courts the room to claim that "the 'principal inquiry' for content analysis is whether the government operated with an impermissible motive."[237] Geoffrey Stone called *Renton* "a disturbing, incoherent, and unsettling precedent" that "threatens to undermine the very foundation of the

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She does state, however, that "[t]he order I am attempting to show in the Court's [content-neutrality] jurisprudence is, without doubt, latent rather than patent." *Id.* at 241.

233 475 U.S. 41, 44 (1986) (stating that the ordinance prohibited such theaters "from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school").

234 *Id.* at 57 (Brennan, J., dissenting) (observing that "[m]ovie theaters specializing in 'adult motion pictures'" are subject to the restrictions, while "[o]ther motion picture theaters, and other forms of 'adult entertainment,' . . . are not subject to the same restrictions").

235 *Id.* at 47–48.

236 *Id.* at 49–54.

237 Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187, 1200 (2013); *see also* Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 91 (1988) ("[*Renton*] turns the Court's traditional focus on the language of statutes on its head and seems to permit benign legislative intent to reduce the level of scrutiny regularly directed at laws that discriminate on their face.").

content-based/content-neutral distinction," since—contrary to well-established case law—it allowed the government to escape strict scrutiny of content-based speech restrictions by simply defending the restrictions with justifications unrelated to communicative impact.[238] Indeed, nearly all speech that the government seeks to regulate carries harmful negative secondary consequences; it's often *because* of these consequences that the government seeks to regulate the speech in the first place.[239] A number of Justices have explicitly recognized the sleight-of-hand nature of the doctrine;[240] Justice Kennedy, for example, called the content-neutral characterization of these sorts of zoning ordinances "something of a fiction," observing that such ordinances "are content based, and we should call them so."[241]

Why did the Court adopt such an unprincipled doctrinal approach in these cases? The most likely answer is that the Court surreptitiously distorted existing doctrine in order to avoid the anomalous consequences of applying the onerous strict scrutiny default rule. That is, the Court distorted doctrine simply because according the same degree of First Amendment protection to, say, adult movies as truthful political speech ran up against its fundamental intuitions as to speech value and harm. As Alan Brownstein has observed, the *Renton* Court not only ignored the facially content-based nature of the ordinance, but also remarkably dismissed out of hand the possibility of an impermissible subordinate motive to the ordinance;[242] thus, as Brownstein concludes, "[a]lthough the Court never explicitly affirms the view that sexually explicit expression is a generally less valuable form of speech . . . , no other explanation of *Renton* is plausible."[243] Indeed, this explanation is borne out by the fact that the Court has never formally extended the secondary effects doctrine beyond the context of adult-oriented businesses.[244]

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238 Stone, *supra* note 7, at 116–17; *see also id.* (observing that the doctrine risks "erod[ing] the coherence and predictability of first amendment doctrine").

239 *See* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 307 (2009) ("Almost all speech with harmful direct effects also has negative downstream consequences that are predictable. Indeed, it is typically because of the downstream social consequences that government officials often wish to regulate dangerous speech.").

240 *See* Kreimer, *supra* note 230, at 1297 (observing that "[a]n array of Justices acknowledge that the 'secondary effects' doctrine . . . is a bit of a cheat" and citing cases).

241 City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in judgment).

242 Brownstein, *supra* note 237, at 92–93.

243 *Id.* at 95.

244 *See* Fee, *supra* note 239, at 304–05 ("The Court has never upheld a content-discriminatory regulation on the basis of the secondary effects doctrine that did not concern sexually explicit speech."); Kendrick, *supra* note 231, at 257 ("[M]any of the Court's subject-matter and viewpoint cases have involved the potential

These are not isolated examples of doctrinal distortion caused by the default rule of strict scrutiny. Bhagwat has catalogued similar distortions in other areas, such as cases dealing with buskers and panhandlers, abortion protesters, and disclosures of personal data.[245] Furthermore, courts can manipulate doctrine[246] in other ways besides watering down strict scrutiny or stretching the content-based/content-neutral distinction; for example, they might find a way to characterize the communication in question as non-speech conduct that falls completely outside of First Amendment coverage,[247] or they might leave the specific standard of review applied in the case intentionally vague.[248]

This sort of doctrinal distortion represents a major cost of the traditional default rule of strict scrutiny. The most obvious cost is the destabilizing ripple effect such distortions have on the entirety of First Amendment doctrine, including areas where the law has been well-settled. Watering down the strict scrutiny standard in the context of cases like *Williams-Yulee* impairs its efficacy as a predictable near-categorical standard elsewhere;[249] distorting the distinction between content-based and content-neutral speech restrictions in cases like *Renton* risks unsettling that distinction elsewhere.[250] This cost is

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extension of *Pacifica* or the secondary-effects rationale to other forms of expression, and in every such case the Court has rejected the argument.").

[245] *See* Bhagwat, *supra* note 225, at 7–10, 12–14 (discussing these possible distortions and citing cases).

[246] To be clear, there is often a fine line between what can be characterized as unprincipled doctrinal manipulation and what can be characterized as an expected lack of legal clarity or consistency associated with hard cases or a legitimate extension of doctrine. Although such characterizations might be debatable in many cases—and might sometimes involve a degree of subjectivity—some decisions and analyses are certainly more readily identifiable as doctrinal distortions than others. *See supra* text accompanying notes 233–44 (discussing the secondary effects cases).

[247] *Cf.* Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 18–19 (2012) (describing the variable treatment of "speech disclosing detailed instructions for criminal or dangerous activity," which some courts treat as a "species of conduct" and others treat as protected speech).

[248] *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723–24 (2010) (stating that a standard of review more demanding than intermediate scrutiny applied, but otherwise leaving the standard vague). Interestingly, Chief Justice Roberts—who wrote the majority opinion in *Holder*—recently clarified that the *Holder* Court was in fact applying strict scrutiny. *See* Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1666 (2015); McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014).

[249] *See Williams-Yulee*, 135 S. Ct. at 1685 (Alito, J., dissenting) ("If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired."); *cf. Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring in the judgment) ("I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force.").

[250] *See, e.g.*, Rienzi & Buck, *supra* note 237, at 1200 (arguing that the secondary effects cases "have subtly distorted the content-neutrality analysis even applied to regulations of political speech by turning it into a direct inquiry focused almost exclusively on legislative motive").

potentially expansive, one that extends beyond the necessary and expected costs associated with the occasional anomalous results inherent to any rule-like approach.

For present purposes, however, I want to focus on another substantial cost associated with such doctrinal distortion: the cost in transparency. The doctrinal distortion represented in these cases serves to obscure the underlying value judgments actually driving the results, as it allows courts to clothe their decisions in formal "doctrinal" terms without offering any space for them to articulate or grapple with the foundational value judgments that are actually driving their analyses. The Supreme Court in *Renton* and the Ninth Circuit panel in *Reed*, for example, framed their analyses as if their findings of content neutrality were simply the inevitable products of formal doctrine.[251] Yet they were in fact likely driven, at least in part, by foundational judgments regarding the value of sexually explicit speech and the relative value and harm associated with outdoor signage—judgments that were never explicitly set forth in those cases. Similarly, the *Williams-Yulee* plurality's application of a diluted form of strict scrutiny was likely driven by a similar set of foundational value judgments regarding campaign fund solicitations from judicial candidates—judgments that were expressed far more directly and transparently in Justice Ginsburg's concurring opinion arguing for a less onerous standard of review.[252]

One could perhaps characterize the sorts of doctrinal distortions described above as actually *increasing* doctrinal transparency insofar as they funnel cases away from strict scrutiny analysis—which, as discussed above, is largely opaque in nature[253]—and into more balancing-oriented approaches, whether in the form of a watered-down version of strict scrutiny or intermediate scrutiny. Although this might be true to a certain extent, such approaches nevertheless obscure doctrine on a broad level. Watering down the strict scrutiny standard or treating content-based regulations as content-neutral allows courts to avoid open discussion regarding the inherent value of the speech in question, since neither intermediate scrutiny nor strict scrutiny, on their face, considers the

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[251] *See* City of Renton v. Playtime Theatres, 475 U.S. 41, 46–54 (1986); *Reed*, 707 F.3d 1057, 1067–76 (9th Cir. 2013).

[252] *See Williams-Yulee*, 135 S. Ct. at 1673–75 (setting forth the reasons why states should have "substantial latitude . . . to enact campaign-finance rules geared to judicial elections").

[253] *See supra* Section II.B.1.

value of the speech as part of the relevant calculus.[254] Thus, a court need not explain why, for example, it deems sexually explicit speech to be less valuable than truthful political speech, even if that is the actual underlying basis for its differential treatment of such speech.

Furthermore, doctrinal distortion breeds confusion, and confusion limits the extent to which courts can accurately articulate and grapple with foundational questions of First Amendment value and harm. If a court distorts doctrine to characterize a clearly content-based speech restriction as content-neutral, for example, then its analysis will be obscured insofar as it rests on this flawed premise. That is, if the court inaccurately assumes that the law is content-neutral, then it will necessarily ask the wrong analytical question: is the "content-neutral" law in question sufficiently tailored to serve an important government interest? The *actual* question underlying the court's decision—the one that accurately encapsulates the central issue of the case—is in fact a very different one: although the law in question is content-based, why do our fundamental judgments regarding speech value and harm dictate that the normal presumption of strict scrutiny should not apply?

Doctrinal distortion thus allows courts to decide cases by asking the wrong questions. And even if those wrong questions might invite more open-ended balancing inquiries, they nevertheless work to obscure the doctrine because they direct the inquiry away from the fundamental judgments actually underlying the court's analysis. Such distortion thus hamstrings courts' ability to participate in a meaningful dialogue regarding fundamental speech values—both amongst each other and amongst society at large. It sidetracks what ought to be an open and transparent debate over fundamental speech values into squabbles over formal doctrine. Furthermore, the indeterminacy and fluidity it introduces into the doctrine increases the risk that courts will simply talk past each other rather than engage in meaningful debate. A court's application of a watered-down version of strict scrutiny or its subtle distortion of the content neutrality doctrine might simply be missed by other courts, thus drastically limiting the potential for direct and forthright debate regarding the underlying reasons for such distortions.

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[254] *See supra* notes 169, 187 and accompanying text (setting forth the doctrinal tests for intermediate and strict scrutiny). Technically speaking, the inherent value of the speech comes into play only in the initial determination of whether the speech falls into a designated category of unprotected (or lesser-protected) low-value speech. *See supra* text accompanying notes 166–68.

3. The Costs of Opacity Associated with the Traditional Rule

The traditional rule applying strict scrutiny as a default to content-based restrictions on speech thus limits doctrinal transparency in two distinct ways. First, strict scrutiny itself is a largely opaque standard, particularly when applied in the "fatal in fact" form broadly adopted in speech cases. Because it creates such a strong presumption of unconstitutionality, strict scrutiny makes it easier for courts to decide cases without meaningfully working through their fundamental judgments of speech value and harm. Second, under the traditional rule, strict scrutiny applies to a broad range of speech of varying value, which produces cases where applying such an onerous standard is dissonant with courts' normative and empirical intuitions regarding the speech in question. Courts have responded to this tension by distorting doctrine in order to avoid the consequences of the strict scrutiny standard, which works to obscure the fundamental judgments regarding speech value and harm that actually drive their analyses.

This doctrinal opacity carries significant costs, which I have outlined in detail above.[255] It limits the internal and external scrutiny imposed on courts' decision-making. It hamstrings judges from effectively revisiting, testing, and questioning their foundational intuitions regarding speech value and harm when confronted with novel speech contexts. It limits the extent to which fundamental disagreements about speech values can be meaningfully and openly discussed, both amongst courts and amongst society at large, thus obscuring the differing normative and empirical assumptions that underlie these disagreements. In all of this, it limits the ability of First Amendment doctrine to evolve in a coherent manner amidst a rapidly changing technological, social, and cultural landscape.

III. RECALIBRATING THE DOCTRINE TO EFFICIENTLY REALIZE THE BENEFITS OF DOCTRINAL TRANSPARENCY

Although I have given a detailed account of the significant transparency costs associated with the current doctrinal frameworks governing low-value speech and content-based speech restrictions, such costs do not necessarily lead to the conclusion that these doctrinal frameworks are suboptimal. As described above, the trade-offs between doctrinal transparency and opacity roughly track the trade-offs between standards and rules: an increase of

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255 *See supra* Section II.A.3.

doctrinal transparency—and all of the benefits associated with it—must be balanced against its costs in the form of a loss of predictability and consistency. The optimal solution is not necessarily for courts to maximize the degree of transparency or for them to adhere only to perfectly predictable and consistent rules—it is to craft the right balance of open-ended transparency and constraining opacity to yield the most benefits from each approach at the lowest cost.

Of course, this is not an inquiry that can be made with scientific exactitude, and one can expect substantial disagreement regarding the extent to which an optimal balance has been reached in various doctrinal areas. That being said, I think it is fairly clear that the Court's purely historical approach to identifying low-value speech does not strike a sound balance between opacity and transparency, for the simple reason that this test trades off the substantial benefits associated with doctrinal transparency for minimal gains in predictability and consistency. And although the traditional strict scrutiny default rule governing content-based speech restrictions presents a harder question, the fact that courts have regularly distorted doctrine to avoid the consequences of the rule strongly indicates that the doctrinal framework ought to be recalibrated. I delve into these arguments in greater detail below, and I make some suggestions as to how courts might adjust the doctrine to balance these considerations more effectively.

A. The Stevens *Test and the Problem of Non-Constraining Rules*

As discussed above, doctrinal transparency represents a vital means for courts—and, by extension, society in general—to articulate and work out our foundational intuitions as to why we value speech and how that value compares to the different harms associated with speech. This sort of open dialogue establishes the conditions under which clearer and more coherent doctrine can emerge. And even if this sort of clarity or coherence is impossible, transparent doctrine is valuable insofar as it forces judges to lay bare the fundamental assumptions—whether normative or empirical—underlying their respective views. On the other hand, however, since doctrinal transparency generally corresponds to open, standard-like approaches, it also produces costs, as increased judicial discretion limits doctrinal predictability and consistency. Thus, it will sometimes—perhaps often—make sense to sacrifice the benefits of transparency for the predictability and constraint offered by more opaque but easier-to-apply abstract rules.

Given this balance of costs and benefits, it directly follows that if a prevailing abstract rule is *not* in fact effective in providing meaningful constraint and predictability to judicial decision-making, the rule is inferior to a more transparent approach. There is simply no reason to adopt opaque doctrine if it provides no meaningful benefits to offset the associated loss of transparency. That is, there is no reason to trade off the benefits of doctrinal transparency if little to no value in the form of increased predictability and consistency is realized in return.

The purely historical approach to low-value speech outlined in *Stevens* clearly illustrates this point. As discussed above, the purely historical test does not provide the meaningful constraint or objectivity to the analysis that presumably drove the Court to adopt it. It is, in reality, as open-ended and indeterminate as the categorical balancing test rejected by the Court—but without the benefit of doctrinal transparency. In other words, the purely historical test does little more than obscure the underlying value judgments that are actually driving courts' analyses, without offering any sort of systemic benefits in return.

This is not to say that history and tradition, in the abstract, cannot play *any* meaningful constraining role in delineating the boundaries of low-value speech categories or recognizing additional categories of low-value speech. Concern for the historical pedigree of a potential category of low-value speech generally represents a systemic concern for doctrinal stability—a recognition that constant doctrinal expansion of low-value speech categories might prove to be harmful for various reasons, such as slippery-slope concerns, possible chilling effects, and so forth. It encapsulates an additional value, external to questions of speech value and harm, that might well be relevant to the equation: the systemic value of caution and deliberate doctrinal development, one that emphasizes conservative, careful, and incremental adjustments to doctrine rather than rapid evolution. So a general appeal to history and tradition might be used simply as a means of counseling for caution.[256]

Thus, the fact that the *Stevens* test looked to history and tradition is not the problem. The problem is its characterization of the inquiry as a *purely* historical, value-neutral one. It is this aspect of the test that makes it bad doctrine: it carries a veneer of constraint, objectivity, and value-neutrality, but it does not actually offer much more predictability or consistency than the

[256] History and tradition may be useful for this purpose even if, as Lakier argues, the actual history as described by the *Stevens* Court is inaccurate. *See supra* text accompanying notes 110–11.

transparent balancing test that the *Stevens* Court rejected. It sacrifices a frank and open discussion of speech value and harm, and all of the benefits associated with that, for little gain in predictability and consistency; in doing so, it limits the extent to which the basic value judgments that actually drive the analysis can be fully scrutinized, developed, and adjusted.[257]

Furthermore, as I noted above, doctrinal transparency is particularly valuable in the specific context of defining low-value speech categories. This particular question presents the foundational balancing inquiry underlying the First Amendment in its purest and most direct context, since courts must ultimately determine whether the speech in question is so lacking in value, or so associated with significant social harm, that it effectively falls outside of the scope of First Amendment protection. Thus, cases dealing with low-value speech issues are uniquely valuable opportunities for courts—and, by extension, society as a whole—to articulate, debate, and develop these fundamental intuitions as to why we value speech and how that value should measure up against the social harms associated with speech. Such cases operationalize the fundamental intuitions underlying First Amendment doctrine in their starkest form.

It is also difficult to think of an abstract, rule-like approach to the low-value speech inquiry that would both adequately track our foundational intuitions regarding speech value and harm while imposing meaningful predictability and constraint on judicial decision-making. Currently recognized categories of low-value speech include defamation, fraud, true threats, incitement, fighting words, child pornography, obscenity, and speech integral to criminal conduct;[258] there is no simple and obvious characteristic that ties all of these categories together, other than the broad determination that the speech in such cases is particularly valueless or the harm associated with the speech is particularly severe. It seems highly unlikely that the analysis is amenable to any sort of highly abstracted, rule-like approach—indeed, the stark balancing judgment at the center of the inquiry suggests that any such formal rule risks being distorted or ignored by courts to match the outcome that would be dictated by this judgment.

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[257] *See* Lakier, *supra* note 10, at 2227 (observing that under a "purpose-based test," a court's exercise of discretion is "evident, and the court's reasoning and conclusions are subject to critique," while under the *Stevens* test, "the discretion built into the test is hidden, and is therefore much more difficult to understand and respond to").

[258] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion).

What, then, might constitute a better and more transparent approach to low-value speech? For starters, we would be better off simply embracing the traditional categorical balancing approach in this area—an approach that forces courts to directly articulate and confront fundamental questions of speech value and harm.[259] Furthermore, such foundational inquiries need not be the sole basis for the analysis; any additional considerations, such as a desire for a strong norm of caution and narrow construction of low-value speech categories, can be openly integrated as well. In other words, historical pedigree can still operate as a relevant consideration, but it should operate in a more transparent and accurate manner: as reflecting a cautionary norm that might serve as a thumb on the scale in conducting the overarching categorical balancing inquiry. Such an approach would bring all of the unstated value judgments underlying the *Stevens* test out into the open in a manageable way, thus allowing for a candid discussion about how we ought to value particular categories of speech as measured against their social harms and how, on a systemic level, the development of First Amendment doctrine should best proceed.

B. Recalibrating the Strict Scrutiny Default Rule for Content-Based Speech Restrictions

1. Doctrinal Distortion as a Symptom of Poor Systemic Design

Unlike the *Stevens* test governing low-value speech—which trades off the benefits of transparency for little gain in predictability or consistency—it is more difficult to judge, in the abstract, whether the traditional default rule applying strict scrutiny to content-based speech restrictions strikes an optimal balance between the benefits of doctrinal transparency and its costs. To the extent that mechanical application of the rule might produce anomalous results and allow courts to avoid transparent discussions regarding fundamental speech values, these are simply the costs that must be paid in order to reap the gains in predictability and consistency associated with the rule. Perhaps a predictable but rigid rule is better here under a judgment that we are more

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[259] *See* Han, *supra* note 112, at 88–89; *see also* Lakier, *supra* note 10, at 2225 ("First Amendment doctrine would be better off were the Court to more affirmatively embrace the purposive and functional, rather than historical, nature of the distinction between high- and low-value speech."). As I noted above, a categorical balancing approach would not be the *most* transparent possible approach to such cases, since it would involve balancing on the level of categories rather than on a case-by-case basis. *See supra* note 153. Such an approach, however, represents a more practical compromise between the benefits associated with transparency and the practical realities of judicial decision-making.

concerned with the arbitrariness associated with judicial discretion than the formal arbitrariness associated with an over- or under-inclusive rule.[260] And perhaps the rule's tendency to overprotect speech reflects our normative preference—based on considerations such as chilling effects on protected speech—for errors to be decided in favor of speech.[261]

But the fact that courts have, in a wide range of contexts, resorted to doctrinal distortion in order to avoid the anomalous consequences associated with a straightforward application of the strict scrutiny default rule strongly suggests that the current doctrinal framework has not captured the optimal balance between opaque, rule-like approaches on the one hand and transparent, standard-like approaches on the other.[262] Whether an area of doctrine is built primarily around rules or standards, doctrinal distortion is a telltale symptom of poor doctrinal design. To illustrate why this is the case, it is useful to conceptualize First Amendment doctrine as a hydraulic system.[263] To the extent that the doctrine produces results that accord with our fundamental intuitions regarding the value of speech and the social harms associated with speech, the system runs smoothly. But whenever the doctrine produces a result that contradicts this underlying foundational judgment, it creates pressure within the doctrinal system—pressure that must be contained or released in some manner.[264]

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[260] *See* Kennedy, *supra* note 40, at 1689.

[261] *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 688 (1978) ("[T]he chilling effect doctrine recognizes the fact that the legal system is imperfect and mandates the formulation of legal rules that reflect our preference for errors made in favor of free speech."); Stone, *supra* note 7, at 74 ("By applying strict scrutiny to virtually all content-based restrictions of high-value speech, rather than attempting to calibrate its standards according to assessments of the relative speech and governmental interests in each case, the Court has erected a strong barrier against institutional underprotection.").

[262] *Cf.* Bhagwat, *supra* note 44, at 984–85 ("[T]he existence of many hard cases might suggest the need to reconsider a constitutional rule as well as common law rules. There are clearly instances in which the Court has, and should, reconsider its constitutional doctrine in light of ongoing discomfort with the doctrine's consequences.").

[263] This metaphor has been invoked in a wide variety of contexts. *See, e.g.*, N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting) (observing that "[g]reat cases . . . make bad law" because they "exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend"); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 880 (2008) ("There is a hydraulic quality to federalism doctrine: weakening one set of constraints on national power tends to create pressure to tighten others if the overall objective of meaningful balance is to be maintained.").

[264] *Cf.* Han, *supra* note 30, at 1716 ("[L]egal doctrine is often hydraulic in nature; whenever the rigidness in one doctrinal area exerts pressure on courts' decisionmaking, that pressure often seeks release in other areas of the doctrine.").

Because, for obvious practical reasons, First Amendment doctrine cannot be built solely on ad-hoc balancing judgments, some degree of pressure will be inevitable. In a healthy doctrinal system, it is dealt with in two different ways. First, a good doctrinal system, like a good hydraulic system, is built to absorb some degree of pressure. This comes in the form of courts simply adhering to the established rule and living with the anomalous results produced—which, after all, is the necessary cost of building a more stable and predictable doctrinal framework.[265] Second, if this doctrinal pressure builds up to a dangerous extent, a good doctrinal system has release valves to release the pressure in the form of formal exceptions. For example, the Court's decision to create categorical low-value speech exceptions serves to release the significant doctrinal pressure that would build if courts were required to apply the default strict scrutiny rule in such cases.[266]

Doctrinal distortion occurs when the pressure created by the conflict between our intuitional judgments of what is fair or sensible or correct and the outcomes produced by the doctrine overwhelms the system. It happens when the magnitude of the pressure in one area is so immense—that is, when the fit of the rules is so poor—that the system cannot absorb it, causing ruptures and disturbances throughout. It happens when no release valves—that is, opportunities to craft formal exceptions—are built into the system to relieve this pressure, or when these release valves are insufficiently robust to save it.

As discussed above, the damage caused by this doctrinal distortion can be immense, destabilizing the entire doctrinal framework in areas well beyond the source of the initial doctrinal pressure; diluting the strict scrutiny analysis in one particular area, for example, risks diluting it everywhere, even in places where its near-categorical nature had been firmly established.[267] This potential for substantial, far-reaching collateral harm extends beyond the typical trade-offs made between transparent balancing approaches and opaque

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265 *See supra* notes 39–40 and accompanying text.

266 *See, e.g.*, Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1194–95 (1988) ("Were existing first amendment rules to be applied to commercial speech, we can foresee . . . dangers of doctrinal dilution, where 'doctrinal dilution' refers to the possibility that some existing first amendment rule would lose some of its strength because of the number of unacceptable applications it would generate when its new applications were added."); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 195 n.24 (1983) ("The low value theory . . . is an essential concomitant of an effective system of free expression, for unless we are prepared to apply the same standards to private blackmail, for example, that we apply to public political debate, some distinctions in terms of constitutional value are inevitable.").

267 *See supra* notes 249–50 and accompanying text.

rule-like approaches. Doctrinal distortion produces an undercurrent of uncertainty and arbitrariness beneath the doctrine's formal façade, and it obscures, on a broad level, the fundamental value judgments driving the courts' analyses.

Furthermore, it creates these substantial systemic costs in return for little systemic benefit.[268] At least within the specific areas where doctrinal distortion exists, all of the arguments in favor of rule-like approaches break down.[269] If the doctrine has been distorted, then facially administrable rules do not yield any actual benefits; they do not actually constrain, nor do they offer meaningful predictability.

Thus, the fact that courts have resorted to doctrinal distortion in order to avoid the default rule of strict scrutiny is a strong indicator that the doctrine is not calibrated correctly. It indicates that the pressure created by the rule's lack of fit in certain cases is so great that courts have chosen to circumvent the rule by distorting the doctrinal framework rather than simply apply it and live with these anomalies. Furthermore, courts have not effectively released this pressure by carving out formal exceptions, and this might be for any number of reasons: perhaps lower courts are institutionally averse to crafting such exceptions without Supreme Court guidance;[270] perhaps it reflects courts' general reluctance to craft numerous exceptions to bright-line rules; perhaps courts simply wish to avoid any negative perception associated with adopting formal exceptions that limit First Amendment protections. Whatever the particular balance of these (or other) contributing factors might be, the existence of doctrinal distortion in this area of First Amendment doctrine is a sign of the doctrine's infirmities.

One might argue, however, that the present doctrinal framework *is* correctly calibrated and the problem lies solely with judges' reluctance to apply it faithfully; that is, the theoretically best solution to this problem is for judges to simply *stop* distorting doctrine in this manner and consistently apply the default rule when it is called for. I do not doubt that, in the abstract, formal

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[268] The only benefit of such distortion is that it produces a greater number of "correct" answers—although it does so in a particularly unconstrained and opaque manner.

[269] *Cf.* Bhagwat, *supra* note 44, at 1017 (observing that his proposed doctrinal framework "depends on a faith in doctrine and its ability to constrain judges, even in the worst of times and even against their own impulses").

[270] *See, e.g.*, United States v. Stevens, 533 F.3d 218, 225 (3d Cir. 2008) ("Without guidance from the Supreme Court, a lower federal court should hesitate before extending the logic of *Ferber* to other types of speech.").

doctrine has constraining power such that judges will sometimes decide cases in a way they perceive as "incorrect" if that's what the formal rule dictates. I also do not doubt that the Supreme Court can play a meaningful role in limiting particular distortions that may emerge in lower courts, as evinced in its *Reed* opinion.[271] But where, as here, courts—including the Supreme Court—have consistently distorted doctrine to circumvent the formally applicable rules, there is usually little reason to hope that they will suddenly change their behavior. Adjusting the doctrine towards greater transparency might only be the second-best solution to this problem of doctrinal distortion, but it may be the more practical and realistic solution, and it certainly represents a superior state of affairs to the current one.

2. Locating a Better Doctrinal Balance

Given that the distorting pressure in this area of First Amendment doctrine is produced by the lack of fit associated with the categorical default rule of strict scrutiny, a better doctrinal balance can be reached by introducing a greater degree of transparent tailoring to the analysis. This approach was touched upon by Justice Kagan in her opinion in *Reed*. Delving beneath the doctrine to the underlying foundational reasons behind it, she observed that because subject-matter regulations "may have the intent or effect of favoring some ideas over others," we generally "insist that the law pass the most demanding constitutional test."[272] She argued, however, that when this sort of danger "is not realistically possible"—such as in the case of reasonable sign regulations—"we may do well to relax our guard so that 'entirely reasonable' laws imperiled by strict scrutiny can survive."[273] In Justice Kagan's view, "We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."[274] As Justice Breyer similarly observed in his concurring opinion, "The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny,' would permit."[275]

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271 *See supra* text accompanying notes 220–22.
272 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring in the judgment).
273 *Id.*
274 *Id.*
275 *Id.* at 2234 (Breyer, J., concurring in the judgment).

Such increased tailoring of the doctrine would relieve the substantial tension created by the bluntness of the current strict scrutiny default rule, which would in turn reduce the risk of doctrinal distortion on the part of courts.[276] At the same time, it would introduce greater transparency to the analysis, with all of the associated benefits. By limiting, in a forthright manner, the most dissonant applications of the rule, increased tailoring would make it easier for courts to apply the established rules consistently in all circumstances.[277]

To be clear, to say that a move towards greater doctrinal tailoring would remedy the current doctrinal imbalance is not to say that maximal tailoring—whether in the form of a completely open-ended balancing analysis or a highly voluminous set of exceptions—is the desired goal; such approaches have their own substantial costs.[278] It is only to say that the way to fix the present doctrinal imbalance is to push the doctrine incrementally towards the more open and transparent side of the spectrum; how strong this push must be is a harder question to answer in the abstract.[279]

On a more practical level, what might this doctrinal shift towards more tailoring and greater transparency look like? It could perhaps take the form of an increased willingness of courts to carve out explicit categorical exceptions to the default rule of strict scrutiny, to which some less onerous standard of review—like intermediate scrutiny—would apply. Although the Supreme Court has occasionally carved out such categories—most notably, in the

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[276] Indeed, this is the same underlying rationale for the Court's recognition of categorical low-value speech exceptions to the default rule. *See supra* note 266 and accompanying text.

[277] *Cf.* Stone, *supra* note 266, at 195 n.24 ("[T]he low value theory acts as a safety valve, enabling the Court to deal sensibly with potentially harmful but relatively 'unimportant' speech without diluting the protection accorded expression at the very heart of the guarantee.").

[278] *See* Schauer, *supra* note 266, at 1199–200 (observing that "[t]he more separate categories there are within the first amendment, . . . the more complex and cumbersome the full corpus of first amendment doctrine becomes," and outlining the costs of such complexity, such as increasing the likelihood of mistakes and rendering the doctrine incomprehensible to "non-legally trained front line" officials).

[279] Some have argued that the addition of greater doctrinal flexibility in individual rights cases "cannot be confined to the situations for which it was envisioned, and therefore will over time produce unacceptable results in other cases." Bhagwat, *supra* note 44, at 999; *see also* Lathrop v. Donohue, 367 U.S. 820, 873–74 (1961) (Black, J., dissenting) ("This case reaffirms that . . . the balancing test cannot be and will not be contained to apply only to those 'hard' cases . . . involving the question of the power of this country to preserve itself."). But as discussed above, the particular doctrinal distortions that courts create in order to reach their desired results can similarly infect doctrine elsewhere. As between the two evils posed in these contexts, it seems preferable to err on the side of doctrinal transparency, since any steps down the slippery slope will at least be openly broadcast rather than smuggled under the surface of formal doctrine.

context of content-based regulations of truthful commercial speech[280]—such carve-outs have been rare, despite the broad range of cases where applying strict scrutiny in its pure form would lead to anomalous or dissonant results. Thus, courts might explicitly carve out certain "middle-value" categories of speech—such as, for example, sexually explicit speech, or false statements of fact, or detailed factual instructions for dangerous or illegal behavior—as exceptions to the default rule such that intermediate scrutiny applies to content-based regulations.[281] Because, under this system, the basis for the differential treatment of such speech would be explicitly delineated, it would represent a far more transparent approach than the current one, in which courts have surreptitiously distorted doctrine to reach their desired results.

Or, perhaps, this sort of doctrinal adjustment can be achieved by adjusting the default rule itself. The tension created by the traditional strict scrutiny rule lies in the fact that the rule applies as a *default* to all residual speech that does not fall into a specifically designated category of lower-value speech. In other words, unless a court can fit the speech within one of these categories—which the court may be disinclined to do for the reasons stated above[282]—current doctrine requires it to apply strict scrutiny to any content-based restrictions of the speech. This pressure would be alleviated, however, if the doctrine instead called for courts to (1) explicitly identify and carve out categories of *high-value* speech, just as they do with low-value speech categories; (2) limit the application of strict scrutiny to content-based speech restrictions only to those categories of speech; and (3) apply *intermediate scrutiny* as the default rule for all remaining residual speech.[283] Under such a regime, the default rule facing courts in difficult cases dealing with content-based speech restrictions would not be the onerous and potentially ill-fitting strict scrutiny standard, but rather the more open-ended and transparent intermediate scrutiny standard. Such an approach can be viewed as effectively formalizing and bringing out into the open what courts have already been doing implicitly through doctrinal distortion.

Each option has its advantages and disadvantages, which I will not dwell on for present purposes. But the case law suggests that the current doctrinal

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280 *See, e.g.*, Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

281 Bhagwat proposes a number of such explicit exceptions in a forthcoming article. *See, e.g.*, Bhagwat, *supra* note 225, at 19–23 (arguing that appropriate subject-matter-based restrictions to allocate scarce speech opportunities should be subjected to a more deferential standard of review).

282 *See supra* text accompanying note 270.

283 I discuss such an approach in a forthcoming article. *See* Han, *supra* note 191.

approach pushes too far in the direction of categorical rules at the expense of transparency and flexibility, and that some form of doctrinal adjustment is warranted. And indeed, current members of the Court have openly agitated for this sort of change, as reflected by Justice Kagan's call for "a dose of common sense" in her *Reed* concurrence,[284] Justice Ginsburg's argument against the application of strict scrutiny in *Williams-Yulee*,[285] and Justice Breyer's repeated characterization of the "tiers of scrutiny as guidelines informing our approach" rather than "tests to be mechanically applied."[286] The incremental benefits associated with the increased transparency brought by such adjustments would be substantial, and such benefits are obtainable at a comparatively limited cost to predictability and consistency.

CONCLUSION

Designing doctrine to effectuate the First Amendment's protection of free speech is a difficult undertaking. Neither the Free Speech Clause itself[287] nor the historical record surrounding its ratification provide much in the way of guidance,[288] and courts and commentators cannot even agree on the underlying theoretical rationales behind the Constitution's mandate that speech be entitled to special protection.[289] As a result, courts often approach First Amendment issues narrowly and incrementally, focusing on resolving the specific case at hand while glossing over broader considerations of doctrinal design.[290]

This incremental approach to First Amendment jurisprudence, however, has its costs. As Schauer has elegantly stated,

> We would hardly think it appropriate to design a building by deciding beam by beam, pillar by pillar, and brick by brick, as we went along,

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284 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring in the judgment).

285 Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1673–75 (2015) (Ginsburg, J., concurring in part and concurring in the judgment).

286 *Id.* at 1673 (Breyer, J., concurring); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2551–52 (2012) (Breyer, J., concurring in the judgment); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400–03 (2000) (Breyer, J., concurring).

287 *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

288 *See* STONE ET AL., *supra* note 17, at 6–7 ("Scholars have long puzzled over the actual intentions of the framers of the first amendment. . . . The framers themselves were unsure what a constitutional guarantee of 'freedom of the speech or of the press' would mean."). As Schauer has observed, "The text of the first amendment is hardly self-defining, and any attempt to say what is included and what is not, what is at the core and what is not, necessitates the development of a theory to enrich the sparse words of the amendment itself." Schauer, *supra* note 266, at 1185.

289 *See supra* text accompanying notes 17–25.

290 *See* Schauer, *supra* note 266, at 1202.

> what the building was to look like. Instead the building's structural integrity depends on a design at the beginning, a design that looks to the full shape of the completed structure. . . .
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> . . . [W]e may discover that the consequences of incremental doctrinal design are quite similar to the consequences of incremental architectural design.[291]

Of course, constructing doctrine is not the same as constructing a building. Particularly in an area of doctrine as potentially expansive and complex as the First Amendment, we cannot possibly foresee every potentially relevant factor and design an elegant and complete doctrinal edifice in advance.[292] But the metaphor serves as a useful reminder that courts, in crafting First Amendment doctrine, should not lose sight of the doctrine's normative superstructure—the foundational reasons why we attribute value to speech and our judgments as to how this value ought to be measured against different types and degrees of social harm. This normative superstructure represents the broad design of the doctrinal edifice being built, and doctrinal transparency is a vital means of ensuring that these foundational intuitions and judgments do not fade into the background.

Of course, the benefits associated with doctrinal transparency must always be balanced against many other normative and practical considerations in constructing doctrine. But it is vital that courts carefully consider the true costs of adopting opaque approaches. It is certainly possible, maybe even likely, that we will never fully agree as to what the overarching blueprint for First Amendment doctrine ought to look like. But if there is any chance of building a coherent First Amendment jurisprudence—an elegant and balanced doctrinal edifice—then articulating, revisiting, and grappling with these foundational intuitions and judgments will be a necessary and important part of that process.

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291 *Id.*

292 *Id.* ("Naturally, common law development, as apt a characterization as any for what the courts do with respect to the first amendment, cannot design the edifice in advance.").