

First Amendment Scrutiny:

Realigning First Amendment Doctrine Around Government Interests

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This Article proposes a simpler way to frame judicial analysis of First Amendment claims: a government restriction on First Amendment expression or action must advance a compelling interest through narrowly tailored means and must not excessively burden the expression or action relative to the interest advanced. The test thus has three prongs: (1) compelling interest; (2) narrow tailoring; and (3) proportionality.

Part I explores how current First Amendment doctrine too often minimizes or ignores a meaningful assessment of the government's purported interest in limiting First Amendment liberties. Part II shows how First Amendment inquiry is further confused by threshold inquiries into coverage, categories, and content. Part III suggests how a uniform strict scrutiny test could better focus courts on government interests and related analyses. Part IV defends this test against possible objections.

Taken seriously, a uniform strict scrutiny test could eliminate cumbersome doctrinal tests and detours that have emerged over the past sixty years. These tests and doctrines are not unprincipled or illogical. In most cases, they emerged out of tough cases and hard issues, with judges and scholars attempting to draw reasonable distinctions and sensible boundaries. But along the way, these approaches became bloated, unwieldy, and difficult to hold together. The result has been a great deal of confusion and head-scratching, including by lower courts attempting to apply Supreme Court precedent. Strict scrutiny shows why these tests and detours are neither necessary nor desirable for First Amendment analysis and how a more simplified analysis better protects our most important civil liberties.

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INTRODUCTION

Modern First Amendment analysis is increasingly confusing and complex. But it doesn't have to be that way. The path to greater clarity begins by focusing on the First Amendment's presumptive restriction against government restrictions: "Congress shall make no law." The First Amendment protects against unjustified government interference with five fundamental liberties: speech, press, religion, assembly, and petition.¹ Nothing in its text, history, or norms suggests that some of these liberties are more important than others, or that the government's reason for restricting these liberties can be trivial or nonexistent.²

An observer with a passing familiarity of constitutional law might assume that courts consistently scrutinize the government's

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¹ The exception is the Establishment Clause, which is sometimes characterized as a "structural provision" of the First Amendment. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 541 U.S. 1, 45-46 (2004) (Thomas, J., concurring) (describing the Establishment Clause as "a federal provision, which, for this reason, resists incorporation"). It's also possible to conceptualize other provisions of the Bill of Rights as restrictions against government restrictions. For example, the Second Amendment restricts infringement of "the right of the people to keep and bear Arms," and the Fourth Amendment restricts violations of "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." But the First Amendment is unique in the number of different government interests invoked to justify government restrictions and the number of doctrinal tests that assess (and sometimes fail to assess) those interests.

² The First Amendment restricts "prohibiting" free exercise and "abridging" the other four individual rights of speech, press, assembly, and petition. It's possible that a restriction only against prohibition is less robust than a restriction against abridgement. But other than the words themselves, there is no founding-era evidence that the framers of the First Amendment considered free exercise less important than the other individual rights in the First Amendment. Nor is there any compelling historical or normative argument suggesting that some of the First Amendment's five individual rights are more important than others.

reasons and methods for restricting First Amendment liberties. But that observer would be wrong.³ The Supreme Court’s First Amendment jurisprudence instead relies on a dizzying array of standards of review, including strict, exacting, intermediate, and rational basis review. And it creates confusing and sometimes contradictory triggers for those standards: content neutrality, viewpoint neutrality, substantial burden, general applicability, public forum analysis, secondary effects, and government speech, to name a few. Those standards and triggers are further complicated by the Court’s normative parsing of different kinds of First Amendment expression or action. For example, when it comes to free speech, the Court has suggested that political and religious speech are “high value,”⁴ commercial speech is “low value,”⁵ and some forms of speech are “categorically unprotected.”⁶ And within the judicially created right of association, the Court has created different tests for intimate associations,⁷ expressive associations,⁸ political associations,⁹ and religious associations.¹⁰ The Court further distorts the First Amendment by focusing too much on speech, occasionally on religion, and almost never on press, assembly, and petition.¹¹ All

³ Cf. Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 917 (1998) (observing that “surprisingly little scholarship has focused on . . . the interests asserted by the government in support of restricting an individual’s constitutional rights”).

⁴ See generally Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 113 (2008) (describing the Supreme Court’s characterization of political and religious speech as “[h]igh value speech at the core of the First Amendment”).

⁵ See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564–66 (1980) (commercial advertising).

⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (referring to “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem”).

⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-20 (1984).

⁸ *Id.* at 622-29.

⁹ *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021).

¹⁰ *Hosanna-Tabor Evangelical Lutheran Sch. & Church v. E.E.O.C.*, 565 U.S. 171, 189 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2068-69 (2020).

¹¹ See generally John Inazu, *The First Amendment’s Public Forum*, 56 WM. & MARY L. REV. 1159 (2015) (critiquing the speech focus of modern public forum doctrine and the neglect of its roots in the right of assembly).

of this has created quite a mess. As Judge Newsom recently observed, “It’s not just that the doctrine is exhausting—although it certainly is that. It’s that the doctrine is judge-empowering and, I fear, freedom-diluting.”¹²

Even when the Court gets its initial framing right—when it requires the careful parsing of the government’s interest best characterized by strict scrutiny review—it often lacks a clear and consistent means of assessing the fit between that interest and the government’s regulation. The Court sometimes asserts the nearly impossible standard of “least restrictive means.”¹³ But often it refers only to “narrow tailoring.”¹⁴ And occasionally the Court entirely omits analyzing the fit of the government’s restriction with its stated interest.¹⁵

This Article proposes that courts take strict scrutiny more seriously in First Amendment claims.¹⁶ It argues for a standard

¹² *United States v. Jimenez-Shilon*, N. 20-13139 (May 23, 2022) (Newsom, J., concurring). Judge Newsom identified “two fixed stars” under First Amendment doctrine: “At one pole, the government can ban certain forms of speech outright—defamation, incitement, obscenity, etc.—because [they are] understood to fall outside the freedom of speech. At the other, speech restrictions based on viewpoint are prohibited, seemingly as a per se matter. In between, it’s balancing tests all the way down.” *Id.* He then catalogued a list of the various tests and doctrines. *Id.*

¹³ *Bonta*, 141 S. Ct. at 2383.

¹⁴ *See, e.g.,* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (“A government policy can survive strict scrutiny only if it advances ‘interests of the highest order’ and is narrowly tailored to achieve those interests.”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (same).

¹⁵ *See, e.g.,* *Masterpiece Cakeshop, Ltd. v. Col. C.R. Comm’n.*, 138 S. Ct. 1719 (2018) (upholding free exercise challenge after finding animus without engaging in strict scrutiny analysis); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (same).

¹⁶ My argument for strict scrutiny critically assesses existing First Amendment doctrine through a normative lens that prioritizes the text, history, and norms of the First Amendment, as well as clarity and administrability. *See generally* JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012), 17-18 (describing my interpretive approach to the Assembly Clause). Neither a uniform strict scrutiny test nor the existing strict scrutiny paradigm it seeks to improve upon can be justified on purely originalist grounds. *See* RICHARD H. FALLON, JR., *THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY* (2019) (tracing the emergence of strict scrutiny to the 1960s and observing that strict scrutiny “is a twentieth-century judicial invention wholly unforeseen by the Founding generation”); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006).

inquiry across all five individual rights of the First Amendment: a government restriction on First Amendment expression or action must advance a compelling interest through narrowly tailored means and must not excessively burden the expression or action relative to the interest advanced. The test thus has three prongs: (1) compelling interest; (2) narrow tailoring; and (3) proportionality.¹⁷

In one sense, this test largely redescribes, simplifies, and clarifies existing First Amendment analysis. But it adds clarity and transparency to the balancing inherent in cases that confront government interests and civil liberties. A meaningful strict scrutiny test would not mean the government always loses. But it would mean the government always justifies its restrictions.

Taken seriously, a clearer focus on strict scrutiny could dispense with a great deal of cumbersome doctrinal tests and detours that have emerged over the past sixty years, including aspects of modern public forum doctrine, content neutrality, and the government speech doctrine, among others. These tests and doctrines are not unprincipled or illogical. In most cases, they emerged out of tough cases and hard issues, with judges and scholars attempting to draw reasonable distinctions and sensible boundaries.¹⁸ But along the way, these approaches became bloated, unwieldy, and difficult to hold together. The result has been a great deal of confusion and head-scratching, including by lower courts attempting to apply Supreme Court precedent.¹⁹ A more consistent strict scrutiny approach shows

¹⁷ The first two prongs of this proposed test follow a version of the Supreme Court's modern strict scrutiny test, and the final prong borrows from proportionality analysis. For an account of the evolution of strict scrutiny, see FALLON, *supra* note ___. For proportionality analysis, see Jamal Greene, *Trump as a Constitutional Failure*, 93 IND. L.J. 93, 107-08 (2018) (noting that proportionality tests focus on whether the government's action was excessive relative to the benefit of the government's interest and the injury to the burdened right); ALEXANDER TSEIS: FREE SPEECH IN THE BALANCE 40-56 (2020) (applying proportionality to free speech context). Incorporating proportionality analysis into strict scrutiny resembles in some ways Justin Collings and Stephanie Hall Barclay's suggestion for "a more proportional version of strict scrutiny." See Justin Collings and Stephanie Hall Barclay, *Taking Justifications Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. REV. 453, 516 (2022).

¹⁸ See, e.g., Part II.C.1, *infra* (tracing the development of free speech content neutrality).

¹⁹ To flag just a few examples touched upon throughout this Article, content neutrality leaves open to manipulation the level at which neutrality is being described; intermediate and exacting scrutiny leave unclear at what level courts

that many of these tests and doctrines are neither necessary nor desirable for First Amendment analysis.²⁰

Strict in theory does not mean fatal in fact.²¹ But strict scrutiny requires a meaningful inquiry into the government’s reasons and methods for limiting First Amendment liberties. That means assessing (1) the strength of the government’s interest; (2) the fit of the government’s restriction with that interest; and (3) the benefits advanced by that interest relative to the burden on First Amendment liberties. These inquiries should not rely on generally stated interests but should instead require courts to assess specific justifications for upholding First Amendment restrictions.²² Strict scrutiny does not eliminate ambiguity and politics from First Amendment doctrine, nor

should review government interests; the line between speech and conduct causes courts either to awkwardly redescribe actions as speech, or alternatively, to ignore the expressive dimensions of actions; and the government speech doctrine raises fundamental tensions with public forum doctrine.

²⁰ This Article’s scope is limited to the First Amendment and does not offer suggestions for strict scrutiny analysis outside of that context. For a more comprehensive consideration of strict scrutiny across various dimensions of constitutional law, see FALLON, *supra* note ____.

²¹ Adam Winkler’s empirical review of strict scrutiny cases found that courts upheld more than 30% of government restrictions assessed under that standard. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794 (2006). See also *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O’Connor, J., concurring) (“it is not true that strict scrutiny is ‘strict in theory, but fatal in fact’”). The phrase “strict in theory and fatal in fact” originates in Gerald Gunter, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

²² See *infra*, Part III. This suggestion echoes the Court’s occasional observation that government interests must be assessed contextually. See *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (requiring the government “to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish”); *Grutter v. Bollinger*, 539 U. S. 306, 327 (2003) (noting that “[c]ontext matters” in applying the compelling interest test”); *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 228 (1995) (observing that strict scrutiny accounts for “relevant differences”). See also the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, as amended, 42 U. S. C. §2000bb-1(c) (requiring the government to demonstrate the compelling interest of applying its burden “to the person”); Justin Collings and Stephanie Hall Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. REV. 453, 458 (2022) (arguing, in the free exercise context, that government actors should “produce evidence demonstrating that affording religious accommodations would undermine the government’s important interest”)

does it encompass the entire landscape of First Amendment cases and issues. But it would at least focus courts and commentators on more of the right questions. Two examples illustrate the significance of this proposed shift.

In 1984, the Supreme Court denied a claim to the right of association brought by an all-male civic organization, the United States Jaycees. The national Jaycees did not want to include women in their organization. The local chapters in Minneapolis and St. Paul wanted to open to women, and the state of Minnesota agreed with the local chapters.²³ The Court’s decision against the national Jaycees introduced a murky test for “expressive association” and relied on the state’s interest in “eradicating gender discrimination.”²⁴

Set aside the fact that there is no right of association in the First Amendment—it’s even less clear that there is or should be a more particularized right of expressive association.²⁵ It’s also unclear why such a right would require anything less than strict scrutiny.²⁶ And it’s not clear why the Court accepts Minnesota’s interest in “eradicating gender discrimination” when in fact Minnesota has no such generalized interest: in fact, decades later, the state continues to welcome single-gender schools, fraternities and sororities, health clubs, and strip clubs, all of which discriminate on the basis of gender. Strict scrutiny should have required a narrowly tailored restriction advancing a particularized compelling interest sufficient to deny the Jaycees’ First Amendment liberties. It’s possible that the Court might have reached the same outcome. But we don’t know because it never undertook the analysis.²⁷

²³ *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

²⁴ *Roberts*, 468 U.S. at 623.

²⁵ See generally *Inazu*, *supra* note __ [LIBERTY’S REFUGE]

²⁶ *Roberts*, 468 U.S. at 623 (“Infringements on [the right of expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”). This language departs from the typical strict scrutiny test and some lower courts have construed it to require less than strict scrutiny. See *Inazu*, *supra* note __ [LIBERTY’S REFUGE], at 141 (collecting cases).

²⁷ See *Inazu*, *supra* note __ [LIBERTY’S REFUGE], at 16 (“Nothing in Justice Brennan’s majority opinion or Justice O’Connor’s concurrence tells us anything about how the Jaycees in Minneapolis and St. Paul had overreached their private power to the detriment of women or why compelling the Jaycees to accept women as full members rather than as associate members would have remedied that power disparity. The justices simply assumed that the state’s interest in eradicating gender

A second example of the value of meaningful strict scrutiny can be seen in the Court's approach to charitable solicitation.²⁸ In *Village of Schaumburg v. Citizens for a Better Environment*, the Court announced that charitable solicitation was something more than "purely commercial speech" because it "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services."²⁹ This reasoning introduced an analytical problem. The Court had previously signaled that commercial speech warranted a form of intermediate scrutiny.³⁰ But *Schaumburg* gave no indication that charitable solicitation was akin to core "high-value" speech (like political or religious speech) warranting strict scrutiny. *Schaumburg* thus meant that charitable solicitation should receive greater protection than the intermediate scrutiny of commercial speech (which in turn receives greater protection than other "low-value" speech) and less protection than the strict scrutiny of "high-value"

discrimination warranted trumping the autonomy of the Jaycees. Nobody offered any explanation of why *this* remedy helped to eradicate gender discrimination in *these* circumstances sufficient to trump the autonomy of *this* group."). The corresponding right of intimate association raises similar questions. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627 (1980) ("The freedom of intimate association, like other constitutional freedoms, is presumptive rather than absolute. In particular cases, it may give way to overriding governmental interests. The freedom does not imply that the state is wholly disabled from promoting majoritarian views of morality. What the freedom does demand is a serious search for justifications by the state for any significant impairment of the values of intimate association.").

²⁸ See John D. Inazu, *Making Sense of Schaumburg: Seeking Coherence in First Amendment Charitable Solicitation Law*, 92 MARQ. L. REV. 551, 559-60 (2009).

²⁹ 444 U.S. 620, 632, 639 (1980).

³⁰ In *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 779 (1976), the Court announced that commercial speech would receive some kind of protection, ostensibly something more than the rational basis scrutiny that the Court had previously applied to commercial speech regulation. But *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978), made clear that commercial speech would not receive the same protection as other protected speech. Cf. KATHLEEN SULLIVAN AND GERALD GUNTHER, CONSTITUTIONAL LAW 1159 (15th ed. 2004) ("[C]ommercial speech continues to stand as the lone formal exception to the two-level approach to speech set forth in *Chaplinsky* . . . it enjoys First Amendment protection, but not as much First Amendment protection as other speech.").

political or religious speech.³¹ But the Court never clarified what standard fell between strict and intermediate scrutiny. And over forty years later, we still don't know the answer.³²

Importantly, *Schaumburg*'s analytical confusion stems from focusing on the nature of the First Amendment expression and neglecting the government's interest in restricting that expression. It's not hard to show why at least some forms of charitable solicitation are deeply connected to "high-value" religious and political speech.³³ Rather than asking courts to rely solely on complex value judgments that protect some forms of charitable solicitation but not others, strict scrutiny would shift the doctrinal focus to assessing in the first instance the government's interest and the fit of its regulation. Perhaps the government has a compelling interest in regulating charitable solicitation through narrowly tailored means sufficient to burden First Amendment expression. But if it lacks such an interest, then convoluted classifications of the value of charitable solicitation should not justify overregulation. As with the right of association, focusing more on government interests would eliminate doctrinal ambiguity and better protect important civil liberties from unjustified restrictions.

³¹ The confusion caused by these concepts was evident in footnote 7 of the Court's opinion in *Schaumburg*, which noted that "[t]o the extent that any of the Court's past decisions . . . hold or indicate that commercial speech is excluded from First Amendment protections, those decisions, to that extent, are no longer good law. For the purposes of applying the overbreadth doctrine, however, it remains relevant to distinguish between commercial and noncommercial speech." *Id.* at 632 (citations omitted). The Court never explained why the distinction between commercial and noncommercial speech remained relevant in the context of the overbreadth doctrine. Three years earlier, in *Bates v. State Bar of Arizona*, the Court had cryptically asserted that "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." 433 U.S. 350, 380 (1977). The only support the Court offered for this assertion was that "[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Id.* at 381.

³² See Inazu, *supra* note __ [Making Sense of *Schaumburg*], at 565-66 (noting that the Eighth and Tenth Circuits interpret *Schaumburg* as an intermediate scrutiny test, the Third and Eleventh Circuits view it as a strict scrutiny test, and the Fourth Circuit has simply noted that the Court has been "unclear" about the appropriate standard).

³³ See *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 292 (1940) (Jehovah's Witnesses soliciting donations as part of their expressive activity).

This Article proposes a uniform strict scrutiny test for evaluating government restrictions on First Amendment liberties. Part I explores how current First Amendment doctrine too often neglects a meaningful assessment of the government’s purported interest in limiting First Amendment liberties. Part II shows how First Amendment inquiry is further confused by threshold considerations of coverage, categories, and content. Part III suggests how strict scrutiny better focuses courts on the strength of the government’s asserted interest, the fit of a restriction with that interest, and the benefits of the interest relative to the burdens on First Amendment liberties. Part IV defends these arguments against possible objections.

I. CURRENT DOCTRINE

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”³⁴ Setting aside the Establishment Clause, which is arguably a structural provision and seldom viewed as an individual right,³⁵ the First Amendment recognizes five individual rights: religion, speech, press, assembly, and petition. It is fundamentally a restriction on government restrictions of these five rights, limiting what government can do to our civil liberties. That would seem to suggest that we should care a great deal about the government’s reasons for its restrictions. Instead, current First Amendment doctrine means that government interests sometimes go entirely unexamined.

A. Neglecting Government Interests

Consider three examples when the Court denied a First Amendment claim without any consideration of the strength or fit of the government’s interest:

- In 1988, the Supreme Court rejected a free exercise claim by Native Americans who alleged that a highway planned

³⁴ U.S. CONSTITUTION, AMENDMENT I.

³⁵ *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 541 U.S. 1, 45-46 (2004) (Thomas, J., concurring).

by the Forest Service would destroy their ancestral burial grounds and prevent religious rituals dependent on the surrounding physical environment. The Court concluded that the government’s action would not substantially burden the free exercise of religion, even if the road would “virtually destroy” the Native Americans’ ability to practice their religion.³⁶

- In 2009, the Court unanimously rejected a challenge from a little-known religious group that wanted to place its monument in a public park next to a monument of the Ten Commandments. The Court concluded that the city’s management of the park was a form of government speech, which meant that any government censorship fell entirely outside of First Amendment review.³⁷
- In 2010, the Court rejected a freedom of association claim by a Christian student group that argued a public law school had impermissibly excluded them from among its recognized student groups. The Court determined that the group’s association claim “merged” with their free speech claim and upheld the school’s exclusion under a speech-based public forum analysis with almost no consideration of the government’s interest.³⁸

Substantial burden analysis, government speech, and public forum doctrine have all generated their share of critics.³⁹ But even

³⁶ *Lyng v. Northwest Indian Cemetery*, 485 US 439, 451-52 (1988). For an argument defending *Lyng* on the basis of no burden, see Chad Flanders, *Substantial Confusion about “Substantial Burdens,”* 2016 U. ILL. L. REV. 27, 28 (“The tribe sued but lost because, while destroying the forest was certainly a bad thing for the tribe and a hindrance to them being able to practice their religion, it did not put pressure on them to violate their beliefs or change their religion.”).

³⁷ *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). The religious group brought its challenge under the establishment clause, but the Court resolved the case using free speech doctrine. *Cf.* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“the Government’s own speech . . . is exempt from First Amendment scrutiny”).

³⁸ *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). After merging the group’s association claim with its speech claim, the Court applied free speech public forum doctrine and upheld the exclusion as “textbook viewpoint neutral.”

³⁹ *See, e.g.,* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1783-87 (2016) (arguing that the substantial burden analysis requires “courts [to] draw lines between impositions that have greater theological

more striking than the ambiguities introduced by these doctrinal innovations is the lack of any scrutiny of the government’s asserted interest in these cases. And these are not the only examples. Courts make similar outcome-determinative decisions without considering government interests when they deem claims as falling outside the First Amendment’s coverage or as categorially unprotected forms of expression.⁴⁰

Inattention to the strength and fit of government interests has also spilled into regulatory and cultural domains. During the COVID-19 pandemic, states and municipalities settled on the unfortunate locution “essential activity” to denote businesses and services exempted from generally applicable shutdown and social distancing orders.⁴¹ The unintended implication was that non-exempted activities were “non-essential.” This led one police department to conclude that “protesting is a non-essential activity”⁴² and several pundits to label religious worship as “non-essential.”⁴³ Classifying

significance and impositions that have less theological significance . . . , [and this type of interrogation of] religious substantiality of conduct on a theological metric runs afoul of core Establishment Clause prohibitions.”); *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) (cautioning that the government speech doctrine is “susceptible to dangerous misuse...[because if] private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints”); Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1976 n.3 (2011) (listing criticisms of the public forum doctrine).

⁴⁰ See *infra*, Part II.

⁴¹ John Inazu, *COVID-19, Churches, and Culture Wars*, 18 U. ST. THOMAS L.J. 207 (2022).

⁴² Jeff Reeves, *Raleigh police release statement after department tweets ‘protesting is a non-essential activity’*, CBS17.COM (updated Apr. 14, 2020, 9:40 PM), <https://www.cbs17.com/news/local-news/wake-county-news/raleigh-police-release-statement-after-department-tweets-protesting-is-a-non-essential-activity/> (noting that the Raleigh Police Department’s official Twitter account tweeted that “protesting is a non-essential activity”).

⁴³ See @TheView, TWITTER (May 31, 2020, 3:00 PM), <https://twitter.com/TheView/status/1267184072184360960> (“I do not feel that houses of worship are essential. I believe that true worship is essential. You can practice your faith anywhere”); Joseph A. Wulfsohn, *De Blasio slammed for halting prayer gatherings but not protests; mayor cites ‘400 years of American racism’*, FOX NEWS (June 2, 2020, 4:33 PM), <https://www.foxnews.com/politics/bill-de-blasio-slammed-for-halting-prayer-gatherings-but-allowing-protests-400-years-of-racism-is-not-the-same-as-religion> (reporting on a press conference where de Blasio stated, “[w]hen you see a nation, an entire nation simultaneously grappling with an extraordinary crisis seeded in 400

First Amendment activities as “non-essential” is constitutionally erroneous and politically misguided. It also ignores any consideration of the strength and fit of the government interest that seeks to limit those activities.

Restrictions on First Amendment activity during the COVID-19 pandemic also demonstrate why interrogating the government’s asserted interest matters. Policy makers and courts routinely relied upon generalized interests like “public health” to justify their restrictions.⁴⁴ In the most general sense, “public health” is one of those phrases that will always sound of the utmost importance. But the strength of the government’s public health interest has varied considerably over the course of the pandemic. In many cases, it depended upon rates of transmission, hospitalization, lethality, and eventually, vaccination. And these factors, in turn, depended on time and location. Contrast, for example: (1) the public health interest in restricting activity in a high transmission area before the vaccine was available; with (2) the public health interest in restricting that activity in a low transmission area where most people were vaccinated. These differences were obscured by focusing on whether an activity was

years of American racism, I'm sorry, that is not the same question as the understandably aggrieved store owner or the devout religious person who wants to go back to services”); @RichardDawkins, TWITTER (May 22, 2020, 4:00 PM), <https://twitter.com/RichardDawkins/status/1263937712173744129> (“Places of worship are ‘essential services’. Oh how silly of me. You see, I thought ‘essential’ meant, you know, essential. As in necessary, vital, important etc.”). Excluding religious worship from among “essential” activities also opened the door to snarky commentary from Justice Gorsuch in a case challenging COVID-19 restrictions issued by New York Governor Andrew Cuomo: “[T]he Governor has chosen to impose no capacity restrictions on certain businesses he considers “essential.” And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring).

⁴⁴ See, e.g. Public Health Order, N.M. Dep’t of Health 1 (June 30, 2020), <https://cv.nmhealth.org/wp-content/uploads/2020/07/063020-PHO-1.pdf> (last visited August 4, 2022) (justifying its “restrictions on mass gatherings and business operations” as “necessary to protect public health”); N.Y. Comp. Codes R. & Regs. tit. 9, § 8.202.68 (2020) (justifying its restriction on “houses of worship” as mitigating a “disaster emergency”).

“essential” and accepting “public health” as an unquestioned compelling interest.

The Supreme Court has occasionally hinted at the danger of neglecting serious inquiry into the government interest restricting First Amendment activity. For example, in *United States v. Alvarez*, the Court underscored that “to recite the Government’s compelling interest is not to end the matter” because “[t]he First Amendment requires that the Government’s chosen restriction on the speech at issue be actually necessary to achieve its interest.”⁴⁵ But elsewhere, the Court has lessened its attention on government interests. One example is its approach to free exercise doctrine. In its 1990 decision, *Employment Division v. Smith*,⁴⁶ the Court concluded that free exercise challenges to neutral laws of general applicability were subject only to rational basis scrutiny.⁴⁷ Recently, the Court signaled its intent to reconsider *Smith* in *Fulton v. City of Philadelphia*.⁴⁸ But Chief Justice Roberts’ majority opinion in *Fulton* ultimately concluded that the Court need not revisit *Smith*.⁴⁹

Justice Barrett, joined by Justices Kavanaugh and Breyer, concurred in the result and questioned the wisdom of revisiting *Smith*. “[W]hat should replace *Smith*?” asked Barrett. She elaborated:

The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*’s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court’s resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced.⁵⁰

⁴⁵ 567 U.S. 709, 725 (2012).

⁴⁶ 494 U.S. 872 (1990).

⁴⁷ *Id.* at 885. Some commentators believed that this decision reduced the free exercise clause to little more than an equal protection right. See, e.g., McConnell, *Free Exercise Revisionism after Smith*.

⁴⁸ 141 S. Ct. 1868, 1876 (2021).

⁴⁹ *Id.* at 1877. Roberts asserted that the challenged regulation lacked general applicability and failed strict scrutiny. *Id.*

⁵⁰ *Id.* at 1882-83 (Barrett, J., concurring).

Whether “an equally categorical strict scrutiny regime” would create as much doctrinal confusion as *Smith*’s standard is not self-evident, particularly given the Court’s struggle in recent years to agree about the meaning of neutrality and general applicability.⁵¹ But even less plausible is Justice Barrett’s contention that the Court’s treatment of speech and assembly claims has been “much more nuanced.” The Court has not addressed the Assembly Clause in over forty years.⁵² And when it comes to speech, confusion is not the same as nuance. In neither speech nor assembly has the Court made clear how it assesses the strength and fit of the government interest seeking to curtail fundamental civil liberties.

Confusion about government interests is also evident in *Americans for Prosperity v. Bonta*, which the Court decided just two weeks after *Fulton*.⁵³ The case involved a challenge to a California law requiring charitable organizations to disclose their major donors to the state’s Attorney General.⁵⁴ Two tax-exempt organizations asserted that the compelled disclosure violated their First Amendment rights.⁵⁵ Chief Justice Roberts’ opinion in favor of the organizations relied on the right of association first recognized by the Court in its 1958 decision, *NAACP v. Alabama*.⁵⁶ The Court’s development of the

⁵¹ See Part II.C.2, *infra*.

⁵² See generally JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012) (tracing the modern Court’s neglect of the Assembly Clause).

⁵³ *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

⁵⁴ *Id.* at 2739.

⁵⁵ *Id.* at 2380. One possible way to address that claim was through the First Amendment’s right of assembly. Two amicus briefs suggested as much, and questions from the Justices provided the most extensive attention to assembly during a Supreme Court oral argument in almost forty years. See Brief for Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioners, *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (No. 19-251); Brief for Concerned Women for America et al. as Amici Curiae Supporting Petitioners, *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (No. 19-251).

⁵⁶ *NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958). I have argued elsewhere that the right of association derives from the right of assembly. See generally INAZU [Liberty’s Refuge]. *Bonta* was the closest the Court has come to recognizing this connection. Part of the confusion stems from the Court’s earlier conflation of assembly and petition. That error began in 1886, when Justice William Woods mistakenly wrote that the First Amendment protected the right to assemble only if “the purpose of the assembly was to petition the government for a redress of grievances.” *Presser v. Illinois*, 116 U.S. 252, 267 (1886). The Court has never corrected this error but appeared to be on the verge of doing so in *Bonta*. During

right of association since *NAACP v. Alabama* has left unclear the level of scrutiny of government interests. Its 1984 decision in *Roberts v. United States Jaycees* split the right into three component parts: expressive association; intimate association, and non-expressive, non-intimate association.⁵⁷ Other decisions have hinted at distinct rights for political associations⁵⁸ and religious associations.⁵⁹ Sometimes the Court has applied strict scrutiny; other times, its standard had been less clear.⁶⁰ *Bonta* added to the confusion when the Court reaffirmed a distinction between strict scrutiny and “exacting scrutiny.”⁶¹ These layers of doctrinal complexity leave unclear how courts are supposed to assess the strength of government interests in cases involving the right of association.

The preceding examples demonstrate how existing First Amendment doctrine neglects—and sometimes altogether ignores—serious inquiry into the strength and adequacy of the government’s interest in limiting First Amendment rights. These shortcomings unfold across the various rights of the First Amendment, and they obscure the kind of analysis that the First Amendment ought to require.

oral argument, Justice Kavanaugh asked the petitioner’s lawyer: “Do you agree on the text of the First Amendment that the freedom to peaceably assemble is distinct from the freedom to petition the government for a redress of grievances?” *Bonta*, Oral Arg. Tr. at 36:2-6. Justice Barrett followed later with a related question about the right of assembly, *id.* at 39:5-7, and Justice Kagan also referenced an amicus brief asking the Court to consider the implications for the right of assembly, *id.* at 61:15-20. The Court’s opinion in *Bonta* failed to acknowledge the importance of assembly or clarify its earlier error in *Presser*. Justice Thomas’s concurrence, however, noted that “the text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously.” *Bonta*, 141 S. Ct. at — (Thomas, J., concurring).

⁵⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984).

⁵⁸ *See, e.g., Tashjian v. Republican Party*, 479 US 208, 217 (1986) (referring to “the freedom of political association”).

⁵⁹ *Hosanna-Tabor Evangelical Lutheran Sch. & Church v. E.E.O.C.*, 565 U.S. 171, 189 (2012) (recognizing ministerial exception after reject the government’s freedom of association argument).

⁶⁰ *Roberts*, 468 U.S. at 623-29.

⁶¹ *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021).

2. *Balancing and Choosing*

Every First Amendment case includes two incommensurable values: the First Amendment interests underlying expression or action, and the government’s interests in restricting that expression or action.⁶² Inattention to government interests and too much scrutiny of the social value of expression or action increases the risk that courts will neglect or misunderstand the significance or meaning of that expression or action. When important civil liberties are at stake, there is value to a posture of epistemic agnosticism toward expression or action whose meaning we may not be able to understand.⁶³

Consider a college sorority. An unfamiliar observer might find himself perplexed or amused by the platitudes to sisterhood, the cheers and songs, and the cruelties of the rush process. But for those women selected for membership (and, at many schools, wealthy enough to pay for its costs), the common life of a sorority takes on a different meaning. That meaning might be temporally and contextually bound—most sorority members do not experience the same intensity of belonging and connectedness to the group for the rest their lives. But its significance cannot be fully captured or understood from the outside. Understanding the sisterhood, songs, and

⁶² Cf. *Ramirez v. Collier*, 595 U.S. ____ (2022) (Kavanaugh, J., concurring) (“The compelling interest standard of RLUIPA—like the compelling interest standard that the Court employs when applying strict scrutiny to examine state limitations on certain constitutional rights—necessarily operates as a balancing test.”).

⁶³ My description of epistemic agnosticism in some ways builds First Amendment jurisprudence on the law’s agnosticism as to the truth or falsity of an idea. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), (“Under the First Amendment there is no such thing as a false idea.”). See also Paul Horwitz, *The First Amendment’s Epistemological Problem*, 87 WASH. L. REV. 445, 454 (2012). Of course, it’s possible that epistemic inaccessibility could cause judges or others to overvalue rather than undervalue the First Amendment importance of an expression or action. The clearest example of this phenomenon within the First Amendment may be the deference to the sincerity of free exercise claimants. See, e.g., *United States v. Ballard*, 322 U.S. 78 (1944) (holding that holds that courts may only inquire into whether a person sincerely holds religious beliefs, and not whether those beliefs are true or false). For a critique of this deference to sincerity, see Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017) (arguing that “courts can and should adjudicate an accommodation claimant’s religious sincerity,” especially because “insincere claims impose costs on the government, third parties, and religious liberty itself.”).

selection of a sorority in some ways requires participation in the group.

The college sorority is an easy example because its liturgy is fairly rudimentary. But what about the celebration of the Eucharist in a Catholic church, the temple marriage in a Mormon tabernacle, or the Passover in a Jewish household? There should be little doubt that outsiders to these kinds of practices are unable to fully grasp their meaning to participants.⁶⁴ The epistemic limitations on assessing the internal value of unfamiliar expression or action also reveal the misleading nature of the balancing metaphor that has captured a great deal of First Amendment rhetoric: judges don't merely weigh; they choose.⁶⁵

The epistemic barriers to evaluating unfamiliar practices arguably decrease when it comes to the restrictions on those practices. Legal restrictions represent the considered judgments of a political community enacted through its elected representatives. I may not be a member of a sorority, but if I live in some proximity to one, I am likely a member of the community of people who come up with regulations that affect the sorority. Moreover, those charged with making the community's laws have some obligation to explain the basis for those laws. Focusing initially on the government's interest properly places the burden on government officials to justify the relative importance

⁶⁴ The importance of epistemic agnosticism can be illustrated by Alasdair MacIntyre's well-known discussion of a practice. ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981). MacIntyre defines a practice as "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions and goods involved are systematically extended." Internal goods on MacIntyre's account can only be explained by appealing to examples from that practice. *Id.* at 188. Put more strongly, internal goods are sometimes only comprehensible within the context of a particular practice. In at least some cases, internal goods "can only be identified and recognized by the experience of participating in the practice in question" and "[t]hose who lack the relevant experience are incompetent thereby as judges of internal goods." *Id.* at 188-89.

⁶⁵ This choice can be preceded by varying degrees of rigor in assessing competing incommensurable interests. Accordingly, while all balancing ultimately involves a choice, we can still maintain a normative preference for more informed and more reflective balancing.

of their restriction rather than on a claimant to justify the importance of her action.

II. CURRENT THEORIES: COVERAGE, CATEGORIES, AND CONTENT

In addition to its growing number of tests and standards, contemporary First Amendment doctrine elides proper attention to government interests by focusing instead on three kinds of threshold inquiries: coverage, categories, and content. Coverage inquiries assume that some restrictions simply do not raise First Amendment claims because the expression or action they target falls outside of the First Amendment. Category inquiries look for expressions or actions deemed wholly unworthy of First Amendment protection, or what the Court in *Chaplinsky v. New Hampshire* described as “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”⁶⁶ Content inquiries consider whether the government restriction is based on the message or meaning of an expression or action. Coverage and category inquiries focus entirely on the nature of expression or action and pay no attention to the government interest; content inquiries consider the scope but not always the importance of the government interest.⁶⁷

A. Coverage Inquiries

Coverage inquiries assert that some expressions and actions are simply outside of the First Amendment. These inquiries have been advanced by a number of prominent First Amendment theorists, most notably Frederick Schauer.⁶⁸ Schauer classifies certain forms of

⁶⁶ 315 U.S. 568, 571-72 (1942).

⁶⁷ Alexander Tsesis has critiqued in a slightly different context “a pattern of categorical pronouncements in First Amendment jurisprudence whose absolute statements are misleadingly opaque.” TSESIS, *supra* note __, at xii [Free Speech in the Balance] (critiquing the Court’s insistence “that all content-based regulations are subject to strict scrutiny).

⁶⁸ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 50-56 (1982); Frederick Schauer, *Can Rights Be Abused?*; 31 PHIL. Q. 225 (1981); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Frederick Schauer, *Codifying the First Amendment:*

expression like perjury or insider trading as “uncovered” expression where “[t]he First Amendment just does not show up.”⁶⁹ Covered expression fares much better: “Once the First Amendment shows up, much of the game is over.”⁷⁰ These threshold coverage distinctions depend upon what Schauer calls “constitutional salience,” which he defines as “the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not.”⁷¹

New York v. Ferber, 1982 SUP. CT. REV. 285. *See also* Ashutosh Bhagwat, *When Speech Is Not “Speech,”* 78 OHIO ST. L.J. 839, 844 (2017) (describing an “amorphous set of factors” that contribute to “a theory of coverage.”)

⁶⁹ Schauer, *supra* note __ [Boundaries], at 1769. Schauer at times distinguishes between expression that lies “inside” the First Amendment and expression that lies “outside” of it. *See, e.g.*, Schauer, *supra* note __, at 1768 (noting “familiar debates about whether obscenity, libel, fighting words, and commercial advertising are inside or outside the coverage of the First Amendment”); *id.* at 1784 (referring to “the line between what is inside and what is outside” the boundaries of the First Amendment); *id.* at 1796 (referring to a cycle that “can be expected to bring issues into the First Amendment that previously had been outside its domain”).

⁷⁰ *Id.* at 1767. To the extent that Schauer’s descriptive analysis tracks current Supreme Court case law, the “expressive” threshold for “covered” speech is quite low. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995) (“information on beer labels” is speech), *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion) (credit report is speech); *Sorrell v. IMS Health Inc.*, 131 S Ct. 2653, 2667 (2011) (“prescriber-identifying information is speech for First Amendment purposes”).

⁷¹ Schauer, *supra* note __, at 1768. This characterization draws upon realist insights to highlight “a complex and seemingly serendipitous array of factors that cannot be (or at least have not been) reduced to or explained by legal doctrine or by the background philosophical ideas and ideals of the First Amendment.” *Id.* Constitutional salience serves as a proxy for “the outcome of a competitive struggle among numerous interests for constitutional attention.” *Id.* at 1788. *Cf.* STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH, AND IT’S A GOOD THING, TOO 102 (1994) (“Free speech, in short, is not an independent value but a political prize, and if that prize has been captured by a politics opposed to yours, it can no longer be invoked in ways that further your purposes, for it is now an obstacle to those purposes.”). For a realist approach to the First Amendment with some resemblance to Schauer’s constitutional salience, *see* Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 390 (1990) (describing rhetorical shifts that accompanied “a loss of faith in the fundamental nature and coherence of an abstract liberty” with respect both to freedom of contract and freedom of speech). *See also* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

Schauer also distinguishes “coverage” (which determines the expressions or actions that are outside of the First Amendment) from “protection” (which applies to a subset of expressions or actions inside the First Amendment).⁷² He observes that coverage refers to the predicate conditions for any legal rule:

“Speed Limit 65,” for example, is but shorthand for a rule, articulated more formally, that applies to particular persons driving on a particular stretch of highway, and that limits those persons’—and only those persons’—speed to sixty-five miles per hour. Elaborating the rule in full would expose the two parts, the first of which can be understood as a predicate—the scope of coverage—and the second as the consequent, such that application of the rule occurs only as a consequence of the predicate conditions being met. *If you are driving a motor vehicle, and if you are not a police officer or driving an emergency vehicle, and if you are driving between these points on this highway—then you are prohibited from driving in excess of sixty-five miles per hour.*⁷³

Schauer is of course correct to note that every rule has predicate or background conditions. But his application of this principle to the First Amendment does far more normative work than his predicate conditions for “Speed Limit 65.”

As Schauer notes, the speed limit assumes predicate conditions that the rule applies to motor vehicles but not to emergency motor vehicles. The most obvious predicate conditions of the First Amendment are its focus on government actors (the object of the First Amendment’s restriction on “Congress”) and its applicability to expression or action that can be classified as religion, speech, press, assembly, or petition. Schauer adds the additional condition that the

⁷² See SCHAUER, *supra* note __, at 89 (“Many discussions of rights make the unfortunate mistake of masking the important distinction between the coverage of a right and the protection of a right.”). Schauer suggests a “logical distinction between coverage and protection is pertinent to all constitutional rights—indeed, to all legal rules.” Schauer, *supra* note __ [Boundaries], at 1771.

⁷³ *Id.* at 1771.

First Amendment applies only to “covered” expression.⁷⁴ But this condition risks being either tautological (covered expressions or actions can’t be illegal) or somewhat arbitrary.

The difficulty arises in the specific applications of “uncovered” expression. Some applications like “not perjury” and “not insider trading” are similar to the predicate condition that “Speed Limit 65” only applies to non-emergency motor vehicles. They work because widespread consensus assumes them to be true.⁷⁵ But other applications of Schauer’s predicate condition are less obvious. For example, Schauer suggests that “most of labor law proceeds unhindered by the First Amendment,” but it’s not clear how this places labor expression and activity outside the boundaries of the First Amendment.⁷⁶ These distinctions matter because, on Schauer’s account, any expression or action falling outside of the First Amendment’s coverage can be restricted without any inquiry into the nature of the government’s interest.⁷⁷ If we instead focused on the government’s interest in maintaining judicial integrity (as in the case of restrictions on perjury) or stabilizing management and labor relations under conditions of economic instability (as in the case of restrictions on labor strikes), we would see that threshold distinctions between covered and uncovered expression or action cannot do all of the work of First Amendment analysis—some government interests

⁷⁴ *Id.* at 1773 (“[T]he strictures of the First Amendment plainly apply not only to a subset of all legal controversies, but also to a subset of those legal controversies involving what would be called ‘speech’ in ordinary language.”)

⁷⁵ In an earlier article discussing Schauer’s examples of restrictions on perjury and insider trading, I characterized those restrictions as “uncontroversial precisely because the contextualized words that they constrain are widely understood to be beyond unreasonable.” John Inazu, *Beyond Unreasonable*, 99 NEB. L. REV. 375, 408 (2020).

⁷⁶ Schauer, *supra* note __ [Boundaries], at 1782. For a consideration of some of the Court’s protections of labor assembly and normative arguments to expand those protections, see Marion Crain & John Inazu, *Reassembling Labor*, 2015 ILL. L. REV. 1791.

⁷⁷ See also Schauer, *supra* note __ [Boundaries], at 1783 (copyright law “remains *largely* unimpeded by the First Amendment”) (emphasis added). *id.* at 1780 (securities regulation is “a domain *largely* outside the coverage of the First Amendment”) (emphasis added); *id.* at 1781 (antitrust law “remains *almost* wholly untouched by the First Amendment” (emphasis added); *id.* at 1784 (the First Amendment is irrelevant to “*almost all* of the regulation of professionals, *virtually the entirety* of the law of evidence, large segments of tort law, and that vast domain of criminal law that deals with conspiracy and criminal solicitation”) (emphasis added).

will prevail against any challenge but others will sometimes lose to the First Amendment liberty interest.

B. Category Inquiries

Like coverage inquiries, category inquiries often preclude any consideration of the government interest restricting First Amendment liberties. The Court first gestured toward categories of unprotected speech in *Chaplinsky v. New Hampshire*, when it described “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”⁷⁸ The Court has since specified that these categories include obscenity, defamation, fraud, incitement, and “speech integral to criminal conduct.”⁷⁹ These categories have remained fairly stable. In *United States v. Stevens*, the Court rejected the government’s suggestion that it recognize “depictions of animal cruelty” as a new category of unprotected expression.⁸⁰ In one sense, the Court’s unwillingness to expand the categories of unprotected expression reinforces helpful limits. But as I will explain later, even restrictions on expression or action that fall within *Chaplinsky*’s categories should be assessed based on the strength and fit of the government’s interest.

Some commentators and courts make moves similar to categorical inquiries when they distinguish speech (or expression) from conduct.⁸¹ Proponents of this distinction conclude that restrictions directed against “nonexpressive conduct” do not raise any First Amendment concerns.⁸² Unlike categoricalism, the speech-conduct distinction at least begins by focusing on the government’s restriction. But the end result is the same: if the restriction is found to target conduct rather than speech, it can be upheld without any inquiry into the underlying government interest.

This speech-conduct distinction is difficult to defend. As Justice Kagan has observed, “[s]peech is everywhere—part of every

⁷⁸ 315 U.S. 568, 571-72 (1942).

⁷⁹ *United States v. Stevens*, 559 U.S. 460, 468 (2010).

⁸⁰ *Id.* at 469 (quoting Brief for United States, at 10).

⁸¹ *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

⁸² *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (“It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.”).

human activity.”⁸³ Consider, for example, whether the decision to exclude someone from a private membership group is an act of discrimination (conduct) or an expression of the group’s values (speech).⁸⁴ It is both at the same time. There is no coherent way to parse the speech-conduct distinction in this example, and we ought not do so in order to circumvent an inquiry into whether the state has overcome the First Amendment’s presumptive restriction against government restrictions.⁸⁵ As Clay Calvert observes: “Speech and conduct are simply too inextricably intertwined in many laws, particularly those affecting economic and social welfare, that time is better spent on tasks other than untangling them.”⁸⁶

Like Schauer’s coverage distinction, categorical distinctions like “protected” and “unprotected” or “speech” and “conduct” risk oversimplifying the range of expression and action that might plausibly implicate First Amendment interests. By focusing on the nature of the expression or action, these classifications also obscure the need to focus on the nature and fit of the government interest that lies on the other side of judicial balancing.

C. Content Inquiries

The final threshold inquiry that detracts from rigorously evaluating the strength and fit of the government’s interest is the content inquiry. The content inquiry focuses on improper legislative motive: whether the legislature has targeted a particular form of

⁸³ *Janus v. Am. Fed. State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting). *See also* *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring) (“virtually all government regulation affects speech”).

⁸⁴ *Cf.* *Lathrop v. Donohue*, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting) (“Joining is one method of expression.”).

⁸⁵ Alexander takes this observation to exactly the opposite conclusion. *See* Alexander, *supra* note __, at 36-37.

⁸⁶ Clay Calvert, *Curing the First Amendment Scrutiny Muddle Through a Breyer-Based Blend Up? Toward a Less Categorical, More Values-Oriented Approach for Selecting Standards of Judicial Review*, 65 WASH. U. J. LAW & POL’Y 1, 12-13 (2021). *Cf.* OWEN FISS, *THE IRONY OF FREE SPEECH*, 13 (expressing “doubts as to the usefulness of the speech/action distinction as a general First Amendment methodology because it masks all the hard judgments that the First Amendment requires.”).

expression because of its content or viewpoint.⁸⁷ But laws expressly targeting a particular viewpoint are the easy cases.⁸⁸

The harder cases are laws that satisfy threshold inquiries of content and viewpoint neutrality. It is not hard to think of examples: a picketing zone enforced against all protesters but effectively restricting only one side;⁸⁹ a restriction on worship that applies to religious and non-religious groups alike;⁹⁰ a neutral membership list disclosure requirement that jeopardizes the viability of some groups more than others.⁹¹ In each of these cases, the content inquiry does most or all of the work without any meaningful consideration of the government interest.

The content inquiry has emerged through distinct lines of cases and reasoning in free speech and free exercise doctrine.

1. Free Speech: Content Neutrality

The free speech content inquiry derives from the Supreme Court's embrace of tiered scrutiny, which represented a move away from categoricalism toward balancing.⁹² As the Court assimilated

⁸⁷ See Heyman, *supra* note __, at 653 (“[T]he courts’ increasing reliance upon the content discrimination doctrine to resolve difficult First Amendment problems only obscures the crucial issues, and leads to hypertechnical decisions that are inaccessible to the public.”).

⁸⁸ See, e.g., *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In many cases, these laws will also violate equal protection standards. *Id.*

⁸⁹ *Hill v. Colorado*, 530 U.S. 703, 707 (2000); *McCullen v. Coakley*, 573 U.S. 464, 469 (2014).

⁹⁰ *Bronx Household of Faith v. Bd. of Educ.* 750 F.3d 184, 187-88 (2d. Cir. 2014).

⁹¹ *NAACP v. Alabama*, 357 U.S. 449, 451 (1958); *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2379 (2021).

⁹² Prior to tiered scrutiny, the Court applied strict scrutiny to classifications that were suspect or involved a fundamental interest while subjecting all other statutes to a “standard of minimal rationality.” See, e.g., Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (“The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive ‘new’ equal protection, with scrutiny that was ‘strict’ in theory and fatal in fact; in other contexts, the deferential ‘old’ equal protection reigned, with minimal scrutiny in theory and virtually none in fact.”). Because the Court deemed speech to be a fundamental liberty interest under the First Amendment, it evaluated regulations of most forms of speech under strict scrutiny. That presumption properly focused courts on the

tiered scrutiny into its First Amendment doctrine, it limited its application of strict scrutiny to regulations that discriminated based upon the content of speech. This distinction first appeared in *Dept. of City of Chicago v. Mosley*, a 1972 decision involving a Chicago ordinance prohibiting picketing or demonstrating on a public way within 150 feet of any school but exempting “the peaceful picketing of any school involved in a labor dispute.”⁹³ Mosley challenged the ordinance on equal protection grounds, and the Court rejected the City’s distinction between labor picketing and other peaceful picketing. Regulations based on content were “never permitted”⁹⁴ and would be subjected to a high degree of scrutiny.⁹⁵

Mosley was consistent with hints in the Court’s 1968 decision in *United States v. O’Brien*.⁹⁶ *O’Brien*, a case involving “expressive conduct,” announced a previously unseen standard of review:

A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the

nature and justification of the government interest, but the framework of categoricalism left some kinds of expressive activity without recourse to this heightened scrutiny. For a broader discussion of the merits of refocusing First Amendment doctrine on viewpoint-based discrimination as opposed to content-based discrimination, see Randy J. Kozel, *Content Under Pressure*, 100 WASH. U. L. REV. (forthcoming 2022).

⁹³ 408 U.S. 92 (1972). Stephen Gottlieb contends that *Mosley* “reinterpreted [past] cases in terms of the obligation of government to remain neutral with respect to the content of speech.” Stephen E. Gottlieb, *The Speech Clause and the Limits of Neutrality*, 51 ALB. L. REV. 19, 24 (1986).

⁹⁴ *Mosley*, 408 U.S. at 99. Noting that “the equal protection claim in this case is closely intertwined with First Amendment interests,” the Court concluded that “the central problem with Chicago’s ordinance is that it describes permissible picketing in terms of its subject matter.” *Id.* at 95.

⁹⁵ Kenneth Karst has observed that *Mosley* marked the Court’s first full acknowledgment that a content-based regulation was particularly odious because it violated “the principle of equal liberty of expression . . . inherent in the first amendment.” Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26 (1975). Karst contends that “[t]he absence of a clear articulation of the principle of equal liberty of expression in Supreme Court decisions before *Mosley* may be attributable to a belief that the principle is so obviously central among first amendment values that it requires no explanation.” *Id.* at 29.

⁹⁶ 391 U.S. 367 (1968).

suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁹⁷

John Hart Ely observed that *O'Brien's* crucial inquiry was its third prong—whether the governmental interest was unrelated to the suppression of free expression.⁹⁸ A regulation that failed to satisfy this prong was not *per se* unconstitutional, but the Court's analysis would be “switched onto another track.”⁹⁹ That other track was strict scrutiny.¹⁰⁰ *Mosley* had reached the same conclusion that a content-based regulation required strict scrutiny. But *Mosley* had failed to distinguish *O'Brien's* more relaxed test from strict scrutiny. Ely clarified the distinction by seeing not only the connection between content-based regulation and strict scrutiny but also its converse: content-neutral regulations were subject to something less than strict scrutiny.

The content distinction has shaped a great deal of free speech jurisprudence.¹⁰¹ But it also permits the state to regulate expression and action under a highly malleable standard. As Steven Shiffrin has argued, “if content neutrality is the First Amendment emperor, the emperor has no clothes.”¹⁰² More recently, Professor Randy Kozel has critiqued the inconsistency of the content distinction.¹⁰³ Kozel correctly notes that First Amendment doctrines such as limited public fora, secondary effects, and other types of speech exempted from strict

⁹⁷ *Id.* at 377. This new test was consistent with the jurisprudential developments in equal protection analysis under the Fourteenth Amendment. *See, e.g.,* *Mathews v. Lucas*, 427 U.S. 495 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

⁹⁸ John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484 (1975).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1484.

¹⁰¹ *See* Steven J. Heyman, *Spheres of Autonomy: Reforming the Content-Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 650 (2002) (“*Mosley's* doctrine of content neutrality has become the cornerstone of the Supreme Court's First Amendment jurisprudence.”).

¹⁰² STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANING OF AMERICA* 66 (1999).

¹⁰³ Randy J. Kozel, *Content Under Pressure*, 100 WASH. U. L. REV. ___ (forthcoming 2022).

scrutiny are effectively content-based regulations.¹⁰⁴ He suggests moving toward a more viewpoint-centered inquiry.¹⁰⁵ But Kozel's proposal does not address the problems that remain with viewpoint neutrality, and the ways that government actors can still fashion their rationales to invariably limit expression under seemingly content-neutral regulations. For example, in many cases, the state's regulation of public spaces through reasonable time, place, and manner restrictions is easily justified apart from expressive content.¹⁰⁶ Any city council can come up with *some* rationale to regulate expressive activity that is unrelated to that expression.

2. Free Exercise: Neutrality and General Applicability

The content inquiry in free exercise cases likewise demonstrates the government's ability to regulate a great deal of activity while skirting any meaningful inquiry into its interest underlying these regulations. Since *Employment Division v. Smith*, the Supreme Court has limited its application of strict scrutiny to regulations that fail either neutrality or general applicability, both of which focus on the relationship of the regulation to the content of the regulated activity.¹⁰⁷ After finding that the free exercise clause did not

¹⁰⁴ *Id.* at ___. The Court has asserted that facially content-based regulations invariably confront strict scrutiny. See *Reed v. Town of Gilbert*, 576 U.S. ___ (2015). *But see id.* at ___ (Kagan, J., concurring) (“Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws”).

¹⁰⁵ Kozel, *supra* note ___, at ___. For the authoritative work on discerning government motive in regulations suspect under the First Amendment, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 412 (2010).

¹⁰⁶ See John Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1181-82 (2015) (cataloguing examples of “content-neutral laws [that] can still devastate expressive content”).

¹⁰⁷ *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (asserting that a law may burden religious beliefs so long as the law is “a ‘valid and neutral law of general applicability’” (quoting *United States v. Lee*, 455 U.S. 252, 262 n.3 (1982) (Stephens, J., concurring))). It is possible that the Court's approach to free exercise claims took a similar path even before *Smith*. See Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 BOS. U. L. REV. 1137, 1158 (2009) (noting that prior to *Smith*, “[f]or a broad range of [free exercise] cases, commentators generally agree that the Court either explicitly abandoned strict scrutiny or used strict scrutiny language, but did not actually apply it.”).

prohibit the enforcement of drug laws against peyote use in a religious ceremony, the Court in *Smith* indicated that the threshold requirements of neutrality and general applicability resolved its concerns about a variety of laws that otherwise would not survive strict scrutiny.¹⁰⁸

While *Smith* did not answer whether neutrality and general applicability were two independent requirements, the Court suggested in *Church of the Lukumi Babalu Aye v. Hialeah* that they were at least complementary: “[n]eutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied.”¹⁰⁹ Then in *Masterpiece Cakeshop*, the Court considered neutrality independently from general applicability, defining the former as requiring a lack of “animus.”¹¹⁰ The Court applied this same reasoning in *Roman Catholic Diocese of Brooklyn v. Cuomo*, finding that New York’s shutdown regulations during the COVID-19 pandemic failed the neutrality requirement “because they single[d] out houses of worship for especially harsh treatment.”¹¹¹ In both *Masterpiece Cakeshop* and *Roman Catholic Diocese*, the Court found that the orders violated the petitioners’ free exercise rights solely on the basis of a lack of neutrality with no consideration of general applicability.

The Court has more recently confirmed in *Fulton v. City of Philadelphia* that general applicability differs from neutrality. In *Fulton*, the Court unanimously held that Philadelphia’s refusal to contract with a Catholic adoption agency for foster care services on account of the agency’s policy not to certify same-sex couples because of its religious beliefs violated the free exercise clause. The Court found that the state’s refusal to contract with the agency failed *Smith*’s general applicability prong because it gave government officials

¹⁰⁸ *Smith*, 494 U.S. at 886-87 (“If the ‘compelling interest’ test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if ‘compelling interest’ really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.”).

¹⁰⁹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993).

¹¹⁰ *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018).

¹¹¹ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).

discretion to grant exceptions.¹¹² It did not matter that the officials had never granted an exception; the discretion itself meant the law lacked general applicability.

These convoluted developments in free exercise doctrine are not easy to follow; they also mask the importance of compelling interest analysis. Consider *Masterpiece Cakeshop*, which upheld the free exercise claim of a Colorado baker on the grounds that during public hearings Colorado officials had demonstrated unconstitutional animus against him. Under *Smith*'s framework, one might have expected the Court to move from its finding of bias to a strict scrutiny analysis (the elevated scrutiny that *Smith* requires on a showing of bias or lack of neutrality) to determine whether the strength and fit of the government's interest justified the restriction. Instead, Justice Kennedy's opinion moved directly from a finding of bias to conclude that the free exercise claim prevailed. There was no strict scrutiny analysis. Four years later, the Court expressly approved of this shortcut, noting in *Kennedy v. Bremerton School District* that "a plaintiff may also prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise; in cases like that we have 'set aside' such policies without further inquiry."¹¹³

The analytical flaw in *Masterpiece Cakeshop* and *Bremerton* is that establishing bias should not always mean a free exercise claimant prevails. In fact, some compelling interests are so strong that they will justify even overtly biased restrictions. Consider a hypothetical involving a time-sensitive response to a ticking time bomb. Suppose local officials in a hastily called press conference make biased comments toward a particular faith group while declaring martial law. It can't be the case that the declaration is automatically invalid if a free exercise challenge reveals it was motivated in part by religious bias. There must be *some* account of the significance of the government's interest.¹¹⁴

¹¹² "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (quoting *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990)).

¹¹³ *Kennedy v. Bremerton School District*, 597 U.S. ___ (2022) (footnote 1).

¹¹⁴ *Cf. Heyman, supra note __*, at 651 ("According to *Mosley*, speech may 'never' be regulated because of its content. . . . If this view were taken literally, however, it would disable government from regulating speech even when necessary

Restrictions on First Amendment liberties should depend on the strength of the government’s interest, not on whether a law is content-neutral or content-based, or whether the motivation for the restriction reflects biased policymaking.¹¹⁵ If the government’s interest is sufficiently weighty and the law otherwise comports with due process requirements, the intent behind the law should not matter. Conversely, even a procedurally sound and unbiased law that lacks a compelling government interest should not restrict First Amendment expression or action.

III. STRICT SCRUTINY

The previous two sections have shown how courts and commentators have introduced a multitude of tests, standards, and categories that too often mask what is at stake in First Amendment cases. But even cases that require the government to prove a compelling interest have not always given adequate attention to the nature of that interest. Strict scrutiny offers a clearer and more simplified approach: a government restriction on First Amendment expression or action must advance a compelling interest through narrowly tailored means and must not excessively burden the expression or action relative to the interest advanced. The test thus has three prongs: (1) compelling interest; (2) narrow tailoring; and (3) proportionality.

to prevent serious injury to individuals or society.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 54 (1980) (“The ‘absolutely protected’ character of the message cannot insulate [all] forms of expression from regulation: context—the threat the particular expressive event poses—obviously is relevant and sometimes will be dispositive.”).

¹¹⁵ The significance of the government’s interest also explains why “a ban on race-based hiring may require employees to remove ‘White Applicants Only’ signs, why an ordinance against outdoor fires might forbid burning a flag, and why antitrust laws can prohibit agreements in restraint of trade.” *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011) (internal citations and quotation marks omitted). The Court in *Sorrell* reasoned instead that these restrictions were justified because “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” *Id.* at 2664.

A. *Compelling Interest*

The first step of strict scrutiny requires the government to establish a compelling interest.¹¹⁶ Importantly, the category of “compelling” interest does not flatten the weight or significance of all government interests. And this is also true under current doctrine: courts don’t really think that all compelling interests are the same, which is why a significant number of cases already subject to strict scrutiny still side with the government.¹¹⁷ On the other hand, requiring a compelling government interest establishes a baseline that separates those interests that burden civil liberties from more ordinary government interests.

Of course, any framework of less than absolute rights—which is to say, any workable constitutional framework—requires choices that sometimes privilege the asserted rights and sometimes privilege the government interests restricting those rights. The difficulties will always lie with borderline cases. And in many of those cases, recent history, comparative examples, or shifting norms will point to

¹¹⁶ For efforts to classify the nature of compelling government interests, see, e.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (intimating that compelling interests include remediating racially discriminatory hiring policies, combatting quid pro quo corruption, barring corporations from using general treasury funds for political campaigns, protecting children and national security in judicial closure cases, Establishment Clause compliance, aesthetics and traffic safety in sign cases, protecting minors in indecency cases, electoral integrity and avoiding voter confusion, and eliminating discrimination and ensuring equal access to publicly available goods); Caleb C. Wolanek and Heidi H. Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 75 MONT. L. REV. 275, 293 (2017) (cataloging ten government interests in free exercise cases as prison safety and security, public health, gender equality, preserving Native American heritage, land and wildlife preservation, enforcing the Establishment Clause; enforcing other laws, preserving general operations, public policy, and protecting groups). See also Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 937 (1998) (critiquing the Supreme Court’s treatment of governmental interests as “largely intuitive” and an “ad hoc approach [that] is suspect as inconsistent, unprincipled, and lacking in the impartiality we require from the Court”); FALLON, *supra* note __, at __ (“the Supreme Court has frequently adopted an astonishingly casual approach in labeling asserted governmental interests as either compelling or not compelling”).

¹¹⁷ Winkler, *supra* note __, at 794 (finding that courts upheld more than 30% of government restrictions assessed under strict scrutiny).

conflicting answers.¹¹⁸ This reality also makes constitutional analysis vulnerable to realist critiques that political power (which in some instances manifests as five votes on the Supreme Court) is all that really matters. In other words, what counts as “compelling” is whatever the people in power say it is. Without dismissing the realist critique out of hand, we can map out a great deal of First Amendment territory—and constrain judicial discretion—by paying closer attention to compelling interests in First Amendment analysis.¹¹⁹ In particular, identifying the interest should involve: (1) naming the interest; (2) specifying the interest; and (3) contextualizing the interest.

1. Naming the Interest

Current doctrine sometimes fails even to name the government’s interest. Consider again Schauer’s coverage distinction, or the Court’s categorical exceptions like obscenity and defamation. Both of these analytical devices assume a compelling government interest without ever identifying that interest.

We tend to think of government interests in First Amendment analysis as disputed and controversial. But that’s really a function of which cases get litigated. In fact, most laws are justified by uncontested government interests that will prevail against rights claims in every instance. Even the most well-articulated expressive rationale for a political assassination will lose to the government’s interest in preventing murder. And this is likely true of most current criminal and civil laws.

Uncontested compelling interests explain why “uncovered” expression and action will not prevail in First Amendment claims.¹²⁰ The government’s interest in maintaining the integrity of the judicial

¹¹⁸ See *Ramirez v. Collier*, 595 U.S. __ (2022) (Kavanaugh, J., concurring) (“But what does ‘compelling’ mean, and how does the Court determine when the State’s interest rises to that level? And how does the Court then determine whether less restrictive means would still satisfy that interest? Good questions, for which there are no great answers. Sometimes, the Court looks to a State’s policy-based or commonsense arguments. Often, the Court also examines history and contemporary state practice to inform the inquiries.”).

¹¹⁹ Cf. FALLON, *supra* note __, at __ (“One can be a bit of a realist, as one ought to be, while also taking doctrinal formulas such as the narrowly-tailored-to-a-compelling-interest test seriously.”).

¹²⁰ See Part II, *supra*, and critiques therein.

system will defeat any First Amendment claim to commit perjury.¹²¹ The government’s interest in market stability will defeat any First Amendment claim to engage in insider trading. The government’s interest in public safety will defeat any First Amendment claim to falsely yell fire in a crowded theater.¹²²

This characterization of government interests does not rely on any ontological or unchangeable understanding of interests.¹²³ Consider the government’s interest in maintaining public morality. In past eras, over First Amendment objections, the state has criminalized

¹²¹ See *United States v. Alvarez*, 567 U.S. 709, __ (2012) (“Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system.”).

¹²² This understanding of uncontested compelling interests also addresses Justice Breyer’s concern over the potential unconstitutionality of certain content discriminatory regulations. See *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (Breyer, J., concurring) (cataloging a list of regulations, like securities regulations, “that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place”). Strict scrutiny would easily uphold most of these regulations because they rely upon uncontested compelling government interests. One outlier on Justice Breyer’s list is his example of a New York law “requiring petting zoos to post a sign at every exit ‘strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area.’” *Id.* (citing N. Y. Gen. Bus. Law Ann. §399–ff(3) (West Cum. Supp. 2015)). It’s possible that a differently worded law rooted in a more particularized government interest could be upheld (e.g., a requirement rather than a “strong recommendation” based on evidence of the spread of disease from people failing to wash their hands after visiting the petting zoo). And if the government lacked a compelling interest for such a sign, it could avoid a First Amendment challenge by recommending rather than requiring petting zoos to post it.

¹²³ See generally John Inazu, *Beyond Unreasonable*, 99 NEB. L. REV. 375, 378 (2020) (cataloging examples of cultural norms in the United States that have changed over time). Cf. JEFFREY STOUT, *DEMOCRACY AND TRADITION* 233 (2004) (“It is perfectly conceivable that we will someday be justified in deviating significantly from the beliefs we are currently justified in believing.”).

polygamy,¹²⁴ obscenity,¹²⁵ nude dancing,¹²⁶ and sodomy,¹²⁷ among other actions. Some of these earlier restrictions are now seen as antiquated and paternalistic.¹²⁸

This trend against morality-based justification is also evident in *United States v. Stevens*¹²⁹ and *Brown v. Entertainment Merchants Association*.¹³⁰ *Stevens* struck down regulations aimed at sexual fetishes involving the torture and killing of animals, and *Brown* invalidated regulations aimed at violent video games that included scenes of simulated rape and torture.¹³¹ The Court gave scant attention to morality-based arguments in these cases. In *Stevens*, the Obama Administration had argued that the depictions of animal cruelty caused “injuries to human beings and the erosion of important public mores”¹³² and portrayed “patently offensive conduct that appeals only to the basest instincts.”¹³³ The government had argued that “debasement of individuals and society causes widespread, if

¹²⁴ *Reynolds v. United States*, 98 U.S. 145 (1878). The government interests underlying the restrictions in *Reynolds* likely went beyond enforcing consensus norms of sexual morality to concerns over social stability. See Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 363 (2003) (“[B]y the mid-nineteenth century, polygyny in general, and Mormon polygyny in particular, seemed to pose not a mere theoretical threat to the egalitarian and democratic government established in the United States. It had already produced a powerful theocracy that showed itself more than capable of quickly populating and controlling the political, economic and social structure of the Western Territories. Therefore, stopping polygyny was understood as the key to thwarting the theocratic ambitions of the Mormon Church and establishing a secular rule of law in the West.”).

¹²⁵ *Roth v. United States*, 354 U.S. 476 (1957).

¹²⁶ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Erie v. Pap’s A. M.*, 529 U.S. 277 (2000).

¹²⁷ See *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting). See also Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 629 (1980).

¹²⁸ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986); *id.* at 605 (Thomas, J., dissenting) (calling the restriction in *Lawrence* “uncommonly silly”). A similar critique can be made of the “secondary effects” doctrine. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

¹²⁹ *United States v. Stevens*, 559 U.S. 460 (2010).

¹³⁰ *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

¹³¹ The Court struck down both regulations as imprecise and overbroad. *Stevens*, 559 U.S. at 482; *Brown*, 564 U.S. at 805.

¹³² Brief for the United States at 8, *Stevens*, 559 U.S. 460 (2010) (No. 08-769).

¹³³ *Id.* at 9.

sometimes inchoate, harm.”¹³⁴ These arguments were nowhere to be found in the *Stevens* opinion. The morality arguments in *Brown* were more complicated because they were directed at the nexus of parental autonomy and state responsibility.¹³⁵ But even in *Brown*, California’s arguments about “the societal interest in order and morality” were unpersuasive to the Justices.¹³⁶ The Court’s recent neglect of these kinds of arguments suggests that morality-based justifications may be unlikely to support future restrictions on First Amendment expression or action.¹³⁷

2. Specifying the Interest

Specifying an interest can clarify both its significance and scope. Take for example, the government’s interest in preventing harm to children. Left undefined, that interest invokes substantial disagreement over what constitutes “harm.”¹³⁸ In contrast, some understandings of harm to children are almost universally accepted,

¹³⁴ *Id.* at 35 (citing JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* 91 (Dover ed. 2007)).

¹³⁵ *See, e.g.*, Petitioner’s Brief at 27, *Brown*, 564 U.S. 786 (2011) (No. 08-1448) (“This Court’s continuing concerns with the unique status of minors under the law, the societal interest in protecting them from harmful material, and the fundamental right of parents to direct their moral and ethical growth are all addressed by the Act”). It’s possible that a better articulated compelling interest in preventing harm to children could have prevailed in *Brown*. *See* Section IV.A.2, *supra*.

¹³⁶ Petitioner’s Brief at 40.

¹³⁷ *See* Ashutosh Bhagwat, *When Speech Is Not “Speech,”* 78 OHIO ST. L.J. 839, 847 (2017) (“The consequence of the *Stevens* and *Brown* decisions is to substantially restrict the ability of courts to make judgments regarding the ‘value’ of speech, in the course of deciding whether to extend protection to it.”). *See also* Chanko v. Am. Broad. Cos., 49 N.E.3d 1171, 1178 (N.Y. 2016) (quoting *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 702 (N.Y. 1993)) (suggesting that the IIED tort standard is met only “where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community”).

¹³⁸ A paradigmatic example is whether shielding children from liberal norms constitutes harm. *See* JEFF SPINNER-HALEV, *SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP* (2000); CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO* 145 (2003) (“within liberal societies, there is no settled consensus on a great range of questions about such things as proper medical practice, physician-assisted suicide, or abortion—or about what children should properly be taught about the world and their place in it.”).

including those resulting from the denial of medical care¹³⁹ and the production of child pornography.¹⁴⁰

Another example of a compelling government interest requiring specificity is the government's interest in managing its internal affairs. Left unspecified, the interest could encompass almost all government action. But while that scope is too wide, some systems and policies require uniform or centralized decisions to prevent freeloading, allocate limited resources, or solve other collective action problems. Under this rationale, narrowly tailored laws requiring the payment of taxes,¹⁴¹ minimum wages,¹⁴² registration with the social security administration,¹⁴³ limits on use of public spaces,¹⁴⁴ and other impositions of government administration¹⁴⁵ should typically prevail against First Amendment challenges.

Specifying an interest in managing the internal affairs of government might also make better sense of cases that have led to the perplexing government speech doctrine. Under this doctrine, when the government characterizes expression as its own speech, it can avoid First Amendment scrutiny and for this reason impose content or even

¹³⁹ See, e.g., *Jehovah's Witnesses of Washington v. King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967) *affirmed* 390 U.S. 598 (1968) (state can order blood transfusions to minor children over the objections of their parents); *Novak v. Cobb County Kennestone Hosp. Auth.*, 74 F.3d 1173 (11th Cir. 1996) (physician and guardian ad litem permitted to order blood transfusion for sixteen-year-old car accident victim after mother refused to sign permission). See generally Kerry Louderback-Wood, *Jehovah's Witnesses, Blood Transfusions, and the Tort of Misrepresentation*, 47 J. CHURCH & ST. 783, 784 n.4 (2005) (collecting cases).

¹⁴⁰ See *New York v. Ferber*, 458 U.S. 747 (1982). Restrictions on the distribution and viewing of existing child pornography rest either on the argument that the continued exposure directly harms the child anew or the secondary effects argument that viewing child pornography increases the likelihood of child abuse.

¹⁴¹ *United States v. Lee*, 455 U.S. 252, 260 (1982) ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."); *Hernandez v. Comm'r*, 490 U.S. 680 (1989).

¹⁴² *Alamo Found'n v. Secy. of Labor*, 471 U.S. 290 (1985).

¹⁴³ *Bowen v. Roy*, 476 U.S. 693 (1986).

¹⁴⁴ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding restriction of overnight camping on the National Mall and Lafayette Park).

¹⁴⁵ It's possible that this interest could also justify the denial of claims by conscientious objectors not otherwise exempted legislatively based on the efficient operation of the selective service system. See *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).

viewpoint-based restrictions.¹⁴⁶ Some examples of government speech are obvious and uncontested. For example, the government can invite a military service member to speak at a Veterans Day celebration without having to give equal time to an antiwar protester. But current law leaves unclear when the government speech doctrine applies.¹⁴⁷

A more specific focus on the government's interest in managing its resource constraints could better parse the current landscape of government speech cases without arbitrarily declaring certain areas as falling completely outside of the First Amendment. Sometimes, limited resources require the government to make decisions that necessarily constrain the universe of viewpoints. For example, because a public park cannot accommodate an unlimited number of monuments, government officials who oversee that park will have a compelling interest permitting them to select some monuments but not others.¹⁴⁸ A similar rationale supports government decisions related to discretionary funding through contracts or grants (as distinct from generally available funding programs).¹⁴⁹ In contrast, limiting the range of expression on state-issued license plates that permit private messages would be difficult to justify under the government's coordination interest.¹⁵⁰

A final example of specifying the government's interest involves election integrity. Existing case law is split on the salience

¹⁴⁶ See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (“the Government’s own speech . . . is exempt from First Amendment scrutiny”).

¹⁴⁷ See Timothy Zick, Summum, *the Vocality of Public Places, and the Public Forum*, 2010 BRIGHAM YOUNG U. L. REV. 2203, 2205 (2010) (observing that aspects of the government speech doctrine suggest “that public forums may themselves constitute a form of government speech”).

¹⁴⁸ *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (holding that monuments in city park are government speech). See also Zick, *supra* note ___, at 2204 (“Just imagine the chaos that would ensue if governments were required to accept either all privately donated monuments or none at all.”).

¹⁴⁹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”). See also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 572-73 (1998) (striking down artists’ claims of First Amendment violations when the National Endowment for the Arts denied them funding). For the distinction between these kinds of discretionary funding decisions and generally available funding schemes, see JOHN D. INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* 66-80 (2016).

¹⁵⁰ *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015).

of this interest, generally upholding speech restrictions near polling stations,¹⁵¹ and more recently rejecting restrictions on campaign finance contributions.¹⁵² But recent years have introduced another—and potentially more urgent—application of the government’s interest in preserving election integrity: the truthfulness of certain election-related claims.

The specific interest in the truthfulness of election-related claims is not the same as an interest in ensuring truth as a general matter. Given the blurry lines between facts and norms, ceding control to government as the arbiter of truth is neither workable nor desirable, even when it comes to all election-related speech.¹⁵³ But the government’s compelling interest in maintaining election integrity could justify narrowly tailored regulations.¹⁵⁴

¹⁵¹ See, e.g., *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992) (plurality opinion) (upholding restriction on campaign speech within 100 feet of a polling place). Eugene Volokh notes that in *Burson* “the interest in preventing fraud and intimidation was jeopardized by people communicating their ideas, and was served by suppressing this communication.” Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 PENN. L. REV. 2417, 2426 (1996).

¹⁵² See, e.g., *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 218 (2014) (striking down aggregate limits on campaign contributions under The Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002). The Court upheld some earlier restrictions in *Buckley v. Valeo*, 424 U.S.1 (1976) and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

¹⁵³ See Eugene Volokh, *Could Lies in Election Campaigns Generally Be Punished?*, REASON: THE VOLOKH CONSPIRACY (July 22, 2022, 8:01 AM), <https://reason.com/volokh/2022/07/22/could-lies-in-election-campaigns-be-generally-punished/#> (“[A]llowing prosecutions for . . . lies [in election campaigns] is too dangerous . . . [because] ‘the distinction between fact and opinion is not always obvious,’ . . . ‘[E]ven in cases involving seemingly obvious statements of political fact, distinguishing between truth and falsity may prove exceedingly difficult. Assertions regarding a candidate’s voting record on a particular issue may very well require an in-depth analysis of legislative history that will often be ill-suited to the compressed time frame of an election.’” (quoting *Commonwealth v. Lucas*, 472 Mass. 387, 403 (2015))).

¹⁵⁴ Cf. FALLON, *supra* note __, at __ (“Courts and commentators have also suggested that the Constitution presupposes fairly conducted elections and thus can generate compelling interests in limiting rights to the extent necessary to preserve electoral fairness.”); Eugene Volokh, *When Are Lies Constitutionally Protected?* 15-16, (July 17, 2022) (draft article), <https://www2.law.ucla.edu/volokh/liesprotected.pdf> (“Narrower restrictions [for punishing lies during an election] might pose fewer problems. This is particularly so with regard to lies about the when, where, how, and who of elections: For

These efforts will require greater specificity about the role of policing truthfulness in a democratic society. In *United States v. Alvarez*, the Court rejected an invitation to place false statements in a new category of unprotected speech.¹⁵⁵ But when the government’s compelling interest is important enough, some false statements will lose every time. Shouting “fire” in a crowded theatre or “bomb” on an airplane are perfectly legal if they are true statements; they are criminal if false. Given the stakes of our public elections, courts might plausibly view narrowly tailored government restrictions rooted in the government’s interest to preserve election integrity as sufficient to limit certain false statements.¹⁵⁶

Richard Hasen has suggested carefully crafted laws along these lines.¹⁵⁷ In particular, Hasen advocates for campaign contribution disclosure requirements, truth in labeling requirements, and implementing a narrow ban on empirically verifiable false election speech (which he defines as “false speech about the mechanics of voting”).¹⁵⁸ He acknowledges that these measures would leave a great deal of election speech unregulated, including claims by Donald Trump that the 2020 election was “stolen” or

instance, lies about when polls close, where one can vote, whether one can vote online, by mail, and the like, and who is eligible to vote. These lies can generally be narrowly defined and tend to be easily verifiable; and many such lies are likely to happen shortly before the election, when established alternative institutions—election officials, candidates, the media, and others— might not have the time to undo the effects of the lie.”).

¹⁵⁵ 567 U.S. 709 (2012). Justice Breyer’s concurrence noted that the Court had “frequently said or implied that false factual statements enjoy little First Amendment protection.” *Id.* at 732-33 (Breyer, J, concurring) (cataloguing previous Supreme Court opinions describing false statements as “unprotected for their own sake,” “particularly valueless” and “not worthy of constitutional protection”). *See also id.* at 746 (Alito, J., dissenting) (similar catalogue).

¹⁵⁶ It’s also conceivable that strengthening this particular government interest over time might also affect the outcome of some campaign finance cases.

¹⁵⁷ RICK HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT* (2022). Hasen’s proposal appears to build in proportionality concerns. *See id.* at 82 (“[W]e do not want a First Amendment so absolute in its speech protection that it blocks laws that would chill little speech but ameliorate social harms.”).

¹⁵⁸ *Id.* at 85-115.

“rigged.”¹⁵⁹ Still, they would be an important step toward supporting the government’s interest in maintaining election integrity.¹⁶⁰

3. Contextualizing the Interest

Some government interests will depend on particularized facts and circumstances. The recent COVID-19 pandemic provided examples of public health interests that sometimes but not always justify limitations on First Amendment activities, including restrictions on peaceful protests and religious worship. Vaccine requirements for COVID-19 and other viruses are similarly situated. As I suggested earlier, whether the government’s public health interest is compelling in these circumstances should depend upon contextualized vaccination and transmissibility rates, among other factors.¹⁶¹

A similar contextualized approach sheds light on restrictions based on the government’s interest in public order. In its landmark decision *Brandenburg v. Ohio*, the Court noted “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁶² But not all volatile expression or action meets this standard.¹⁶³ Given the fact-specific and often volatile nature of protests and other forms of public engagement, the government’s interest in these cases should always be assessed contextually. In fact, many jurisdictions have long

¹⁵⁹ *Id.* at 111. Hasen notes in particular that “during the 2020 election season there was relatively little empirically verifiable false election speech.” *Id.*

¹⁶⁰ Hasen worries that the Supreme Court’s decision in *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021), “signaled closer scrutiny of disclosure laws going forward, including campaign finance laws.” Hasen, *supra* note __, at 95. But from a government interests perspective, it’s not hard to distinguish between regulations aimed at preserving election integrity and those aimed more generally at regulating charitable contributions.

¹⁶¹ See Part I.A, *supra*.

¹⁶² *Brandenburg v. Ohio*, 395 U. S. 444, 447 (1969) (“the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

¹⁶³ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 410 (1989) (“the State’s interest in maintaining order is not implicated on these facts”).

required a subjective element of fear by the local populace of serious and immediate breach of the peace.¹⁶⁴ Assessing the threat will also depend on the government's ability to respond to an actual disruption.¹⁶⁵

Contextualizing the government's interest will require front-end policymakers and enforcers and back-end judges to account for the "facts on the ground" rather than relying on generically formulated government interests. These fact-specific inquiries can still incorporate standards and norms that provide guardrails and guidance to decisionmakers. But especially in situations with rapidly changing circumstances like the COVID-19 pandemic or a protest, the relative harm a government interest seeks to address should be explained with specificity and particularity.

B. Narrow Tailoring

The second prong of strict scrutiny is whether a restriction relying upon a compelling governmental interest is narrowly tailored. This should not require the least restrictive means, which is an incredibly demanding standard that places too high a burden on government officials who have already established a compelling reason for regulation.

The Supreme Court has been inconsistent in specifying whether strict scrutiny requires narrow tailoring or the least restrictive means. Most free exercise cases that apply strict scrutiny require only narrow tailoring.¹⁶⁶ Elsewhere in its First Amendment cases, the

¹⁶⁴ See generally John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 23 (2017) (noting that Missouri's requirement of a "perception of harm" based on "rational, firm, and courageous persons in the neighborhood"). See also *id.* at 13 (noting requirements in the Louisiana Territory that threats must be "to the terror of the people"); *id.* at 31-32 (observing that under nineteenth-century British restrictions on unlawful assembly, "the character of the meeting must be such as to cause alarm to firm men, not merely such as may produce fear in timid persons").

¹⁶⁵ *Id.* at 8 ("In an earlier era, unlawful assembly prohibitions extended significant preemptive discretion to local law enforcement officials because those officials lacked sufficient resources and personnel to maintain public order in the face of rebellions and revolts. In many parts of the country today, highly trained and lethal police forces have far greater firepower than the people assembled, and state and federal reinforcements are a phone call or a text away.").

¹⁶⁶ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (specifying that a non-neutral law "is invalid unless it is

Court has suggested that strict scrutiny demands the least restrictive means.¹⁶⁷ And in at least one case, the Court unhelpfully suggested that narrow tailoring means the least restrictive means.¹⁶⁸

Even when the Court distinguishes narrow tailoring from the least restrictive means, it has been unclear about the meaning of the former. The phrase “narrow tailoring” appears in at least three different First Amendment tests: intermediate scrutiny,¹⁶⁹ exacting scrutiny,¹⁷⁰ and strict scrutiny.¹⁷¹ The Court has not always specified what this tailoring means within each of these tests. Its clearest discussion comes in its parsing of “strict scrutiny” and “exacting scrutiny” in *Americans for Prosperity v. Bonta*.¹⁷² The Court began by recognizing that the parties differed in their understanding of the meaning of “exacting scrutiny,” with the petitioners arguing that “such review incorporates a least restrictive means test similar to the

justified by a compelling interest and is narrowly tailored to advance that interest”); *id* at 546 (“To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” (internal quotations omitted)); *Masterpiece Cakeshop*, at 1734 (Gorsuch, J., concurring) (referencing narrowly tailored prong and arguing “[t]oday’s decision respects these principles”). Significantly, the statutory protections of the Religious Freedom Restoration Act specify “least restrictive means” and not “narrow tailoring.” *See* 42 U.S.C. § 2000bb-1(b) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.”). *See also* *Gonzales v. O Centro Espírita Beneficente União Do Vegetal*, 546 U.S. 418, 423, 430 (2006) (referring to “RFRA, and the strict scrutiny test it adopted” and discussing “the least restrictive means of advancing a compelling interest”); *but see* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (referring both to “least restrictive means” and “narrowly tailored” regulations).

¹⁶⁷ *See, e.g.,* *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2379 (2021) (“Under strict scrutiny, the government must adopt “the least restrictive means of achieving a compelling state interest” (citing *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)).

¹⁶⁸ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (“The term ‘narrowly tailored,’ so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used.”).

¹⁶⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

¹⁷⁰ *Bonta*, 141 S. Ct. at 2383.

¹⁷¹ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

¹⁷² *Bonta*, 141 S. Ct. at 2383-85.

one imposed by strict scrutiny,” and the government suggesting that “exacting scrutiny demands no additional tailoring beyond the ‘substantial relation’ requirement” of intermediate scrutiny.¹⁷³ The Court split the difference: “We think that the answer lies between those two positions. While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government’s asserted interest.”¹⁷⁴

There are two problems with this parsing. First, as noted earlier, the Court does not consistently require the least restrictive means when it applies strict scrutiny. Second, and more fundamentally, the least restrictive means test prevents the government from a great deal of meaningful regulation, even when it has articulated a compelling interest.

Bonta’s discussion about fit is more helpful. The Court began by quoting *McCutcheon v. Federal Election Commission*:

In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective.¹⁷⁵

The Court elaborated as to why the substantial relation requirement of intermediate scrutiny fell short:

¹⁷³ *Id.* at 2383.

¹⁷⁴ *Id.* The Court had previously asserted that “exacting scrutiny” is required “[w]hen content-based speech regulation is in question.” *United States v. Alvarez*, 567 U.S. 709, 715 (2012). *See also* *Buckley v. Valeo*, 424 U.S. 1, 44-5 (1976) (“In several situations concerning the electoral process, the principle has been developed that restrictions on access to the electoral process must survive exacting scrutiny.”); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448, 2477 (2018) (asserting that “[t]he exacting scrutiny standard we apply in this case was developed in the context of commercial speech”).

¹⁷⁵ *Bonta*, 141 S. Ct. at 2384 (quoting *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 218 (2014)).

A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters. Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.¹⁷⁶

These passages illustrate how courts might assess the fit of restrictions advancing compelling government interests. Similar to *Bonta*'s characterization of fit, strict scrutiny's narrow tailoring seeks a pragmatic fit requirement that can be applied consistently across all five First Amendment rights, "a fit that is not necessarily perfect, but reasonable."¹⁷⁷ In other words, the government must provide a convincing rationale for its narrow tailoring, but it should not need to defend the least restrictive means possible.

The importance of narrow tailoring can be seen in cases involving the government's compelling interest in national security.¹⁷⁸ Legitimate national security interests are among the most compelling government interests.¹⁷⁹ But government actors sometimes inflate the scope of this interest, often in decisions

¹⁷⁶ *Bonta*, 141 S. Ct. at 2384.

¹⁷⁷ *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (internal quotation omitted).

¹⁷⁸ The adjective "national" encompasses threats to all levels of government. *See, e.g.*, *Adler v. Board of Education*, 342 U.S. 485 (1952).

¹⁷⁹ *See* *Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."). *See also* *New York Times v. United States*, 403 U.S. 713 (1971) (Pentagon Papers case). Even cases in which the First Amendment seems to prevail over national security concerns reinforce the strength of the state's interest. As Owen Fiss observes about the Pentagon Papers case "though the Court did in fact deny the government an injunction against further publication, a majority of the Justices made clear that the government could protect a legitimate interest in secrecy by use of the criminal law." OWEN FISS, *THE IRONY OF FREE SPEECH* 8 (1996). But *see* *Alvarez* (a restriction against "speech presenting some grave and imminent threat the government has the power to prevent" is "most difficult to sustain").

shrouded with secrecy.¹⁸⁰ The Court’s 2010 decision in *Holder v. Humanitarian Law Project* illustrates these dangers.¹⁸¹ In *Holder*, the Court rejected speech and association claims by individuals seeking to associate with and advocate on behalf of certain foreign political groups that had been designated as “foreign terrorist organizations.”¹⁸² The Court concluded that the state’s national security interests prevailed and observed that advocacy “helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.”¹⁸³ The Court’s holding even encompassed legal advocacy: a lawyer who filed an amicus brief on behalf of one of these groups could be subject to criminal liability.¹⁸⁴

Justice Breyer’s dissent rightly noted that the majority’s reasoning “failed to require tailoring of means to fit compelling ends.”¹⁸⁵ Breyer noted that “courts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative

¹⁸⁰ An added complexity of the state’s national security interest is its resistance to specificity, especially when the justifications for the state’s interest are themselves protected from disclosure. This is particularly acute when the government invokes the “state secrets” privilege to block “right to know” inquiries, as it has done since 1997 with respect to tort litigation surrounding “the operating location near Groom Lake” (known more colloquially as “Area 51”). See, e.g., Presidential Determination 96-54, 61 Fed. Reg. 52679 (Oct. 8, 1996). For a general critique of the “state secrets” privilege and an institutional defense of classified leaks, see Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881 (2008). National security justifications can also be manipulated to silence almost any measure of dissent, and our history is replete with examples of the state asserting these justifications to stifle legitimate political expression and association. A concise account of some of the more egregious episodes in our nation’s history is provided in *Rasul v. Bush*, 524 U.S. 466 (2004), Brief of Amicus Curiae Fred Korematsu in Support of Petitioners. The cases arising out of some of these settings have shaped a great deal of First Amendment doctrine. See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919); *Whitney v. California*, 274 U.S. 357 (1927); *Dennis v. United States*, 341 U.S. 494 (1951).

¹⁸¹ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

¹⁸² *Id.* at ___.

¹⁸³ *Id.* at ___.

¹⁸⁴ *Id.* at ___ (Breyer, J., dissenting) (noting that “the Government’s claim that the ban here, so supported, prohibits a lawyer hired by a designated group from filing on behalf of that group an amicus brief before the United Nations or even before this Court”). See also Margaret Tarkington, *Freedom of Attorney-Client Association*, 2012 UTAH L. REV. 1071 (critiquing the majority along similar lines).

¹⁸⁵ *Id.* at ___ (Breyer, J., dissenting).

Branches the power to provide for the national defense, and that it grants particular authority to the President in matters of foreign affairs.”¹⁸⁶ But he argued that the Court “failed to examine the Government’s justifications with sufficient care” and “failed to insist upon specific evidence, rather than general assertion.”¹⁸⁷ As Breyer suggests, more careful attention to a narrow tailoring requirement would not have supported the broad reach of the government’s national security interest. Or, stated differently, the government should bear “the evidentiary burden of demonstrating that the harms it anticipates from the restricted . . . activity are actually likely to materialize.”¹⁸⁸

C. Proportionality

The final inquiry of the proposed strict scrutiny test introduces a kind of proportionality analysis that asks whether the benefit of the government’s compelling interest advanced through a narrowly tailored restriction clearly outweighs the burden imposed on the First Amendment liberty.¹⁸⁹ The proportionality requirement introduces an

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Justin Collings and Stephanie Hall Barclay, *Taking Justifications Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. REV. 453, 478-79 (2022). Collings and Barclay call attention to the Supreme Court’s lack of scrutiny of the government’s interest in the infamous decision of *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018). They note that “[t]he majority did not require the government to establish [public] necessity by meeting even the lightest evidential burden.” *Id.* at 502. Instead, the Court “merely parroted the government’s claims that ‘exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.’” *Id.*

¹⁸⁹ This inquiry draws from the proportionality analysis common in European constitutional courts, which typically has four requirements: (1) pursuit of a legitimate end; (2) suitability of an act achieving the objective; (3) necessity of the act; and (4) balancing the benefits of the government’s interest against the burdens on the right. ALEXANDER TESIS, *FREE SPEECH IN THE BALANCE* 79 (2020). *See also* Collings and Barclay, *supra* note __, at 469-70 (“Outside the United States, proportionality is the dominant mode of constitutional rights adjudication.”). For arguments applying proportionality analysis to U.S. constitutional law, *see* TESIS [Free Speech in the Balance] at 42-56 (applying proportionality to free speech law); Jamal Greene, *Trump as a Constitutional Failure*, 93 IND. L.J. 93, 107-08 (2018) (describing proportionality as whether “the government’s action [is] excessive in relation to the benefit in policy terms and the injury in rights terms”); JAMAL

additional degree of subjectivity into strict scrutiny.¹⁹⁰ But it does not make the analysis “open-ended and unprincipled.”¹⁹¹ In fact, the front-end government interests analysis that precedes proportionality balancing will likely be more rights-protective and judge-constraining than existing doctrine. Recall the cases at the beginning of this Article that illustrated the problems with current doctrine: *Lyng v. Northwest Indian Cemetery* (the Native American burial site), *Pleasant Grove v. Summum* (the religious monument in a public park), and *Christian Legal Society v. Martinez* (the Christian student group at a public law school). Strict scrutiny would require a narrowly tailored regulation advancing a compelling government interest in each of these cases, an analysis missing under current doctrine.

In some cases, including those involving uncontested government interests, the benefit of the restriction will be so clear as to eliminate any discretion in proportionality analysis; think again of the example of political assassination. Proportionality analysis will also be relatively straightforward in cases with a high benefit from the government’s interest and a low harm to the First Amendment expression or action. The harder cases will be those in which we would want additional scrutiny and justification anyway: an unfamiliar religious minority whose harm from the government’s restriction is not readily apparent; sexual expression that seems

GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART xxii-xxiii (2021) (arguing for a proportionality approach that “though exotic in the United States, dominates courts around the world”). Justice Breyer has advocated for a similar kind of proportionality analysis in First Amendment cases. See Calvert, *supra* note __, at 13-14 (noting that Breyer would ask “whether a law ‘work[s] harm to First Amendment interests that is disproportionate to their furtherance of legitimate regulatory objectives’” and that under this approach, “laws receive closer, more exacting scrutiny when they threaten ‘the speech interests that the First Amendment protects’ and more deferential, relaxed review when they do not.”); *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. __ (2022) (Breyer, J., concurring) (“Where content-based regulations are at issue, I would ask a more basic First Amendment question: Does ‘the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives?’”).

¹⁹⁰ For this reason, proportionality analysis has been critiqued as “fundamentally subjective.” Pamela S. Karlan, “Pricking the Lines”: *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 882-83 (2004) (quoted in TESIS, *supra* note __, at 78).

¹⁹¹ David Cole, *The Poverty of Posner’s Pragmatism: Balancing Away Liberty After 9/11*, 59 Stan. L. Rev. 1735, 1751 (2007) (quoted in TESIS, *supra* note __, at 78).

merely crass but conveys a serious political message; a narrowly tailored time, place, or manner restriction that appears facially unrelated to the restricted expression but significantly disrupts or hinders the intended expression.

In each of these cases, proportionality analysis allows litigants to argue that the intended restriction comes at too high a cost (or conversely, that the desired expression or action comes at too high a cost). Take the last example in the preceding paragraph. Under current public forum doctrine, reasonable and content-neutral time, place, and manner restrictions will typically prevail over speech and assembly challenges. But suppose a local municipality closes a city park for maintenance every year during the first week of July (including the Fourth of July holiday). Suppose further two challenges to that closure: one by a food truck vendor and one by an anti-war group.

It's possible that the city's closure requirement is a narrowly tailored restriction that advances a compelling government interest in maintaining the park, similar to the public coordination interest discussed earlier. It's also likely that the food truck vendor would be unable to articulate a non-economic harm sufficient to prevail under a proportionality analysis. But the anti-war group is much differently situated. And even though the government's restriction might survive the first two prongs of strict scrutiny's requirements of a compelling interest and narrow tailoring, there's a good chance it would be struck down under proportionality analysis, unless the government can explain why the benefit of this particular restriction outweighs the First Amendment interest of the anti-war group.

Now suppose the regulation instead closed the park during the *second* week of July. The anti-war group would be unlikely to demonstrate the same First Amendment harm of the regulation and would likely lose under strict scrutiny's proportionality prong. Proportionality requires litigants to articulate the First Amendment value of their expression or action, and claims with only the barest ties to First Amendment value will lose (including claims like those of the food truck vendor).

IV. OBJECTIONS

The argument for a uniform strict scrutiny test encounters at least two objections. One is that existing distinctions (like those between covered and uncovered expression, protected and

unprotected categories of speech, and speech and conduct) are pragmatic limitations on the scope of the First Amendment. This objection contends that eliminating existing distinctions would dilute meaningful protections for First Amendment liberties or overwhelm judicial resources. A second objection is that a uniform strict scrutiny would require a fundamental reordering of First Amendment doctrine that is simply unworkable in the current constitutional landscape (or, relatedly, that strict scrutiny cannot account for the vast and diverse range of First Amendment cases and issues).

A. First Amendment Expansionism

There is a longstanding assumption that expanding the First Amendment's scope will inevitably dilute the strength of its protections. Kenneth Karst worried that expanding the First Amendment would create a "doctrinal infection [that] would spread, touching even traditional First Amendment concerns."¹⁹² William Marshall has argued that "[t]he more broadly rights are drawn, the more difficult it becomes to enforce those rights stringently."¹⁹³ The editors of a leading casebook on the First Amendment's religion clauses have argued that the "inverse relation between coverage and protection" is "like taffy" such that "[t]he wider we stretch the meaning of [a particular right], the thinner the barrier between us and the government."¹⁹⁴ In Philip Hamburger's pity description, "more is less."¹⁹⁵

I am skeptical of this premise, which I have elsewhere called a "rights confinement" theory.¹⁹⁶ In my view:

¹⁹² Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654-55 n.140 (1980) ("[T]he danger of such a doctrinal approach is that First Amendment doctrine would become encumbered with new limits and exceptions, because some claims inevitably would be rejected. From these decisions a doctrinal infection would spread, touching even traditional First Amendment concerns.").

¹⁹³ William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U. L. REV. 558, 567 (1985). Focusing specifically on the First Amendment, Marshall asserts that "although everything we do may be characterized as 'expressive,' it is nonetheless inappropriate to consider all individual action as constitutionally protected." *Id.* at 567-68.

¹⁹⁴ MICHAEL MCCONNELL, JOHN GARVEY, AND THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 782 (2011).

¹⁹⁵ Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835 (2004).

¹⁹⁶ John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 488 (2014).

[T]he interplay between doctrine and cultural views suggests that rights confinement is an unproven and, indeed, unprovable, theory; we simply do not know in advance whether rights confinement will strengthen or even maintain cultural views about our liberties. Moreover, it is difficult to think of many historical examples of an expanded right compromising the previously protected core of a right. That is not generally how precedent works.

On the other hand, we know that rights *expansion* sometimes increases the scope of rights protection. The free speech right provides the clearest illustration. Free speech advocates have repeatedly argued that courts should increase the scope of protection under that right from written and verbal speech to symbolic speech, from excluding commercial speech to including commercial speech, and from only the right to speak to including the right not to speak. In all of these cases, the scope of the right has expanded without any damage to its core.¹⁹⁷

In other words, sometimes more is more. It's possible that a uniform strict scrutiny test that eliminates some existing doctrinal lines will diminish the overall protections of the First Amendment. But there's no reason to assume this will be the case.

Nor is there reason to think that eliminating existing doctrinal boundaries will overwhelm judicial resources. The universe of plausible First Amendment claims is not coterminous with the universe of all expressions or actions. Litigants must establish some plausible link between their expression or action and the values underlying First Amendment rights (like autonomy, democratic governance, the marketplace of ideas, dissent, or religious freedom). With many actions, this link would be so tenuous that claims would not survive ordinary standing principles. To take an easy example, the vast majority of criminal actions cannot be shoehorned into expressive or religious frameworks. Only a subset of those actions, like political

¹⁹⁷ *Id.*

assassinations, unlawful assemblies, and jaywalking, would plausibly implicate First Amendment values.

Additionally, as previously discussed, a proportionality prong requires some balancing of the government's asserted interest against the right asserted by a First Amendment litigant. Claims that survive standing challenges but that implicate an extraordinarily compelling government interest (like the protection of human life) will lose under strict scrutiny's proportionality analysis. Strict scrutiny does not inevitably lead to an overly expansive First Amendment that leaves all expression and action essentially unregulatable.

Importantly, a uniform strict scrutiny test would ensure that claims meeting standing requirements are evaluated *after* establishing the government's compelling interest. It would also mean that speech claims are not treated more favorably than free exercise claims, political speech does not receive greater scrutiny than charitable or commercial speech, and doctrines like government speech and content neutrality do not predetermine the relative weights of the interest and the right.

In many instances—indeed, for most currently constrained expressive activity—the strength of the government's interest will be so obvious and uncontested that existing restrictions will easily satisfy strict scrutiny. The Court has hinted at this very point in *New York v. Ferber*, observing that sometimes “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,” because “the balance of competing interests is clearly struck.”¹⁹⁸ In *Ferber*, a case involving child pornography, the Court identified several related compelling government interests underlying the state's regulation: “safeguarding the physical and psychological wellbeing of a minor”;¹⁹⁹ ensuring the “healthy, well-rounded growth of young people into full maturity as citizens” for the sake of “a democratic society”;²⁰⁰ and preventing “sexual exploitation and abuse of children.”²⁰¹

The Court's subsequent interpretation of *Ferber* has obscured the significance of the government interests analysis by focusing instead on child pornography as a category of unprotected speech. For

¹⁹⁸ *New York v. Ferber*, 458 U.S. 747, 763-64 (1982).

¹⁹⁹ *Id.* at 756-57.

²⁰⁰ *Id.* at 757.

²⁰¹ *Id.*

example, in *United States v. Stevens*, the Court described the state’s “compelling interest in protecting children from abuse” in *Ferber* but also referred to child pornography as a “long-established category of unprotected speech” that lies “fully outside the protection of the First Amendment.”²⁰²

The subtle but important slippage from *Ferber* to *Stevens* reflects the shift from focusing on the government interest to the First Amendment liberty. The Court has also done this in other contexts, noting that traditionally regulated categories of speech like obscenity, defamation, fraud, incitement, and “speech integral to criminal conduct”²⁰³ can be punished or prohibited without “rais[ing] any constitutional problem.”²⁰⁴ But the analytical process should matter to First Amendment analysis: as in *Ferber*, we should require courts and policy makers to identify the government interest that informs “the evil to be restricted.”²⁰⁵

This same reasoning limits the potential disruption of a uniform strict scrutiny test when it comes to the nebulous category of “symbolic speech” that arguably expands to any human action.²⁰⁶ At first glance, strict scrutiny would seem to impose far greater burdens on government actors attempting to regulate everyday actions with little expressive conduct. But almost all existing criminal or civil laws that can withstand vagueness and overbreadth challenges should also be able to survive strict scrutiny challenges. The expressive jaywalker, the communicative murderer, and the dissenting trespasser can still be regulated under the state’s compelling interest in maintaining public order.²⁰⁷ And if we think some of these outcomes are wrong—for

²⁰² *United States v. Stevens*, 559 U.S. 460, 471 (2010).

²⁰³ *Id.* at 468.

²⁰⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (referring to “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem”).

²⁰⁵ *New York v. Ferber*, 458 U.S. 747, 763-64 (1982).

²⁰⁶ *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). *See also* MARK TUSHNET, ALAN CHEN, AND JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017), 6 (“the *Spence* test has occasionally been quietly deemphasized and sometimes ignored altogether”). *See also* SCHAUER, *supra* note __, at 93 [PI] (“all voluntary conduct *is* self expression.”).

²⁰⁷ Each of these actors also intend to communicate through their actions. *See* Ashutosh Bhagwat, *When Speech Is Not “Speech”*, 78 OHIO ST. L.J. 839, 871-72 (2017) (“[T]he Court has said that conduct is expressive, and so falls within the scope of the First Amendment, only if “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great

example, if we think the state lacks a compelling interest in restricting the expressive jaywalker—then this may indicate a problem with overcriminalization (jaywalking should not be illegal) or overbreadth (the prohibition on jaywalking should contain an exemption or safe harbor for expressive jaywalking). Either the state has a compelling interest in preventing jaywalking that justifies restricting First Amendment liberties or its interest is not as compelling as it initially appears. But recognizing the latter would not mean First Amendment expansionism; it would reflect an awareness that existing criminal law is too broad.

B. Existing Doctrine

A second objection to a uniform scrutiny is test that its claims are too afield from current doctrine. To be sure, strict scrutiny may not cover the entire range of First Amendment cases and issues. It may well be that special tests or approaches will be needed for particularly thorny areas like public employee speech, public sector unions, and specialized institutions like the military, prisons, and schools.

But even in these specialized contexts, focusing more precisely on government interests can shed light on the values the Court is attempting to balance. Consider the case law surrounding public schools. In its landmark 1969 decision in *Tinker v. Des Moines School District*, the Supreme Court highlighted the role of school officials in averting “substantial disruption of or material interference with school activities.”²⁰⁸ But in *Bethel School District v. Fraser*, Chief Justice Burger shifted the rationale for the government’s restriction from “order and discipline” to a less convincing argument that teaching the “shared values of a civilized social order” was a “highly appropriate function” of schools.²⁰⁹ Closer attention to the

that the message would be understood by those who viewed it.’ This test necessarily limits First Amendment coverage to communicative conduct, because most people would agree that regulations of noncommunicative conduct raise no First Amendment issues.”).

²⁰⁸ *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 514 (1969) (noting the absence of facts in the record that might have led school officials to forecast such disruption).

²⁰⁹ *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). The Court’s decision in *Morse v. Frederick*, 551 U.S. 393, 408 (2007), purported to represent a shift back toward the interest in order and discipline. Chief Justice Roberts concluded that Joseph Frederick’s “BONG HiTS 4 JESUS” sign was

government’s compelling interest in limiting First Amendment liberties in schools and the proportional balancing of those interests and liberties could better explain whether the unique environment of public schools requires greater First Amendment restrictions.

A uniform strict scrutiny test may also facilitate what Justice Kagan has called “a dose of common sense” in assessing government restrictions on First Amendment expression.²¹⁰ In *Reed v. Town of Gilbert*, the majority struck down a content-based signage restriction after noting that “[a] law that is content based is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”²¹¹ Justice Kagan correctly noted that the Court’s “cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws” and listed a number of examples of the Court applying lesser scrutiny to content-based restrictions.²¹² Kagan pleaded for the Court to “relax [its] guard” when assessing “entirely reasonable” laws that do not realistically favor some ideas over others.²¹³

Kagan’s critiques of the majority’s absolutist statements in *Reed* are persuasive. But there’s no reason that such a “common sense” framework needs to be built around existing doctrine that looks first at content neutrality and then at improper government motive. Instead, a proportionality prong could uphold narrowly tailored restrictions furthering a compelling government interest in the many cases where the benefits of the interest clearly outweigh any harm to First Amendment liberties.²¹⁴

“reasonably viewed as promoting illegal drug use.” *Id.* at 403, 408. The connection is far from obvious. *Cf. Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

²¹⁰ *Reed v. Town of Gilbert*, 576 U.S. ____ (2015) (Kagan, J., concurring).

²¹¹ 576 U.S. at ____.

²¹² 576 U.S. at ____ (Kagan, J., concurring).

²¹³ *Id.* See also Ashutosh Bhagwat, *When Speech Is Not “Speech”*, 78 OHIO ST. L.J. 839, 848-49 (2017) (“[T]he consequence of [Reed] is to restrict judicial flexibility in the face of seemingly socially beneficial regulation of speech, and therefore to reduce legislative authority as well.”)

²¹⁴ The difficulty of linking “common sense” inquiry to content neutrality is also illustrated in *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. ____ (2022). The case involved the application of a zoning restriction to digital billboards in Austin, Texas. Two advertising companies sued the city, arguing that the restriction’s distinction between signs on the premises of businesses and signs off-premises (like billboards) was content-discriminatory and required strict scrutiny under *Reed*. In a 6-3 decision, the majority upheld the restrictions

Another way to assess the advantages of a uniform strict scrutiny test over existing First Amendment doctrine is to consider whether focusing on government interests is conceptually clearer than declaring some expressions or actions to be categorically unprotected. Consider again the example of child pornography in *Ferber*. Current doctrine asserts that child pornography as a form of expression is categorically unprotected. Strict scrutiny says that the government's interest in preventing sexual exploitation of children is so compelling that there will never be a First Amendment exception.

In this example, both arguments support comprehensive regulation of child pornography. But strict scrutiny makes better conceptual sense because the categorical approach is both underinclusive and overinclusive. As the Court noted in *Ashcroft v. Free Speech Coalition*, virtual child pornography (presumably even that which looks entirely lifelike and realistic) cannot be regulated akin to actual child pornography because the harms (and therefore the government interests) are different.²¹⁵ But this calls into question a

based on “the ‘commonsense’ result that a location-based and content-agnostic on/off-premises distinction does not, on its face, ‘singl[e] out specific subject matter for differential treatment,’” and thus, did not require strict scrutiny. As the majority saw it, Austin’s restriction treated a sign “differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign’s relative location.” The majority also distinguished *Reed*: “Unlike the regulations at issue in *Reed*, the City’s off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City’s distinction is content neutral and does not warrant the application of strict scrutiny.”

The dissent, on the other hand, would have required Austin to satisfy strict scrutiny. The dissent argued that *Reed* means that a speech regulation is presumptively invalid “if it ‘draws distinctions based on the message a speaker conveys.’” Because Austin “discriminates against certain signs based on the message they convey—*e.g.*, whether they promote an on- or off-site event, activity, or service,” the restriction is content based and requires strict scrutiny. The dissent asserted that the majority could conclude otherwise “[o]nly by jettisoning *Reed*’s ‘commonsense’ definition of what it means to be content based” because “the law undeniably depends on both location and communicative content.”

²¹⁵ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250 (2002) (virtual child pornography “records no crime and creates no victims by its production”). Alternative formulations of the state’s interest in preventing harm to children rest on more contested arguments that viewing any form of child pornography encourages child sexual abuse or that widespread availability of virtual child pornography hinders law enforcement efforts directed against actual child pornography. The Supreme Court rejected those arguments in *Ashcroft*, concluding

categorical ban on the expressive category of child pornography. In the other direction, focusing only on the category of child pornography rather than the government’s interest in prohibiting the sexual exploitation of children minimizes the uncontested nature of that interest. The government will never allow a First Amendment exception to a law narrowly tailored to advance its interest in prohibiting child sexual exploitation. And this is true whether the claim sounds in free speech (e.g., viewing or disseminating actual child pornography), freedom of association (e.g., an expressive claim by an adult to be in an intimate association with a child), or the free exercise of religion (e.g., an asserted religious duty to engage in sexual touching of a child). A First Amendment claim to child pornography loses every time not because child pornography is categorically unprotected speech but because the government’s compelling interest underlying its regulation tolerates no exceptions.

The preceding example hints at a related observation about strict scrutiny’s compatibility with current normative baselines: In most cases of what the Court currently considers “unprotected” speech, strict scrutiny clarifies the analysis but reaches the same outcome. The government clearly has a compelling interest in prohibiting defamation, fraud, incitement, and “speech integral to criminal conduct.” And outlawing these forms of speech is a narrowly tailored means of advancing those interests. Any concern about a proliferation of implausible claims clogging judicial resources could be addressed by a Supreme Court opinion reclassifying government regulation of unprotected speech (with the possible exception of obscenity) as easily satisfying strict scrutiny’s analysis.²¹⁶

that “the causal link [between viewing images of child pornography and actual instances of child abuse] is contingent and indirect.” *Id.*

²¹⁶ In fact, when we compare a strict scrutiny to the clunky classification of unprotected speech, even the exception proves the rule. The category of “obscenity” remains on the Court’s list of unprotected speech. *United States v. Stevens*, 559 U.S. 460, 468 (2010). But as previously noted, obscenity is extremely difficult to regulate today, and recent attempts to do so have been struck down. *See, e.g., Free Speech Coal., Inc. v. Att’y Gen.*, 974 F.3d 408, 423 (3d Cir. 2020) (holding that age verification, record keeping, and labeling requirements imposed on pornography producers violated the First Amendment). That’s not because obscenity is now somehow “protected” when it was previously “unprotected” but because the strength of the government’s interest has diminished due to a complex set of factors including changing moral norms, the advent of the Internet and social media, and the transnational reach of Internet users.

CONCLUSION

I have suggested that a uniform strict scrutiny test across the First Amendment could eliminate a great deal of confusing and cluttered tests and doctrines. In many cases, uncontested compelling interests would leave existing holdings undisturbed. But strict scrutiny would still require courts to revisit some existing case law, including:

- Focusing more precisely on whether the government has justified a narrowly tailored restriction that advances a precisely defined compelling government interest.²¹⁷
- Eliminating the government speech doctrine and focusing instead on the government's compelling interest in managing its internal affairs. Rather than simply declaring certain areas beyond the First Amendment's purview (as happens under the government speech doctrine), the interest in managing internal affairs could determine when government is justified in making resourced-constrained decisions and when it must allow all voices and viewpoints to be aired.²¹⁸
- Restoring free exercise analysis to a pre-*Smith* baseline that eliminates threshold inquiries into neutrality and general applicability.

Strict scrutiny does not offer a framework for resolving all First Amendment disputes. But it clarifies and simplifies a great deal of the current landscape. More pragmatically, strict scrutiny may be unlikely to appeal to judges committed to either an originalist jurisprudence or to the text, history, and tradition approach that the

²¹⁷ Some examples of decisions that appear to lack a compelling government interest include *Christian Legal Soc'y of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010) (paying little attention to government interests and relies almost entirely on speech-based public forum and content neutrality analyses); *Lyng v. Northwest Indian Cemetery*, 485 US 439 (1988) (engaging in no government interests analysis after finding a lack of substantial burden on religious freedom); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (relying on "secondary effects" doctrine).

²¹⁸ This would likely mean overruling cases like *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015).

Supreme Court has flagged in recent decisions.²¹⁹ But greater inquiry into the strength and fit of the government’s interests may still appeal to jurists interested in constraining judicial discretion or strengthening the constitutional protections for First Amendment liberties. Alternatively, the arguments here might complement a kind of proportionality analysis that others have suggested would better position First Amendment doctrine.²²⁰ Regardless, a uniform strict scrutiny test would simplify existing doctrine and require courts to consider interests they have too often avoided.

The First Amendment is fundamentally a restriction against government restrictions. Decades of First Amendment decisions and path-dependent doctrine have lost sight of that important baseline. Strict scrutiny better ensures that First Amendment restrictions are justified by compelling government interests, that those restrictions are narrowly tailored, and that the benefits of the government’s interests clearly outweigh the burdens on First Amendment liberties. These are sensible hurdles for restrictions that seek to limit our expressions and actions—and, in many cases, our ways of life. By pressing state actors for clarity and justification around the strength,

²¹⁹ In *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. __ (2022), the Court rejected a Second Amendment intermediate scrutiny test, noting instead the need for “a test rooted in the Second Amendment’s text, as informed by history” and a “historical tradition.” The Court reasoned that “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon” and that “means-end scrutiny” would “subject [the Second Amendment] to future judges’ assessments of its usefulness.” *Id.* at __. The Court also asserted that “This Second Amendment standard accords with how we protect other constitutional rights” and included a brief reference to the free speech right. *Id.* at __. Strict scrutiny’s compatibility with this approach will depend on whether *Bruen*’s skepticism of “means-end scrutiny” signals opposition to any kind of balancing or whether text, history, and tradition encompass modern doctrinal developments like strict scrutiny review. *See also* *American Legion v. American Humanist Association*, 588 U.S. __ (2019) (upholding against Establishment Clause challenges “categories of monuments, symbols, and practices with a longstanding history” that reflects “respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans”).

²²⁰ *See, e.g.*, TESIS, *supra* note __ [FREE SPEECH IN THE BALANCE]; RONALD J. KROTOZYNSKI, *THE FIRST AMENDMENT IN CROSS CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* (2006).

fit, and benefit of their restrictions, we can better protect our First Amendment liberties.