
MIDDLE-VALUE SPEECH

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ABSTRACT

One of the cornerstones of First Amendment doctrine is the general rule that content-based restrictions on all speech—apart from a few narrow categories of low-value speech—are evaluated under strict scrutiny. As many have observed, this rule has produced considerable strain within the doctrine because it applies the same onerous standard throughout the vast and varied expanse of all non-low-value speech, which includes not only the core, highest-value speech for which such stringent protection is clearly warranted, but also less valuable speech to which the application of strict scrutiny is often dissonant. Nevertheless, traditional accounts maintain that this blunt, highly prophylactic approach is necessary given the significant costs and risks associated with granting courts greater discretion to make value-based speech distinctions.

This Article challenges these accounts. I argue that courts should more explicitly recognize a broad conceptual category of what I call “middle-value speech”—that is, speech that falls within the hazy center of the speech-value spectrum between clearly high-value speech, like political speech or truthful news reporting, and clearly low-value speech, like true threats or incitement. The scope of such speech is vast, potentially encompassing speech as diverse as public disclosures of sensitive private data, sexually explicit speech, professional advice, search engine results, and false statements of fact. Yet current First Amendment doctrine broadly fails to recognize middle-value speech as a discrete conceptual category, and this failure has produced substantial costs in the form of doctrinal distortion and a lack of analytical transparency. These costs have grown

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precipitously—and will continue to grow—in conjunction with the First Amendment’s broad expansion beyond the familiar precincts of core ideological expression into increasingly eclectic varieties of speech.

I therefore propose an adjustment to the doctrinal framework. Rather than broadly presume that all speech outside of the low-value categories is subject to maximum First Amendment protection, courts should affirmatively designate and carve out the particular categories of high-value speech that merit such protection, in a manner similar to how courts have dealt with low-value speech. Once both low-value and high-value speech categories have been carved out, all remaining uncategorized speech is, by definition, middle-value speech, and courts should adopt intermediate scrutiny as the default rule applicable to all such speech. This approach would greatly reduce the doctrinal distortion and analytical opacity associated with the traditional default rule of strict scrutiny, and it would do so at a limited cost to doctrinal consistency and administrability.

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INTRODUCTION

In *Young v. American Mini Theatres, Inc.*, Justice Stevens—writing for a plurality of the Court—famously observed that while “every schoolchild can understand why our duty to defend the right to speak” would apply to “political oratory or philosophical discussion,” “few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”¹ In other words, although “the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value,” society’s interest in protecting such speech “is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.”²

Whether or not one agrees with Justice Stevens’s characterization of this particular type of speech, the natural intuition underlying his statement is difficult to deny, at least in the abstract: within the incredibly vast and varied expanse of speech covered by the First Amendment, some types of speech simply carry more constitutional value than others. The clearest manifestation of this intuition is the Court’s longstanding recognition of discrete low-value speech categories to which the First Amendment offers minimal protection, such as obscenity, true threats, and incitement.³ But this intuition also extends to the diverse and ever-expanding range of speech outside of these narrow low-value speech exceptions. It is one thing to say, for example, that political speech constitutes high-value speech, the regulation of which should be subject to the most exacting scrutiny. But what about search engine results? Or detailed factual instructions for illegal or dangerous conduct? Or professional advice given by a lawyer or accountant?

Justice Stevens’s argument for further subdivision of speech based on

1. *Young v. Am. Mini Theaters, Inc.*, 426 U.S. 50, 70 (1976) (plurality opinion).

2. *Id.*

3. *See, e.g., United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

value,⁴ however, has gained little traction with the Court. Rather—save one notable exception⁵—the longstanding default rule of First Amendment doctrine continues to apply, at least as a formal matter: outside of the low-value speech categories, content-based restrictions on speech are evaluated under strict scrutiny, which effectively dooms them to failure. This rule produces considerable strain within First Amendment jurisprudence simply because it applies the same onerous strict scrutiny standard to content-based regulations of *all* non-low-value speech, even though the vast expanse of such speech encompasses not only the core, highest-value speech for which such stringent protection is clearly warranted, but also—and to a rapidly increasing extent—less valuable speech, to which the application of strict scrutiny is often dissonant.

Academic accounts defending this rigid doctrinal framework, however, argue that the blunt over-inclusiveness of the strict scrutiny default rule represents the lesser evil as compared to granting courts more discretion to make value-based distinctions amongst different categories of speech. Scholars have argued, for example, that even though the current approach might often be ill-fitting, it is nevertheless necessary to adequately protect speech from the conscious or unconscious biases held by judges and juries,⁶ to correct for courts' broad systemic tendency to undervalue the more abstract benefits of free speech in favor of more concrete regulatory interests,⁷ and to give clear guidance to speakers, legislators, and courts.⁸

This Article challenges these accounts. I argue that the current state of First Amendment jurisprudence strongly suggests that the doctrinal

4. In another plurality opinion, Justice Stevens similarly argued that profane speech is “not entitled to absolute constitutional protection under all circumstances.” *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (plurality opinion).

5. See *infra* text accompanying notes 58–64 (discussing commercial speech).

6. See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 73–74 (1987).

7. See, e.g., Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 744 (2002); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 304 (1981). See also Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1313–14 (2014) (observing that in disputes with local dissidents, one can expect local officials “systematically to inflate the threats posed, and to underestimate the expressive interests at stake”).

8. See, e.g., Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 288 (“Extreme subdivision of the First Amendment magnifies the risk that an increasingly complex body of doctrine, even if theoretically sound, will be beyond the interpretative capacities of those who must follow the Supreme Court’s lead—primarily lower court judges, legislatures, and prosecutors.”); Stone, *supra* note 6, at 72.

framework should be modified—albeit cautiously—to grant courts greater freedom to make speech-based value judgments more openly and explicitly. Specifically, I argue that courts should more explicitly recognize a broad conceptual category of what I call “middle-value speech”—that is, speech that falls within the hazy center of the speech-value spectrum between clearly high-value speech, like political speech and truthful news reporting, and clearly low-value speech, like fraudulent speech and incitement. This category of middle-value speech is potentially vast. Areas of speech as diverse as computer code, sexually explicit speech, professional advice, panhandling, search engine results, false statements of fact, and public disclosures of sensitive private data can all be potentially characterized as middle-value in nature.⁹ Yet under current First Amendment doctrine, there is only minimal recognition of middle-value speech as a discrete conceptual category,¹⁰ and courts’ broad failure to recognize such a category has substantially undermined both the stability of the doctrine and its capacity to evolve amidst a rapidly changing communications culture.

My argument here is not based on a strong sense that the traditional justifications for the current doctrinal framework are fundamentally flawed. Nor do I argue that the Court was necessarily unwise to adopt this doctrinal framework when it did. Rather, my argument rests primarily on a pragmatic view of First Amendment jurisprudence as it stands today.

First, over forty years of experience with the strict scrutiny default rule has revealed courts’ consistent willingness to surreptitiously evade the formal doctrinal framework when confronted with middle-value speech cases where applying such scrutiny would seem dissonant or anomalous. In other words, although courts have not explicitly recognized various categories of speech as middle-value in nature, they have effectively treated them as such *sub rosa*, through doctrinal distortion. This doctrinal distortion not only severely limits the theoretical benefits of judicial constraint that underlie the current doctrinal framework, but it also works to destabilize the foundations of First Amendment doctrine as a whole while limiting analytical transparency in courts’ resolution of significant First Amendment questions.

Furthermore, the costs associated with the traditional doctrinal framework have multiplied—and will continue to multiply—given the rapid and continuing expansion of the First Amendment’s coverage well

9. See *infra* Part II.B.

10. See *infra* Part I.B.

beyond core ideological speech.¹¹ Today's First Amendment is far more expansive than could ever have been imagined in the formative years of First Amendment jurisprudence, and the rapid technological and social changes associated with our ever-evolving communications culture ensure that difficult and unique questions will continue to be raised as courts are confronted with novel and increasingly varied categories of "speech." Such variety and eclecticism magnifies the dissonance associated with a rigid and onerous strict scrutiny default rule, which mandates that even speech that is very different from core political speech nevertheless be treated similarly, even if such a result would seem absurd or anomalous.

Finally, courts' demonstrated willingness to distort doctrine and the rapid expansion of First Amendment coverage highlight the strong need for increased transparency in courts' First Amendment analyses. The current all-or-nothing doctrinal approach hinders courts—and society at large—from engaging in the sort of collective dialogue and discussion necessary to advance the common law development of First Amendment doctrine in step with rapidly evolving cultural and technological conditions.¹² Difficult middle-value speech cases represent particularly valuable opportunities for courts to truly confront and grapple with the broad foundational questions of First Amendment doctrine: what exactly makes speech constitutionally valuable, and how such value should be weighed against the social harms caused by speech.¹³ Yet the current approach squanders this benefit of such cases, not only because courts have distorted doctrine to mask such judgments, but also because the bluntness of strict scrutiny allows courts to resolve such cases without undertaking any deeper foundational inquiry.

I therefore propose a modification to the doctrinal framework that would incrementally expand courts' ability to openly and accurately capture the diversity of speech protected by the First Amendment. First, courts should adopt a categorical approach in identifying *high-value* speech, in the same manner currently used to identify low-value speech. In other words, rather than simply characterize *all* uncategorized speech as high-value speech subject to maximum First Amendment protection, courts should affirmatively identify and delineate the particular categories of speech that merit such protection under a strict scrutiny standard. Then—

11. By "ideological speech," I mean speech concerning political, religious, or social issues. See Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1186 (1988) (describing the "core" speech category of "political, religious, and otherwise ideological communication").

12. See David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 371–79 (2015) (describing the concept of doctrinal transparency and outlining its value).

13. *Id.* at 372–73.

once both low-value *and* high-value speech have been carved out—all remaining uncategorized speech is, by definition, middle-value speech, and I propose that courts adopt intermediate scrutiny as the default rule applicable to all such residual speech,¹⁴ at least provided that the regulation in question is not viewpoint-based in nature. This approach would greatly reduce the doctrinal distortion and lack of analytical transparency associated with the traditional default rule of strict scrutiny, injecting a greater degree of theoretical clarity, candor, and flexibility into a rapidly evolving jurisprudence currently hamstrung by a rigid and opaque doctrinal regime.

It is worth clarifying a couple of important points up front. First, my proposal does *not* seek to eliminate or drastically alter the content-based/content-neutral inquiry at the center of the doctrine, as others have advocated;¹⁵ it merely seeks to tweak the present doctrine to better account for middle-value speech. Nor is my goal here to argue for a general broadening or narrowing of current First Amendment protection, or to advocate for any specific vision of what sorts of speech ought to be classified as high-value, middle-value, or low-value. The core of my proposal is simply that intermediate scrutiny be the default standard with respect to content-based regulation of residual, middle-value speech—that is, if a court finds that the speech does not fall into a delineated category of low- or high-value speech, it will simply apply intermediate scrutiny.

Second, my argument focuses specifically on considerations regarding the value and harms associated with speech—considerations that play a prominent role in First Amendment analyses. There are, however, other significant considerations that drive courts’ judgments—for example, the government’s motive in enacting a speech regulation¹⁶ or special factual

14. I have not come across any scholarship proposing this particular approach. Schauer perhaps hinted at something similar in a brief footnote, but his passing reference included no elaboration or discussion. See Schauer, *supra* note 7, at 296 n.145 (“I presuppose some considerable strength for the general level of first amendment protection. If that level falls, however, it may be wise to consider the creation of subcategories of particularly strong protection.”).

15. See, e.g., Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1423 (2006) (arguing that “the content neutrality analysis needs to be changed in several important respects”); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114 (1981) (“It is therefore time to rethink, and ultimately to abandon, the content distinction.”); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 364 (2006) (“[N]either simple nor complex forms of the CB-CN distinction serve as a useful proxy for the underlying values about which society cares most.”).

16. See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 422, 426 (1996); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 776 (2001).

contexts where the government's regulatory interests may be heightened.¹⁷ This Article does not argue that considerations of speech value and harm are, or ought to be, the sole or primary drivers of First Amendment analysis—it merely recognizes that such considerations play a substantial role in the analysis, whether addressed explicitly or *sub rosa*.

This Article proceeds as follows. In Part I, I walk through relevant First Amendment theory and doctrine, focusing in particular on the default rule that content-based restrictions on speech are subject to strict scrutiny. In Part II, I introduce and describe the conceptual category of middle-value speech, and I outline the significant costs associated with the current doctrinal framework's general failure to account for such speech. In Part III, I propose a new approach to remedy these shortcomings: courts should affirmatively designate categories of high-value speech—just as they currently do with low-value speech—and adopt intermediate scrutiny as the default rule applicable to any remaining uncategorized speech. In Part IV, I address a number of potential critiques to my approach, including arguments that it would be insufficiently protective of speech interests and that it would allow for excessive judicial discretion; I also address the practical question of how my proposed approach might realistically be implemented by courts. Part V concludes.

I. THEORETICAL AND DOCTRINAL FOUNDATIONS OF THE CURRENT STRICT SCRUTINY DEFAULT RULE

A. THEORETICAL FOUNDATIONS

At the theoretical core of the Free Speech Clause is the basic idea that speech is entitled to greater protection from government regulation than non-speech conduct.¹⁸ If this were not the case, of course, then the provision would be meaningless. Thus, First Amendment doctrine fundamentally rests on the broad theoretical rationales as to *why* speech is entitled to this special degree of protection; it is these rationales that ultimately drive determinations regarding the breadth and degree of First Amendment protection. Neither the sparse text of the Free Speech Clause¹⁹

17. See *infra* text accompanying notes 82–86.

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

19. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

nor the historical background surrounding its drafting,²⁰ however, provide much useful guidance in elucidating these background rationales. Thus, at least as a practical matter, First Amendment doctrine is largely driven by courts' underlying intuitions as to what exactly makes speech valuable, and these intuitions are the product of the particular theory or theories of speech protection adopted by the courts.²¹

Although many theoretical bases for granting special constitutional protection to speech have been proposed, three particular rationales have dominated both the academic and judicial discourse.²² The first is the idea that unfettered speech has special value as a means of uncovering truth,²³ an idea famously encapsulated by Justice Holmes's statement that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."²⁴ The second is the idea that unfettered speech is necessary for democratic self-governance; after all, if the citizens in a democracy are the ultimate sovereigns, they must have the freedom to openly debate and discuss matters of public concern to govern themselves effectively.²⁵ The third is the idea that freedom of speech is an essential aspect of individual autonomy and personhood, and thus represents a good in itself, since "[o]ur ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons."²⁶

20. See GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT 6–7* (2d ed. 2003); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 *IND. L.J.* 1, 26–27 (2011) (observing, after undertaking a detailed historical survey, that "the evidence regarding the original meaning of the Speech and Press Clauses is anything but easy to sort out" and that "[i]n the face of such deeply conflicting evidence, most scholars of the First Amendment have despaired of producing any coherent originalist account of the Speech and Press Clauses"). See also *id.* at 29 ("[T]he difficulties in identifying the original meaning of the First Amendment are a function of the reality that the meaning of free speech and a free press was something of a moving target in the eighteenth and nineteenth centuries.").

21. Han, *supra* note 12, at 364–67. See Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 *VA. L. REV.* 203, 251 (1982) (observing that speech value judgments "will vary with the substantive values one believes underlie the amendment").

22. See, e.g., STONE ET AL., *supra* note 20, at 15–16.

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

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

25. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22–27 (1948); Robert Post, *Participatory Democracy and Free Speech*, 97 *VA. L. REV.* 477, 482 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 *VA. L. REV.* 491, 497–98 (2011).

26. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 *U. CHI. L. REV.* 225, 233 (1992). See also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 966 (1978); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFF.* 204, 213–15 (1972).

In developing the current First Amendment doctrinal framework, courts have not settled on any single rationale as the definitive theoretical basis for protecting speech. Rather, they have adopted a patchwork approach, recognizing these and other theoretical rationales in different contexts.²⁷ And in a broad sense, these theoretical rationales represent the bedrock upon which we map the contours of First Amendment coverage and protection. If speech is constitutionally entitled to special protection because it is particularly valuable in some way, our intuitions as to *when* the value of speech justifies stringent constitutional protection are driven by these foundational theoretical justifications.²⁸ And these justifications also provide an underlying normative basis for calculating the other side of the fundamental First Amendment calculus: evaluating the degree of social harm caused by the speech. For example, the democratic self-governance theory might dictate that we broadly exclude a person's strong moral offense to her neighbor's political views as a colorable speech-based harm—even though such offense would constitute a form of social disutility in the abstract—since that theory rests on the broad need for sovereign citizens to hear out all ideas, whether offensive or not.²⁹

Judgments of speech value and harm are certainly not the only relevant inquiries in First Amendment doctrine. Considerations such as the government's motive in enacting a speech regulation often come into play, and indeed play a vital role in a wide variety of doctrinal contexts.³⁰ All I mean to say here is that given the lack of guidance in the text or history of the Free Speech Clause, our broad sense of what constitutes the "right answer" in a given case is driven, to a significant extent, by the intuitions we hold regarding the value and harm associated with speech.³¹ And these

27. See Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1252 (1983) (observing that "the Court has been unwilling to confine the first amendment to a single value or even to a few values"). *But see* Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1042–44 (arguing that the three traditional rationales are in fact components of a broader theory conceptualizing the First Amendment "as an essential component of a nation whose primary purpose is the protection of individual rights for the common good").

28. See, e.g., Stephan, *supra* note 21, at 206 ("The approach reflected in the Court's free speech opinions, and in almost every scholarly discussion of the first amendment, posits some hierarchy of values entitled to constitutional protection. Such a hierarchy implies a similar ranking of particular categories of expression, according to the degree the expression implicates the underlying values.").

29. Han, *supra* note 12, at 365–66.

30. See Kagan, *supra* note 16, at 422, 426; Rubinfeld, *supra* note 16, at 776.

31. See Schauer, *supra* note 7, at 288 (observing that "most people do believe that there are 'commonsense differences' between different categories of utterances" and that "most people believe that some categories are more important than others, with great agreement about many questions of relative worth"); Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the*

intuitions, in turn, are rooted in the underlying theoretical rationales for protecting speech.

B. THE DEFAULT RULE OF STRICT SCRUTINY FOR CONTENT-BASED RESTRICTIONS ON SPEECH

Perhaps the most important cornerstone of current First Amendment doctrine is the broad default rule that content-based restrictions on speech are evaluated under strict scrutiny. The origins of this rule can be traced back to two cases dealing directly with issues of political dissent:³² the Supreme Court's 1970 decision in *Schacht v. United States*³³ and its 1972 decision in *Police Department of Chicago v. Mosley*.³⁴

Schacht involved a statute that allowed "an actor in a theatrical or motion-picture production" to wear a military uniform only "if the portrayal does not tend to discredit that armed force."³⁵ *Schacht* was convicted under the statute for wearing his army uniform in a "street skit" that protested United States involvement in the Vietnam War. In striking down the statute, the Court focused on the fact that *Schacht* "was free to participate in any skit at the demonstration that praised the Army, but . . . he could be convicted of a federal offense if his portrayal attacked the Army instead of praising it."³⁶ The Court concluded that such a provision "cannot survive in a country which has the First Amendment,"³⁷ although it did not formally establish any sort of broad rule governing content discrimination.

Two years later, in *Mosley*, the Court reviewed a Chicago ordinance that broadly prohibited picketing within 150 feet of a school during school hours but specifically carved out an exception for "peaceful picketing of any school involved in a labor dispute."³⁸ *Mosley* had been peacefully picketing outside of Jones High School during school hours, carrying a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota." Once the ordinance was enacted, however, he was forced to stop his protest.³⁹ After observing that "[t]he central problem

Twentieth Century, 36 PEPP. L. REV. 273, 276 (2009) ("[W]e have some intuitive sense of what the First Amendment sensibly means.").

32. Stone, *supra* note 31, at 278–80.

33. *Schacht v. United States*, 398 U.S. 58 (1970).

34. *Police Dep't. of Chi. v. Mosley*, 408 U.S. 92 (1972).

35. *Schacht*, 398 U.S. at 59–60.

36. *Id.* at 63.

37. *Id.*

38. *Mosley*, 408 U.S. at 93.

39. *Id.*

with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter," the Court observed that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."⁴⁰

As later decisions would clarify,⁴¹ *Mosley* established the broad rule that content-based speech restrictions are subject to strict scrutiny—that is, they are upheld only if they are “narrowly tailored to promote a compelling Government interest” and represent the least restrictive means of promoting that interest.⁴² And in this particular context, strict scrutiny has broadly been applied by courts in its strictest, least-forgiving form;⁴³ this reflects the *Mosley* Court's absolutist rhetoric, which went so far as to suggest that the government has “no power” to restrict speech based on its content.⁴⁴

Although the rule originated in two cases dealing specifically with direct government regulation of political dissent, it was formulated—and has been applied—as a default rule that applies broadly to all speech.⁴⁵ The Court has also, however, carved out a few narrow exceptions to the rule, specifically delineating certain categories of low-value speech that are effectively entitled to no First Amendment protection at all.⁴⁶ These oft-cited categorical exceptions include obscenity, true threats, child pornography, incitement, and fighting words, and the government is generally free to regulate these categories of speech based on content under a broadly deferential standard of review.⁴⁷ And on a very limited basis, the Court has identified some categories of speech to which the First Amendment offers some lesser degree of protection, such that content-

40. *Id.* at 95.

41. *See, e.g.,* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229–31 (1987); Carey v. Brown, 447 U.S. 455, 464–65 (1980).

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

43. Han, *supra* note 12, at 397–98. *See also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1313 (2007) (“In free speech cases, the Supreme Court most commonly applies a version of strict scrutiny that is ‘strict’ in theory and fatal in fact.”).

44. *Mosley*, 408 U.S. at 95.

45. *See, e.g.,* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226, 2231 (2015) (striking down content-based outdoor sign regulations); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430–31 (1993) (striking down a ban on the distribution of materials via sidewalk newsracks); Ark. Writers' Project, 481 U.S. at 229–30, 234 (striking down a sales tax targeting “general interest magazines” but not “newspapers and religious, professional, trade, and sports journals”).

46. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). As the Court made clear in *R.A.V. v. City of St. Paul*, however, the government does not have free rein to regulate within the realm of low-value speech; it still may not, for example, distinguish amongst low-value speech based on viewpoint. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–85 (1992).

47. *See* Chaplinsky, 315 U.S. at 571–72.

based regulations are evaluated under a form of intermediate scrutiny rather than strict scrutiny; the most notable example of this is truthful commercial speech.⁴⁸

So at least as a matter of formal doctrine, the stringent strict scrutiny default rule generally applies to the vast expanse of uncategorized speech that does not fall into any of the narrowly designated subsets of low-value speech. Furthermore, the Court has, in recent years, expressly discouraged the development of any novel low-value speech categories beyond the limited categories that have already been historically recognized,⁴⁹ which means that in the future, the strict scrutiny default rule will presumably apply in the vast majority of cases dealing with novel forms of speech.

This onerous default rule, along with the Court's stringent limitations on recognizing additional low-value speech exceptions, reflects the massive gravitational pull that the highest-value ideological speech exerts on First Amendment doctrine.⁵⁰ And this gravitational pull is unsurprising, given the historical development of the current doctrinal framework. The modern era of First Amendment jurisprudence began in the early twentieth century⁵¹ with a set of cases dealing with textbook examples of political dissent,⁵² and it is these early political speech cases that produced probably the two most influential and oft-quoted opinions in all of First Amendment jurisprudence: Justice Holmes's dissent in *Abrams v. United States*⁵³ and Justice Brandeis's concurrence in *Whitney v. California*.⁵⁴ Indeed, much of

48. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–66 (1980). The Court has applied intermediate scrutiny in a few other limited contexts, such as cases dealing with government employees' speech. As I discuss below, however, commercial speech is the only purely substantive category of speech that the Court has recognized as middle-value in nature. See *infra* text accompanying notes 58–64.

49. I discuss this in greater detail below. See *infra* text accompanying notes 139–43.

50. See Schauer, *supra* note 7, at 287 (“[M]ost first amendment theory is formulated around the ‘advocacy’ paradigm.”).

51. See DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS I* (1997) (noting the traditional view that modern First Amendment jurisprudence began with the Espionage Act cases); STONE ET AL., *supra* note 20, at 8 (observing that the Supreme Court never directly considered the Free Speech Clause prior to the Espionage Act of 1917).

52. See, e.g., *Whitney v. California*, 274 U.S. 357 (1927); *Abrams v. United States*, 250 U.S. 616 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

53. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

54. *Whitney*, 274 U.S. at 376–77 (Brandeis, J., concurring) (stating that “[f]ear of serious injury cannot alone justify suppression of free speech and assembly” and that whenever possible, “the remedy to be applied [to dangerous speech] is more speech”).

the fundamental structure of current First Amendment doctrine can be traced back to a handful of seminal cases dealing with political or otherwise ideological speech in some form.⁵⁵

The doctrinal primacy of the most valuable ideological speech is also reflected in the broad social understanding of the First Amendment, both within and outside of the courts. Mention the First Amendment to a person on the street, for example, and it will most likely evoke some conception of protecting dissent and debate regarding political, religious, or social issues. It is therefore natural that whenever people discuss the freedom of speech in general terms, or when courts construct First Amendment doctrine on a broad architectural level, they tend to do so while implicitly or explicitly conceptualizing speech in its highest-value forms.⁵⁶ After all, these are the subsets of speech that best capture our fundamental reasons for protecting speech and thus raise our greatest concerns regarding government regulation.

The strict scrutiny default rule—which, as described above, arose in cases dealing with direct state regulation of political dissent—was thus presumably developed with the highest-value “core” speech specifically in mind. But the blunt presumption underlying the rule—that all speech (at least outside of a few narrow exceptions) is, in effect, as valuable as the highest-value ideological speech—fits poorly with the diverse and ever-expanding range of “speech” protected by the First Amendment.⁵⁷ And as I describe in detail below, this wide and growing disconnect between the highly speech-protective default rule and the fact that not all uncategorized speech carries the same degree of First Amendment value has produced significant costs within the current doctrinal framework.

55. See, e.g., *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1287–88 (2005) (observing that prior to 1976, the “overwhelming majority of First Amendment cases” dealt with government regulations that “generally concerned either speech specifically about candidates or officials, speech about issues on the public agenda, or speech generally criticizing our form of government and advocating its overthrow”).

56. This includes not just ideological speech, but also speech like artistic expression, truthful news reporting, and academic debate. See Schauer, *supra* note 11, at 1186 (observing that the First Amendment “has not one but several cores,” which include “the category of political, religious, and otherwise ideological communication; the category of literary and artistic communication; and the category of scientific and academic exchange of information”).

57. Cf. Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 954–55 (2016) (“The [strict-scrutiny default] rule can be appreciated, perhaps, as an understandable reaction to a long period in our history in which political dissent was not protected rigorously enough. But the cardinal rule has outgrown that core mission.”).

C. THEORETICAL JUSTIFICATIONS FOR THE CURRENT TWO-TIER
STRUCTURE

As described above, the Court has settled on a largely binary, all-or-nothing structure with respect to questions of speech value. It groups the vast majority of speech by default into an expansive category of presumptively high-value speech, to which the onerous rule of strict scrutiny for content-based speech restrictions applies. It recognizes some narrow subsets of speech as low-value speech, the regulation of which is subject to a highly deferential standard of review, but compared to the broad expanse of the First Amendment's coverage, these low-value speech categories are relatively limited in scope.

Only in the commercial speech context has the Court explicitly characterized speech as falling somewhere within the middle of the speech-value spectrum⁵⁸—what I refer to in this Article as “middle-value speech.” In *Ohralik v. Ohio State Bar Ass’n*, the Court observed that it “afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.”⁵⁹ Pursuant to this classification, the Court has held that content-based regulations of truthful commercial speech are subject only to a form of intermediate scrutiny rather than strict scrutiny.⁶⁰

In no other context, however, has the Court clearly designated a substantive category of speech as middle-value in nature,⁶¹ such that it is entitled to some intermediate degree of protection between that afforded to high-value speech and low-value speech.⁶² Rather—at least as a matter of

58. In *Young*, a plurality of the Court appeared to characterize non-obscene but sexually explicit speech as middle-value speech. See *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion). The plurality observed that “society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate,” but this view has never been adopted by a majority of the Court. *Id.* See *infra* text accompanying notes 147–56 (discussing the secondary effects approach adopted in subsequent cases).

59. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

60. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–66 (1980).

61. As Ashutosh Bhagwat has observed, the Court appeared to apply “an indeterminate form of balancing/tailoring analysis” in cases dealing with charitable solicitations, although it has also stated that the default strict scrutiny rule applies to content-based regulations of such speech. See Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 798–99.

62. As I discuss below, the Court has applied intermediate scrutiny-style analyses in certain cases based primarily on the *context* of the speech in question rather than its substantive value—for example, in cases dealing with government employees’ speech, symbolic speech, or speech in prisons, public schools, or the military. See *infra* notes 82–86 and accompanying text.

formal doctrine—it has consistently resisted this sort of value-based differentiation of speech.⁶³ Indeed, in *United States v. Stevens*, the Court emphatically rejected the government’s argument that “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs,” calling such value-based analysis “startling and dangerous.”⁶⁴

Needless to say, the current two-tier doctrinal structure does not accurately reflect the broad and varied range of speech that is covered by the First Amendment. Given the massive value placed on ideological speech—and, presumably, our heightened suspicions of illicit government motives if such speech is sought to be regulated—it makes sense to effectively bar the government from regulating such speech based on its content, as was the case in *Schacht and Mosley*.⁶⁵ But much of the vast expanse of uncategorized speech is *not* easily characterized as this sort of particularly valuable speech. Surely, for example, speeches at political rallies carry more First Amendment value than nude dancing, and truthful reporting on issues of public concern is more valuable than false statements of fact. As many have recognized, the formal presumption that all speech is equally valuable simply does not square with the common-sense notion that the diverse and ever-expanding range of speech covered by the First Amendment—even outside of the designated low-value speech categories—carries varying degrees of constitutional value.⁶⁶

But the lack of doctrinal fit produced by the rigidity and over-inclusiveness of the current two-tier structure is not, by itself, a sufficient reason for rejecting or modifying it. There are significant considerations to

63. Some members of the Court have suggested creating further value-based subdivisions of speech. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (arguing that some non-low-value speech can nevertheless be regarded as “a sort of second-class expression”). But outside of the commercial speech context, the Court has generally rejected this approach.

64. *United States v. Stevens*, 559 U.S. 460, 470–72 (2010).

65. And for similar reasons, it makes sense for courts to adopt this onerous standard in other contexts dealing with speech that, for one reason or another, is broadly deemed to be highly valuable, like truthful news reporting or academic debate.

66. *See, e.g.*, Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1429 (2017) (stating that “developing fault lines” within First Amendment jurisprudence “reflect a growing discontent with a basic assumption underlying current doctrine—that all fully-protected speech is equal and must be treated equally by regulators”); Schauer, *supra* note 7, at 287–88 (observing that a refusal to categorize speech is “frightfully counter-intuitive” because “most people believe that some categories are more important than others, with great agreement about many questions of relative worth”); Stephan, *supra* note 21, at 206 (stating that because “[n]o sensible approach to first amendment questions can dispense with” a hierarchical “ranking of particular categories of expression, . . . a broad content neutrality rule is indefensible” in principle).

doctrinal design beyond fit, and one's decision as to the number of doctrinal categories to recognize directly reflects a judgment as to the best balance between a simple and administrable rule-like regime on the one hand and a more complex and open-ended standard-like regime on the other.⁶⁷ For example, a single-category regime that treats all speech identically would be highly rigid and grossly over- or under-inclusive, but it would also be easier to administer, produce greater uniformity and consistency in decision-making, and give clearer notice to speakers and regulators as to what exactly would or would not be permissible. On the other hand, an infinite-category case-by-case balancing regime, although unpredictable and difficult to administer, would allow for fully tailored analyses that account for the precise facts and context of each individual case.⁶⁸

Many scholars have thus defended the current two-tier approach as reflecting the most suitable balance between these considerations, arguing that it is unwise and dangerous to afford courts discretion to make more nuanced value-based distinctions of speech. As Geoffrey Stone has argued, the preference for a blunt, widely over-inclusive framework is driven by the risk that “judges and jurors may be influenced by their own conscious or unconscious biases, which may undermine their ability to evaluate accurately and impartially the extent to which particular content-based restrictions actually impair the communication of specific, often disfavored, messages.”⁶⁹ As a result, “the Court has appropriately embraced a ‘fortress model’ of jurisprudence that gives judges little room to maneuver and that intentionally overprotects speech, in order to minimize the potential harm from legislative and administrative abuse and judicial miscalculation.”⁷⁰ In other words, the two-tier framework is prophylactic in nature: it adopts a rigid, overprotective doctrinal approach in order to account for the intentional and unintentional errors that might consistently favor regulatory interests over speech.

Such prophylaxis may be necessary for a number of reasons. For one, courts may be broadly reluctant to protect unpopular speech in the face of intense majoritarian pressures. As Vincent Blasi has noted, this danger is maximized particularly in those “pathological” times “when intolerance of unorthodox ideas is most prevalent and when governments are most able

67. See Han, *supra* note 12, at 367–70 (describing the contours of the rules-versus-standards debate).

68. See *id.* at 369–70.

69. See Stone, *supra* note 6, at 73.

70. *Id.* at 73–74.

and most likely to stifle dissent systematically.”⁷¹ Thus, as Blasi argues, courts, in crafting doctrine, “should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense.”⁷² In other words, simple and overprotective doctrine is necessary to ensure that courts and other actors lack the wiggle room to erroneously underprotect speech amidst strong majoritarian pressures to do so.

Furthermore—even outside of these particularly dangerous moments of pathological pressure—courts, legislatures, or local bureaucrats⁷³ might simply be predisposed to favor speech with which they agree.⁷⁴ Or, perhaps, they may systematically overvalue the government’s regulatory interests over the speech interests at stake. After all, the government’s regulatory interests are usually concrete, focused, and immediate: for example, preserving national security, preventing severe emotional distress, or reducing harmful criminal activity. By contrast, the benefits of free speech—such as aiding in the pursuit of truth or supporting democratic self-governance—are far more abstract and dispersed in nature.⁷⁵

Thus, a rigid and highly overprotective two-tier doctrinal structure—rather than one that grants courts and state officials additional discretion to classify speech based on its value—may be necessary to counteract these systemic biases against speech.⁷⁶ As Frederick Schauer has observed, “[i]f . . . the first amendment seeks to protect that which may at first sight . . . seem worthless, then we must guard against the pressure to create subcategories that will leave to judges in a particular case the determination of either the truth or the social utility of a covered communicative act.”⁷⁷

71. Blasi, *supra* note 6, at 449–50.

72. *Id.* at 474.

73. See Kreimer, *supra* note 7, at 1304–14 (arguing that the current, highly prophylactic approach is necessary to constrain the actions of local officials).

74. See Stone, *supra* note 6, at 73 (“[A]s history teaches, judicial evaluations of content-based restrictions are especially likely to ‘become involved with the ideological predispositions of those doing the evaluating.’”).

75. See Posner, *supra* note 7, at 744 (“[T]he costs of freedom of expression are often more salient than the benefits, and their salience may cause the balance to shift too far toward suppression.”); Stone, *supra* note 6, at 72–73 (observing that balancing approaches “invite[] judges to understate speech interests by focusing on the value of free speech to individuals, as a private interest, rather than on its value to the community generally, as a public interest that serves the essential ends of a self-governing society”).

76. See Schauer, *supra* note 7, at 295 (“When the error of misclassification is likely to occur in derogation of constitutionally preferred values, categorization in the sense of creating additional subcategories is a technique to be employed with only the greatest of caution.”).

77. *Id.* at 295–96.

Finally, the prophylactic, over-inclusive two-tier approach might be necessary simply to limit the chilling effects on speech that would result from a more complex and nuanced doctrinal structure. If the doctrine were to become more complex, then speakers would become increasingly uncertain as to whether their speech is protected, given that such complexity might strain the interpretive capacities of courts or afford them with greater opportunities to manipulate results.⁷⁸ This uncertainty would discourage risk-averse speakers from partaking in constitutionally protected speech, whether because they are unsure of the speech's protected status or because they are worried about the possibility of intentional or unintentional judicial error.⁷⁹

These arguments all serve as theoretically persuasive justifications for the current two-tier framework, suggesting that any costs in terms of a lack of doctrinal fit are outweighed by the gains of a system that is predictable, administrable, and less subject to dangerous judicial discretion. As I will argue, however, practical realities surrounding the current state of First Amendment jurisprudence have significantly weakened these justifications, strongly suggesting the need for doctrinal reformulation.

II. MIDDLE-VALUE SPEECH AND THE SHORTCOMINGS OF THE TRADITIONAL APPROACH

A. THE CONCEPT OF MIDDLE-VALUE SPEECH

As discussed above, a framework that broadly presumes that all non-low-value speech is high-value speech subject to the most stringent protection against content-based regulations simply does not fit with the reality that the First Amendment covers a broad range of speech of varying constitutional value. In order to better articulate and analyze the substantial costs associated with this lack of fit, I here introduce and describe the idea of what I call “middle-value” speech. As I will argue below, many infirmities within the current doctrinal framework can be traced to courts' broad failure to account for such speech.

On a purely conceptual level, middle-value speech is exactly as it sounds: it is speech that falls within the hazy middle of the speech-value

78. See *id.* at 306 (observing that because complex doctrines can outstrip peoples' interpretive capacities, and given the risk that “errors will most often be on the side of repression rather than permission, we must abandon codes of great sophistication and consequent complexity in favor of simpler or more general codes”); Stone, *supra* note 6, at 72.

79. See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 689–701 (1978).

spectrum, between clearly high-value speech (like, for example, political speech or truthful news reporting) on the one hand and clearly low-value speech (like, for example, fighting words or fraud) on the other.⁸⁰ It is therefore useful to define middle-value speech in the negative: it is all of the speech that remains after one carves out all of the highest-value speech and all of the lowest-value speech.

If we broadly conceptualize middle-value speech in this manner—as a sort of residual catch-all—different types of middle-value speech need not share any overarching similarities. It is simply a grab-bag of all speech that, for one reason or another, cannot easily be categorized as high- or low-value. Its distinguishing characteristic is that it has *some* meaningful degree of First Amendment value—unlike, say, true threats or incitement—but not so much value that we are comfortable affording it the same stringent protection as the highest-value speech—like, say, ideological speech, artistic expression, or truthful news reporting.

This raises the question of how exactly one measures the constitutional value of speech. As I discussed above, given the absence of concrete guidance in the text or history of the Free Speech Clause, the constitutional value of speech is ultimately tied to the varying theoretical rationales as to why speech is entitled to special protection. Thus, the value of a particular subset of speech might be tied to its capacity to advance the pursuit of truth, or to its contribution to democratic self-governance, or to its centrality to individual autonomy.

As I noted, however, the Court has never settled on any single theoretical rationale for protecting speech, choosing instead to recognize different theoretical rationales in different contexts. And although scholars have long argued as to what particular rationale ought to stand as the sole or dominant basis underlying First Amendment doctrine,⁸¹ I do not delve into this debate for present purposes, simply because my discussion here does not rest on any particular normative preference as to how courts should value speech.

80. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (describing commercial speech and sexually explicit speech as “a sort of second-class expression”).

81. See David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 89–93 (2012) (describing this debate). Other scholars who have focused on the lack of fit associated with the current doctrinal framework have done so specifically through the lens of a particular normative view as to what theoretical considerations should predominate in First Amendment analysis. See Bhagwat, *supra* note 66, at 1450–54 (democratic self-governance); Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 653 (2002) (autonomy).

That is to say, although I will survey some possible subsets of middle-value speech below, my ultimate goal here is *not* to argue that any of these particular subsets of speech must or even ought to be classified as middle-value in nature. Nor is it to specifically endorse any particular theoretical rationale for protecting speech; to the extent that I discuss such rationales, such discussion simply reflects the varying theoretical considerations that the Court has set forth in delineating speech value. In the end, my argument requires only a basic recognition that some meaningful subset of speech covered by the First Amendment is not comfortably characterized as either the highest-value core speech or low-value speech—a claim that is, I think, difficult to dispute on its face, regardless of whether one believes that truth-seeking, democratic self-governance, autonomy, or any other consideration ought to predominate in speech-value determinations.

It is also worth clarifying that when I refer to speech as middle-value, I am referring specifically to the inherent constitutional value of the speech itself rather than the contextual, non-speech elements surrounding the speech that might call for greater deference to government regulation. Thus, for example, while the Court has implemented a more deferential standard of review for content-based restrictions of high-value speech within certain special settings—such as, for example, speech of government employees,⁸² or speech in prisons, public schools, or the military⁸³—these subsets of speech are not actually middle-value in substance.⁸⁴ Their differential treatment reflects the heightened government interests associated with the particular circumstances surrounding the speech rather than a value-based judgment regarding the substance of the speech itself.⁸⁵ Thus, although the Court has applied a more deferential standard of review to content-based restrictions of both truthful commercial speech and speech of government employees, only the former represents an

82. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

83. See Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1698–1701 (2009) (observing that “[i]n many cases involving speech restrictions within government institutions or programs, the courts apply a form of reasonableness review,” and discussing the above categories).

84. See C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other “Special Contexts,”* 56 U. CIN. L. REV. 779, 783–84 (1988) (observing that fundamental First Amendment principles “do not really apply to whole categories of speech which would clearly implicate first amendment values,” such as speech in cases dealing with “the military, government employees, prisons, [and] children in schools”); Stone, *supra* note 31, at 285–89 (discussing “special circumstances” in which the default strict scrutiny rule does not apply because of contextual factors independent of speech value).

85. See, e.g., *Pickering*, 391 U.S. at 568 (“[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”).

actual substantive category of middle-value speech.⁸⁶

B. POTENTIAL EXAMPLES OF MIDDLE-VALUE SPEECH

If one defines middle-value speech as a sort of residual catch-all—that is, as all speech that is not comfortably characterized as either the highest-value speech or the lowest-value speech—then the potential variety of such speech is vast. As I noted above, truthful commercial speech is the only substantive subset of speech that the Court has formally recognized as middle-value in nature. But there are numerous additional subsets of speech that can likely—or at least plausibly—be classified as such.

I list some of these potential subsets of middle-value speech below. To be clear, this list is not meant to be exhaustive, nor is it simply a product of my own normative predilections as to what might or should count as middle-value speech. Rather, the subsets listed below have been gleaned from a survey of both case law and the academic literature; they represent areas of speech that have already been the subject of targeted scholarly and/or judicial analyses given the significant doctrinal tension created by their middle-value nature. These areas are generally marked by a substantial degree of doctrinal confusion or distortion, which can manifest itself in different ways, including disagreement as to whether they should even qualify as “speech” covered by the First Amendment in the first instance.⁸⁷ They include:

86. A court might take a more deferential approach to content-based speech regulation for other reasons: for example, if it has a strong sense that no improper government motives were involved. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring in the judgment) (stating that when an improper government motive attached to a content-based regulation is not “realistically possible, we may do well to relax our guard so that ‘entirely reasonable’ laws imperiled by strict scrutiny can survive”). *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) (stating that selective regulation of low-value speech may be broadly permissible as long as “there is no realistic possibility that official suppression of ideas is afoot”). Furthermore, courts might take *both* speech value and context into account in applying a more deferential standard to a content-based speech regulation. *See FCC v. Pacifica Found.*, 438 U.S. 726, 747–48 (1978) (plurality opinion) (stating that “vulgar, offensive, and shocking” language “is not entitled to absolute constitutional protection under all circumstances”); *id.* at 748–50 (adopting a more deferential approach given the unique features of broadcast media).

It bears noting, however, that the analysis and proposal that I set forth below are potentially relevant not just to middle-value speech cases, but to any other First Amendment context where the onerous strict scrutiny default rule does not appear to fit the speech and/or the surrounding circumstances, as these cases raise the same risks of doctrinal distortion and analytical opacity as middle-value speech cases.

87. *See infra* text accompanying notes 175–82 (describing how potential middle-value speech cases often implicate the preliminary question of First Amendment coverage).

Charitable solicitations⁸⁸

Sexually explicit (but not obscene) speech⁸⁹

Professional speech made in the context of one's occupation⁹⁰

False statements of fact⁹¹

Panhandling⁹²

Search engine results⁹³

Profanity⁹⁴

Automated, fact-based recommendations⁹⁵

88. See Bhagwat, *supra* note 61, at 798–99 (describing how the Court has applied “an indeterminate form of balancing/tailoring analysis” in cases dealing with charitable solicitations); John D. Inazu, *Making Sense of Schaumburg: Seeking Coherence in First Amendment Charitable Solicitation Law*, 92 MARQ. L. REV. 551, 552 (2009) (describing the “lack of doctrinal coherence” in this area given the split amongst the circuits as to whether intermediate scrutiny or strict scrutiny should apply).

89. See *infra* text accompanying notes 147–57 (discussing in detail the Court’s use of the secondary effects doctrine to avoid applying strict scrutiny in cases dealing with zoning of adult businesses).

90. See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 838 (1999) (arguing that “[a]t a minimum, professional speech should be accorded no less protection than commercial speech”); Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 183 (2015) (observing that occupational speech, like speech from a lawyer or a tour guide, is often subject to licensing requirements that seem to be “in conflict with virtually all established First Amendment principles”).

91. See David S. Han, *Categorizing Lies*, 89 U. COLO. L. REV. (forthcoming 2018) (discussing the “doctrinal vacuum” surrounding lies post-*Alvarez* and proposing a substantive and structural framework for organizing them); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 163–85 (setting forth a broad taxonomy of falsehoods and discussing how they implicate First Amendment values); *infra* text accompanying notes 131–34 (describing the different approaches taken by the plurality and Justice Breyer in characterizing false statements of fact in *United States v. Alvarez*).

92. See Bhagwat, *supra* note 66, at 1436–39 (observing that cases dealing with regulations of busking and panhandling reveal “confusion regarding the nature of content analysis”).

93. Whether the First Amendment applies to search engine results has been the subject of considerable academic debate. See, e.g., Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013); Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629 (2014); James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868 (2014); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013). If search engine results are covered by the First Amendment, the natural next question is the extent to which they should be protected. See also *infra* text accompanying note 117.

94. See *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (plurality opinion) (stating that “vulgar, offensive, and shocking” language “is not entitled to absolute constitutional protection under all circumstances”); Rodney A. Smolla, *Words “Which by Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 324–40 (2009) (describing the Court’s complex treatment of profanity).

95. See Wu, *supra* note 93, at 1531–33 (analyzing the extent to which automated recommendations trigger First Amendment scrutiny).

Computer code⁹⁶

Indeed, a significant proportion of purely *factual* speech might be classified as “middle-value” in nature,⁹⁷ as such speech often raises distinct and more difficult analytical issues as compared to the core context of “normative, religious, ideological, and political disagreements” that underlies current First Amendment theory and doctrine.⁹⁸ As Ashutosh Bhagwat has catalogued, this might include:

Factual instructions for illegal or dangerous activities⁹⁹

Public disclosures of personal data¹⁰⁰ or highly offensive private facts¹⁰¹

96. See Adam Candeub, *Digital Medicine, The FDA, and the First Amendment*, 49 GA. L. REV. 933, 941 & n.39 (2015) (surveying the substantial literature surrounding this issue).

97. See Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 6 (2012) (arguing that “specific facts should be treated differently from other forms of speech and should be subject to greater government regulation than ideas”).

98. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 899 (2010). As Schauer observed, First Amendment theory and doctrine has largely developed “in the context of [] normative, religious, ideological, and political disagreements,” but with respect to “the relationship of the First Amendment to questions of hard fact, . . . the extent to which, if at all, the standard First Amendment theories, slogans, and doctrines are applicable” is unclear. *Id.* One might argue that factual speech should broadly be deemed high-value based on the “pursuit of truth” rationale for protecting speech, as articulated most notably by John Stuart Mill and Justice Holmes. See *supra* notes 23–24 and accompanying text. But the most prominent expositors of this theory—like Holmes, Mill, and John Milton—were primarily concerned with ideological “truth” rather than factual truth. See Schauer, *supra*, at 902–08. And as many have observed, there are strong reasons to doubt that the marketplace of ideas actually works to identify truth, whether ideological or empirical in nature. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17 (“Due to developed legal doctrine and the inevitable effects of socialization processes, mass communication technology, and unequal allocations of resources, ideas that support an entrenched power structure or ideology are most likely to gain acceptance within our current market.”); Schauer, *supra*, at 908–10; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1281 (1983) (observing that the marketplace of ideas theory “calls up the picture of a rational individual making informed choices, and downplays the extent to which the inputs in a culture influence the beliefs of the persons within that culture”); Tsesis, *supra* note 27, at 1041 (describing the theory’s failure to account for “the different access speakers have to means for influencing truth seeking discourse”).

99. See Bhagwat, *supra* note 97, at 15–19 (highlighting the “inconsistency and contradictions” in courts’ treatments of these cases).

100. See *id.* at 7–14 (observing that “judges have proven themselves to be extremely inconsistent in evaluating such disputes”).

101. See Fla. Star v. B.J.F., 491 U.S. 524, 532 (1989) (declining “appellant’s invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment”); RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977) (setting forth elements of the privacy tort of “publicity given to private life”).

Scientific and technical details¹⁰²

Military and diplomatic secrets¹⁰³

Again, this list is not meant to be exhaustive, and there is strong reason to think that the scope of middle-value speech is substantially broader than the potential categories listed above.¹⁰⁴

So what, precisely, makes these subsets of speech potentially middle-value in nature? Again, this judgment is ultimately rooted in the intuition that they simply do less to advance the theoretical rationales for protecting speech than, say, core political speech. To use the *Ohralik* Court's language, middle-value speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of [high-value] expression."¹⁰⁵ If, for example, one deems democratic self-governance to be the sole or dominant theoretical rationale driving the First Amendment's protection of speech, then it seems quite natural to say that commercial speech, or nude dancing, or private lies about receiving military medals directly advance such values to a meaningfully lesser extent than political, religious, or other ideologically-oriented speech.

In theory, this fundamental idea of speech value is distinct from the idea of speech-based harm. But as a practical matter, judgments regarding the degree of social harm associated with the speech are often blended into the speech-classification analysis. As I have noted elsewhere, all of the designated categories of low-value speech—such as fraud, true threats, and obscenity—are at least partially defined in terms of the social harm they cause.¹⁰⁶ These judgments of speech harm are premised on both normative considerations as to the appropriate weight to be afforded to different types of social harms¹⁰⁷ and empirical judgments as to the actual or likely degree

102. See Bhagwat, *supra* note 97, at 19–25 (describing the inconsistent treatment of such speech amongst courts, with some treating it as fully protected and others according it little to no First Amendment protection).

103. See *id.* at 25–30 (outlining the unclear constitutional status of such speech).

104. See *infra* Part II.C.

105. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

106. Han, *supra* note 12, at 366. See also David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 WM. & MARY L. REV. 1647, 1672 (2014) [hereinafter Han, *Mechanics*].

107. See *supra* text accompanying note 29. Rebecca Brown has argued that these normative considerations regarding the kinds of alleged harms should be the central criteria in assessing content-based speech restrictions. See Brown, *supra* note 57, at 961–63 (distinguishing between censorial and non-censorial theories of harm).

of harm associated with the speech in question.¹⁰⁸ Thus, in practice, speech value judgments are often based not simply on innate characteristics of that speech, but also on the speech's association with socially harmful consequences.¹⁰⁹ For example, courts might explicitly or implicitly classify panhandling as middle-value speech not only because its inherently transactional nature makes it less central to democratic self-governance than core political speech,¹¹⁰ but also because it represents a particularly harmful type of personal harassment.¹¹¹

Again, however, my argument here does not rest on any broad agreement that any or all of the subsets of speech listed above should be regarded as middle-value in nature. Perhaps plausible arguments can be made that one or more of these subsets should, in fact, be deemed as valuable as core political speech. But I suspect that most will agree, at least in the abstract, that there is some meaningful difference in speech value between many of the subsets of speech listed above and the highest-value core speech, whether based on autonomy, truth-seeking, democratic self-governance, or any other theoretical considerations. And this difference in speech value produces tension in applying the onerous strict scrutiny default rule to all cases; at the very least, the subsets of speech listed above pose considerably more difficult questions regarding the appropriate extent of government regulation than, for example, core political speech.

C. THE PRESENT AND FUTURE SCOPE OF MIDDLE-VALUE SPEECH

If one were to recognize a conceptual category of middle-value speech, then the natural next question is how expansive this category might be. After all, if middle-value speech is just a minimal, *sui generis* sliver of speech, then perhaps we need not bother with any sort of deep reevaluation of the present doctrinal framework, even if we think that courts deal with such speech in problematic ways.

108. See generally Han, *Mechanics*, *supra* note 106 (analyzing, in detail, these sorts of empirical judgments regarding speech-based harm).

109. *Id.* at 1672.

110. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1229 (1996) (stating that “[t]here are reasons to suppose that the Court, were it ever to review a begging case, would categorize begging as commercial speech” rather than political speech, since “[o]rdinarily, a panhandler’s intended message is wholly transactional”).

111. See *United States v. Kokinda*, 497 U.S. 720, 734 (1990) (plurality opinion) (“As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information.”).

To get a sense of the scope of middle-value speech, we can start with the many discrete subsets of potential middle-value speech listed above—subsets that, as I explained, have already been implicitly or explicitly identified within the case law or contemporary scholarship as standing in tension with the strict scrutiny default rule. The breadth and variety of these areas strongly suggest that middle-value speech is not a highly anomalous, *sui generis* category, but rather a meaningful portion of the body of “speech” protected by the First Amendment.

Furthermore, an examination of the current frontiers of speech regulation and the long-term trajectory of modern First Amendment jurisprudence strongly suggests that the scope of middle-value speech is substantially broader than the potential categories listed above, and that it is likely to expand rapidly in the coming years. Much of contemporary First Amendment scholarship has focused on the constitutional status of, for example, search engine results,¹¹² computer code,¹¹³ automated recommendations,¹¹⁴ pervasive video recording,¹¹⁵ or the widespread collection and dissemination of personal data¹¹⁶—heretofore unexplored issues arising out of the many recent social and technological changes associated with our communications culture, such as the advent of mass data collection and analysis, the ubiquity of the internet and smartphones, the rise of social media, and the development of algorithm-based “smart” communications.

These potential subsets of speech are, on their face, very different in nature from the highest-value ideological speech most commonly associated with the First Amendment.¹¹⁷ They often implicate the preliminary question of whether the First Amendment even applies in the first instance, and in the event that they *are* classified as speech, a strong intuition remains that many of these subsets of speech are middle-value in nature—that is, that they carry some meaningfully lesser degree of

112. See *supra* note 93 and the sources cited therein.

113. See Candeub, *supra* note 96, at 941 & n.29 (surveying the substantial literature surrounding this issue).

114. See, e.g., Wu, *supra* note 93, at 1531–33.

115. See generally, e.g., Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335 (2011); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016) (arguing that video recording is covered by the First Amendment and outlining the extent to which it is constitutionally protected).

116. See generally, e.g., Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014).

117. Cf. Schauer, *supra* note 7, at 286–87 (“The tests and tools created to deal with the likes of *Brandenburg*, *Whitney*, *Schenck*, and *Debs* . . . may not be those most appropriate for dealing with problems of a quite different kind.”).

constitutional value than, say, core political speech. For example, if one subscribes to a democratic self-governance theory of speech protection, it seems reasonable to argue that mass disclosures of sensitive private data broadly carry less constitutional value than speeches at political rallies or truthful reporting of newsworthy events. And as shifting social and technological conditions continue to drastically alter the landscape of our communications culture, courts will be increasingly forced to confront novel and difficult speech contexts that do not fit easily within the traditional conception of core protected speech upon which the doctrinal framework has been built.

This expansion of the breadth and variety of middle-value speech covered by the First Amendment is also consistent with the broad historical trajectory of First Amendment jurisprudence. The story of modern First Amendment doctrine has been one of steady expansion beyond the core categories of the highest-value speech that have disproportionately shaped the doctrine's fundamental design. If, for example, attorneys in the 1940s were to suggest that nude dancing, crush videos, commercial advertising, or false statements of fact were entitled to protection under the First Amendment, they would likely be laughed out of the room. As Lillian BeVier has noted, “[b]efore the Court’s extension of First Amendment protection to commercial speech in 1976, the overwhelming majority of First Amendment cases involved attempts to regulate speech that was in one way or another speech about government.”¹¹⁸

And this expansion continues to the present day. As Schauer has observed, recent cases have evinced an “accelerating attempt to widen the scope of First Amendment coverage to include actions and events traditionally thought to be far removed from any plausible conception of the purposes of a principle of free speech”¹¹⁹—a trend perhaps driven by the unique magnetism and attractiveness of First Amendment arguments in a broad range of legal disputes.¹²⁰ Thus, for example, the First Amendment has recently been invoked by companies arguing against mandated disclosures to the SEC, by tattoo parlors seeking to be shielded from health regulations, and by therapists seeking to escape state regulation of

118. BeVier, *supra* note 55, at 1287.

119. Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1616–17 (2015).

120. *See id.* at 1633 (“[T]he political, cultural, ideological, and psychological resonance of the First Amendment, when coupled with an increasingly receptive doctrinal landscape, will lead good lawyers to strain to make First Amendment arguments more than they would strain to make arguments based on other constitutional doctrines or provisions.”).

scientifically unproven therapeutic methods.¹²¹

Much of this ostensible “speech” had historically been treated as “uncovered” by the First Amendment—that is, it resided completely off of the First Amendment’s radar, failing to trigger any sort of serious First Amendment analysis.¹²² The mere fact that these sorts of arguments are increasingly being made by litigants—and meaningfully considered by courts—indicates that the vast expanse of uncovered speech is shrinking as more and more “speech” is integrated into the First Amendment’s doctrinal framework. And, of course, much of this realm of heretofore uncovered “speech”—such as speech subject to regulation under securities laws, antitrust laws, labor laws, evidence law, and so forth¹²³—is a far cry from the highest-value speech that resides at the core of First Amendment doctrine. Thus, to the extent that uncovered speech continues to be invited into the First Amendment fold, such speech is most likely to be middle-value rather than high-value in nature.

All of this suggests a fundamental disconnect between a doctrinal system built around a broad assumption that nearly all speech is as valuable as political speech and the fact that a substantial—and rapidly expanding—proportion of the theoretical realm of “speech” protected by the First Amendment may well be middle-value in nature.¹²⁴ Indeed, it may be that given the massive breadth of speech potentially subject to government regulation, it is the *highest-value speech*—like political speech, artistic expression, truthful news reporting, or academic debate—that represents the outlier, and that much of what we deem to be “speech” potentially subject to constitutional protection is speech that we broadly intuit to be middle-value in nature.¹²⁵ And if, as I argue below, courts’ present treatment of middle-value speech incurs significant costs, these costs will only multiply as the proportion of middle-value speech covered by the First

121. *Id.* at 1616–17 (citing cases).

122. See Bracha, *supra* note 93, at 1659. Bracha refers to such uncovered speech as the “dark matter” of the First Amendment, which is a helpful way to conceptualize it. *Id.* As Schauer has observed, “[l]ittle case law and not much more commentary explain” why content-based restrictions of such speech “do not, at the least, present serious First Amendment issues.” Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).

123. Schauer, *supra* note 122, at 1768.

124. See Bhagwat, *supra* note 66, at 1450 (“[G]iven that full First Amendment protection is extended to speech that most citizens, legislators, and judges are likely to view as of limited value, and peripheral to the purposes of the First Amendment . . . , the pressure for regulation is likely to grow.”).

125. Cf. Schauer, *supra* note 122, at 1768 (“[E]ven the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule.”).

Amendment continues to grow, widening the already substantial gap between reality and the doctrinal presumption that all speech is high-value.¹²⁶

D. THE SHORTCOMINGS OF THE CURRENT DOCTRINAL FRAMEWORK

As discussed above, traditional accounts hold that the current strict scrutiny default rule—despite its blunt and overprotective nature—is necessary to protect speech adequately, particularly given the risks posed by conscious and unconscious judicial biases.¹²⁷ But although such arguments have their merits in the abstract, the current state of First Amendment doctrine strongly suggests that the benefits of the current approach are outweighed by its costs, and that some degree of doctrinal adjustment is therefore necessary.

On one side of the ledger, the theoretical benefits of the formally rigid, highly prophylactic binary approach have not been actually realized in many areas of First Amendment doctrine, simply because the substantial tension between an often ill-fitting strict scrutiny default rule and the wide variety of speech covered by the rule has consistently driven courts to distort doctrine to reach desired results rather than adhere to the formal rules. A simple, prophylactic rule meant to constrain judicial discretion has little value if, in practice, courts freely (and surreptitiously) distort formal doctrine to avoid applying the rule when it does not seem to fit. Thus, the actual benefits derived from the current doctrinal structure have proved to be more limited than theoretically envisioned.

On the other side of the ledger, the costs inflicted by the current doctrinal regime on the structural integrity of First Amendment doctrine and the doctrine's capacity to adapt to a rapidly changing communications culture have been substantial. The doctrinal distortion produced by courts in many areas of First Amendment jurisprudence threatens to unsettle well-established doctrinal structures throughout. Furthermore, the current approach greatly limits the degree of meaningful analytical transparency in difficult middle-value speech cases where such transparency is most valuable, since it allows courts to hide behind formal doctrine without articulating, in clear and direct terms, what exactly makes the speech in

126. To be clear, one need not agree with my observations regarding the likely scope of middle-value speech to accept my proposed doctrinal adjustments below. Even if one were to deem the realm of middle-value speech to be far narrower than what I have described here, shifting the doctrinal center of gravity in the manner I propose will still ultimately yield significant benefits in the form of a more transparent and less distorted doctrine than what we currently have. *See infra* Part III.C.

127. *See supra* Part I.C.

question constitutionally valuable and how that value compares to the social harms associated with the speech. Not only are these costs substantial, but they are likely to increase significantly as the First Amendment's coverage continues to expand into unexplored and novel realms of speech.¹²⁸

1. Doctrinal Distortion Arising from Imprecise Doctrinal Fit

In middle-value speech cases, applying the strict scrutiny default rule is intuitively dissonant because the outcome dictated by the rule—near-automatic invalidation—simply does not match our foundational intuitions regarding the value of the speech in question and/or the social harms associated with the speech.¹²⁹ Such dissonance, however, is not necessarily a problem in doctrinal design that requires fixing; particularly in the First Amendment context, it is often worth trading off equitable flexibility for a more rigid but administrable doctrinal framework.

Thus, within the formal confines of the doctrinal framework, courts confronted with this dissonance in a given case can take one of two approaches. They can simply grit their teeth and apply the strict scrutiny default rule to invalidate the regulation, despite any strong intuitive judgment that such a result is incorrect. Or they might carve out a new categorical exception that takes the speech in question outside of the default strict scrutiny rule—that is, they can craft a new category of low-value or middle-value speech.¹³⁰

The plurality opinion and Justice Breyer's concurrence in *United States v. Alvarez* illustrate these two approaches in action. In *Alvarez*, the Supreme Court struck down the Stolen Valor Act, a federal statute that criminalized lying about having received military medals.¹³¹ In doing so, both the plurality and Justice Breyer agreed that false statements of fact of this sort did not constitute low-value speech.¹³² But there is also undoubtedly a strong intuition that such false statements of fact are not as valuable as, say, truthful political speech, and that the same stringent

128. Portions of my discussion in this section draw on my work in a previous article. See Han, *supra* note 12, at 371–79, 395–414.

129. See Bhagwat, *supra* note 66, at 1429–30 (“[T]he reason why lower courts disagree about the definition of content discrimination, and why the Supreme Court itself has not been consistent on this question, is an unstated discomfort with the implications of the all-speech-is-equal premise. The truth is that this premise simply does not coincide with the instincts of most citizens and—importantly—most judges.”); Han, *supra* note 12, at 400–01.

130. Han, *supra* note 12, at 401–02.

131. *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (plurality opinion).

132. *Id.* at 720–22; *id.* at 731–32 (Breyer, J., concurring in the judgment).

standard of review applicable to the highest-value speech ought not to apply to lies about military honors.

The plurality dealt with this dissonance by simply applying the strict scrutiny default rule to invalidate the statute, regardless of any strong intuitive judgment that such an approach might seem anomalous or incorrect.¹³³ On the other hand, Justice Breyer proposed modifying the doctrinal framework to account for this dissonance by explicitly carving out false statements of fact as a new category of partially protected speech, such that any content-based regulation would be subject to intermediate scrutiny rather than strict scrutiny.¹³⁴ Both of these approaches account for the dissonance within the confines of the doctrinal framework, either by absorbing it in the former approach or by creating a formal exception in the latter.

If courts adhere to these two approaches in dissonant cases, then the doctrine is at least accomplishing its intended purpose: constraining judicial discretion, or—at the very least—requiring courts to explain themselves through formal doctrinal modification if they wish to craft exceptions to existing rules. Both of these approaches incur some costs—reaching results that seem anomalous in the first approach, or eroding the predictability and consistency associated with a simple bright-line rule in the second—and which approach is preferable rests on some judgment as to which of these costs is more severe. But as long as courts adhere to these two options, the formal doctrinal framework retains some degree of integrity and structure, as it accurately reflects courts' actual decision-making processes.

There are strong indications, however, that courts are often disinclined to take either approach. On the one hand, courts generally do not like to reach results that seem incorrect, absurd, or otherwise anomalous. Take, for example, the recent *Reed v. Town of Gilbert* case, in which the Supreme Court struck down an Arizona sign ordinance.¹³⁵ As the Court observed, the ordinance in question was clearly content-based on its face, as it accorded differential treatment to signs based on whether they were “ideological signs,” “political signs,” or “temporary directional signs.”¹³⁶ Nevertheless, in the case below, the Ninth Circuit had classified the ordinance as content-neutral and upheld it under intermediate scrutiny¹³⁷—an approach likely dictated, to a significant extent, by a strong reluctance to

133. *See id.* at 724–29 (plurality opinion).

134. *See id.* at 730–32 (Breyer, J., concurring in the judgment).

135. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015).

136. *See id.* at 2224–25, 2227.

137. *Reed v. Town of Gilbert*, 707 F.3d 1057, 1069, 1073–76 (9th Cir. 2013).

apply the onerous strict scrutiny standard to a seemingly benign sign regulation.

On the other hand, the relative paucity of low-value speech exceptions suggests that courts are not generally inclined to craft broad exceptions to the strict scrutiny default rule.¹³⁸ There are many possible reasons for this: perhaps lower courts are institutionally averse to crafting such exceptions without Supreme Court guidance; “perhaps it reflects courts’ general reluctance to craft numerous exceptions to bright-line rules; [or] perhaps courts simply wish to avoid any negative perception associated with adopting formal exceptions that limit First Amendment protections.”¹³⁹

In any case, even if courts were in fact inclined to create formal exceptions to the default rule, the Supreme Court’s recent adoption of a purely historical approach to low-value speech appears to greatly limit their ability to do so. In *United States v. Stevens*, the Court explicitly rejected the government’s argument that “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs,”¹⁴⁰ even though the government’s proposed test merely reflected the Court’s longstanding characterization of low-value speech as speech “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”¹⁴¹ Rather, the Court held that the test for low-value speech is purely historical, based only on whether the subset of speech in question “ha[s] been historically unprotected.”¹⁴²

As I have argued at length elsewhere, the Court’s purely historical test is a poor means of delineating low-value speech; it offers little more than a veneer of objectivity, predictability, and constraint that ultimately works to obscure the underlying judgments regarding speech value and harm that actually drive the analysis.¹⁴³ Nevertheless, the Court’s adoption of this test will likely deter courts from crafting novel categories of low-value speech. Although savvy courts could certainly find ways to characterize a wide

138. The recognized categories of low-value speech are incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, and true threats. *Alvarez*, 567 U.S. at 717–18 (plurality opinion).

139. Han, *supra* note 12, at 421.

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

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

142. *Stevens*, 559 U.S. at 472. The Court would later affirm this purely historical approach to low-value speech in *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 805 (2011), and *Alvarez*, 567 U.S. at 729–30.

143. Han, *supra* note 12, at 384; Han, *supra* note 81, at 88.

variety of speech as historically unprotected, *Stevens* and its progeny send a clear message that the Court intends to curb any further expansion of the low-value speech doctrine.¹⁴⁴ Thus, given that courts already appeared reluctant to carve out formal exceptions to the default strict scrutiny rule prior to *Stevens*, the Court's imposition of a facially strict, history-based limitation on the expansion of low-value speech categories will discourage courts even further from doing so, even in cases where the default rule leads to an absurd or anomalous result.

If courts are broadly disinclined to reach intuitively incorrect results, and if they consider themselves handcuffed from crafting formal doctrinal exceptions, that leaves them with a third option: doctrinal distortion. That is, they might surreptitiously distort the doctrinal framework "to reach the 'correct' result in cases where the onerous strict scrutiny standard does not appear to fit."¹⁴⁵ They might, for example, water down the strict scrutiny standard to something resembling intermediate scrutiny, classify clearly content-based regulations as content-neutral regulations, characterize expression as non-speech conduct that falls outside of the scope of First Amendment coverage, or simply leave the specific standard of review applied in a case intentionally vague.¹⁴⁶

Probably the most notable example of such distortion is the Supreme Court's use of the "secondary effects" doctrine in a series of cases dealing with zoning restrictions on sexually-oriented businesses.¹⁴⁷ As discussed at the beginning of this Article, Justice Stevens, writing for a plurality of the Court in *Young v. American Mini Theatres, Inc.*, had suggested that the government has greater latitude to regulate sexually explicit (but non-

144. Furthermore, the *Stevens* rule presumably applies not just to low-value speech categories, but also to any partially protected speech categories like truthful commercial speech, since the reasoning behind the rule would appear to extend identically to these subsets of speech. See *Stevens*, 559 U.S. at 470 ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.").

145. Han, *supra* note 12, at 402. See Brown, *supra* note 57, at 956 ("[T]he Court has used various techniques, in a wide variety of cases, to avoid application of the cardinal rule rather than apply it straightforwardly to invalidate such laws."); McDonald, *supra* note 15, at 1394 ("[T]he Court has developed certain coping mechanisms—some overt, others covert or unarticulated—to avoid the rigid strictures of its content rule when a selective content regulation appears to pose a minor threat to the principles animating that rule.").

146. Han, *supra* note 12, at 411. See Bhagwat, *supra* note 66, at 1430 ("[W]hen a law that regulates fully protected speech that seems less socially valuable than speech at the core of First Amendment's protections is coupled with a strong, albeit likely not 'compelling,' government reason to restrict the speech, judges regularly look to avoid labeling the law as content-based, even when it is clearly so.").

147. See Han, *supra* note 12, at 409–10.

obscene) speech based on its content as compared to political speech.¹⁴⁸ Nine years later, however, the Court adopted a completely different approach in *City of Renton v. Playtime Theatres, Inc.* There, the Court reviewed a zoning restriction that prohibited any “adult motion picture theater” from being located in close proximity to residential housing, parks, churches, or schools.¹⁴⁹ Although the ordinance was clearly content-based on its face, the Court treated it as content-neutral, since the regulation “aimed not at the *content* of the films shown at ‘adult motion picture theatres,’ but rather at the *secondary effects* of such theaters on the surrounding community,” with goals such as preventing crime, preserving property values, and protecting retail trade.¹⁵⁰ The Court therefore evaluated the ordinance under intermediate scrutiny rather than strict scrutiny and upheld it.¹⁵¹

The secondary effects doctrine has been subject to nearly universal criticism. Stone, for example, called *Renton* “a disturbing, incoherent, and unsettling precedent” that “threatens to undermine the very foundation of the content-based/content-neutral distinction.”¹⁵² Other scholars have similarly described the extent to which *Renton* “warped” content-neutrality analysis¹⁵³ by “turn[ing] the Court’s traditional focus on the language of statutes on its head.”¹⁵⁴ Indeed, a number of the Justices themselves have acknowledged that characterizing such ordinances as content-neutral is “something of a fiction.”¹⁵⁵ As Alan Brownstein observed, “[a]lthough the Court never explicitly affirms the view that sexually explicit expression is a generally less valuable form of speech . . . , no other explanation of *Renton* is plausible.”¹⁵⁶

As Bhagwat has noted, courts have similarly distorted doctrine in a

148. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

149. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 44 (1986).

150. *Id.* at 47–48.

151. *Id.* at 50–54.

152. Stone, *supra* note 6, at 115–16.

153. Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187, 1200 (2013).

154. Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 91 (1988).

155. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment). See Kreimer, *supra* note 7, at 1297 (citing cases indicating that “[a]n array of Justices acknowledge that the ‘secondary effects’ doctrine . . . is a bit of a cheat”).

156. Brownstein, *supra* note 154, at 95. More recently, in *United States v. Playboy Entertainment Group*, the Court applied strict scrutiny to a content-based regulation of sexually explicit speech, although that case did not deal specifically with the zoning of adult-oriented businesses. See *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 806, 812–13 (2000) (applying strict scrutiny to regulations of cable operators “who provide channels ‘primarily dedicated to sexually-oriented programming’”).

wide variety of cases dealing specifically with the communication of detailed, purely factual information.¹⁵⁷ He discusses, for example, the infamous “Nuremburg Files” case,¹⁵⁸ in which the American Coalition of Life Activists (“ACLA”), an antiabortion group, posted on its website “Wanted” posters that targeted specific abortion doctors and included personal information such as photographs of the doctors and their home and work addresses.¹⁵⁹ Although three doctors previously featured on such posters had been murdered, the website itself did not contain any direct threats of violence against the targeted individuals¹⁶⁰—indeed, the site “foreswore the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so.”¹⁶¹

A group of doctors featured on the website sued the ACLA for civil damages and injunctive relief under a federal statute, and in an en banc opinion, the Ninth Circuit upheld a jury verdict in the plaintiffs’ favor.¹⁶² In doing so, the majority classified the speech in question as low-value “true threats” not subject to the default rule of strict scrutiny.¹⁶³ But as Judge Kozinski observed in dissent, it seems inaccurate to classify the speech as such, even if it was designed to intimidate the doctors.¹⁶⁴ As he noted, “[a] true threat warns of violence or other harm that the speaker controls,” yet there was no indication that the ACLA or its members were threatening violent action.¹⁶⁵ Rather, the more doctrinally appropriate test would be the stringent *Brandenburg* standard, which clearly would not be met by the facts of the case.¹⁶⁶

This sort of doctrinal distortion—or, to put it more charitably, doctrinal confusion—extends to other contexts dealing with factual

157. See Bhagwat, *supra* note 97, at 46; *id.* at 7–31 (providing a typology and analyses of different categories of factual details).

158. *Id.* at 9–10. See also *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

159. *Planned Parenthood*, 290 F.3d at 1063–66; Bhagwat, *supra* note 97, at 9–10.

160. *Planned Parenthood*, 290 F.3d at 1062–64.

161. *Id.* at 1090 (Kozinski, J., dissenting).

162. *Id.* at 1088.

163. *Id.*

164. *Id.* at 1090 (Kozinski, J., dissenting).

165. *Id.* at 1089–90.

166. *Id.* at 1092. Under *Brandenburg*, advocacy of lawless action constitutes regulable incitement only “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). The ACLA’s speech would presumably fail the imminence requirement, since putting up posters or setting up a website generally does not, by nature, cause *imminent* lawless action in the same way as, say, inciting a rioting crowd to burn down a nearby building. See *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam) (finding no imminence for “advocacy of illegal action at some indefinite future time”).

information, such as detailed instructions for illegal or dangerous behavior or technical details.¹⁶⁷ As Bhagwat observed, despite the fact that “modern doctrine would seem to be extremely hostile to attempted regulation of factual details, . . . [courts] have in fact been far more lenient than doctrine would seem to permit,” since “when faced with such regulations, courts have tended to twist or even ignore that doctrine.”¹⁶⁸

As a final example, consider the Court’s recent opinion in *Williams-Yulee v. Florida Bar*, in which the Court upheld a Florida Bar rule that prohibited candidates in judicial elections from personally soliciting campaign funds.¹⁶⁹ Chief Justice Roberts—writing for only a plurality of the Court on this point—observed that the rule was clearly a content-based restriction on speech, and thus strict scrutiny was the appropriate standard to apply.¹⁷⁰ Despite noting that it is a “rare case” in which a content-based speech restriction satisfies strict scrutiny, the Court held that the rule in question was, in fact, narrowly tailored to serve a compelling government interest and thus survived strict scrutiny.¹⁷¹ Yet as the dissenting Justices observed, the Court applied a watered-down version of strict scrutiny more akin to intermediate scrutiny than the “fatal in fact” version it usually applies in speech cases.¹⁷² The rule in question failed to draw distinctions based on obvious, analytically significant factors such as the identity of the people solicited and the method of solicitation, and thus did not come close to matching the far more rigorous tailoring required by the Court in other speech cases.¹⁷³

These examples of doctrinal distortion used to avoid the consequences of the strict scrutiny default rule are by no means exhaustive. Such distortion arises in a wide range of cases, and it takes many different

167. See Bhagwat, *supra* note 97, at 15–25.

168. *Id.* at 46.

169. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015). See also Han, *supra* note 12, at 402–05. It is somewhat unclear whether the regulated speech in *Williams-Yulee*—direct solicitations for campaign funds by judicial candidates—should be classified as middle-value speech in the manner I defined above, since the increased deference to government regulation in that case might be more properly attributed to the particular *context* in which the speech is made rather than to the substance of the speech itself. See *supra* text accompanying notes 82–86. Regardless, *Williams-Yulee* is a prime example of the sort of doctrinal distortion that courts resort to in order to avoid the full brunt of the strict scrutiny default rule in cases where that rule simply does not fit.

170. *Williams-Yulee*, 135 S. Ct. at 1664–65 (plurality opinion).

171. *Id.* at 1666.

172. See, e.g., *id.* at 1677 (Scalia, J., dissenting) (stating that while the Court purported to apply strict scrutiny, “it would be more accurate to say that it . . . appl[ie]d the appearance of strict scrutiny”).

173. See *id.* at 1679–80; see also Han, *supra* note 12, at 404 & n.208 (describing the rigorous standard applied in other cases).

forms.¹⁷⁴ Furthermore, courts' efforts to avoid anomalous results in applying the strict scrutiny default rule can influence the distinct, theoretically prior inquiry of whether certain actions constitute speech or non-speech conduct.¹⁷⁵ As Schauer has noted, "if we take the 'full protection within' rule as the standard, there may be pressure to keep troublesome categories completely outside" the scope of First Amendment coverage.¹⁷⁶ If, for example, courts are reluctant to treat detailed instructions on how to be a contract killer as fully protected speech, they might choose to classify such instructions as non-speech conduct in order to avoid applying the strict scrutiny default rule.¹⁷⁷

Consider occupational speech—that is, speech made in a professional capacity by people like doctors, lawyers, or financial advisors. Much of this speech is subject to stringent regulations—such as licensing requirements—that are clearly content-based in nature,¹⁷⁸ yet courts have quite reasonably taken the position that the government should have some meaningful latitude to regulate occupational speech in this manner.¹⁷⁹ Thus, to account for the substantial tension between this strong intuition and the onerous strict scrutiny default rule, courts have often characterized occupational speech as non-speech conduct falling completely outside of the scope of First Amendment coverage,¹⁸⁰ despite strong arguments that

174. For example, a court might simply leave the applicable standard of review intentionally vague. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28 (2010) (stating that a standard of review more demanding than intermediate scrutiny applied, but otherwise leaving the standard vague). Interestingly, the Chief Justice—who wrote the majority opinion in *Humanitarian Law Project*—later clarified on two separate occasions that the *Humanitarian Law Project* Court was in fact applying strict scrutiny. *See Williams-Yulee*, 135 S. Ct. at 1666; *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

175. *See Schauer, supra* note 7, at 273 (“[T]he constitutional definition of the word ‘speech’ carves out a category that is not coextensive with the ordinary language meaning of the word ‘speech.’ When we define the word ‘speech,’ we are categorizing.”).

176. *Id.* at 286.

177. *Cf. Rice v. Paladin Enters.*, 128 F.3d 233, 243 (4th Cir. 1997) (characterizing an instructional book on how to be a contract killer as “speech . . . tantamount to legitimately proscribable nonexpressive conduct” and on this basis declining to extend First Amendment protection).

178. *See Sherman, supra* note 90, at 191.

179. *See, e.g., Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (“Under the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment.”); *Locke v. Shore*, 682 F. Supp. 2d 1283, 1290–92 (N.D. Fla. 2010).

180. *See Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2364 (2000) (“[C]ontent-based regulation of speech is routinely enforced without special constitutional scrutiny, as for example when lawyers or doctors are held liable in professional malpractice for the communication of irresponsible opinions.”); *Sherman, supra* note 90, at 187–88 (collecting cases).

such an approach is inconsistent with existing case law¹⁸¹ or prevailing First Amendment theory.¹⁸²

In all of these cases, courts have distorted doctrine to avoid the anomalous consequences of applying an onerous rule of strict scrutiny to cases where the rule does not fit.¹⁸³ Their actions reflect an underlying intuition that sexually explicit speech, or occupational speech, or disclosures of personal information meant to intimidate carry meaningfully less constitutional value than the core categories of highest-value speech—like political speech or truthful news reporting—around which current First Amendment doctrine has largely been built. And these are not merely isolated examples; courts have grappled with this dissonance in cases dealing with, for example, charitable solicitations,¹⁸⁴ panhandling,¹⁸⁵ mass collection and dissemination of sensitive personal data,¹⁸⁶ and profanity.¹⁸⁷

This doctrinal distortion undermines the theoretical benefits of creating an overprotective but administrable prophylactic rule. In areas where courts are not actually adhering to the rule, but instead distorting it *sub rosa* because it does not fit, the rule produces no effective judicial constraint, no consistency in application, and no predictability for litigants and lawmakers. And as I discuss in greater detail below, it allows courts to reach their desired results with no meaningful explanation for their actions.¹⁸⁸

Such distortion is a symptom of structural defects within the current doctrinal framework; it indicates that the doctrine is not operating as intended.¹⁸⁹ And once a particular means of distortion is introduced, it greases the wheels for future courts to follow the same path when confronted with a similarly ill-fitting case. The *Williams-Yulee* Court's use of a clearly watered-down strict scrutiny standard, for example, was

181. See Sherman, *supra* note 90, at 188 (arguing that this position is “impossible to maintain in light of the Supreme Court’s recent decisions in *Humanitarian Law Project* and *Stevens*”).

182. See Halberstam, *supra* note 90, at 838 (arguing that there is no theoretical basis for excluding professional speech from First Amendment protection and that such speech, “[a]t a minimum, . . . should be accorded no less protection than commercial speech”).

183. See, e.g., Brown, *supra* note 57, at 994 (“The *Renton* case shows that if a draconian doctrinal rule purports to prevent the intuitively correct constitutional analysis, the intuition will emerge in another form, just like squeezing a balloon and watching the air bulge out in another place.”).

184. See Inazu, *supra* note 88, at 552; Bhagwat, *supra* note 61, at 798–99.

185. See Bhagwat, *supra* note 66, at 1436–39.

186. See Sorrell v. IMS Health Inc., 564 U.S. 552, 568–71 (2011).

187. See FCC v. Pacifica Found., 438 U.S. 726, 747–48 (1978) (plurality opinion); Cohen v. California, 403 U.S. 15, 24–26 (1971); Smolla, *supra* note 94, at 324–40.

188. See *infra* Part II.D.2.

189. See Han, *supra* note 12, at 418–20.

heavily influenced by *Burson v. Freeman*, a 1992 case reviewing restrictions on campaign speech close to polling places on election days.¹⁹⁰ In *Burson*, a plurality of the Court applied a similarly diluted version of strict scrutiny to uphold the content-based regulation,¹⁹¹ and the *Williams-Yulee* Court repeatedly and conspicuously relied upon that plurality opinion to justify its approach.¹⁹²

Furthermore, the costs created by such distortion potentially extend well beyond the particular precincts of First Amendment doctrine where they originally arise: doctrinal distortion in one area threatens to infect and destabilize the entire doctrinal framework.¹⁹³ For example, the Court's adoption of the secondary effects doctrine in the narrow context of adult-oriented businesses ultimately worked to destabilize the fundamental content-neutrality inquiry on a broader scale.¹⁹⁴ Although the Court has never technically applied the secondary effects doctrine outside of this specific context,¹⁹⁵ the suggestion in those cases that a facially content-based restriction can be deemed content-neutral based solely on motive analysis led to substantial disruption and confusion throughout the doctrine,¹⁹⁶ which the Court only recently clarified in *Reed*.¹⁹⁷ When

190. *Burson v. Freeman*, 504 U.S. 191, 193 (1992).

191. Although purporting to apply strict scrutiny, the plurality required only that the regulation constitute a "reasonable" response to "potential deficiencies in the electoral process" and that it not "significantly impinge on constitutionally protected rights." *Id.* at 209 (emphasis omitted) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)). See also *id.* at 226 (Stevens, J., dissenting) (criticizing the plurality for applying a "toothless" analysis that was "neither exacting nor scrutiny").

192. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668, 1670, 1671 (2015) (citing *Burson* to support various propositions mitigating the strictness of the strict scrutiny standard).

193. See Han, *supra* note 12, at 411–12.

194. See, e.g., Rienzi & Buck, *supra* note 153, at 1190 (stating that the secondary effects cases have exerted "a powerful distorting effect on the traditional content-neutrality analysis that lies at the heart of much of the Court's free speech analysis").

195. See, e.g., John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 304–05 (2009) ("The Court has never upheld a content-discriminatory regulation on the basis of the secondary effects doctrine that did not concern sexually explicit speech.").

196. See Rienzi & Buck, *supra* note 153, at 1200 (observing that the secondary effects doctrine "undermines the most straightforward requirement of content neutrality: that a law must be neutral in its application," and that "in reliance on *Renton*, courts have begun claiming that the 'principal inquiry' for content analysis is whether the government operated with an impermissible motive"). The Court itself contributed to this confusion prior to *Reed*. See *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); McDonald, *supra* note 15, at 1352 ("[A] review of the Court's post-*Renton* cases indicate that that decision was anything but an aberration in calling a facially content discriminatory regulation content-neutral.").

doctrinal stability is undermined in this manner, the benefits of a simple, administrable rule-like regime begin to collapse; the doctrine becomes less predictable, more susceptible to abuse, and more opaque, which is a particularly troublesome state of affairs in the speech regulation context.¹⁹⁸

2. A Lack of Analytical Transparency

Courts' broad failure to account for middle-value speech imposes another significant cost: it undermines the transparency of courts' analyses, which hinders courts from developing the sort of collective dialogue and discussion necessary to advance the development of First Amendment doctrine. I discussed the broad importance of doctrinal transparency in First Amendment jurisprudence in detail in a previous article,¹⁹⁹ and as I did there, I broadly define doctrinal transparency here as the extent to which doctrine encourages or forces courts to analyze speech cases openly, in a fashion that elicits direct discussion of foundational questions regarding the constitutional value of the speech in question and the social harms associated with it.²⁰⁰

Doctrinal transparency is particularly important in First Amendment jurisprudence because it represents a vital means for courts—and, by extension, society in general—to evaluate and think through our fundamental intuitions as to why we value speech and how that value ought to compare to the different harms associated with speech.²⁰¹ Hollow sloganeering often stands in for rigorous analysis in First Amendment cases;²⁰² transparent doctrine avoids this by forcing courts to clearly articulate the underlying reasons behind their judgments of speech value and harm, which in turn sets the stage for rigorous deliberation and debate amongst courts and the public at large.²⁰³ It thus helps to create a positive

197. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)) (“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”).

198. *See, e.g.*, David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1178.

199. A more detailed discussion of the issues that I touch upon in this section can be found in that article. *See Han, supra* note 12, at 371–79.

200. *Id.* at 362.

201. *Id.* at 372.

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

203. *See Heyman, supra* note 81, at 696 (“To the extent that the Supreme Court has an educative role in our system, that role is better served by opinions that openly canvass the substantive values on both sides, rather than obscuring them in a technical haze. When an opinion that focuses on substantive

feedback loop in which courts, by openly working through their judgments regarding speech value and speech harm, drive the public discussion, which may in turn shape the judgments made by courts in similar cases down the road.²⁰⁴

Transparency is particularly valuable in advancing the evolution of these fundamental intuitions amidst a rapidly changing communications culture. The issues we face today are exceedingly different from those we faced even twenty years ago, and transparent doctrinal approaches give courts the tools to consider and debate, in a direct and open manner, the ways in which the First Amendment should apply to the broad range of novel questions now confronting them.²⁰⁵ Doctrinal transparency also encourages courts to review the efficacy of existing rules by reevaluating the extent to which they fit our foundational intuitions regarding speech value and harm as those intuitions continue to evolve.²⁰⁶ Such transparency ultimately prevents courts from losing sight of the normative superstructure underlying the doctrinal edifice they are creating: “the foundational reasons why we attribute special value to speech and our judgments as to how this value should be measured against different types and degrees of social harm.”²⁰⁷

Of course, although transparency is particularly valuable in the First Amendment context, it is not the only consideration in crafting sound First Amendment doctrine. Doctrinal transparency is broadly associated with more open-ended, standard-like approaches,²⁰⁸ which may not be tenable in the First Amendment context given the risks of unchecked judicial discretion and chilling effects on speech.²⁰⁹ Some degree of opaque but administrable rules are necessary within speech doctrine to offer a measure

values upholds a First Amendment claim, the opinion is more likely to promote popular acceptance of free speech and tolerance of dissent.”).

204. Han, *supra* note 12, at 373–75.

205. See Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 170 (“Just as legal rules are typically premised on background assumptions about technologies, so too are such rules usually premised on assumptions about social conditions, behaviors, and attitudes. As these change, legal rules may require reexamination.”). See also Han, *supra* note 12, at 394–95.

206. Han, *supra* note 12, at 372–73.

207. *Id.* at 426.

208. See Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 67 (1992) (observing that “standards make visible and accountable the inevitable weighing process that rules obscure”). *But cf.* Han, *supra* note 12, at 371–72 (observing that “doctrinal transparency in the First Amendment context is broadly associated with the ‘standards’ side of the rules-versus-standards debate,” but also noting that transparency does not always track the “rules-standards distinction, since the degree of transparency . . . ultimately rests simply on the extent to which courts directly discuss foundational questions of speech value and harm”).

209. Han, *supra* note 12, at 367–68.

of predictability and consistency. The key question in designing the doctrine is whether the optimal balance between opaque, rule-like approaches and transparent, standard-like approaches has been met.²¹⁰

The current doctrinal structure provides little in the way of meaningful analytical transparency. Particularly in the hardest middle-value speech cases—where direct, nuanced articulations of difficult speech value and harm judgments are presumably most valuable—the traditional strict scrutiny default rule allows courts to hide behind formal doctrine without being forced to openly grapple and engage with these difficult foundational questions.²¹¹ This is simply because under the present doctrine, the result is effectively foreordained in nearly all cases involving content-based regulations. If the speech in question is deemed to fall into one of the low-value speech exceptions, then the government is broadly free to regulate it; if it does not, then strict scrutiny applies, and the regulation will essentially always be struck down as a matter of course. Although courts might happen to embroider their analyses in these cases with deeper explanation, they generally need not do so, since such analyses carry little weight in the face of a foregone conclusion: except in the most extraordinary of circumstances, strict scrutiny means automatic invalidation when applied in the context of speech regulation.²¹²

Analytical transparency—and all of the benefits associated with it—is further undermined by the substantial degree of doctrinal distortion resulting from courts’ efforts to avoid the consequences of the strict scrutiny default rule in ill-fitting cases.²¹³ Such distortion works to obscure the underlying value judgments actually driving the results reached by courts, as it clothes these judgments in formal “doctrinal” terms that allow courts to sidestep any meaningful and direct articulation of them. Take, for example, the Supreme Court’s decisions in *Renton* and *Williams-Yulee*, or the circuit courts’ decisions in *Reed* and the *ACLA* case. In all of these cases, the courts broadly characterize their decisions as the inevitable products of formal doctrine, when in fact they were likely driven largely by unarticulated value judgments—for example, foundational judgments as to the relative value of sexually explicit speech or the relative value and harm

210. *Id.* at 379–80.

211. *See* Brown, *supra* note 57, at 958 (observing that the rule “allows the upholding of speech-restricting regulations without serious engagement with their true effect on democratic values, and camouflages the Court’s tacit sympathies for state interests that have not been acknowledged or defended openly”).

212. Han, *supra* note 12 at 396–400.

213. *See supra* Part II.D.1.

of posting personal information online as a means to intimidate.²¹⁴

Such distortion can further exacerbate doctrinal opacity by breeding analytical confusion, which limits the extent to which courts can directly and accurately grapple with the central underlying questions of speech value and harm. A court that, for example, inaccurately characterizes a content-based speech restriction as content-neutral ensures that the wrong analytical question will be asked: does the “content-neutral” law in question survive intermediate scrutiny? The analytical question that actually captures the issue posed in such a case is a very different one: even though the speech restriction is content-based, why should our fundamental judgments regarding speech value and harm dictate that the default strict scrutiny standard not apply?²¹⁵ By allowing courts to decide cases by asking the wrong questions, such doctrinal distortion impedes courts—and society at large—from participating in meaningful dialogue regarding fundamental questions of speech value and harm, transforming what ought to be open and direct debate regarding such issues into squabbles over formal doctrine. It invites courts and critics to simply talk past each other and miss the underlying bases for disagreement, thereby limiting the potential for direct and forthright discussion.²¹⁶

Thus, both the inherent design of the current doctrinal framework and the significant doctrinal distortion produced by this design have resulted in a largely opaque doctrine—one that allows courts to broadly avoid meaningful articulation of the foundational value judgments that underlie the doctrine as a whole. Such opacity limits courts’ capacity to grapple with the difficult questions of speech value and harm posed in middle-value speech cases, particularly in cases raising novel issues. This cost is therefore likely to be particularly high given the consistent expansion of First Amendment coverage into novel realms of “speech” and the rapid social and technological changes within our communications culture.

III. A REVISED APPROACH TO CONTENT-BASED SPEECH REGULATION

Thus, applying the traditional strict scrutiny default rule in middle-

214. To be clear, I am referring here to *constitutional* value judgments—that is, speech value and harm judgments premised directly on the underlying theoretical rationales of the Free Speech Clause. Courts might also reach results based on illegitimate, purely personal value judgments (e.g., distaste for a particular political view), but courts would (presumably) never openly articulate these sorts of judgments regardless of the degree of doctrinal transparency.

215. Han, *supra* note 12, at 413.

216. *Id.*

value speech cases has proven to be costly. On the one hand, the theoretical benefits of the traditional rule have been significantly undermined by courts' demonstrated willingness to distort doctrine; on the other hand, the costs produced by the analytical opacity associated with the traditional rule are both substantial and likely to grow rapidly given the current trajectory of First Amendment jurisprudence. How, then, might we recalibrate the doctrinal framework to remedy these problems?

As an initial matter, any solution must be a balanced one; a radical shift to a fully discretionary and open-ended framework, for example, would be dangerous and unwise for the reasons outlined by many of the proponents of the current framework.²¹⁷ An optimal approach should continue to recognize the broad need for judicial constraint, predictability, and doctrinal consistency while ensuring an incrementally greater degree of flexibility to limit doctrinal distortion and promote analytical transparency where warranted.

I therefore suggest an approach that incrementally shifts the First Amendment's center of gravity away from the highest-value speech and closer to the middle of the speech-value spectrum. First, categories of *high-value speech* should be categorically carved out, in the same way that courts already carve out categories of low-value speech. In other words, rather than operate under an assumption that, as a default, all speech is high-value speech subject to the most stringent First Amendment protection, courts should affirmatively designate the categories of the highest-value speech to which strict scrutiny applies—for example, political speech, artistic expression, truthful news reporting, academic debate, and so forth. Once courts have carved out both the lowest *and* the highest-value speech, the uncategorized speech that remains is the residual category of middle-value speech—and for this remaining speech, I propose that intermediate scrutiny, rather than strict scrutiny, apply as the default standard, provided that the regulation in question is not viewpoint-based in nature.

A. ADOPTING A “DEFINING IN” APPROACH TO HIGH-VALUE SPEECH

A natural reaction to my proposal may be that it overcomplicates things. A simpler approach, perhaps, would be to retain the strict scrutiny default rule but allow courts to more aggressively identify and carve out categorical middle-value speech exceptions subject to a lesser degree of scrutiny. Such an approach would effectively extend what the Court has

217. See *supra* Part I.C.

already done with truthful commercial speech; courts could delineate panhandling, or computer code, or public disclosures of sensitive private information as middle-value speech exceptions such that content-based regulations would be evaluated under intermediate scrutiny.²¹⁸ Like the Court's current approach to low-value speech, strict scrutiny would remain the default rule, but courts could carve out categorical exceptions for middle-value speech under appropriate circumstances.

Both approaches may well be effective in alleviating the problems associated with the current doctrinal framework, but they attempt to do so through fundamentally different means. The current doctrinal framework crafts the category of high-value speech by “defining out”²¹⁹—that is, it presumes that all speech is high-value, and it earmarks certain subsets of speech for different treatment by carving them out from this default position. The approach described above adheres to this “defining out” approach, as it merely pushes courts to be more solicitous in “defining out” categorical middle-value speech exceptions from the default high-value classification. My proposed approach, however, adopts a “defining in” approach to high-value speech. That is, speech is by default categorized as *middle-value* rather than high-value in nature, and if courts want to instead recognize certain subsets of speech as high-value, they must specifically designate the speech as such to take it outside of the default position.

One might argue that a “defining out” approach to high-value speech is preferable in light of our sense of what biases are most likely to infect the analysis or what values ought to trump under conditions of uncertainty. As Schauer observed, “[w]hen we use presumptions and allocate the burden of proof, we attempt to ensure that decisions under uncertainty will be biased away from restriction of those values we hold to be of greatest importance.”²²⁰ If we assume that courts are broadly inclined to underprotect speech under conditions of uncertainty—and there are good reasons to think this might be the case²²¹—we might prefer a “defining out” regime that, by default, classifies speech in the highest-value category in order to counteract this bias.

218. This approach has been proposed by other scholars. *See, e.g.*, Bhagwat, *supra* note 97, at 6 (arguing that because “disputes involving [factual] details are meaningfully distinguishable from other free speech disputes and pose distinct analytic issues,” specific facts “should be treated differently from other forms of speech and should be subject to greater government regulation than ideas”).

219. I borrow the terms “defining in” and “defining out” from Schauer, who applied them in a different First Amendment context. *See* Schauer, *supra* note 7, at 279–82 (discussing these terms with respect to questions of First Amendment coverage).

220. *Id.* at 280–81.

221. I discuss this assumption in greater detail above. *See supra* Part I.C.

As an initial matter, the basic assumption underlying this argument is an empirical one, and it is the same assumption that underlies the traditional defenses of the current doctrinal framework: that courts are so strongly predisposed to be underprotective of speech interests that a highly prophylactic doctrinal approach is necessary to adequately safeguard such interests. As I discuss in greater detail below, however, some cautious scrutiny of this assumption might be in order. While few will dispute the basic point that some degree of doctrinal prophylaxis is necessary to adequately protect speech, it may be worth considering whether the current doctrine broadly overestimates this risk of systemic underprotection of speech, thus creating a doctrinal regime that is excessively prophylactic in nature.²²²

Putting this issue to the side, however, there are two countervailing practical considerations that ultimately lead me to prefer the “defining in” approach. First, a preference for one approach over the other should be driven by the ease with which courts and other actors can identify and define the relevant categories in question,²²³ and a category is useful only insofar as it identifies a particular subset of speech entitled to a particular degree of protection based on the theoretical rationales underlying the First Amendment.²²⁴ Particularly at this stage of the First Amendment’s doctrinal development, it is far easier to identify and carve out distinct speech categories at the extremes of the speech-value spectrum (that is, the highest-value speech and the lowest-value speech) as opposed to identifying distinct categories that reside in the hazy middle of the spectrum. Our shared intuitions regarding speech value and harm—which reflect decades (if not centuries) of theoretical and jurisprudential development of the idea of free speech—readily yield the clearest examples of the highest-value speech, such as political speech, truthful news reporting, and artistic expression. While the precise boundaries of these categories are certainly fuzzy and subject to debate,²²⁵ both the core categories themselves and paradigmatic instances within these categories are relatively easy to identify and broadly reflected in both judicial and

222. See *infra* text accompanying notes 248–58.

223. Cf. Schauer, *supra* note 7, at 280 (“The ‘defining in’ approach assumes both that we can construct a workable definition reflecting the deep theoretical premises of the concept of free speech and that such a definition can be taught to those who matter—the judges who must both apply it and refine its imprecision.”).

224. See *id.* at 293.

225. This fuzziness in categorical definition—which gives courts greater discretion to consciously or unconsciously manipulate doctrine—might be a reason to avoid any additional categorization beyond what currently exists in the doctrine. I address this potential objection in detail below. See *infra* Part IV.B.

popular understandings of the First Amendment.

It is a far more difficult undertaking, however, to identify discrete subsets of speech that fall within the murky middle of the speech-value spectrum, simply because such speech, by definition, does not implicate the theoretical rationales behind speech protection in the same obvious and direct manner. This merely reflects the basic truth that core applications of a legal rule or principle are generally more concrete and easier to identify than borderline or “penumbral” applications.²²⁶ Furthermore, as a matter of historical development and doctrinal design, First Amendment doctrine has naturally focused primarily on the highest-value “core” speech and the low-value speech exceptions, as these are the instances that most starkly reflect both our theoretical rationales for protecting speech and the practical necessity of limiting speech protection in certain circumstances.

Thus, not only are middle-value speech categories more difficult to carve out by nature, but they have not been worked through and discussed as thoroughly as high-value or low-value speech categories. It therefore makes practical sense to set middle-value speech and intermediate scrutiny—rather than high-value speech and strict scrutiny—as the default residual category and standard of review, since middle-value speech categories are, by nature, more eclectic and harder to define than categories of the highest-value speech. And courts would presumably have an easier time articulating clear constitutional values and principles in delineating specific high-value speech categories rather than middle-value speech categories, which would have positive effects on both the transparency of First Amendment doctrine and the doctrine’s capacity to evolve in light of rapidly changing cultural and technological conditions.

Second, although worries about systemic underprotection of speech might theoretically favor an approach that defines speech “out” of a default high-value speech category, there are strong indications that the current default rule is simply too strong, and that merely exhorting courts to more actively carve out middle-value speech exceptions may not bring about meaningful change. As I discussed above, the doctrinal distortion associated with the current doctrinal framework is rooted, to a significant extent, in courts’ broad reluctance to carve out categorical exceptions to the default strict scrutiny rule when warranted by the circumstances—a

226. See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (“[T]he general words we use—like ‘vehicle’ in the case I consider—must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.”).

reluctance that appeared to be ingrained even before the Court's recent decisions explicitly limiting courts' capacity to create such exceptions.²²⁷ Thus, as a practical matter, even if any formal doctrinal obstacles to carving out middle-value speech exceptions were removed, courts might still be highly reluctant to do so, resulting in little meaningful change.

On the other hand, if the doctrinal framework were adjusted so that intermediate scrutiny—rather than strict scrutiny—represents the default standard unless speech is otherwise entitled to special treatment, courts would presumably be more willing to apply it in difficult middle-value speech cases.²²⁸ And as I discuss in detail below, to the extent we may be concerned with systemic underprotection of speech given this greater degree of judicial discretion and the potential inertial pull of intermediate scrutiny as a default standard, courts can include within the doctrinal framework a series of prophylactic rules or principles designed to limit the risk of such underprotection; for example, they might openly adopt the broad principle that in all close cases of speech categorization, speech should be categorized as high-value rather than middle-value.²²⁹ In other words, courts, in designing the doctrine, can incorporate measures that would mitigate *ex ante* the risk that the inertial pull of an intermediate scrutiny default rule will be too strong.

B. THE INTERMEDIATE SCRUTINY STANDARD

Again, under my proposal, if the regulated speech in question cannot be categorized as either low-value or high-value in nature, then content-based regulations of such speech should be evaluated under intermediate scrutiny rather than strict scrutiny by default.

To be clear, I am not arguing that intermediate scrutiny must apply in *all* middle-value speech cases dealing with content-based regulations. As I noted above, there are many factors that play a role in evaluating speech regulations beyond the value of the regulated speech in question, and these factors might dictate a more stringent standard of review in some cases. Most notably, when the government adopts *viewpoint-based* distinctions in regulating middle-value speech, it makes sense to apply strict scrutiny rather than intermediate scrutiny, since such regulatory approaches represent direct government distortion of the marketplace of ideas and thus

227. See *supra* text accompanying notes 138–39.

228. Of course, one possible critique of this approach is that courts may become *too* willing to apply intermediate scrutiny across the board. I address this critique in detail below. See *infra* Part IV.B.

229. See *infra* text accompanying notes 246–47.

implicate most clearly the significant dangers of government abuse.²³⁰ Indeed, as the Court held in *R.A.V.*, viewpoint-based restrictions of even the *lowest-value* speech can be subject to the most stringent First Amendment scrutiny,²³¹ so it follows naturally that strict scrutiny similarly ought to apply to such restrictions of middle-value speech. Apart from cases dealing with viewpoint discrimination, however, I broadly propose that intermediate scrutiny be the default standard applicable to content-based regulations of middle-value speech.

The next question is what this default intermediate scrutiny standard ought to look like. As Bhagwat has catalogued in an insightful and comprehensive article, intermediate scrutiny has emerged in a wide variety of areas within First Amendment doctrine, such as in evaluating content-neutral regulations, symbolic speech, and speech of government employees; as such, the precise formulation of the standard has varied based on the context.²³² But the most relevant formulation, which I will adopt for present purposes, is the *Central Hudson* test for evaluating content-based regulations of truthful commercial speech—again, the only substantive category of speech that the Court has explicitly recognized as middle-value in nature. Under this test, for the regulation to survive, (1) the government interest must be “substantial,” (2) the regulation must “directly advance[] the governmental interest asserted,” and (3) it must do so in a way that is “not more extensive than is necessary to serve that interest.”²³³

As many have noted, the essence of all intermediate scrutiny tests like

230. See Stephan, *supra* note 21, at 233; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L.R. 189, 198 (1983) (observing that “[a]ny law that substantially prevents the communication of a particular idea, viewpoint, or item of information violates the first amendment except, perhaps, in the most extraordinary of circumstances,” since such a law “effectively excis[es] a specific message from public debate” and “mutilates ‘the thinking process of the community’”). See generally Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) (describing the distinction between viewpoint-based and subject-matter-based restrictions and outlining why the latter is potentially less problematic than the former). My proposal therefore reflects the broad “equal protection” approach to speech regulation suggested by Daniel Farber, under which viewpoint-based restrictions are deemed more suspect than other content-based restrictions, such that strict scrutiny applies to the former and some form of “middle-tier” intermediate scrutiny applies to the latter. See Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 729–30 (1980). Farber, however, would apply this approach broadly to all speech, as he does not distinguish between high-value and middle-value speech, whereas I would adopt this distinction only in the specific context of middle-value speech cases.

231. See *supra* note 47.

232. Bhagwat, *supra* note 61, at 788–800.

233. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

the *Central Hudson* test is balancing.²³⁴ On one side of the balance is the constitutional value of the speech, and this value judgment is made at the outset, through the selection of the appropriate standard of review. Under my proposal, the first inquiry is whether the speech in question falls into a category of either high-value or low-value speech; if so, then the appropriately stringent or deferential standard of review is applied. If the speech cannot be carved out in this manner, it is, by default, classified as middle-value speech to which intermediate scrutiny applies.²³⁵ Adopting this standard of review to middle-value speech is, in effect, an acknowledgement of some meaningful degree of constitutional value—but a value that is less substantial than that of the highest-value speech, such that it is subject to open balancing against the government’s regulatory interests.

Once the middle-value nature of the speech has been established, the three prongs of the *Central Hudson* test effectively balance that value against the government’s regulatory interests in light of the particular manner by which the government chooses to regulate. The first prong represents a judgment as to whether the government’s regulatory interests are of a sufficient magnitude to outweigh the constitutional value of the speech in question. The second prong works to ensure that the asserted interests are genuine ones that the government is pursuing in good faith, and it acts as a check on the government’s judgments, empirical or otherwise, regarding the efficacy of the regulation.²³⁶ Finally, the third prong works to ensure that the government’s particular regulatory approach is proportional in nature—that the regulation is tailored such that it takes adequate account of the speech-based interests on the other side of the equation.

This intermediate scrutiny test is, of course, highly open-ended and indeterminate in nature, which may raise significant concerns as to administrability, predictability, and the possibility of judicial abuse. I address this potential critique in greater detail below,²³⁷ but broadly speaking, some degree of open-endedness and indeterminacy is to be

234. See, e.g., Bhagwat, *supra* note 61, at 819–20; Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 300 (1992) (observing that “[i]n either its official or de facto form, intermediate scrutiny is a balancing mode”).

235. Again, my focus here is solely on the question of speech value, so this does not take into account other significant factors that might affect the level of scrutiny (such as, for example, whether viewpoint discrimination is involved).

236. I have argued elsewhere that courts should broadly err on the side of empirical rigor in conducting these sorts of analyses. See Han, *Mechanics*, *supra* note 106, at 1710–13.

237. See *infra* Part IV.C.

expected given the inherent difficulty of resolving middle-value speech cases. And if, as current First Amendment jurisprudence suggests, the alternative to this sort of open-ended approach is doctrinal distortion with similar value judgments being made *sub rosa*, then an approach that at least openly recognizes the sorts of value-based balancing judgments driving courts' decisions certainly represents a superior state of affairs.

C. THE BENEFITS OF THE PROPOSED APPROACH

My proposed adjustment would greatly mitigate the substantial doctrinal distortion and confusion associated with the current doctrinal framework. As discussed above, under the current strict scrutiny default rule, courts faced with an ill-fitting middle-value speech case are often inclined to distort the doctrine in order to reach the "correct" result, given their general reluctance to reach anomalous results and the doctrinal and practical obstacles to crafting formal exceptions to the rule.²³⁸ If, however, strict scrutiny is limited solely to delineated categories of high-value speech—and intermediate scrutiny applies to all residual middle-value speech—then courts faced with a difficult middle-value speech case would have a far more palatable set of options.

Under this framework, courts would know that the path of least resistance leads to something resembling a true balancing analysis rather than a severe (and potentially ill-fitting) rule of automatic invalidation. This would reduce their incentives to distort doctrine and leave them free to work through difficult middle-value speech cases openly and directly. Thus, for example, the *Renton* Court need not have relied on the suspect secondary effects doctrine in order to avoid the strict scrutiny default rule. Rather, under my approach, the Court need only find that the speech in question did not fall into a designated category of high-value speech, and on this basis it could apply intermediate scrutiny directly. Similarly, in the *Nuremburg Files* case, the court could have reached its result by openly articulating, under the intermediate scrutiny standard, the broad judgments of speech value and harm driving its analysis rather than by shoehorning the speech into the ill-fitting category of true threats.

Indeed, in all of the examples discussed above, courts need not have resorted to any sort of doctrinal distortion, at least insofar as such distortion flowed from a strong intuition that the speech in question was, in fact, middle-value rather than high-value in nature. Rather, they would be free to apply the more open-ended intermediate scrutiny standard, which would

238. See *supra* Part II.D.1.

give them the flexibility to openly grapple with the difficult aspects of these cases rather than surreptitiously manipulate doctrine to arrive at the desired result.²³⁹

Furthermore, my approach would greatly increase the degree of analytical transparency—and all of the benefits associated with such transparency—at a limited cost. First, and most obviously, it would promote such transparency simply because it would limit the degree of doctrinal distortion, as I described above. When doctrine is distorted, transparency necessarily suffers because courts’ actions and explanations no longer bear a direct relationship to formal doctrine. This gives courts more opportunities to hide the ball in their analyses, which makes it more difficult to identify and critique the underlying foundational value judgments actually driving their decisions.²⁴⁰ By substantially reducing the need for doctrinal distortion, my approach would help to ensure that courts’ decisions accurately reflect the formal law that applies to them.

In addition, the intermediate scrutiny standard is itself highly transparent, since unlike strict scrutiny or rational basis review, it is a balancing mode of analysis—the only standard of review in which the outcome of the case is not effectively foreordained.²⁴¹ Thus, if courts apply intermediate scrutiny as a default in middle-value speech cases, this effectively forces them to confront and openly grapple with foundational questions of speech value and harm—first by articulating exactly why the speech in question does not fall into a designated low-value or high-value exception, then by walking through the three open-ended prongs of the *Central Hudson* test.²⁴² In other words, courts would not be able to hide behind formal doctrine; they would have to articulate their underlying judgments as to what makes the speech in question valuable and directly analyze how this value measures up against the government’s countervailing regulatory interests.

This sort of broad discussion of foundational values is particularly valuable in middle-value speech cases, which are by definition the most difficult cases. When clearly high-value speech is in play, it is clear that

239. To be clear, I take no position here as to whether any of these cases were correctly decided. I only mean to emphasize that under my approach, courts have a clear path to deal with difficult middle-value speech cases without resorting to doctrinal distortion.

240. See Han, *supra* note 12, at 413.

241. See Sullivan, *supra* note 234, at 300–01 (observing that although all tiers of scrutiny “employ[] the vocabulary of weights and measures as a metaphor for justification,” intermediate scrutiny is the only standard of review that “really means it”).

242. See *supra* text accompanying notes 233–36.

effectively no content-based regulation will pass muster; when clearly low-value speech is in play, the opposite is true. Middle-value speech cases are the difficult cases in the middle; they are thus the cases that truly force courts to consider, in a nuanced manner, what makes the speech constitutionally valuable and how that ought to be balanced against the harm associated with the speech. Intermediate scrutiny allows for an open, balancing mode of analysis to deal with these difficult cases.

My proposed approach would further enhance analytical transparency insofar as it would force courts to openly articulate why certain speech ought to be entitled to the most stringent degree of First Amendment protection. Under the current approach, courts are free to subject all content-based restrictions of uncategorized speech to strict scrutiny without much thought or analysis. Under a default rule of intermediate scrutiny, however, courts who wish to apply strict scrutiny in, say, a case dealing with a novel subset of speech must explain *why* that speech falls within a categorical high-value speech exception to the default rule. Thus, my proposal would ensure that courts cannot apply strict scrutiny blindly; they would have to articulate the basis for its application, just as they would have to articulate their basis for recognizing a new category of low-value speech.

All of this would ultimately produce far more candid, direct, and nuanced analyses of foundational questions of First Amendment value and harm. And as I discussed above, such analytical transparency is particularly vital in spurring the common-law development of First Amendment doctrine amidst rapidly changing cultural and technological conditions.²⁴³ Furthermore, on the other side of the ledger, these substantial gains in doctrinal integrity and analytical transparency would come at a limited cost to case-by-case predictability and consistency. Under my approach, the standards for evaluating content-based regulations of clearly high-value or low-value speech would remain unchanged. My proposed adjustments would ultimately affect only middle-value speech cases—cases that have largely served to undermine rather than promote predictability and consistency within the current doctrine given the substantial degree of doctrinal distortion and confusion associated with them.

IV. POTENTIAL CRITIQUES AND PRACTICAL CONSIDERATIONS

In this Part, I address some of the most likely substantive critiques of my proposed approach, which would presumably center around a perceived

243. See *supra* Part II.D.2.

reduction in the protection of speech interests or the dangers associated with a heightened degree of judicial discretion. I also address the more practical critique that my approach is simply too radical a shift to be realistically considered by courts.

A. INSUFFICIENT FORMAL PROTECTION OF SPEECH INTERESTS

One might argue that my approach would be insufficiently protective of speech interests on a purely formal level, since setting the default standard to intermediate scrutiny rather than strict scrutiny would necessarily mean that a large swath of speech regulations would now be subject to this more deferential standard of review. Any such argument, however, misunderstands the nature and scope of my proposal. I do not argue here that the middle-value speech classification should necessarily be expansive in nature. The nub of my proposal is merely that intermediate scrutiny, rather than strict scrutiny, serve as the default standard of review for content-based regulations of any residual middle-value speech. The reach of this default intermediate scrutiny standard will ultimately rest on how broadly one delineates the categories of high-value speech: one might define these categories very broadly, leaving only a narrow swath of residual middle-value speech, or one might define them narrowly, leaving a broad expanse of middle-value speech.

Thus, under my approach, courts could certainly construct an aggressively speech-protective doctrine while leaving intermediate scrutiny as the default standard applicable to any uncategorized speech. And the broad benefits of my approach would remain regardless of how large or small the residual category of middle-value speech ends up being. If courts are forced to articulate the basis for classifying speech as high-value—rather than simply assume speech to be high-value by default—then any decision to classify speech as such will, by nature, more transparently reflect the fundamental value judgments and intuitions underlying it. And even if the size of the residual middle-value speech category is relatively small, its position within the doctrinal framework as the default category would make it easier for courts to formally apply intermediate scrutiny—rather than distort doctrine—in those cases where applying the onerous strict scrutiny standard would be most dissonant.

My proposed approach therefore does not necessarily translate to a broad reduction in speech protection across the board. By formulating highly expansive categories of high-value speech, courts could craft a First Amendment doctrine that offers a similar or greater degree of overall speech protection compared to the current doctrine. But they would do so

in a far more open and transparent manner, without having to resort to the doctrinal distortion that has infected the present doctrine.

B. CATEGORICAL VAGUENESS AND THE RISK OF WATERING DOWN
PROTECTION OF HIGH-VALUE SPEECH

Another concern might be that establishing intermediate scrutiny as the default rule would lead to slippery slope concerns given the difficulties in cabining the scope of the rule's application. That is, courts might be tempted to expand the application of intermediate scrutiny very broadly, eventually eroding even the significant protection currently afforded to the highest-value speech. There are strong, foundational reasons why we have concluded that, for example, content-based restrictions on political speech ought to be prohibited in all but the most extreme circumstances. Perhaps shifting the default rule away from strict scrutiny would trigger a broad erosion of speech protection that ultimately unsettles even these most firmly held intuitions regarding the freedom of speech.

In more concrete terms, some degree of vagueness is inevitable in delineating high-value speech categories, and this vagueness creates a risk that courts will, over time, expand the boundaries of middle-value speech until it threatens to engulf even what we today consider core instances of high-value speech.²⁴⁴ It is relatively straightforward and uncontroversial to say, for example, that political speech and truthful news reporting are categories of high-value speech subject to the most stringent protection. But even if the core instances within each of these categories are clear, the boundaries will be fuzzy and vague²⁴⁵—speech, after all, comes in infinite variations and contexts. And if it is in fact true that courts will (either intentionally or unintentionally) regularly favor state regulatory interests or personal predilections over speech interests, then the broad discretion afforded to courts by this categorical vagueness may well lead to systematic and ever-expanding dilution of the substantial protection currently afforded to the highest-value speech.

This argument suggests that my proposed cure would be worse than the disease, and that it might be wiser to forego creating discrete high-value speech categories. As Schauer put it, when a First Amendment category “is

244. Cf. Schauer, *supra* note 7, at 290 (“[W]e do not wish to create subcategories that, either because of the inherent indeterminacy of the category or because of the difficulty in verbally describing that subcategory, create an undue risk of oversuppression.”).

245. See *id.* at 288 (“[T]he categories of political speech, entertainment, and literature, for example, have such loose and overlapping boundaries that the dangers of mischaracterization are particularly strong.”).

so inherently and extremely indeterminate and so linguistically ill-defined, a serious risk exists that the category will in practice be misapplied, and a powerful argument therefore arises against the creation of the category.”²⁴⁶

These are legitimate concerns, and they represent a significant source of caution in considering any broad adjustments to the present doctrine. Nevertheless, in implementing my approach, some doctrinal measures can be taken to at least mitigate this risk of dilution. For example, the Supreme Court could articulate specific approaches to category-setting that would limit the degree of discretion afforded to courts: perhaps a strong principle that high-value speech categories will be construed expansively, or that all borderline cases are to be treated as high-value speech cases, or that the creation of new high-value speech categories is both expected and encouraged. If there are indeed systemic risks that courts will tend to erode the protection of speech if afforded greater discretion to make speech-value judgments, there are ways to implement my proposed approach that work to cabin the scope of this discretion.

Furthermore, there are strong reasons to believe that the incremental risks associated with categorical vagueness are outweighed by the benefits of reducing doctrinal distortion and increasing analytical transparency, especially if precautionary doctrinal measures such as those suggested above are implemented. In evaluating the costs and benefits of my proposed approach, the appropriate point of comparison should not be the current approach as it would work in a theoretical vacuum; rather, my approach should be compared to what the current approach has produced in actual practice. And as I described in detail above, the current approach has produced substantial doctrinal distortion, which threatens to destabilize the entire doctrinal structure, and analytical opacity, which limits courts’ ability to critically evaluate the many novel issues of speech regulation arising from our rapidly evolving communications culture.²⁴⁷ Of course, this is ultimately an exercise of comparing incommensurables: the risks associated with a more open-ended framework on the one hand, and the shortcomings of the present doctrinal approach on the other. But at the very least, it does not seem a foregone conclusion that the current state of affairs is any better than what I propose.

Finally, these slippery-slope concerns are ultimately driven by the

246. *Id.* at 295. Thus, Schauer argues, it might make sense to adopt a presumption against creating First Amendment categories unless the proposed category is “consistent with the theoretical foundations of the first amendment, . . . capable of principled definition and application, and . . . sufficiently determinate that the dangers of incorrect application are manageable . . .” *Id.* at 296.

247. *See supra* Part II.D.

same core assumption underlying much of traditional First Amendment theory and doctrine: that courts are so strongly predisposed to be underprotective of speech interests that an extremely prophylactic doctrinal approach is necessary to adequately safeguard such interests. As I suggested earlier, however, it is perhaps worth reevaluating the scope of this basic assumption. Few will disagree, I think, that there are strong reasons to fear conscious or unconscious biases against speech when speech interests are weighed against regulatory interests, and that First Amendment doctrine should take this risk of underprotection into account. But there is the additional question as to whether the current doctrine accurately reflects the actual degree of this risk.

That is to say, even if we all agree that prophylactic doctrinal measures are necessary, we must nevertheless question whether the particular measures adopted either underestimate or overestimate the actual risk of underprotection. After all, overestimation of this risk incurs significant costs just as much as underestimation. If, for example, the Supreme Court were to adopt the (presumably) empirically inaccurate assumption that every single court, in every single case, would always uphold speech restrictions if given the discretion to do so, then it would presumably institute rules that are excessively prophylactic in nature, which would handcuff legislatures from reasonably regulating speech in cases where such regulation is clearly justified.²⁴⁸

The actual extent of the risk that courts will systematically underprotect speech is ultimately an unanswerable empirical question, so any judgments on the subject are necessarily speculative. But there are perhaps reasons to believe that the current, highly prophylactic approach overestimates these risks within the present cultural context. As Schauer has observed, the First Amendment carries massive cultural and political force in contemporary society, with a “magnetism” unmatched by other constitutional protections. He states:

To an extent unmatched in a world that often views America’s obsession with free speech as reflecting an insensitive neglect of other important conflicting values, the First Amendment, freedom of speech, and freedom of the press provide considerable rhetorical power and argumentative authority. The individual or group on the side of free speech often seems to believe, and often correctly, that it has secured the upper hand in public debate. The First Amendment not only attracts

248. See Brown, *supra* note 57, at 957 (observing that “over-protection does hurt liberty” because “it results in the disabling of government from redressing real social harm at or beyond the outer periphery of First Amendment concern”).

attention, but also strikes fear in the hearts of many who do not want to be seen as opposing the freedoms it enshrines.²⁴⁹

The enormous political and cultural force associated with the First Amendment's protection of free speech seems undeniable on its face. There is perhaps no constitutional provision that is as universally embraced and praised as the Free Speech Clause, such that—as Schauer colorfully noted—“the First Amendment's magnetism leads strategic actors to embrace it as easily as politicians embrace motherhood, the flag, and apple pie.”²⁵⁰

There is thus perhaps reason to believe that any systemic risk that courts (or the general public) will favor government regulation over conflicting speech interests is less severe today than it may have been in, say, the early-to-mid-twentieth century. As Neil Richards has observed, the sorts of slippery-slope arguments that have often been marshalled to support the current doctrine's highly prophylactic approach have not actually been borne out in practice.²⁵¹ The scope of the traditional low-value speech categories, for example, has shrunk rather than expanded over time; indeed, it is unclear whether the traditional low-value category of fighting words remains viable.²⁵² Furthermore, the long-term trajectory of commercial speech doctrine has been a broad shift from less protection to greater protection. Truthful commercial speech has evolved from unprotected speech in *Valentine v. Chrestensen*²⁵³ to partially protected speech under the *Central Hudson* framework,²⁵⁴ and the Court's recent opinion in *Sorrell v. IMS Health Inc.* suggests that full constitutional protection of such speech may be imminent.²⁵⁵ Thus, as Richards concluded, “the principal theoretical and practical difficulty” in defining the limits of First Amendment protection might actually be ensuring the adequate protection of non-speech interests “under a juridical regime in

249. Schauer, *supra* note 122, at 1790.

250. *Id.* at 1794.

251. Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1178 (2005).

252. *Id.*

253. *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942).

254. Richards, *supra* note 251, at 1178–79.

255. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (applying “heightened judicial scrutiny” to a content-based regulation of truthful commercial speech). *See also* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1198 (2016) (“*Sorrell* suggests that a majority of the Justices will offer true and non-misleading commercial speech protection almost as great as core political speech.”).

which free speech always wins.”²⁵⁶

I want to tread lightly here, however, as I am fully cognizant of the risks of making these sorts of unprovable judgments. It is certainly dangerous to assume that either the past trajectory of doctrinal development or currently prevailing cultural conditions will necessarily continue into the future.²⁵⁷ Cultural attitudes towards free speech—and any doctrine associated with them—might shift quickly in times of “pathological” stress, such as wartime.²⁵⁸ I therefore do not suggest here that it is unreasonable to take doctrinal approaches that seem overly protective of speech given currently prevailing cultural conditions. What I do want to emphasize, however, is that the degree of such prophylaxis can be excessive, and it is worth considering the extent to which the severe slippery-slope concerns that have driven the theoretical development of First Amendment doctrine—the same sorts of concerns that might be raised against my proposed approach—actually hold true.

C. EXCESSIVE JUDICIAL DISCRETION IN INTERMEDIATE SCRUTINY ANALYSIS

Similarly, one might argue that even if the scope of the rule’s application could be effectively cabined, intermediate scrutiny analysis itself is simply too open-ended and discretionary in nature, and it will produce excessive unpredictability, inconsistency, and potential for judicial abuse. As stated above, intermediate scrutiny is, at its heart, a balancing mode of analysis. And as Bhagwat has argued, “intermediate scrutiny doctrine, as articulated by the Supreme Court, does not provide any guidance on how such assessments should be made, thereby eliminating any hope that the Court can assert control over (and consistency among) appellate courts applying its precedents.”²⁵⁹ This open-endedness, he argues, has led to a failure amongst lower courts to systematically account for relevant factors such as the particular social value and regulatory needs associated with different types of speech, causing courts to “systematically overprotect[] speech in some contexts and underprotect[] it in others.”²⁶⁰

The amorphous nature of the intermediate scrutiny standard might thus raise the same broad concerns generally associated with balancing

256. Richards, *supra* note 251, at 1179. Richards made this observation specifically with respect to the issue of privacy, which was the focus of his article. *See id.*

257. *Id.* (“It is certainly difficult to predict future events based upon trends from the past.”).

258. *See* Blasi, *supra* note 6, at 449–50.

259. Bhagwat, *supra* note 61, at 823.

260. *Id.* at 824.

approaches. In the speech context, such an open, discretionary standard might lead to unpredictable and inconsistent results, as well as intentional or unintentional errors in judicial judgment, all of which may produce substantial chilling effects on protected speech. These are certainly legitimate and important concerns to be considered any time some form of balancing is proposed within the First Amendment context. But there are, I think, strong reasons to believe that these concerns can be mitigated within my proposed framework.

As an initial matter, the magnitude of these concerns would be directly related to the scope of application of the intermediate scrutiny standard—that is, the breadth of speech deemed to be middle-value in nature. Thus, to the extent we are concerned with granting courts the sort of discretion inherent to intermediate scrutiny analysis, we might choose to define the categories of high-value speech extremely broadly, leaving only a very narrow swath of residual middle-value speech.²⁶¹ Under such a doctrinal structure, courts would apply the open-ended intermediate scrutiny standard in only a limited subset of middle-value speech cases, which would mitigate any concerns associated with excessive judicial discretion. And as I noted above, such a structure would not blunt the efficacy of my proposal, since the default nature of the intermediate scrutiny standard would still provide courts a more palatable doctrinal option in cases where applying strict scrutiny would be highly anomalous or dissonant.²⁶²

Furthermore, the sort of intermediate scrutiny analysis I envision need not—and should not—be a form of ad hoc, case-by-case balancing. One of the great lessons gleaned from the development of modern First Amendment doctrine is the practical necessity of a broader frame of reference when balancing speech value against harm, most notably reflected in the Court’s adoption of categorical balancing rather than ad hoc balancing in evaluating low-value speech.²⁶³ Such an approach produces a more manageable and administrable doctrinal regime that mitigates the unpredictability, inconsistency, and potential for abuse associated with ad hoc balancing.

261. As discussed above, this might be accomplished by adopting a strong general presumption in favor of broad characterizations of high-value speech categories. *See supra* text accompanying notes 246–47.

262. *See supra* Part IV.A.

263. *See* Schauer, *supra* note 8, at 287 (describing the Court’s “desire to preserve long-run First Amendment values by looking not at isolated instances of speech but at broad categories”); Stone, *supra* note 31, at 275–76 (describing the shortcomings of ad hoc balancing and the Court’s rejection of such an approach); *id.* at 283–85 (describing the Court’s adoption of a categorical balancing approach).

Thus, while a broad intermediate-scrutiny standard might apply to all middle-value speech in the abstract, this standard should evolve to apply in a more specific, tailored manner in different contexts. That is, different variations and more concrete standards should emerge based on the type of speech involved, the particular method of regulation used, and so forth. This echoes Bhagwat's overarching "call for disaggregation" in the intermediate scrutiny standard as applied in speech cases.²⁶⁴ As Bhagwat observed, the more that courts apply a broad, one-size-fits-all intermediate scrutiny standard to a wide variety of different First Amendment problems, the higher the likelihood that the standard devolves into a vague and open-ended "doctrinal mush."²⁶⁵

In the context of middle-value speech, some degree of doctrinal partitioning within the broad intermediate scrutiny framework is sensible, given the varied and eclectic nature of the speech that can fall within this broad classification.²⁶⁶ For example, truthful commercial speech, public disclosures of embarrassing private facts, and false statements of fact might all sensibly be deemed categories of middle-value speech, but the underlying bases for classifying each category as such are distinct.²⁶⁷ And as Bhagwat noted, this segmentation within the broad intermediate scrutiny standard would have salutary effects on doctrinal transparency, as it would lead courts to "articulate standards regarding what kinds of speech, and what kinds of regulatory interests, should be accorded more or less weight (or indeed, any weight at all) in each of the different areas of law."²⁶⁸ In the end, this is simply the sort of common law development that is *de rigueur* in developing practical doctrine within First Amendment jurisprudence—which, after all, is ultimately built on a sparse textual provision with a fuzzy historical record.²⁶⁹ Although the starting point for evaluating middle-value speech may be the general intermediate scrutiny standard, more tailored standards applicable to specific subsets of such speech can

264. Bhagwat, *supra* note 61, at 824–29. In his article, Bhagwat focuses broadly on all applications of intermediate scrutiny in First Amendment doctrine, not just within the context of middle-value speech cases. *Id.* at 784–85.

265. *Id.* at 825.

266. See Schauer, *supra* note 7, at 286 (“[N]ot all forms of speech are necessarily amenable to the same analytic approach.”).

267. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (articulating anti-paternalism rationale for protecting truthful commercial speech); Norton, *supra* note 91, at 163–85 (distinguishing amongst different types of lies and describing the complex ways in which they relate to core First Amendment values); Richards, *supra* note 251, at 1181–1210 (dividing privacy rules into four categories and outlining how each category raises a distinct set of analytical questions).

268. Bhagwat, *supra* note 61, at 825.

269. Han, *supra* note 81, at 119.

and should emerge as courts accumulate experience and data in evaluating a wide range of cases.²⁷⁰

That being said, even if implemented in the way I propose, my approach may well sacrifice some predictability and consistency in the doctrine, at least on a formal level. But that, of course, is the basic tradeoff between rule-like approaches and standard-like approaches.²⁷¹ The more standard-like balancing mode of intermediate scrutiny, by its very nature, offers more case-by-case equity and flexibility at the cost of predictability and consistency.²⁷² And my strong sense is that the gains associated with the greater flexibility and openness of this standard would offset any losses associated with diminished administrability.

As I discussed above, courts are already in the practice of ignoring the formally applicable strict scrutiny default rule in difficult middle-value speech cases, choosing instead to distort doctrine to reach their desired results.²⁷³ Thus, there is little value to be lost in introducing intermediate scrutiny to these cases. My proposal merely seeks to bring the value-based judgments underlying these existing doctrinal distortions out into the open, which is certainly a superior state of affairs to the current one.²⁷⁴

To be sure, my proposals in this section assume some capacity on the part of the Supreme Court to institute meaningful clarity and uniformity within the doctrine: to articulate clear and direct judgments of speech value and harm in different circumstances, to translate such judgments into practically administrable doctrine, and to police lower courts that are making these same sorts of determinations. In practice, however, this might ultimately look messy and unwieldy. But even if that is the case, messy, unpredictable, and transparent is certainly better than messy, unpredictable,

270. See Schauer, *supra* note 8, at 310 (“As time goes on situations repeat themselves. We are then more able to discern patterns, and these patterns enable us to group recurring features into legal rules and categories. The more we have seen, the less likely we are to be surprised, and open-ended flexibility becomes progressively less important.”). Since I am advocating for an approach that would tailor the intermediate scrutiny standard more precisely based on different subsets of speech, one might question why I do not favor an approach that calls for courts to carve out specific categories of middle-value speech rather than high-value speech. As I argue above, however, the benefits of my proposal rest on making some form of intermediate scrutiny the *default* standard, since it opens up the path to more nuanced and forthright analyses in middle-value speech cases. See *supra* Part III.

271. See Han, *supra* note 12, at 367–70.

272. See *supra* text accompanying notes 67–68.

273. See *supra* Part II.D.

274. See Han, *supra* note 12, at 422. Cf. Bhagwat, *supra* note 97, at 54–57 (proposing that intermediate scrutiny apply to regulation of “noncore factual details” because this would “require judges to make [speech value] judgments explicit and to defend them in the course of announcing their decisions”).

and opaque, which is the current state of affairs.²⁷⁵

D. LOOSENING CONSTRAINTS ON LOCAL OFFICIALS

Perhaps my proposal would undermine efforts to constrain not just courts and legislatures, but also what Seth Kreimer calls “village tyrants”—the “local officials and street level bureaucrats” who make speech-related enforcement decisions against “village Hampdens,” or local dissidents.²⁷⁶ Kreimer observed that these sorts of local enforcement cases represent a significant proportion of instances in which the content-neutrality rules are actually applied, yet they rarely reach court at all, let alone the Supreme Court.²⁷⁷ As a result, he argues that the current, highly prophylactic two-tier approach is necessary to adequately protect local dissidents, since such an approach “is well adapted to counterbalance predictable cognitive biases that warp judgment when potential village tyrant confronts aspiring village Hampden,” and “[i]t is easy enough to write an administrative manual that prohibits treating speakers differently because of what they say.”²⁷⁸

My proposed approach, however, would keep any such constraints largely intact. As an initial matter, the actual degree of formal constraint that the current doctrine imposes on village tyrants might be limited, given the substantial doctrinal distortion associated with the current framework.²⁷⁹ But in any case, the onerous strict scrutiny standard would still apply to all high-value speech, which would include the broad categories of speech most likely to be at the center of local disputes between village tyrants and village Hampdens, such as political speech, truthful news reporting, or artistic expression. Strict scrutiny would also still apply to all viewpoint-based restrictions of middle-value speech.²⁸⁰ Thus, in these vital contexts, village tyrants would be constrained by the same strong and clear rules.

This is not to say that such constraints will necessarily remain just as

275. See Bhagwat, *supra* note 66, at 1474–75 (observing that “the current rule is simply not working” and that “[t]o frankly acknowledge what is already going on . . . has the advantage of honesty and consistency”).

276. Kreimer, *supra* note 7, at 1264, 1282 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

277. *Id.* at 1304.

278. *Id.* at 1316.

279. That is, the constraining power of the default strict scrutiny rule on local officials may be weakened to the extent that courts regularly distort the rule to uphold speech regulations in cases where the rule does not seem to fit. If local officials know that courts only apply the default rule selectively, they may not be effectively deterred from suppressing speech.

280. See *supra* text accompanying notes 230–31.

robust under my approach; village tyrants may well perceive incrementally greater opportunities to suppress speech given the vagaries associated with categorizing high-value speech. But these increased opportunities for speech suppression would presumably arise not in the most vital cases dealing with clearly high-value speech, but rather in borderline cases dealing with middle-value speech or speech at the fringes of the high-value speech categories. Furthermore, as I discussed above, this sort of discretion produced by vagueness can be mitigated *ex ante* by adopting doctrinal presumptions, and any risks associated with any incremental discretion afforded to courts or local officials under my proposal are likely to be outweighed by the benefits of a better-fitting, less distorted, and more transparent doctrine.²⁸¹

E. THE PRACTICAL LIKELIHOOD THAT COURTS WILL ADOPT THE APPROACH

On its face, my approach might appear somewhat radical. After all, the default rule of strict scrutiny has been entrenched for well over forty years, and courts have applied the rule—or at least paid lip service to it—on countless occasions. So even if one were to agree with my proposed approach, how realistic is it to expect that courts would adopt it?

My proposal, however, is far less radical than it may appear. The broad idea that there are gradations of speech value beyond the binary low-value/high-value framework is ingrained throughout First Amendment jurisprudence. The Court's treatment of truthful commercial speech as a form of middle-value speech subject to intermediate scrutiny is the most obvious example of this. But beyond that, the Court has often singled out political speech as uniquely valuable speech that resides at the core of First Amendment protection;²⁸² similarly, it has explicitly recognized, in various contexts, that speech on matters of public concern carries greater constitutional value than speech on matters of private concern.²⁸³ Thus, my proposal can be seen as a means of capturing and formalizing basic

281. See *supra* text accompanying notes 246–47.

282. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)) (“Political speech, of course, is ‘at the core of what the First Amendment is designed to protect.’”); *Boos v. Barry*, 485 U.S. 312, 318 (1988) (observing that the Court has “consistently commented on the central importance of protecting speech on public issues”).

283. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (observing that while “‘speech on matters of public concern’ . . . is at the heart of the First Amendment's protection, . . . ‘not all speech is of equal First Amendment importance’ . . . and where matters of purely private significance are at issue, First Amendment protections are often less rigorous”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (plurality opinion) (observing that “speech on matters of purely private concern is of less First Amendment concern” than “speech on public issues”).

intuitions regarding gradations of speech value that the Court has already recognized to a significant extent.

Furthermore, as I discussed above, courts have often found ways to distort the existing doctrinal framework to avoid the ramifications of the strict scrutiny default rule.²⁸⁴ So on a practical level, my approach does not represent any sort of radical change in the doctrine. It merely involves openly recognizing and formalizing something that courts have already been doing implicitly. In other words, courts have *already* effectively recognized middle-value speech cases and subjected them to special treatment distinct from cases dealing with clearly high-value speech; they have just done so *sub rosa*.

Indeed, there appears to be a substantial appetite amongst some members of the current Court to revise the traditional default rule of strict scrutiny.²⁸⁵ Justice Breyer has long been highly vocal in his displeasure with a rigid strict scrutiny framework²⁸⁶—for example, in his opinion in *Reed*, he argued that “content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny.”²⁸⁷ And in recent cases, both Justice Ginsburg and Justice Kagan have similarly evinced an inclination to soften the traditional rule: in *Williams-Yulee*, Justice Ginsburg argued that strict scrutiny should not apply to the clearly content-based Florida Bar rule in question,²⁸⁸ and Justice Kagan rejected the application of strict scrutiny in *Reed*, observing that “[w]e can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.”²⁸⁹

Thus, my proposal is not a radical departure from what courts have already been doing or from the Court’s existing approach to questions of speech value in other doctrinal contexts, and it reflects the same frustrations with the current strict scrutiny default rule shared by a number of Justices currently on the Court. So while it might perhaps be unrealistic to expect the Court to, say, suddenly adopt this exact proposal in one fell swoop, it seems at least plausible to envision a gradual recognition by a

284. See *supra* Part II.D.1.

285. See Han, *supra* note 12, at 425.

286. See Gewirtz, *supra* note 205, at 189–98 (describing Justice Breyer’s rejection of conventional First Amendment doctrine in favor of a more flexible proportionality analysis).

287. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring in the judgment).

288. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673–74 (2015) (Ginsburg, J., concurring in part and concurring in the judgment).

289. *Reed*, 135 S. Ct. at 2238 (Kagan, J., concurring in the judgment).

majority of the Court, perhaps over the span of many cases, that the traditional strict scrutiny default rule is simply too ill-fitting to function as the backbone of a workable First Amendment doctrinal framework. And should the Court ever arrive at this moment of recognition, my proposed approach would represent a relatively simple and broadly effective means for the Court to address the problems associated with the current doctrine.

V. CONCLUSION

My proposal here is not rooted in any deep-seated sense that the theoretical underpinnings of the existing doctrinal framework are flawed or unpersuasive. The strict scrutiny default rule is easy to administer and highly speech-protective, and as a theoretical matter, this approach makes sense within the First Amendment context. Theory, however, often translates imperfectly to reality. The benefits of predictability, consistency, and judicial constraint associated with the current rule extend only insofar as courts actually adhere to it, and as I have discussed, courts—when confronted with the significant strain produced by a lack of fit between the value of speech and the onerous strict scrutiny rule—have often chosen to distort doctrine to avoid application of the default rule.

Nor does my proposal reflect some underlying belief that the current framework was necessarily infirm from its inception. The strict scrutiny default rule made sense within the historical context in which it was developed—an era dominated by issues surrounding government regulation of the highest-value ideological speech, which stands at the core of the varying theoretical rationales underlying the First Amendment’s protection of free speech. But the present-day scope of the First Amendment’s coverage is far more expansive and eclectic than what could have been imagined in the formative years of modern First Amendment jurisprudence, particularly as rapid technological and cultural changes raise novel issues that are far afield from the regulation of core ideological speech.

My proposed approach simply reflects the practical realities of the First Amendment we actually have today. It reflects the lessons we have learned from courts’ actual practices in applying (and misapplying) the existing doctrinal framework, and it accounts for the present reality of a far more expansive First Amendment jurisprudence—one that must be better equipped to navigate the significant uncharted realms of potential middle-value speech that courts will inevitably encounter in the near future.

