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The Categorical Free Speech Doctrine and Contextualization

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THE CATEGORICAL FREE SPEECH DOCTRINE AND CONTEXTUALIZATION

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ABSTRACT

This Article discusses the impact of the Supreme Court's recently enhanced categorical approach to free speech analysis. It demonstrates that, contrary to the concerns of some other scholars, the Court should not be understood to be entirely averse to balancing interests. In several cases—such as those dealing with government employee speech, civil defamation, and fraud—the Court continues to rely on balancing approaches. This has created a seeming internal contradiction among precedents that appear only to recognize the constitutionality of content-based restrictions on low-value categories of speech that have historically and traditionally been unprotected. These two lines of cases can and should be reconciled for the sake of adjudicative predictability and stability.

The Court's categorical free speech doctrine should be understood as a bar only against ad hoc balancing, but not as a total prohibition against a contextual analysis of expressive and countervailing social interests. Indeed, even some of the categories the Court has identified as being historically unprotected—specifically obscene, defamatory, and fraudulent speech—were judicially derived through evaluations of private and public concerns. I argue that the Court should approach free speech regulations from a holistic standpoint that evaluates whether a restriction on speech arises from a conflict with constitutional, statutory, or common law interests; whether the restricted expression has historically or traditionally been constitutionally protected; the breadth and strength of general welfare policies behind the speech restriction; the fit between the objectives and regulations; and whether a less restrictive means could be enforced to meet particularized goals. This balancing requires

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more complex analysis than categorical induction, but contextual reasoning is more likely to identify the full spectrum of factors pertinent to a decision.

INTRODUCTION

The Supreme Court has long sought to make sense of First Amendment principles. Over the past century, the Court has created a variety of context-rich doctrines preserving the liberty of expression while recognizing that some forms of communication are not constitutionally protected. Free speech jurisprudence has consistently identified categories that are outside the heightened protection of the Free Speech Clause and explained the constitutional rationales behind decisions. The complex nature and variety of expressive issues associated with one of America's most treasured rights have required the Court to wrestle with multifarious constitutional values. The weight of stare decisis has always required judges to apply reasoning and classifications from previous decisions but to remain open to the arguments of litigants seeking fresh understandings, especially in the context of ever-advancing technologies and countervailing sociolegal concerns.

Several recent cases have announced a more bright-line-sounding doctrine than the Court had relied on in previous decisions. Heralding this new trend, *United States v. Stevens* emphatically announced that there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[1] The Court recognized only a short list of unprotected speech categories.[2] In subsequent cases, majorities emphasized a presumptive hesitancy to lengthen that list of traditionally unprotected speech.[3] Several scholars have pointed out that this rule of decision appears to inflexibly disregard living constitutional developments[4] and to be historically inaccurate.[5]

The modern categorical approach is particularly difficult to square with the various balancing doctrines the Court has created for adjudicating matters, such as fighting words, that cause an immediate threat to public order.[6] Curiously, even as the Court asserted its case against "ad hoc balancing of

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1 559 U.S. 460, 472 (2010).

2 *Id.* at 468–69.

3 *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733–34 (2011).

4 *See, e.g.*, Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 399–401 (2014).

5 Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2169, 2212 (2015).

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

relative social costs and benefits,"[7] it continued to balance public concerns in other areas. For example, in a case upholding the material-support-for-terrorism statute, the Supreme Court used strict scrutiny analysis to balance the interests of public safety against those of persons wishing to provide political advice to statutorily designated foreign terrorist groups.[8]

The seeming contradiction between the new line of categorical speech cases and the continued validity of free speech balancing precedents raises a curious conundrum. Parsing the Court's meaning is necessary to reconcile these conflicting-sounding lines of reasoning. Only by unpacking the Court's meaning and taking it on its own terms will it be possible to discern the relevance of existing precedents and the likely direction of future litigation.

This Article seeks to locate a middle ground—one that provides clarity to judges faced with free speech cases. It reflects on the potentially negative ramifications of abandoning the balancing of speakers' and society's concerns in favor of an inflexibly historical interpretation of the First Amendment. A contextual balancing of interests need not be ad hoc, but should be nuanced in the evaluation of pertinent history, tradition, government policy, and case-by-case specifics. Part I reviews the *Stevens* line of cases. Part II reviews several criticisms of the categorical free speech doctrine. Part III parses the categorical approach to demonstrate its shortcomings for explaining the contexts of several free speech precedents on which the Roberts Court relied. Part IV presents a contextual mode of balancing that is not ad hoc but, rather, sensitive to the historical value of communicative content, along with the multiple factors typically involved in difficult cases.

I. UNPROTECTED CATEGORIES OF SPEECH

In *United States v. Stevens*, an opinion with far-reaching implications, the Supreme Court announced a historical-sounding categorical approach for identifying low-value speech.[9] The 8-to-1 majority opinion in that case, written by Chief Justice John Roberts, found unconstitutional the Animal Crush Videos Act, which prohibited the creation, distribution, or possession of crush videos depicting actual suffocation, drowning, and infliction of injuries on non-human animals.[10] The statute was clearly passed with the moral intent of

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7 559 U.S. at 470.

8 Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724, 2734 (2010).

9 559 U.S. at 468–72.

10 *Id.* at 464–65 (discussing 18 U.S.C § 48 (2010)).

punishing and deterring the viciously brutal treatment—intentional torture, mutilation, killing, and other cruelties—of living animals.[11] The legislation targeted visual recordings, which typically showed women in high heels torturing cats, dogs, monkeys, mice, hamsters, and other animals.[12] On the videos, animals were heard screaming in pain.[13] Because the time and place of the recordings were typically unknowable, defendants in state courts were often successful in having cases dismissed for lack of jurisdiction or as untimely filed under a state's statute of limitations.[14] Moreover, although all states had statutes against cruelty to animals, "none ha[d] a statute that prohibits the sale of depictions of such cruelty."[15] The defendant in *Stevens* did not fit into the mold. He sold videos not of perverse sexual cruelty but of pit bulls fighting among themselves and attacking other animals.[16] The laws of all fifty states and the District of Columbia prohibit dogfighting and other acts of animal cruelty.[17]

In his majority opinion, Chief Justice Roberts identified a finite set of unprotected speech categories.[18] He disavowed any "free-floating test for First Amendment coverage," prohibiting the state from using "ad hoc balancing of relative social costs and benefits."[19] *Stevens* rejected a weighing analysis that the government had proposed,[20] finding it "highly manipulable."[21] On its face, Chief Justice Roberts seemed to be saying that judges could only identify low-value speech categories through strictly historical findings rather than through a principle-rich analysis. Ultimately, the Court held animal cruelty videos were not among any historically banned category of speech and therefore struck down the Crush Videos Act for being substantially overbroad.[22]

Justice Alito alone dissented, taking a more nuanced approach. He understood the depiction of animal cruelty to be inherent to the underlying

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11 *See* H.R. REP. NO. 106-397, at 2–4 (1999).
12 *Id.* at 2.
13 *Id.*
14 *Id.* at 3.
15 *Id.*
16 United States v. Stevens, 559 U.S. 460, 466 (2010).
17 *Id.*
18 *Id.* at 468.
19 *Id.* at 470.
20 Brief for United States at 8, *Stevens*, 559 U.S. at 470 (No. 08-769) ("Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.").
21 *Stevens*, 559 U.S. at 472.
22 *Id.* at 482.

criminality. As he put it, while "[t]he First Amendment protects freedom of speech . . . it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes."[23] He understood that these videos could not have been created but for the violation of legal standards on the treatment of animals and that the majority's decision would hinder Congress from deterring future commissions of the crimes:

> The Court strikes down in its entirety a valuable statute that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of "crush videos," a form of depraved entertainment that has no social value. The Court's approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted.[24]

Unlike the majority, Justice Alito recognized the legitimacy of regulating the wanton production, sale, and consumption of actual (rather than digitally contrived) brutality against animals.

In a doctrinal portion of his dissent, Justice Alito challenged the Court's finding that the Act constituted an overbroad restriction on constitutionally protected speech.[25] As a general principle, the overbreadth doctrine recognizes the need to "strike a balance between competing social costs."[26] That balance is meant to maintain the social need to regulate antisocial criminal conduct unless the law's sweep "prohibits a substantial amount of protected speech."[27] While the majority in *Stevens* quoted the overbreadth doctrine with no intimation of abandoning it,[28] the opinion made no effort to balance social values of speech and criminality, which would have been the logical means of determining whether the anti-cruelty law regulated more speech than necessary to achieve the government's aim. Justice Alito thought the majority contrived the claim that the crush video prohibition would impact video sales of legal activities, such as hunting or "humane slaughter."[29] He believed that hunting fell under one of the statute's express exceptions for depictions of "educational," "historical," or "serious scientific" materials.[30]

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23 *Id.* at 493 (Alito, J., dissenting).
24 *Id.* at 482 (citation omitted).
25 *Id.* at 483–90.
26 United States v. Williams, 553 U.S. 285, 292 (2008).
27 *Id.*
28 *Stevens*, 559 U.S. at 474.
29 *Id.* at 486, 489 (Alito, J., dissenting).
30 *Id*. at 487–88, 490.

The following year, Justice Scalia relied on the same reasoning in *Brown v. Entertainment Merchants Ass'n* to strike a state law that restricted the sale and rental of violent video games to minors.[31] As in *Stevens*, the majority listed a variety of speech categories whose content did not qualify for First Amendment protections, such as obscenity, incitement, fraud, defamation, speech linked to criminal activity, and fighting words.[32] To avoid the appearance that it was adopting a broad definition, the Court qualified this group of low-value speech as "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[33] The Court's rationale was tied to a historical claim about the constitutional value of speech, that no legislation could survive statutory fiat: "[W]ithout 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.'"[34] The Court relied on strict scrutiny analysis because violent depictions were not a traditional category of unprotected expression.[35] Under this rigorous test, which found that violent but non-threatening expression is not among the unprotected category, California lacked a compelling government interest to enforce the content-based regulation on speech.[36] Jointly, *Entertainment Merchants Ass'n* and *Stevens* stand for the proposition that the judiciary will not be deferential to lawmakers' assessments about what speech is low value and therefore unworthy of full constitutional protection.[37]

As if there was any doubt, *United States v. Alvarez*[38] made clear that the Roberts Court is determined to imprint the categorical approach in a variety of free speech contexts. *Alvarez* relied on the *Stevens* paradigm of unprotected categories in finding that the Stolen Valor Act of 2005[39] was

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[31] 131 S. Ct. 2729 (2011).

[32] *Id.* at 2733; *Stevens*, 559 U.S. at 468.

[33] *Entm't Merchs. Ass'n*, 131 S. Ct. at 2733 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

[34] *Id.* at 2734 (quoting *Stevens*, 559 U.S. at 470).

[35] *Id.* at 2736, 2738.

[36] *Id.* at 2738–41.

[37] This proposition is further ingrained in *Reed v. Town of Gilbert*, in which the Court rejected content-based regulations without taking into account whether some forms of expression are more closely connected to First Amendment than others. 135 S. Ct. 2218 (2015).

[38] 132 S. Ct. 2537 (2012) (plurality opinion).

[39] 18 U.S.C. § 704 (2006).

unconstitutional.[40] Alvarez had violated the federal statute by intentionally lying, in order to deceive others, that he had been awarded the Congressional Medal of Honor.[41] Writing for a plurality, Justice Kennedy relied on "exacting scrutiny" to review the suppression of speech.[42] Justice Kennedy treated the statute as a content-based restriction and, therefore, presumed it to be invalid absent the government's ability to meet the heavy burden of demonstrating the Act to be constitutional.[43]

Justice Kennedy reiterated that a "free-floating test" of "ad hoc balancing of relative social costs and benefits" was "startling and dangerous."[44] The plurality listed several content-based restrictions it considered to be historically and traditionally warranted, repeating many of the categories in *Stevens* and *Entertainment Merchants Ass'n*, adding child pornography and true threats to the low value list.[45] Justice Kennedy referred to one of George Orwell's dystopian novels, *1984*, to illustrate the autocratic consequences of censuring speech.[46]

Justice Alito's dissent demonstrated that the historico-traditional categorical approach is not as determinative as its supporters claim. Contrary to the plurality, Justice Alito believed Alvarez's false representation of being the recipient of the highest military award did not warrant First Amendment scrutiny.[47] Instead, Justice Alito regarded the Stolen Valor Act to be part of "a long tradition . . . to protect our country's system of military honors."[48] This was a very different rendition of American heritage than the one found in Justice Kennedy's opinion. Justice Alito further asserted that Congress passed the law to punish and prevent widespread fraudulent veterans' benefits filings by persons who had not been awarded military honors.[49] Justice Alito then reviewed a variety of precedents dealing with fraud, perjury, and other demonstrable falsehoods with no First Amendment credentials.[50] The low-

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40 *Alvarez*, 132 S. Ct. at 2543.

41 *Id.* at 2542.

42 *Id.* at 2543.

43 *See id.* at 2543–44. ("[T]he Constitution 'demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.'" (quoting Ashcroft v. ACLU, 542 U.S. 656, 660 (2004))).

44 *Id.* at 2544 (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

45 *Id.*

46 *Id.* at 2547.

47 *Id.* at 2560–62 (Alito, J., dissenting).

48 *Id.* at 2557.

49 *Id.* at 2558.

50 *Id.* at 2560–61.

value nature of the speech at bar was evident because so "many kinds of false factual statements have long been proscribed."[51] On the other hand, First Amendment review is warranted where regulations censure matters of public concern, general wisdom, literature, or politics.[52] The *Alvarez* dissent's and plurality's conflicting perspectives on the historical trends of free speech doctrine demonstrate the difficulty with the claim that there are readily discernable, historical, traditional, well-defined, and unambiguous categories that receive no First Amendment protection. Expressions are often too complex to pigeonhole into discrete categories.

The dissent in *Alvarez* would have been better off engaging the sophisticated free speech analysis rather than couching its arguments on the statute's pedigree, or as Justice Alito called it, "long tradition." At the same time, the dissent acknowledged that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech."[53] The breadth of these areas requires nuanced analysis rather than simplistic categorization, especially when an issue of first impression comes before the Court. For example, prohibitions against "false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat"[54] that, in addition to tradition, judicial scrutiny would require a careful weighing of democratic, autonomy, and audience interests at stake in litigation, as well as an examination of regulatory scope. A judge determining whether statements fall under any of these categories would need to examine the content of statements—rather than accepting litigants' and lower courts' categorizations of them as being in one or more of these sets of expressions—and then identify whether there is any overriding public reason (national security, incitement, and the like) that the state can give for censuring them. With those categories, the default presumption is that, absent truly compelling reasons, their value to individuals and society outweighs any government justification for suppression. The existence of protected and unprotected categories of speech itself demonstrates a careful reflection of social values related to the First Amendment, not simply history, tradition, and doctrine. Low-value speech does not warrant the same amount of judicial

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[51] *Id.* at 2561.

[52] *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 61 (1982); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[53] *Alvarez*, 132 S. Ct. at 2564 (Alito, J., dissenting).

[54] *Id.*

scrutiny. For the time being, I refrain from explaining the details of contextual balancing further, and reserve that topic for Parts III and IV of this Article.

II. CRITICISM OF *UNITED STATES V. STEVENS* AND ITS PROGENY

The Supreme Court's recent insistence on the categorical framework has been widely criticized. Professor Joseph Blocher, for instance, points out that a variety of categories excluded from First Amendment protections reflect a balancing of values.[55] The Court sometimes, rather magisterially, treats categorical rules as if they were constitutional commands rather than judicial doctrines.[56] Categorical rules, Blocher argues, prevent judges and policymakers from exercising their constitutional obligation to balance individual interests against government concerns.[57]

Professor William Araiza is more conciliatory. He recognizes some value in the rigid rules in *Stevens* because "they provide enough of a thumb on the judicial scale to produce predictable results that do a reasonably good job of protecting the constitutional value at issue."[58] In many cases, an inflexible methodology will likely empower judges to fulfill their responsibility of acting as a bulwark against government intrusion into free speech values. On the other hand, judges can manipulate objective-sounding claims to categorical rigidity as a smokescreen to obfuscate personal or political leanings. Furthermore, as Araiza points out, the reliance on rigid rules might allow "judges to hide behind that standard when striking down speech restrictions that may be justified by their unique factual or social context."[59] According to this perspective, the *Stevens* approach can sometimes lead to rights-enhancing results, but it is not a panacea on which the judiciary should ubiquitously rely.

Writing on the same subject, Professor Steven Shiffrin regards the Court's claim in *Stevens* with suspicion. While he concedes that some precedents have relied on historical pedigree, there is nothing unusual about the Court using an

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[55] Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 388 (2009).

[56] Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1652 (2005) ("In a striking number of cases the Court has forgotten the reasons behind particular rules and has come to treat them as nothing more than statements of constitutional requirements. This . . . distorts the relationship the Court has to other governmental actors and to the American people.").

[57] Blocher, *supra* note 55, at 382 ("The creation of the category cuts off future adjudicators from the underlying value and prohibits the reweighing of interests.").

[58] William D. Araiza, Citizens United*,* Stevens*, and* Humanitarian Law Project*: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 837 (2011).

[59] *Id.* at 836–37.

exclusively balancing analysis without so much as referring to historical matters.[60] Balancing is thus at least as much a part of stare decisis as traditional categorization is. Moreover, Shiffrin goes on to say that many of the current historical categories, such as obscenity, defamation, and criminal advocacy, "are entirely different than at the time of the framing; indeed their most recent definitions have been refined in a line of cases beginning in the late 1960s."[61] The category of actual malice used in those defamation cases involving public figures about public matters,[62] and cited in *Alvarez*,[63] is a construct of the twentieth century with no historical antecedents traceable to the nation's founding.

Professor Toni Massaro rhetorically questions the notion that there is any definitive way to uncover historical or traditional exceptions to free speech protections.[64] Rather, she argues that case-by-case balancing is necessary to weigh speech against the harm resulting from it.[65] As a historical matter, the First Amendment applied only to the federal government. The Court only expanded its coverage to state regulations in the twentieth century under the doctrine of incorporation.[66] Moreover, there are some categories of speech that the Court has only recently declared are constitutionally protected. These include the much debated commercial speech[67] and modern government speech[68] doctrines. Furthermore, historical questions about what the framers thought of contemporary matters, such as the regulation of violent video games, are nonsensical given that digital media's novelty.[69]

Academic criticism has consistently regarded the Court's categorical statements of free speech limitations to be almost absolutist. This does not square with a variety of free speech doctrines, and therefore many scholars

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60 Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1490 (2014).

61 *Id.*

62 *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

63 United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion).

64 Massaro, *supra* note 4, at 400.

65 *Id.*

66 Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating First Amendment freedom of speech and press).

67 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) (stating that government has more latitude to circumscribe commercial communication when it is misleading or "related to unlawful activity"). Otherwise, "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal." *Id.*

68 Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("A government entity has the right to 'speak for itself.'" (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000)).

69 Massaro, *supra* note 4, at 400.

who have examined the subject believe the Court has gone astray from existing precedents. I have made similarly critical observations about the Court's narrow statements about historical and traditional categories of unprotected speech.[70] Part IV of this Article seeks a way forward, one that acknowledges that the Court's categorical statements on free speech are now a lasting feature of First Amendment jurisprudence, but also better explains how a more holistic stare decisis should play a role in future litigation. My aim is to fold the categorical model into the parameters of precedents. But first I turn to a variety of balancing doctrines that stand at odds with the *Stevens* model.

III. CONTEXTUAL SPEECH BALANCING

Balancing resounds in many aspects of free speech jurisprudence, rendering the Court's recent categorical pronouncement on the topic so controversial.[71] As a first step to understanding how the historico-traditional method of interpretation fits with the existing body of law, this Part examines the categories set out by the Court in *Stevens*. Perhaps surprisingly, some of those categories were developed in cases through sophisticated weighing of government and private interests. Secondly, I discuss balancing jurisprudence more generally in cases involving public employees and constitutional defamation. This Part then concludes by scrutinizing the Roberts Court's forays into balancing free speech analysis.

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[70] Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. (forthcoming 2016).

[71] *See* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 85–86 (2012) (arguing that the Court has long used balancing analysis in categories like fighting words, which reveals the "fundamentally illusory nature of the Court's historical analysis for determining the boundaries of the First Amendment"); Charles W. "Rocky" Rhodes, *The Historical Approach to Unprotected Speech and the Quantitative Analysis of Overbreadth in* United States v. Stevens, 2010 EMERGING ISSUES 5227 (LexisNexis July 30, 2010) ("*Stevens* announced a sea change in the Court's approach to identifying categories of unprotected speech. The commonly accepted view before *Stevens* comported with the government's position—that unprotected categories of speech were identifiable through a cost-benefit analysis, allowing for the expansion of such classes to new modes of expression and communication."); Nadine Strossen, United States v. Stevens*: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2009–2010 CATO SUP. CT. REV. 67, 84–85 ("The Court's effort in *Stevens* to limit categories of unprotected expression to the finite set that it has historically recognized is underscored by *Stevens*'s novel characterization of the child pornography exception to First Amendment protection. . . . [T]he Supreme Court's *Stevens* opinion did not acknowledge that the Court had recognized child pornography as a new category of unprotected expression. To the contrary, the *Stevens* Court treated child pornography as a specific example of a longstanding more general category of unprotected expression, citing a case that had recognized this broader excluded category just five years after *Chaplinsky*.").

A. United States v. Stevens*'s Reliance on Precedents*

In *Stevens*, Chief Justice Roberts asserted what seemed to be a historical claim, dating to the ratification of the Bill of Rights:

> "From 1791 to the present," . . . 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." These "historic and traditional categories long familiar to the bar,"—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[72]

Two of these examples—incitement and speech integral to criminal conduct—in fact refer to holdings rendered without social balancing.[73] As to his other examples, however, Chief Justice Roberts's claim is unfounded and seemingly misleading.

1. Obscenity

The Supreme Court first announced that obscenity is not within the scope of First Amendment protections in a 1957 decision, *Roth v. United States*.[74] Fifty-three years later in his majority opinion to *Stevens*, Chief Justice Roberts cited *Roth* in support of his statement that obscenity is a historically and traditionally recognized category of low-value speech.[75] The *Stevens* majority's reliance on that case, as part of a formalistic statement against ad hoc balancing, implied that obscenity determinations do not require a weighing

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[72] United States v. Stevens, 559 U.S. 460, 468–69 (2010) (citations omitted) (first quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992); then quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment); and then quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

[73] *See* Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (incitement); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (integral to criminal conduct).

[74] 354 U.S. 476 (1957). The Supreme Court later refined *Roth*'s obscenity test in *Miller v. California*. 413 U.S. 15 (1973). *Miller* provides the following test:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

[75] *Stevens*, 559 U.S. at 468.

of relevant content, but that assumption turns out to be mistaken. His choice of *Roth* was unexpected, and seemed forced, because its test for obscenity has long been superseded by later doctrinal developments.[76]

Roth established that courts should use the "contemporary community standard" to evaluate whether an obscenity statute's limits on prurient expressions are constitutional.[77] It also required that juries consider the work in its entirety and ascertain its effect on an average, rather than a hyper-sensitive, person.[78] Both standards are used today, but in more refined forms.[79] Obscenity, the Court announced in *Roth*, is "utterly without redeeming social importance."[80] The case involved the conviction of a defendant for mailing obscene materials in contravention to a federal statute.[81] The Court's recounting of history was informative. A survey revealed that Congress had enacted twenty obscenity laws between 1842 and 1956.[82] That method is closely related to *Stevens*'s classification scheme of low-value speech. In neither case did the Court provide judges with any precise time frame or historical method to rely on in future cases for uncovering previously unrecognized, traditional categories of low-value speech.

Chief Justice Roberts read *Roth* to establish a bright-line dichotomy between speech that enjoys no constitutional protection and speech covered by the First Amendment.[83] In support of this position, the majority in *Roth* asserted that "[a]ll ideas having even the slightest redeeming social

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[76] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 497 (1985) ("Under *Roth*, obscenity was equated with prurience and was not entitled to First Amendment protection. Nine years later, however, the decision in *Memoirs v. Massachusetts* established a much more demanding three-part definition of obscenity, a definition that was in turn modified in *Miller v. California*." (citations omitted)); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 n.10 (1975) ("In *Miller v. California*, we abandoned the *Roth-Memoirs* test for judging obscenity with respect to adults." (citation omitted)). In the categorical line of cases, the court continued to cite *Roth* for the obscenity category in *Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011). Only in *Alvarez* did the Court cite to *Miller*, and it did so without reflecting on the implications such a substitution had on its argument against ad hoc balancing. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

[77] Roth v. United States, 354 U.S. 476, 489 (1957) (defining obscenity as material that "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest").

[78] *Id.*

[79] *See infra* text accompanying notes 89–94.

[80] *Roth*, 354 U.S. at 484.

[81] *Id.* at 480.

[82] *Id.* at 485.

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

importance . . . have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests."[84]

However, a closer look at *Roth* reveals that Justice Brennan's majority rationale was more than a survey of history and tradition. The opinion stated that the First Amendment protects all ideas with the "slightest redeeming social importance."[85] The Court unmistakably remarked that obscenity is "utterly without redeeming social importance,"[86] which is a value judgment, not simply a statement of historical fact. Justice Brennan explained that whatever may be said in defense of obscene speech, it lacks social value and does not warrant First Amendment protection.[87]

The history of obscenity doctrine does not end with *Roth*. Its statement that obscenity is "utterly without redeeming social value" begs the question of how to identify such a value, especially since it should be judged against what the average person, "applying contemporary community standards," would find to be prurient.[88] Greater nuance was necessary to provide lower court judges with adequate guidance for weighing the content and subject of controversial materials against standards of community decency. To that end, the Court later treated obscenity as outside the purview of the First Amendment, not only for historical and absolute reasons but also because it lacks First Amendment communicative value. Without context, the *Roth* definition is either circular—seemingly stating that obscenity is not socially valuable because it is obscene or that material is obscene because it lacks social value—or so ambiguous as to provide insufficient judicial guidelines for identifying the category.

The current obscenity test, which appeared in a seminal 1973 case and continues to be good law, contains three parts: (1) whether an "average person" relying on "contemporary community standards" would find the work "taken as a whole, appeals to the prurient interest"; (2) whether it "depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) "whether the work, taken as a whole, lacks

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84 *Roth*, 354 U.S. at 484.
85 *Id.* at 484–85.
86 *Id.*
87 *Id.* at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).
88 *Id.* at 489.

serious literary, artistic, political, or scientific value."[89] Adjudication requires a balancing of these three concerns.[90]

Evaluating the first prong contains a high degree of malleability. Each community can identify what it considers to be outside the bounds of decency and what it takes to be prurient; moreover, communities' points of view can change over time. This judgment will not be categorical but based on local values. The second prong is more objectively descriptive. While it requires some judicial assessment of what is "patently offensive," whether the conduct is covered by a state law is an objective, societal matter, "not judged by contemporary community standards."[91] As for the third prong, *Miller* grants juries the power to weigh evidence about whether a work, taken in its entirety, "lacks serious literary, artistic, political, or scientific value."[92] Such an analysis definitionally involves varying assessments that will not yield a self-contained, historically unambiguous category of what material is obscene; there simply is no objective standard on which everyone will agree as to what is literary, artistic, political, or scientific. The third prong requires juries "to weigh the merits of the material."[93] Under the *Miller* formula, a court is instructed to evaluate whether a work, taken as a whole, has literary, scientific, artistic, or political values, which are of greater First Amendment significance than counterclaims by the government about order and morality. Judges are responsible for evaluating evidence about history and tradition, but the judgment is also undeniably evaluative of social and autonomy interests, beyond the *Stevens* formalistic construction. The exclusion of some but not other forms of sexual expression from First Amendment protection, as then Professor Elena Kagan explained before joining the Supreme Court, "mandates an inquiry into the value of the materials" that "demands a finding of community offense."[94] In other areas too, the Court has balanced competing

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89 Miller v. California, 413 U.S. 15, 24 (1973).

90 *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 975 n.240 (2001) ("*Miller v. California* ushered in an era of balancing."); Joseph Blocher, *supra* note 55, at 388–89 ("[T]he scope of this exclusion is itself defined through a kind of balancing test that relies on a conception of the First Amendment's central values: Speech is obscene under *Miller* if it appeals to the 'prurient interest,' is patently offensive, and has no serious literary, artistic, political, or scientific value.").

91 Reno v. ACLU, 521 U.S. 844, 873 (1997).

92 *Miller*, 413 U.S. at 24–25.

93 David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 834 (1993).

94 Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 480 (1996); *id.* at 472–73 ("First Amendment law is replete with content distinctions that do not count as content distinctions because they disfavor speech found by the Court to have

interests of speakers and society to recognize certain categories as having low-value constitutional significance.

2. Defamation

Civil defamation, dealing with private speakers and personal harms to reputation, is another category the *Stevens* Court referred to in its list of utterances the regulation of which has not traditionally and historically raised First Amendment concerns.[95] The Court relied on *Beauharnais v. Illinois* to illustrate its point.[96] The *Beauharnais* decision is distinct from cases dealing with public figures and public matters, which do implicate constitutional issues.[97] In *Beauharnais,* the majority upheld a group defamation statute.[98]

While not as extensive as the discussion in *Roth*, the majority in *Beauharnais* made a brief historical survey of personal libel laws, going back as far as the colonial, common law period, through the early American Republic, and into modern times.[99] Not being content with simply listing examples of speech that have "never been thought to raise any Constitutional problem,"[100] which is all a simple categorical framing would have required, the Court explained that "the social interest in order and morality" was "clearly outweighed" by the slight social value those utterances might have to the search for truth.[101]

Thus, the *Stevens* Court's own precedential reference for the category of civil defamation is not categorical but balanced. In fact, critics of the *Beauharnais* holding argue that the majority's balancing approach upheld a paternalistic legislative scheme abridging free speech without providing any clear guidelines or principles.[102] That criticism of *Beauharnais* calls for more narrow tailoring, but does not gainsay the need to rigorously balance the likelihood of the group defamation causing reputational harm against the interests of speaker's self-expression, social concerns in preventing associated

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little (or no) constitutional value and thus to receive little (or no) constitutional protection. . . . [D]isfavored categories are based on the content of speech; some, at least arguably, are based on its viewpoint.").

95 United States v. Stevens, 559 U.S. 460, 468 (2010).

96 *Id.* at 468–69.

97 *See infra* text accompanying notes 171–74, 181–82.

98 Beauharnais v. Illinois, 343 U.S. 250, 252, 258, 261, 263, 266–67 (1952).

99 *Id.* at 254–55, 255 nn.4–5.

100 *Id*. at 255–56 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

101 *Id.* at 256–57.

102 Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 662–63 (1985).

dangers, the fit between the regulation and the government objective, and whether there is a less restrictive means to achieve it.

Some speech, for example epithets and personally abusive remarks, undoubtedly can be valuable to the speakers, but social interest in preventing immediate harms, such as fights and breaches of the peace, justify the enforcement of narrowly tailored regulations.[103] In its evaluation of whether libelous claims alleging a third party's criminality were protected by the First Amendment, the Court explicitly asserted, "We cannot say . . . that the question is concluded by history and practice."[104] Instead, the majority upheld the statute because the state could exercise its duty to maintain order and prevent violence likely to result from "extreme racial and religious propaganda."[105]

Beauharnais, which the Court has consistently cited as precedent,[106] treated the state's interest in preventing future group violence instigated by defamatory statements to be so high as to constitutionally justify the punishment of content-based expressions.[107] So overriding was the public concern in public safety that the Court did not apply the "imminent threat of harm" test nor the "clear and present danger" test.

Speech in the group defamation context was made to yield to more pressing social concerns that were certainly tied to text, history and tradition, but also deeply grounded in balanced principles of autonomy and social welfare. In the category of personal defamation, a purely categorical explanation would fail to contextualize litigants' several interests and governmental values at stake for judicial resolution. The defamation doctrine and its constitutional subcategories weigh the dignitary interests of speakers and audiences and the need to safeguard free and open debate for the airing of political and otherwise

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103 *Beauharnais*, 343 U.S. at 254–57.

104 *Id.* at 258.

105 *Id.* at 261.

106 *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2561 (2012) (plurality opinion); United States v. Stevens, 559 U.S. 460, 468 (2010); R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 (1984). I have written extensively against the commonly accepted mistake that *Beauharnais* is no longer good law. *See* Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 635–40 (2010); Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1179–87 (2013).

107 *Beauharnais*, 343 U.S. at 255–57 (balancing the value of expressing group defamation against the "social interest in order and morality").

publicly and personally gratifying issues.[108] The first step in identifying the level of constitutional protection raised by a controversial statement is to determine whether it concerns private or public matters by examining its "content, form, and context."[109]

The key question in defamation cases is whether the limitation on speech is likely to stifle self-expression or debate; if so (and the likelihood is far greater when the communication is about public issues), then the inquiry becomes whether the government's objective of preserving reputation and compensating the victim is narrowly enough tailored to meet that aim, under the circumstances.[110] The inquiry is one that looks broadly at the Constitution's synthetic principle for government to safeguard individual rights for the common good.[111] When the libel or slander is directed toward a public figure and touches upon a matter of public concern, even mistakes are countenanced as long as they are not uttered with actual malice.[112] Judicial free speech inquiries should evaluate not simply the category of defamation and its historical pedigree but the actual content of speech, when and how it was

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[108] *See* Air Wis. Airlines Corp. v. Hoeper, 134 S. Ct. 852, 863 (2014) ("[T]he identity of the relevant reader or listener varies according to the context. In determining whether a falsehood is material to a defamation claim, we care whether it affects the subject's reputation in the community."); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 788 (1986) (Stevens, J., dissenting) ("Even assuming that attacks on the reputation of a public figure should be presumed to be true, however, a different calculus is appropriate when a defamatory statement disparages the reputation of a private individual."); Time, Inc. v. Firestone, 424 U.S. 448, 471–72 (1976) (Brennan, J., dissenting) ("[W]e have held that laws governing harm incurred by individuals through defamation or invasion of privacy, although directed to the worthy objective of ensuring the 'essential dignity and worth of every human being' necessary to a civilized society, must be measured and limited by constitutional constraints assuring the maintenance and well-being of the system of free expression.") (citation omitted); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (asserting that free debate is intrinsic to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

[109] Snyder v. Phelps, 562 U.S. 443, 453 (2011).

[110] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The First amendment requires that we protect some falsehood in order to protect speech that matters. The need to avoid self-censorship . . . . however, [is] not the only societal value at issue. . . . The legitimate state interest underlying the law of libel. . . . [w]e would not lightly require the State to abandon.").

[111] *See generally* Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1019 (explaining that the "core constitutional value is for government to protect individual rights for the common good. . . . that means judges can rely on the strict scrutiny standard to review restrictions on expression purportedly meant to benefit the public good but whose formulations lack compelling reasons").

[112] *Sullivan*, 376 U.S. at 279–80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

uttered, and whether the speaker engaged in open debate as opposed to reckless or purposeful disregard and intentionally attempted character assassination.

Unlike private defamation, which favors the victim, constitutional defamation doctrine favors open debate above the suppression of ideas. But it was not until 1964, in *New York Times Co. v. Sullivan*, that the Supreme Court recognized civil defamation had a constitutional analogue.[113] The balance is made even clearer when private defamation is contrasted from *Sullivan*; in matters involving a private party's personal interests, the Court in *Dun & Bradstreet v. Greenmoss Builders* gave greater weight to preserving reputation as opposed to expressive false insults causing harms to reputation.[114] On the other hand, even false statements must be tolerated unless a speaker's comments about public figures engaged in public functions were made with actual malice or reckless disregard for the statement's falsity.[115]

3. Fraud

The same weighing of social against private interests appears in the case that the *Stevens* Court cited to illustrate that fraud is another historically and traditionally unprotected category of speech.[116] Chief Justice Roberts relied on *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, which repudiated the earlier judicial stance that commercial speech was unprotected by the First Amendment.[117] The majority in *Virginia Board of Pharmacy* recognized that the state can prohibit false and misleading advertisement without violating the First Amendment.[118] The Court found differently where the advertisements were truthful; under those circumstances, the balance

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[113] *See Gertz*, 418 U.S. at 334 (asserting that in *New York Times Co. v. Sullivan*, the court "defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation"); Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting A Problematic Defamation Category*, 65 MO. L. REV. 597, 600 (2000) ("*New York Times Co. v. Sullivan* revolutionized defamation law by supplanting a portion of common law liabilities with abundant constitutional protection for criticism of public officials.").

[114] 472 U.S. 749, 758–59, 761 (1985).

[115] *Sullivan*, 376 U.S. at 279–80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

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

[117] 425 U.S. 748, 763 (1976). For an example of the earlier line of cases, finding commercial advertising to be unprotected by the First Amendment, see Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no such restraint on government as respects purely commercial advertising.").

[118] *Virginia Bd. of Pharmacy*, 425 U.S. at 771–72.

swung to the side of more speech and away from tolerated regulation.[119] The potential that commercial information will convey valuable details about products or services rendered it a form of communication that is valuable under the First Amendment.[120] Thus, the Court found a ban targeting licensed pharmacist advertisements of prescription medicines to be an illegitimate use of state authority: the interests of individuals—particularly indigent, infirm, and elderly parties seeking information on the subject—outweighed those of the state.[121] *Virginia Board of Pharmacy* therefore contains a categorical statement against the inclusion of fraud under the umbrella of First Amendment coverage, on the one hand, and, on the other, a balanced explanation of why pharmacists' truthful advertisement of drug prices can provide patients with information allowing them to intelligently decide how to best budget medicinal treatment. Details about the validity of the advertisement and its social worth are content based, not categorical.

B. Balancing in Free Speech Doctrine

Several of the cases the *Stevens* Court cited to demonstrate the existence of historically and traditionally unprotected categories contain balancing rationales.[122] Free speech canon is in fact filled with the judicial balancing of the public's interest against the speaker's, which requires contextual scrutiny. Balancing the individual right to free speech against compelling or substantial government interests typically takes into account personal claims to communication—which can be either political, self-expressive, or exploratory—and weighs them against public interests in matters like safety. A clear example of this methodology is found in the seminal child pornography case *New York v. Ferber*.[123]

In that opinion, the Court dealt with child pornography differently than it had with obscenity in *Roth* and *Miller*.[124] The *Ferber* majority found that suppression of visual depiction of juveniles engaged in sexual behaviors was "a government objective of surpassing importance" aimed at preventing the "sexual exploitation and abuse of children."[125] The Court held that the

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119 *Id.* at 770, 773.
120 *Id.* at 763 (discussing consumers' interest in obtaining pricing information on prescription drugs).
121 *Id.* at 763–64, 770.
122 *See supra* Part III.A.
123 458 U.S. 747, 756, 762 (1982).
124 *See supra* text accompanying notes 78–92.
125 *Ferber*, 458 U.S. at 757.

legislative aim superseded any desire child pornography producers, marketers, and audiences might have in watching youths engage in sexual behaviors.[126]

While it may initially appear that after *Stevens* this balancing is no longer permissible, a more refined reflection reveals no clash between the two cases: weighing the expressive value of child pornography against the harm involved in its creation[127] does not violate the *Stevens* Court's prohibition against ad hoc balancing.[128] The reasoning in *Ferber* is not sui generis—solely confined to the specific nature of child pornography; rather, the Court regarded its decision to be based on precedential methodology relied on by other content-based restrictions:

> [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.[129]

Child pornography is indeed a low-value category of expression not protected by the First Amendment, but the rationale for this conclusion is neither perfunctory nor simply a matter of historical fact, as the plurality in *Alvarez* implied,[130] but a balanced public policy.

The holding in *Ferber* does not violate the rule against ad hoc balancing. It is, instead, a meticulously reasoned decision providing the government the doctrinal space to protect the "well-being of its youth."[131] The expressive value pedophiles attach to the sexual depiction of children is outweighed by the social interest in punishing their exploitation.[132] The New York anti-child pornography statute was valid not only because it protected against immediate victimization, but also because it aimed to safeguard children's abilities to grow into active members of a democratic polity. The state's interest,

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126 *Id.* at 756–58, 764.

127 *Id.* at 764 ("When a definable class of material, such as that covered by § 263.15 [New York's anti-child pornography statute], bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.").

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

129 *Ferber*, 458 U.S. at 763–64.

130 In *United States v. Alvarez*, the Court identified child pornography to be among the categories of speech that have historically and traditionally not been afforded First Amendment protections. 132 S. Ct. 2537, 2544 (2012) (plurality opinion).

131 *Ferber*, 458 U.S. at 757 (quoting FCC v. Pacifica Found., 438 U.S. 726 (1978)).

132 *Id.* at 761.

therefore, included maintaining children's opportunities to become "well-rounded . . . young people" who grow into "full maturity as citizens."[133] What is critical for our purposes is that contextual balancing was indispensable to the decision. Safeguarding children's wellbeing was implicitly treated as a compelling state interest; the First Amendment sensitivities of producers, directors, wholesalers, retailers, marketers, and traffickers do not supersede that public concern.

Had the Court in *Ferber* solely relied on an examination of historical or traditional low-value speech categories, it might have well arrived at a different result. Until *Ferber* was decided in 1982, courts relied on the *Miller* obscenity framework (itself setting a new standard in 1973[134]) for adjudicating child pornography cases.[135] Put somewhat differently, prior to the holding in *Ferber*, child pornography was not obscene under the *Miller* test; it might have been deemed protected by the First Amendment. Hence, judicial balancing—weighing the private and public interests involved—was critical to the establishment of this new category, rather than the adoption of a wholly historically grounded doctrine.

Ferber was a case in the broader tradition of weighing social interest. *Chaplinsky v. New Hampshire*[136] is typically cited for its model statement on balancing values. The latter case arose when a police marshal escorted a person of the Jehovah's Witness denomination away from a violent crowd.[137] On the way to the police station, in response to the crowd goading him, Chaplinsky called the marshal a "damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[138] For this statement, Chaplinsky was convicted pursuant to a statute that prohibited, in part, anyone from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place."[139] Writing for a unanimous Court, Justice Murphy sketched what endures as the current balancing test:

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133 *Id.* at 757 (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

134 *See supra* text accompanying notes 70–79.

135 Brian G. Slocum, *Virtual Child Pornography: Does It Mean the End of the Child Pornography Exception to the First Amendment?*, 14 ALB. L.J. SCI. & TECH. 637, 692 (2004).

136 315 U.S. 568, 571–72 (1942).

137 *Id.* at 569–70.

138 *Id.* at 569.

139 *Id.*

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[140]

The Court in *Ferber* cited this passage as the foundational test for courts to identify content-based expressions whose social value is so low that it can be regulated despite the Court's zealous protection of free expression.[141] The interest in children's well-being is so great that it outweighs any interest audiences or speakers might have in the depiction and distribution of child pornography.[142] The *Chaplinsky* balancing formula also played a central role in a decision that upheld a group defamation statute, *Beauharnais v. Illinois*.[143]

In a variety of precedents—such as those dealing with child pornography, obscenity, group defamation, common law defamation, and fraud—the Court has established categories of low-value speech on the basis of nuanced, contextualized analyses of constitutional values.[144] The cross-section of interests has required balanced judicial evaluations of texts, norms, and specific applications of expressive principles.[145] Analysis goes well beyond any simple catalogue of traditionally and historically accepted categories of exclusions from First Amendment doctrine. Rather, the Court has engaged in context-rich examinations that take into account history, the normative value of expression in a representative democracy, and the specific details of cases and statutes in light of doctrinal tests and ambiguities.

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140 *Id.* at 571–72.

141 New York v. Ferber, 458 U.S. 747, 754–56 (1982).

142 *See supra* note 125 and accompanying text.

143 343 U.S. 250, 256–57 (1952); *see supra* text accompanying notes 80–91.

144 *See* Richard Delgado, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CALIF. L. REV. 871, 883 (1994).

145 *Cf.* Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 539 (2015) (describing contextual constitutional interpretation to comprise three aspects: text, principle, and application).

IV. ROBERTS COURT ON BALANCING

Despite the critical role balancing has played for decades in free speech jurisprudence, courts and scholars might question the continued validity of those precedents in light of the categorical speech doctrine, established by *Stevens* and its progeny, with their disavowal of "ad hoc balancing"[146] as "startling and dangerous."[147] The doctrine's potential to substantially shift First Amendment discourse has led to sharp criticism of the Court's categorical approach in *Stevens*.[148] Yet, a closer look at Roberts Court jurisprudence demonstrates that the Court has not abandoned balancing. Indeed, several of its cases demonstrate how judges should engage in careful balancing, staying clear of arbitrariness. A contextual approach provides judges the guidance necessary to avoid the ad hoc balancing against which the Court has inveighed.[149]

A. Judicial and Academic Concerns

Critics have objected to the Roberts Court's seeming break with precedents. Justice Breyer's concurring opinion in *Alvarez* contains a powerful statement against inflexible demarcation of low-level expressions. As we have seen, in that case Justice Kennedy's plurality opinion adopted the categorical statement against ad hoc balancing.[150] Justice Breyer agreed with the plurality that the Stolen Valor Act of 2005 was an unconstitutional violation of the First Amendment, but his rationale did not accept the plurality's "strict categorical analysis."[151] Instead, his discussion of statutory law and the Constitution was based on "the fit between statutory ends and means."[152] The concurrence examined "the seriousness of the speech-related harm the provision will likely

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

147 United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (quoting *Stevens*, 559 U.S. at 470).

148 *See supra* Part II.

149 A further benefit of contextual balancing is that it brings free speech doctrine in line with substantive due process jurisprudence. Typically, where a judge relies on the Due Process Clause to identify a fundamental right that is protected against government intrusion, "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015). No generation of Americans, including those that lived at the nation's founding and reconstruction, can lay claim to absolute knowledge about all the forms of human dignity encompassed by constitutional safeguards for fundamental rights, "so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." *Id.* A categorical approach in the area of free speech would be incompatible with that progressive doctrine of interpretation.

150 *Alvarez*, 132 S. Ct. at 2544; *see supra* text accompanying notes 31–38.

151 *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring).

152 *Id.*

cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so."[153] Justice Breyer argued for adopting "intermediate scrutiny" for the "examination of 'fit'" needed to conduct a "proportionality review."[154] This approach contextualizes the relevant factors at play in the litigation to determine whether the restriction on speech outweighs the government's important interest—in *Alvarez*, the defense of national integrity in military honors.[155]

Academic criticism, which I surveyed in Part II, has been more forceful. Professor Shiffrin writes that the Supreme Court "specifically rejected the idea that First Amendment protection should be determined by balancing the value of speech against the interests in regulating the speech."[156] Professor Charles Rhodes perceives the Court's updated approach of "identifying categories of unprotected speech" to be "a sea change."[157] Put more strongly yet, another author asserts, "The Court has utterly rejected the balancing approach in a way that will make it difficult for future courts to revive the doctrine."[158] Along the same lines, Professor Ashutosh Bhagwat asserts, "The sum total effect of *Stevens* and *Brown* appears to be to freeze into place the list of low-value speech categories, absent the (unlikely) discovery of a historically unprotected category which somehow has escaped notice till now."[159] These scholars demonstrate a genuine concern that the Roberts Court has of late systematically adopted a formalistically rigid approach.

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153 *Id.*

154 *Id.* at 2551–52 ("In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications. Sometimes the Court has referred to this approach as 'intermediate scrutiny,' sometimes as 'proportionality' review, sometimes as an examination of 'fit,' and sometimes it has avoided the application of any label at all.").

155 *Id.* at 2548 (plurality opinion).

156 Shiffrin, *supra* note 60, at 1489.

157 Rhodes, *supra* note 71.

158 John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 7 (2014).

159 Ashutosh Bhagwat, Who's Afraid of Content Regulation? 15 (unpublished manuscript) (on file with author).

B. Reliance on Chaplinsky

For a variety of reasons, their criticism is overstated. For one, the Roberts Court continues to cite to the Court's general statement about the validity of balancing, albeit selectively. Most tellingly, in *Snyder v. Phelps*, a case striking a punitive damages award for intentional infliction of emotion distress, Justice Alito quoted *Chaplinsky* in his dissenting opinion for the proposition that certain utterances are not essential to "any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[160] This statement should be read as an approval of some forms of balancing that are more rigorous than the ad hoc variety.

The Court also relied on *Chaplinsky* in the categorical line of cases: *Stevens*, *Entertainment Merchants*, and *Alvarez*.[161] Yet those cases appear to blunt *Chaplinsky*'s balancing implications. *Chaplinsky* expressed a methodology for identifying core First Amendment expression as opposed to speech outside the constitutional threshold. That formula mentions "classes" (a term that seems to me to be a more amorphous and broader reference than "categories") of speech, but the standard is indubitably linked to a weighing of public interests.[162]

Entertainment Merchants and *Stevens* also recite *Chaplinsky*'s balancing formula.[163] But in those cases the majorities avoided seriously engaging in any analysis of the *Chaplinsky* test and how its analytical construct can help judges contextualize cases while avoiding subjective decision making.

In *Alvarez*, the plurality simply cited *Chaplinsky* as the seminal case to express the continued legitimacy of "fighting words" regulations. The citation appears in a string cite beginning with the statement that the Court has rejected an ad hoc approach and instead adopted a few historical and traditional categories of low-value speech, such as fighting words.[164] The Court in *Stevens*, on the other hand, explained the existence of categories from a more nuanced and less formalistic perspective, stating, "[T]his Court has often

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160 Snyder v. Phelps, 131 S. Ct. 1207, 1223 (2011) (Alito, J., dissenting); Moore, *supra* note 158, at 7.

161 Bhagwat, *supra* note 159, at 15.

162 Chaplinsky v New Hampshire, 315 U.S 568, 571–72 (1942). For relevant text from *Chaplinsky*, see *supra* text accompanying note 140.

163 Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2741 (2011) (quoting *Chaplinsky*, 315 U.S. at 571–72); United States v. Stevens, 559 U.S. 460, 468–69 (2010) (same).

164 *Alvarez*, 132 S. Ct. at 2544 (plurality opinion).

described historically unprotected categories of speech as being 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[165] Given that *Stevens* is the wellspring for the new categorical approach, we might ameliorate the potentially disruptive effect of this seemingly rigid methodology on precedent by explaining that the Court has gradually, through precedent and history, arrived at these ex ante categories by identifying the values that make some classes of speech low-value and others subject to more stringent review. And since the Court continues to confirm that *Chaplinsky* is good law, never having overruled any part of its test, that approach provides the formula judges must use to identify whether an expression is of "such slight social value" as to not warrant First Amendment protection without running into the problem of ad hoc balancing. Such a reading of the *Stevens* line of cases would allow courts to continue weighing cognizable socio-legal factors in identifying previously acknowledged and not yet recognized categories of speech.

The continued balancing of interests is indispensable to the unceasing new questions that arise about whether expression should be covered by the First Amendment. The digital age presents many new questions, such as whether mechanical, algorithmic speech fits in the context of First Amendment stare decisis, that do not neatly correlate with existing categories.[166] Indeed, the one Supreme Court case that squarely addressed data mining, *Sorrell v. IMS Health Inc.*,[167] skirted the analysis. In that case, data miners and pharmaceutical manufacturers successfully challenged the constitutionality of a Vermont law prohibiting the non-consensual "s[ale], license, or exchange for value" of pharmacy records to pharmaceutical manufacturer and marketers to be used for the promotion and marketing of prescription drugs.[168] The Court held that the marketing of such data was a form of free expression protected by a heightened

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165 *Stevens*, 559 U.S. at 470 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)).

166 For the growing body of literature debating whether the First Amendment protects robotic speech, see C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646, 652 (1982) (relying on the self-realization theory of free speech to find that the First Amendment does not protect corporate speech, which includes computer processing of data gathered for profit); Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1482–83 (2013) (defending the view that a wide variety of algorithmic-based decisions should be protected under the First Amendment); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 89 (2007) (arguing against Baker's views against corporate speech and rejecting the claim that a "robotic goal of profit maximization is somehow assumed to justify exclusion from the First Amendment"); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1496 (2013) (arguing against the view that robotic, algorithmic processing enjoys free speech).

167 131 S. Ct. 2653 (2011).

168 VT. STAT. ANN., tit. 18, § 4631(d) (West 2007); *Sorrell*, 131 S. Ct. at 2660.

standard of judicial scrutiny.[169] Its opinion, however, was by no means categorical; nor was there any clear balancing. Without careful consideration of competing speech and government values, the decision seems based on the preferences of a majority of justices for commercial interests (in that case, those of the multi-billion dollar pharmaceutical industry) rather than carefully worked through reflections on concerns about privacy, informational manipulation, dignity, autonomy, and economic regulation of the commercialization of data.[170]

C. Roberts Court Balancing

Besides this subtle space for weighing divergent free speech interests that *Stevens* and *Alvarez* acknowledge by quoting *Chaplinsky*, the Roberts Court has on several occasions explicitly relied on balancing in its free speech jurisprudence. Furthermore, in *Snyder*, the Court engaged in balancing without resorting to categorical analysis and also demonstrated its continued commitment to *Chaplinsky*.[171]

The cause of action in *Snyder* arose when the Westboro Baptist Church pastor and his parishioners displayed highly offensive signs at a military

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[169] *Sorrell*, 131 S. Ct. at 2659. There is some uncertainty as to whether the Court will continue to apply the intermediate scrutiny test for commercial speech from *Central Hudson Gas & Electricity Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), or a heightened level of scrutiny between intermediate and strict scrutiny in cases involving content-based commercial regulations. Paula Lauren Gibson, *Does the First Amendment Immunize Google's Search Engine Search Results from Government Antitrust Scrutiny?*, 23 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 125, 136 (2014) (asserting that cases like *Sorrell* indicate that "where commercial speech is involved, an argument can now be made that the form of scrutiny is a higher form of intermediate, heightened level of scrutiny, even if not strict scrutiny"); Hunter B. Thomson, *Whither* Central Hudson*? Commercial Speech in the Wake of* Sorrell v. IMS Health, 47 COLUM. J.L. & SOC. PROBS. 171, 173 (2013) ("By declaring that content-based restrictions trigger heightened review in an area of law that is distinguished by the content of speech, the Court appears to have elevated the First Amendment protection accorded to commercial speech."). The confusion should partly be attributed to the majority, which in places spoke as if it were considering the Vermont statute as something akin to ordinary viewpoint discrimination. *Sorrell*, 131 S. Ct. at 2663 ("[The statute] goes even beyond mere content discrimination, to actual viewpoint discrimination." (quoting R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992))). From my reading of the case, I believe that intermediate scrutiny continues to be the rule. The majority specifically asserted that a content-based restriction on commercial speech cannot be sustained unless it "directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Id.* at 2667–68. But any further analysis of this point would be beyond the scope of this Article and will require separate treatment.

[170] *See* Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1121–22 (2015).

[171] Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (quoting Connick v. Myers, 461 U.S. 138, 145 (1983))).

funeral. Their protest targeted a variety of United States policies, including the tolerant treatment homosexuals enjoy throughout much of the United States.[172] Rather than using tempered discourse, protestors carried inflammatory signs with messages such as "God Hates the USA/Thank God for 9/11," "Priests Rape Boys," and "God Hates Fags."[173] Fred Phelps, the church founder, chose this vitriolic rhetoric to gain national media attention for his movement.[174] What made the case so important from the free speech perspective was that the protestors committed no conduct warranting their arrest. They confined their gathering to public land and complied with a police order about the location for their demonstration.[175] Throughout the protest that gave rise to litigation, protestors stood 1,000 feet away from the funeral service, and the Plaintiff could not read their signs until he saw their contents on the evening news.[176] Under these circumstances, the Court affirmed a court of appeals decision to overturn the district court's finding of liability for intentional infliction of emotional distress. Suppression of the picketing, the Court found, would have been "content and viewpoint" discrimination against the conveyed message.[177]

Rather than basing his opinion on the lack of a pertinent historical or traditional category of speech, Chief Justice Roberts reasoned that Phelps's church was speaking about "broad issues of interest to society at large" that the First Amendment guaranteed against government suppression.[178] The Court's finding that Phelps's speech concerned a public matter was based on the "content, form, and context" of the message as it was "revealed by the whole record."[179] The Court then balanced the Plaintiff's "anguish," against the Church's interest in using a public form to crassly articulate its views on a public subject.[180] The Church's method of communication was relevant because protestors sought to shock the conscience of observers, but not to intimidate them.[181] The Court also considered the Plaintiff's interest in

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172 *Id.* at 448.

173 *Id.*

174 Snyder v. Phelps, 533 F. Supp. 2d 567, 571 (D. Md. 2011) ("Members of the church have increasingly picketed funerals to assert these beliefs. Defendants have also established a website identified as www.godhatesfags.com in order to publicize their religious viewpoint."). At trial Phelps testified that picketing funerals gained his movement the attention it craved. *Id.*

175 Snyder v. Phelps, 562 U.S. 443, 448–49 (2011).

176 *Id.* at 449.

177 *Id.* at 457.

178 *Id.* at 454.

179 *Id.* at 453 (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)).

180 *Id.* at 456.

181 The Westboro Baptist Church even contacted the police before arriving at the protest, indicating that its members had no intent to spark a fight or riot. *Id.* at 448.

avoiding being berated during such a sensitive event, but found the constitutional value of public debate to be weightier than the interest of a funeral mourner in avoiding the emotional distress caused by offensive placards that had been illegible from the cemetery.[182]

Snyder then was an example of balancing—non-ad hoc balancing—that is permissible under the *Stevens* line of cases. Another example of legitimate balancing appeared in another decision drafted by Chief Justice Roberts, *Holder v. Humanitarian Law Project*, which upheld the material support for terrorism statutes.[183] Chief Justice Roberts made clear that "sensitive and weighty interests of national security and foreign affairs" were significant to the opinion.[184] With those interests at play, the Court regarded congressional and executive findings to be pressing enough to outweigh personal and public interests in content-based speech tending to advance the foreign terrorist organizations' political standings.

The case pertained to executive and legislative uses of power. The statute set federal penalties against parties who provided "material support or resources" to groups whom the State Department had placed on a list of foreign terrorist organizations.[185] U.S. non-profit organizations who wanted to provide political training to the Liberation Tigers of Tamil Eelam and the Kurdistan Workers' Party, both of which were on the State Department's terrorist list, challenged the constitutionality of the statute.[186] The First Amendment would have certainly protected the exposition of that content had the same advice been provided to groups who had not been similarly designated. Rather than creating or identifying a categorical rule, the Court

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[182] *Id.* at 458–59. Likewise, the concurrence in *Snyder*, written by Justice Breyer, found the fact that the Plaintiff could not even see the placards at the time of the funeral demonstrated that the state lacked a proportionate "interest in protecting its citizens against severe emotional harm." *Id.* at 463 (Breyer, J., concurring). In a later case, Justice Breyer more clearly differentiated his balancing method from the majority, creating a clear means–ends test to evaluate the "the degree to which" a challenged statute "injures speech-related interests," the extent to which it furthers a compelling state interest, and "the nature and effectiveness of possible alternatives." Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2765–66 (2011) (Breyer, J., dissenting).

[183] 18 U.S.C. §§ 2339A–2339B (2006); Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730–31 (2010).

[184] *Humanitarian Law Project*, 130 S. Ct. at 2727.

[185] *Id.* at 2712–13. The statute's definition of "material support or resources" included "property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials." 18 U.S.C. § 2339A(b)(1) (2006).

[186] *Humanitarian Law Project*, 561 U.S. at 2713.

undertook a nuanced approach, recognizing that a judge assessing the constitutionality of the statute's application would need to examine the context of the communication and the party's knowledge of or intent to support a group's terrorist activities.[187] The majority found relevant that money in the coffers of a terrorist organization could easily be shifted from social to violent functions; with no "firewalls" preventing charitable contributions from being funneled toward violent activities,[188] Congress had authority to restrain support even when it only indirectly advanced terrorism.

The majority balanced public safety concerns against the interests of expression and found that the statute was narrowly drafted. The prohibition of material support did not prevent groups from discussing the activities of banned organizations, supporting them, or even from joining them,[189] but the "Government's interest in combating terrorism," as Chief Justice Roberts put it, was "an urgent objective of the highest order."[190] Thus, the Court found that the material-support-for-terrorism statute aimed to prevent conduct rather than the communicated messages.[191] This formulation of the case obfuscates the fact that while the statute clearly limited free speech rights, it did so because the government could legitimately advance the compelling purpose of safeguarding national security even at the cost of content-based limitations on expression. In *Humanitarian Law Project*, therefore, the Court grappled with the implications of the statute on speakers' autonomy rights, the public ends sought to be achieved, the fit between the restriction and the government's stated aim, and alternative channels the plaintiffs could pursue to engage in political speech without advancing the causes of foreign terrorist organizations.

Balancing rights is a more comprehensive approach than the categorical one. Evaluating cases on the basis of their specific facts, a law's purpose, and social priorities can facilitate a focused assessment of whether some overriding public interests—such as national security—outweigh personal autonomy. It would have been a mistake in *Humanitarian Law Project* for the Court to simply assert that terrorist support was or was not a historically unprotected category. Instead, the majority came to a ruling on the merits by carefully analyzing the private and public interests involved, alternative available

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187 *Id.* at 2720–22 (scienter requirement); *id.* at 2720 ("Of course, the scope of the material-support statute may not be clear in every application.").

188 *Id.* at 2725–26.

189 *Id.* at 2723.

190 *Id.* at 2724.

191 *Id.* at 2728.

avenues of communications, the extent to which expression was impeded, and arrived at a conclusion that preserved free thought and associational freedoms, but enabled the government to retain its role as a guarantor of public safety.

Chief Justice Roberts was not categorical in his opinion in *Humanitarian Law Project*. To the contrary, the majority evaluated the record, taking into account the organizations' expressive interests within the context of the government's determination that material support for terror posed a public threat.[192]

There is further indication that *Stevens*'s statement on the dangerousness of ad hoc balancing does not spell the death-knell for free speech balancing. In the public employee line of cases, the Court has repeatedly held that free speech protection depends on a careful balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[193] *Lane v. Franks*, the most recent case decided in this area, repeated the standard, finding that the sworn court testimony of a community college director enjoyed First Amendment protection because it concerned a public matter.[194] Justice Sotomayor's opinion eschewed simple formalism, opting instead for careful scrutiny of the nature of speech, the speaker, and the government's interest: "A public employee's sworn testimony is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern."[195] That synthetic analysis relied on the *Pickering* test to determine whether

> if an employee speaks as a citizen on a matter of public concern, the next question is whether the government had "an adequate justification for treating the employee differently from any other member of the public" based on the government's needs as an employer.[196]

The holding in *Lane* certainly should not be characterized as "simple balancing," but as a sophisticated examination of the speech and public interests involved in the litigation. By relying on the *Pickering* test, Sotomayor demonstrated factual and contextual sensitivity about a public employee's

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192 *Id.*
193 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
194 134 S. Ct. 2369, 2374 (2014).
195 *Id.* at 2380.
196 *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)).

statements that were uttered during the course of a grand jury proceeding and later at trial about a public matter. The Court recognized that the case involved a matter of public interest concerning truthful witness testimony. The categorical approach to low-level speech would have, therefore, been completely out of place. As with *Lane*, the fundamental right to free speech must often be balanced against completing constitutional, legal, and social concerns.

D. Contextual Balancing

A careful parsing of all relevant legal and factual matters surrounding free speech limitations is a more honest way to approach adjudication. A pre-*Stevens* free speech case, *Rosenberger v. Rector & Visitors of University of Virginia*,[197] helpfully demonstrates the problems with categorical statements about free speech doctrine. In that case, the Court evaluated the constitutionality of a university policy that refused to pay for the outside printing costs incurred by a religious student organization, while reimbursing that expense for other student-edited publications.[198] The majority held that the university was engaged in unconstitutional viewpoint discrimination by differentiating between the plaintiff's evangelical publication and the secular contents of other groups.[199] The terms used in the opinion make it appear that the decision was an obvious one. The majority at one point implied that the holding was a simple matter of protecting uninhibited expression: "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[200]

That categorical statement is not satisfying, however, because besides free expression, the challenge also implicated a different First Amendment interest. The dissent pointed out that the use of public funds to subsidize religious preaching "is categorically forbidden under the Establishment Clause."[201] Preference for one constitutional interest over the other was not as obvious as either the majority or dissent made it out to be. Justice O'Connor's concurrence in *Rosenberger* more subtly asserted the complexity of contextual adjudication:

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197 515 U.S. 819 (1995).
198 *Id.* at 824–27.
199 *Id.* at 832.
200 *Id.* at 828 (citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).
201 *Id.* at 868 (Souter, J., dissenting).

> When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.[202]

This nuanced understanding should apply in all adjudications implicating free speech and any conflicting constitutional rights. Categorical statements allow for manipulation of decision making, choosing a singular value or category for the outcome rather than closely scrutinizing all constitutional principles at stake and facts relevant to resolving outstanding issues.

The upshot of my argument is that content-based statutes should be subject to the level of scrutiny that is commensurate with their nexus to all relevant constitutional mandates. Such a contextual approach best enables judges to assess the level of government and private interests—and it is not ad hoc. Neither are alternative constitutional interests (such as free exercise of religion in *Rosenberger*) the only relevant interests to balance against speech claims. A variety of uncontroversial limits on speech are predicated on common law and statutory values. Common law defamation, where no public issue or public party is involved, places greater weight on the victim's reputation and standing in a community than the speaker's desire to spread falsehood and create injury.[203] The balance shifts to the greater protection of free speech when the alleged defamation involves public statements about a public or private figure.[204] Perjury, another common law crime, is also unprotected by the First Amendment because it can compromise the integrity of legal proceedings.[205]

Targeted statutory regulations on speech can likewise be tested through contextual balancing. In this regard, limits can be placed in statutory regimes governing such instruments as securities laws. For example, a maximum civil

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[202] *Id.* at 847 (O'Connor, J., concurring). Aharon Barak has made the same contextual point in more sweeping terms, explaining that "an expression of the national ethos, the cultural heritage, the social tradition, and the entire historical experience of that nation." AHARON BANK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 73 (Doron Kalir trans., Cambridge Univ. Press 2012) (2010).

[203] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974).

[204] *Compare* Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (defamation alleged concerning private figure and public matters), *with* N.Y. Times, Inc. v. Sullivan, 376 U.S. 254 (1964) (defamation of public figure about a public matter).

[205] United States v. Alvarez, 132 S. Ct. 2537, 2540 (2012) (plurality opinion).

penalty for violating the Insider Trading Sanctions Act[206] does not harm the defendant's right to free speech.[207] Likewise, the Securities Act of 1933 requires a variety of disclosures of registered securities.[208] This regimen demonstrates a preference for efficiency, fairness, and investor confidence to any contrary preferences of publically traded companies, which may desire to keep some information, such as foreign ownership or market pricing, secret.[209] Securities regulation, then, balances the benefits of regulating transparent and efficient markets against the speech interests of corporations. This is not an ad hoc process but one that carefully assesses burdens on the speech of corporations and benefits to private investors.

The categorical speech statement of the *Stevens* line of cases[210] requires a test that will both enable the Court to recognize speech that has historically not enjoyed free speech protection and provide a rigorous method for judicial weighing of interests without becoming entangled in extemporaneous assessments.

Accordingly, I recommend the adoption of an analysis for rigorously scrutinizing the private and public interests implicated by a speech regulation: Judges should determine (a) whether the limit on free speech arises from conflicting constitutional, statutory, or common law interests; (b) whether the restricted expression has historically and traditionally been constitutionally protected; (c) the strength of the governmental objective; (d) the fit between that objective and the regulation; and (e) whether a less restrictive means could achieve the particularized public aims. This test stays true to free speech doctrine, which, as we have seen, often resorts to constructive balancing, and answers the Court's evident commitment to historical and traditional assessment of restricted categories. Far from being ad hoc, it requires judges to

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206 15 U.S.C. § 78u-1 (2012).

207 *See* SEC v. Lipson, 278 F.3d 656, 664–65 (7th Cir. 2002).

208 15 U.S.C. §§ 77h–77j. Disclosure requirements apply when a company reaches a certain threshold of shareholders and assets. 15 U.S.C. §§ 78a–78mm (2012). At that point, the company must file and publish a yearly report of its business operations that must be updated each quarter. 17 C.F.R. § 249.308a (2006).

209 *See* Arthur R. Pinto, *The Nature of the Capital Markets Allows a Greater Role for the Government*, 55 BROOK. L. REV. 77, 89–90 (1989) ("[I]f the regulation deals with mandatory disclosure or with the timing and form of nonfraudulent speech, then it should not be invalidated under the first amendment as long as the regulation is reasonably necessary for the protection of investors and does not directly involve the traditional kinds of speech protected by the first amendment." (footnote omitted)). *But see* Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 771 (2007) (arguing that SEC disclosure "rules and regulations should be scrutinized under the prevailing commercial speech standards").

210 *See supra* cases cited notes 1, 3, and text accompanying note 20.

evaluate the "content, form, and context" as they are "revealed by the whole record."[211]

Each case should be understood for the details of factual content as well as any and all relevant issues arising from them. History and tradition are indeed important because they provide context, preventing judges from issuing decisions ungrounded in constitutional values, precedents, and pertinent cultural developments. In addition to historical scrutiny, First Amendment adjudication should account for public interests. General welfare concerns, such as those aimed at protecting national security, must be weighed against autonomy concerns in living an expressive life that is not harassed by arbitrary and overbearing regulations. But the inquiry does not end with simply identifying government interest. Courts should also weigh the fit of regulation with the relevant policy and the fit of the provided remedy.

CONCLUSION

The Court's categorical framing of recent free speech cases has caused uncertainty about the continued judicial reliance on balancing jurisprudence. Upon closer examination, it appears that *Stevens* and its progeny sounded an alarm against only ad hoc balancing. The Roberts Court has continued to balance values in a variety of First Amendment cases, specifically those upholding the material support for terrorism statute; preventing the suppression of outrageous public-issues protests, even when they intentionally cause emotional distress; and recognizing the distinction between public employees' and private citizens' rights to express themselves freely.

Absolutist rhetoric proclaiming the static nature of First Amendment categories is likely to diminish the Court's prestige among the lay public and lawyers, which may come to see them as selective political statements rather than measured products of adjudication.[212] The categorical approach is inadequate for analyzing the complex problems involved in constitutional jurisprudence. Judicial splits on the resolution of free speech litigation demonstrate that deciding cases requires a close consideration of the personal interests, empirical indeterminacy, precedents, history, social traditions, community standards, and the ends government seeks to achieve through

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[211] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (quoting Connick v. Myers, 461 U.S. 138, 147–48 (1983)).

[212] *See* Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 709–10, 716–22, 725–26 (2015).

various regulatory schemes. While ad hoc balancing is indeed a potentially dangerous license for judicial subjectivity, rigorous balancing continues to be essential for evaluating specific interests in expression, countervailing public interests, and public policies behind regulations.

The Roberts Court has demonstrated that it is not averse to all forms of balancing, relying on that method in cases like *Snyder*, *Humanitarian Law Project*, and *Lane*. Less convincingly, it has settled for absolute-sounding reasoning in identifying categories of low-level speech. The categorical approach is subject to labeling machinations that overlook the evolving nature of free speech jurisprudence; instead, the Court should balance public and private interests in identifying broad free speech values, communications unprotected by the First Amendment, the interests of parties to litigation, and the fit of speech regulations. Contextual balancing at the levels of free speech theory and prudential conflict resolution will enable adjudicators to render robust judgments predicated on synthetic assessments of the record, history, tradition, dignitary interests, and values of representative democracy.