https://doi.org/10.1162/daed_a_02098

racies. A series of recent cases have strictly construed the Free Speech Clause to strike various regulations. The predominant framework of analysis strengthens the Court's hand at the expense of legislative initiative. As the power of the judiciary has waxed, the ability of legislators to pass laws responsive to constituents' demands has waned. The Court's rigid free speech doctrine creates a model of governance that is "incapable of responding to new conditions and challenges."[1]

Judicial formalism lacks transparency, which is essential to litigation and appeal. This essay argues for greater judicial clarity in balancing competing interests and in evaluating surrounding circumstances. It proposes an analytical approach for courts to undertake when assessing First Amendment challenges to traditional government functions. Rather than dismissing lawmakers' concerns, the Court should evaluate whether a law interferes with self-expression, civic participation, or factual assessment. A balance is needed for courts to reflect on speech concerns, how well the law fits with regulatory aims, and alternatives for communication.

Before explaining under what circumstances the Supreme Court invokes the First Amendment to strike regulations, a few words are in order about baseline principles. At its core, the constitutional protection of speech reflects the individual right to express ideas, participate in politics, and gather information. The First Amendment restrains government from imposing autocratic orthodoxy. It secures the marketplace of ideas as an open forum for exchanging ideas that make their way into politics, private life, and education. The flow of information, unencumbered by onerous regulations, is critical to everything from vigorous engagement in federal and local politics to the recitation of poetry.

Determining what communications the First Amendment covers cannot be gleaned from the text alone. Its written terms only prevent Congress from meddling in free expression, but that cannot be its full meaning. Representative democracy could not survive were the executive and judicial branches allowed to censor speakers indiscriminately. Moreover, the prohibition against Congress "abridging the freedom of speech" says nothing of other modes of protected communications that include artistic symbolism, meaningful gestures, expositive gesticulations, and guttural sounds.

Neither do the views of the Bill of Rights' framers provide enough information to construct more than a prohibition against restraints prior to publications, parliamentary privileges, or procedural fairness. However, the historic lens does not suffice to evaluate laws dealing with modern communication tools such as broadcast television, the internet, telephone, or even sound equipment.

Almost all human activities that are subject to laws involve some implicit or explicit communications.[2] The judiciary serves as a bulwark against policies that infringe on the Bill of Rights or Due Process Clause. It determines when speech-protective rules arise and what human activities are outside the range of subjects

that bene t from constitutional status. Speech that enjoys the greatest constitutional safeguards concerns personal, associational, and social matters.

The Court's early forays into free speech appertained to cases in which defendants were charged with inciting opposition to America's role in the First World War and to the administration of conscription. On the whole, during the early decades of the twentieth century, the Court upheld convictions of persons who decried U.S. foreign policy or attempted to interfere with the draft. In those years, judicial opinions tended to be deferential to legislative efforts against the perceived spread of communism. A consensus among American courts and scholars has long recognized that early-twentieth-century cases wrongly upheld government prosecution of nonviolent members of subversive organizations.

The Warren Court altered free speech doctrine in favor of underdogs and politically disfavored groups. For instance, the Supreme Court held that a vague and selectively enforced state law could not prevent the National Association for the Advancement of Colored People (NAACP) from soliciting clients to its civil rights legal practice.[3] The Court began to rely on a developing standard of review, which came to be known as *strict scrutiny*, requiring the prosecution to prove that there was a compelling government reason for suppressing politically disfavored speech and that the law was narrowly tailored to that end.co.5tm [(The)Tm [(strict 14ur)-c

from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content."[5] Yet the Burger Court, just as its predecessor, articulated no overarching doctrine to determine whether a law with only an incidental effect on speech, such as a prohibition against destroying a military draft card, or one that restricts unprotected expression, such as obscenity, falls outside the coverage of the First Amendment.

Despite this similarity, legal scholar Thomas Emerson goes too far in saying that the Burger Court made "little change in the position" taken by the Warren Court as to the role of free expression in national life.[6] By the mid-1970s, special interest groups opportunistically invoked strict scrutiny to challenge ordinary regulations. The First Amendment then became an effective tool for challenging legal restrictions on political expenditures that were meant to prevent corruption and the appearance of corruption. Reliance on the First Amendment as a deregulatory instrument has reached new heights under the Roberts Court. The recent pattern of invoking the Free Speech Clause in opinions that expand judicial authority, Justice Kagan has said, resembles "black-robed rulers overriding citizens' choices."[7]

At its core, the First Amendment prevents government from imposing punishments on persons because of their abstract or concrete ideas. By mandating official neutrality, the Constitution prevents the imposition of any secular creed on private persons. Its roots are planted in anti-autocratic statecraft born of a revolution against British monarchy. The First Amendment prevents government actors from censoring discussions about ideas, topics, and perspectives. Those principles preserve autonomy, political self-determination, and science. Difference exists, as writes First Amendment scholar Geoffrey Stone, between the suppression of political perspectives and the neutral enforcement of "legitimate governmental interests" that do not implicate "first amendment interests." That dichotomy assures that sensible regulatory responses are subject to "content-neutral balancing" rather than the most rigorous judicial review.[8]

In recent years, however, the Roberts Court has not followed such a fine distinction. It has expanded the array of regulations subject to the content-neutral, strict scrutiny standard of review. Corporate litigants increasingly invoke the First Amendment in lawsuits that seek to strike legislation that so much as brushes up against expression, such as pricing notifications on credit card sales.[9]

Several opinions form a corpus of First Amendment jurisprudence that consistently adopts distinctly deregulatory interpretations. Those holdings typically rely on strict construction of the Free Speech Clause and often lack sufficient nuance to differentiate protected speech from reasonable regulations on workplace harassment, consumer disclosure, and medical patient privacy. Some justices wish to broaden the reach of the First Amendment still further, scarcely distinguishing commercial advertisements from scientific knowledge, pricing notifi-

cations from philosophic propositions, and signage ordinances from political debates. In its benighted hands, the Supreme Court recently struck down states' laws that required pregnancy crisis centers to disclose public health information and charitable organizations to identify their top donors.[10]

The current Court has taken it in hand to invalidate economic, safety, and health regulations. These decisions have augmented judicial authority while thwarting states' capabilities to exercise traditional powers. The danger is one of selective decision-making, what legal theorist Pierre Schlag points out incentivizes activist judges to prepackage "justi cations for particular outcomes."[11] Lack of contextu alization, Justice Stephen Breyer rightly noted in a dissenting opinion, "threatens signi cant judicial interference with widely accepted regulatory activity."[12] Litigants have strategically taken to attacking ordinary regulations by relying on an increasingly expansive de nition of what quali es for First Amendment protection.

Justice Antonin Scalia set a pattern for strict categorical formalism with his reasoning in *R.A.V. v. St. Paul*, which found unconstitutional a vaguely drafted cross-burning ordinance. More important than that speci c holding was Scalia's use of the strict scrutiny standard for all content and viewpoint regulation, except for certain categories of low-value speech. The list of unprotected expressions, Scalia claimed, already existed when the Bill of Rights was rati ed in 1791.[13]

Upon examination, however, his claim to the mantle of history and tradition turns out to be spurious. Current historical categories, as the late legal scholar and advocate Steven Shiffrin pointed out, "are entirely different than at the time of the framing; indeed their most recent de nitions have been re ned in a line of cases beginning in the late 1960s."[14] Similarly, legal scholar Toni Massaro questions the possibility of compiling any de nitive enumeration of historical or traditional exceptions to free speech protections.[15] The Court ignored criticism and self-assuredly plowed on with a doctrine of its creation.[16] Even on his originalist terms, Scalia's claim is demonstrably false. Among the categories he listed, two–obscenity and " ghting words"–were judicial constructs of the mid-twentieth century, not categories that existed at the founding of the nation.[17] In the words of Justice Amy Coney Barrett, "tradition is not an end in itself. . . . Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is itself a judge-made test."[18]

Chief Justice John Roberts, the author of the majority opinion in *United States v. Stevens*, reiterated Scalia's historically groundless claim that all legitimate content-based restrictions of speech were xed in 1791. As Scalia before him, Roberts made no effort to review any primary or secondary sources to substantiate this histori

To add further force to his vacuously originalist claim, the following year Justice Scalia again relied on it in Brown v. Entertainment Merchants Ass'n, where he adopted strict scrutiny to reject the State of California's policy of requiring children to get parental permission before buying or renting violent video games. Outside a few forms of speech that had been unprotected from the founding–Scalia listed obscenity, incitement, and fighting words–no regulation was likely to survive rigorous judicial scrutiny. Without reference to any primary source, historical treatise, monograph, article, or even pamphlet, Scalia grandiloquently pronounced that the First Amendment reflected the "judgment [of] the American people," dating back to the year of its drafting.[20]

Other cases likewise picked up on Scalia's originalist conjecture. Contrary to the Court's claims, though, obscenity was a doctrine established in 1973, the current incitement test set in 1969, and "fighting words" was a concept that entered First Amendment jurisprudence in 1942.[21] These remain highly contested doctrines that emerged during the twentieth century through Supreme Court opinions rather than the framers' constitutional vision.

When coupled with the strict scrutiny test for content neutrality, the Court's historical inaccuracy about the early republic bolsters the judicial branch's ability to find laws not to be grounded in a compec y thr30.2 Tm (-)Tj ET EMC /P <</Lang (en-U

tions pointing to church services. What is needed is a more contextual approach that requires judges to consider both the importance of the asserted speech rights and the fit of public policy to reasonable policies. Rather than hard and fast rules, judicially created categories should be "rules of thumb."[23] As things stand, the Court has created formulaic categories that oversimplify the meaning of the First Amendment and grant the judiciary excessive authority to thwart legislative policy. Moreover, review of whether and to what extent laws impact free speech rights would be more in keeping with older precedents that established that the First Amendment is tied to ideas, politics, and information, not to laws that peripherally involve communications.

Opportunistic reliance on the First Amendment to challenge legislation extends well beyond commercial regulations. The Supreme Court continues to invoke it to thwart federal and state efforts to limit corruption and the appearance of corruption from the enormous money flowing into political campaigns.[24] The Court's recurrent equation of money with speech and protection of an unlimited amount of expenditures provided Donald Trump with 20 percent of his financing for a successful run for presidential office in 2016.[25] The Court's refusal to defer to laws that limit money in bloated election campaigns prevents lawmakers from enforcing statutes designed to level the playing field of election campaigns. As a result, plutocratic wealth (personal and corporate) has flooded into American politics.

Even accepting the need to scrutinize closely laws that limit campaign contributions and expenditures, compelling legislative interests exist for regulating government administration of elections. As professor of civil liberties Burt Neuborne points out, "Fostering equal political participation is a sufficiently compelling interest to justify some regulation of campaign spending."[26] The Court's holdings, to the contrary, restrain election reforms under a First Amendment doctrine that views money as speech itself, not simply as facilitating speech.

Neither does judicial deregulation end with natural people. The Court's libertarian streak affects the most critical aspects of representative democracy. The majority in Citizens United v. Federal Election Commission concluded that corporations, even though they are artificial persons who can neither be candidates for public office nor vote in elections, have a First Amendment right to expend general treasury funds in support of political candidates who are more likely to favor their businesses' bottom lines.[27] The holding relied on strict scrutiny. The majority's insubstantial understanding of history may explain why it protected corporations to a degree unfathomable to the framers.[28]

The strict scrutiny test has come to be a tool for asserting judicial authority over legislative and administrative policy. The adoption of strict scrutiny often describes no more than the judicial conclusion that a regulation is invalid.[29] The increasing use of the Free Speech Clause to strike regulations extends beyond matters of political self-deliberation to speech that proposes commercial exchange.

Returning to the issue of commercial speech, in the mid-1970s, the Court swerved away from its earlier stance that the First Amendment does not cover "purely commercial speech" and recognized truthful commercial speech to be protected under the Free Speech Clause. From the inception of the doctrine, though, Justice William Rehnquist disagreed with the decision to augment judicial authority to strike advertising regulations, which he would have left outside the purview of the Constitution. Against his continued dissent, in 1980, the Court defined a test to review legal and nonmisleading commercial speech matters. The test requires government to demonstrate that the law in question directly advances a substantial government interest without being unnecessarily extensive in scope.[30]

The Court's rationale for finding that commercial speech enjoys at least limited First Amendment value has been tied ever since its nascence to the rationale that advertisement informs ordinary people through the marketplace of ideas. In more recent cases, however, the majority has shifted the focus of free speech analysis from consumer concerns to those of businesses. Justice Breyer, like Rehnquist before him, regarded the deregulatory direction in the commercial speech area to be as retrogressive as the misguided period during the early twentieth century when the Court regularly struck down health and welfare regulations.[31]

In the recent *Expressions Hair Design v. Schneiderman* case, the Court found that a New York law that regulated surcharges on products raised a First Amendment claim. Merchants asserted that the law forbade them from choosing how to communicate charges. The Court found that the statute was unconstitutional, even though the law was content and viewpoint neutral. The State's legislative aim was to preserve consumer choice. Merchants were neither censored nor were they required to accept some orthodox government perspective. The State statute expurgated no information; neither did it suppress dissent, deliberation, or free thought; nor did it impose state orthodoxy. Rather than treat it as a neutral economic or pricing regulation designed to help customers select their method of payment, the Court found the law interfered with merchants' speech.[32]

The pattern of commercial law deregulation under the auspice of the Free Speech Clause extends far beyond *Expressions Hair Design*. The Court's encroachment on traditional legislative authority is also evident in *Sorrell v. IMS Health, Inc.*, in which the majority found a state privacy protection on confidential medical information to violate the First Amendment. A Vermont law forbade pharmacies to sell prescriber information. Pharmaceutical companies purchased those records from data brokers and used them strategically to influence physicians with a history of prescribing low-cost or generic prescriptions.

the corporate marketing strategy to be a form of "speech" that warranted height ened scrutiny. However, it gave no serious weight to prescribers' and patients' in terests in anonymity. Free speech became a categorical norm to the Court com pared to which privacy apparently did not even warrant substantive consideration.

Moreover, as several legal scholars, including Martin Redish and Julie Cohen, have pointed out, the *Sorrell* Court indicated a future willingness to level the free speech value of commercial speech and any other content-based communica tions, be it political or artistic.[34] This again touches on the approach taken in *Reed* of subjecting all content-based regulation to strict scrutiny.

Scholar and activist Shoshana Zuboff characterizes the Court's deregulato ry approach as " ying the banner of 'private property' and 'freedom of contract,' much as surveillance capitalists march under the ag of freedom of speech." The approach taken risks the "con ation of industry regulation with 'tyranny' and 'au thoritarianism.'"[35] As during the *Lochner* era, the *Sorrell* Court relied on freedom of contract–entered upon by pharmacies that mine data and corporate pharma ceutical purchasers of the information–to undermine consumer regulation. *Sorrell* weaved deregulatory analysis into a doctrine that lacks interpretive shading and sti es legislative initiative at a time of exponentially increasing commercial exchange in digital data. The Court has added confusion to an already turbid eld of law by asserting, in cases such as *R.A.V.* and *Reed*, that strict scrutiny applies to all laws that target communicative content except a few judicially created "low-value" cat egories. The Court's absolutist-sounding doctrine creates a litigation environment that is rife for exploitation by corporations challenging economic regulations and politicians interested in deregulating campaign expenditures and contributions.

Opportunistic litigants recognize the exibility of a doctrine that, while it claims to be formal, in practice empowers judges to reject government interests in health care and collective bargaining. Relying on overly simpli ed categories does not suf ce to contextualize challenges to regulations that affect speech. The Court's approach fails to explain why a variety of content-speci c laws remain constitutional, ranging from con dential medical recordkeeping to a complex ar ray of disclosure statements concerning securities transactions. Neither does the Court's determinative historical method, which purports to have its roots at the nation's founding, articulate a usable standard.

The meaning of free speech to ordinary people living in 1791 is relevant but unlikely to help us resolve modern questions about communications over the internet, electronic balloting, or broadcasting. We've already seen that Supreme Court claims that free speech formalism is tied to the nation's founding are suspect.

Historical evidence does not bear out the Court's claim that the categorical rule of First Amendment construction has ancient pedigree. The founding-gener

ation's record was mixed. It contained lofty statements about natural rights, but also a record of political censorship. At the time of the Revolution, free speech had a narrower meaning than it enjoys today. Neither were the founders' sentiments on the subject consistent, clear, or pertinent to every case and controversy challenging a law on First Amendment grounds. Modern dilemmas about the regulation of expressive content arising from AI, social media, public education, corporate disclosure statements, and telemarking require judges to rely on contemporary contexts, not the sensibilities of men who had not an inkling about those topics when they proposed and ratified the First Amendment.

History alone cannot resolve contemporary free speech issues. Many scholars, for instance, believe the framers understood freedom of the press to mean nothing other than the liberty to publish without prior restraint.[36] Punishment after publication was permitted. Others think of free speech at the founding in broader terms. They turn to Thomas Jefferson's and James Madison's opposition to the infamous Sedition Act of 1798 to draw the inference that the framers opposed political censorship.

In truth, the record is mixed at best. There was certainly a tradition, dating prior to the Revolution, that regarded speech to be a natural right. Colonists were born of a tradition that considered public debate about matters of politics and criticism of rulers to be among the most important privileges of citizenship. The Third Marquess of Huntly, for example, regarded political dissent to be an ancestral right that predated the first English Civil War. The right to speech protected Englishmen's ability to express opinions without prior penalty for engaging ideological opponents with thrusts and parries. A Federalist jurist and the first chief justice of the Supreme Court, John Jay, asserted that citizens are free to "think and speak our Sentiments."[37]

The same ideal of open debate for representative governance informed state guarantees of free speech. In 1776, the same year that the Second Continental Congress adopted the Declaration of Independence, the Pennsylvania Constitution recognized that "the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." The reference to the people's sovereign place atop government indicated that ordinary citizens enjoyed a similar privilege of voicing their views about matters of public concerns as did legislators expostulating arguments in the heat of debate.[38]

Even before adoption of the First Amendment into the Constitution, several states secured the people's right to express "sentiments" through expressive channels, especially via the press, and to thereby engage in the controversial deliberations about American democracy.[39] A rare point of agreement between American Revolutionaries and British Loyalists was a sentiment voiced by the Loyalist Samuel Stearn in a column that appeared in the *Philadelphia Magazine* in 1791. "That

the freedom of speech and the liberty of the press are the natural rights of every man, providing he doth not injury himself or others by his conversation or publications."[40] The early history of the Republic indicates widespread recognition that representative democracy cannot function without people enjoying the security to articulate views orally, in print, or pictorially.[41]

That principled conviction, however, did not halt Federalists from adopting the Sedition Act in order to suppress Republican opposition to President John Adams's administration. The Court's recent claim that the framers believed all manner of political speech to be protected outside of a few categories existing in 1791 is belied by Congress's enactment of a law just seven years later to stifle political debate. The Sedition Act criminalized "false, scandalous and malicious writing or writings against the government of the United States." Ever since Jefferson's presidency, when he pardoned fellow Republicans who had been convicted under the Act, that law has been understood to have been a mistake of historic magnitude. The passage of the statute, its subsequent enforcement by the Adams administration, and its later repudiation led the Supreme Court in 1964 to conclude that "the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[42]

The differing strands of thought about free speech at the time of the nation's founding render the framers at best inconclusive guides, not the determinate sections that Justice Scalia envisioned in *R.A.V.*[43] As we have seen, the Roberts Court has repeated and compounded that erroneous rendition of history.

Many questions about the meaning of free speech come down to context and determinations of the value of speech for personal, associational, and informational purposes. The most stringent protections are reserved for communications with "serious literary, artistic, political, or scientific value."[44] That affirmative statement is matched by its negative formulation: some utterances play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[45] History is a starting point of interpretation, but its mischaracterization has become an instrument of deregulation.

The Roberts Court's approach to free speech restrictions purports to recognize only historical exceptions to the otherwise absolutist-sounding rule against content-based regulations. Its interpretive rhetoric claims an ancient pedigree dating back to 1791. Upon closer examination, however, the list of categories is not grounded in core principles of the First Amendment, but a patchwork of doctrines that define low-value speech, such as incitement and obscenity.

What strict formalism lacks by way of judicial rigor it makes up for with overgeneralizations and underexamined conclusions. The Court invokes it to strike a wide variety of ordinary laws without closely reviewing whether the regulated

communications advance any of the values commonly associated with free speech. The Court's dismissiveness of ordinary legislative priorities continues along a path that Horwitz characterizes as "a Lochnerization of the First Amendment."

Cases with political, economic, and social implications require a balance of constitutional concerns. For example, in cases like Sorrell, free speech and privacy issues should be understood as two weighty constitutional interests. The strict scrutiny test in free speech law should not be a bludgeon for judicial activism. Rather, judicial reasoning should be consistent with the First Amendment's core values of personal, political, and educational autonomy. Judicial opinions that categorically thwart social policy will likely be viewed by the public with distrust and uncertainty.

The appropriate role of courts is to determine, decide, compare, analogize, and distinguish the values of free speech and the priorities of challenged regulations. Static tests that are categorical in their approaches are unlikely to provide the context necessary to describe the values at stake in litigation that challenges laws that directly or indirectly affect speech. A formalistic approach leads to result-oriented decisions rather than rationales grounded in First Amendment values of personal speech, self-government, and informational acquisition. Categorical doctrines rely on absolute-sounding tests. We have seen that judicially enumerated categories are neither historical nor particularly effective in providing focused reasoning for adjudicating modern-day claims filtered through an ancient text.

The Roberts Court has taken the First Amendment in a deregulatory direction on matters ranging from campaign financing, collective bargaining, health care information, and charitable disclosure. Opinions too often rely on frameworks that favor corporate interests, wealthy donors, anti-abortion activists, and libertarian causes.[49] Such politically charged judicial decisions increase the difficulty of passing laws pursuant to traditional government functions.

A

[1] See Seila LLC v. CFPB, 140 S. Ct. 2183, 2226 (2020) (Elena Kagan, concurring and dissenting in part, asserting that the unitary theory of executive power commits the Nation to a static version of governance, incapable of responding to new conditions and challenges).

[2] United States v. United Foods, Inc., 533 U.S. 405, 424 (2001) (Nearly every human action that the law affects, and virtually all governmental activity, involves speech).

[3] NAACP v. Button, 371 U.S. 415 (1963).

[4] Bates v. City of Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); New York Times Co. v. Sullivan, 376 U.S. 254, 279 280 (1964) (holding that a showing of actual malice is required in defamation cases brought by public gures about public matters); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (stating that the intentional lie . . . [is] no essential part of any exposition of ideas, quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 [1942]); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757 761 (1985) (plurality opinion, nding that in those defamation cases involving private parties and private matters, the First Amendment does not require proof of a speaker s actual malice); Morton J. Horwitz, The Constitution of Change: Legal Fundamentality Without Fundamentalism, Harvard Law Review 107 (1) (1993): 30, 109; and Presidents Council District 25 v. Community School Board No. 25, 409 U.S. 998, 1000 (1972) (William O. Douglas, dissenting).

[5] Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[6] Thomas I. Emerson, First Amendment Doctrine and the Burger Court, California Law Review 68 (3) (1980): 422.

[7]

315 U.S. 568, 572 (1942). That statement of judicial review is a form of reasoned judgement in which courts engage, especially where there is another constitutional right, such as privacy, in addition to expression at stake in the litigation. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion), overruled on other grounds by Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) (discussing the judicial role in interpreting personal autonomy); and Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (same).

[17] R.A.V. v. City of Saint Paul, Minnesota, 505 U.S. 383.

[18] Vidal v. Elster, 602 U.S. 286, 323–334 (2024) (Amy Coney Barrett, concurring). History and tradition are often mentioned in passing and without elaboration, as in a case decided in 2022 that upheld the speech and free exercise right of a coach to pray at a public-school event. Kennedy v. Bremerton School District, 597 U.S. 507 (2022); and Alexan

[29] See Peter J. Rubin, Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw, University of Pennsylvania Law Review 149 (1) (2000): 1, 3–4 ("Strict scrutiny has become something of a talisman. While some commentators score debating points by identifying those rare cases in which governmental actions have survived it, most have concluded that a judicial determination to apply 'strict scrutiny' is little more than a way to describe the conclusion that a particular governmental action is invalid").

[30] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (overturning Valentine v. Chrestensen, 316 U.S. 52 [1942]); ibid., 783–784, 787 (1976) (William Rehnquist, dissenting); and Central Hudson Gas & Electric Corporation v. Public Service Commission, 447 U.S. 557, 566 (1980).

[31] Sorrell v. IMS Health Inc., 564 U.S. 552, 585 (2011) (Stephen Breyer, dissenting), quoting Central Hudson Gas & Electric Corporation v. Public Service Commission, 447 U.S. 557, 589 (1980) (William Rehnquist, dissenting). The reference to the early twentieth century alludes to jurisprudence named after a case that is representative of an era during which the Supreme Court regularly struck economic and health care regulations based on libertarian reasoning. Lochner v. New York, 198 U.S. 45 (1905). See also Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 260 (1978) ("The Due Process Clause . . . during the heyday of substantive due process largely supplanted the Contract Clause in importance and operated as a potent limitation on government's ability to interfere with economic expectations").

[32] Expressions Hair Design v. Schneiderman, 581 U.S. 37, 48 ("In regulating the communication of prices rather than prices themselves, § 518 regulates speech"). Before Reed, content-neutrality referred to a doctrine that prohibited government from favoring some statement and being hostile to others. Justice Stevens for the Court wrote that "absolute neutrality by the government" is required in respect to content. Young v. American Mini Theatres, Inc., 427 U.S. 50, 67 (1976). Whether a regulation on speech is neutral is determined by whether "the government has adopted it because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[33] Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011). The Court discounted out of hand the state's extensive legislative record that demonstrated that "if prescriber-identifying information were available . . . then detailing would be effective in promoting brand-name drugs that are more expensive and less safe than generic alternatives."

Blackstone, Commentaries on the Laws of England, ed. William G. Hammond (San Francisco: Bancroft-Whitney Co., 1890 [1778]), 189–190 (emphasis added).

[37] George Bishop,

[49] McCutcheon v. FEC, 572 U.S. 185 (2014) (holding the Bipartisan Campaign Reform Act's cumulative aggregation limit to be unconstitutional); Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011) (finding a state's matching campaign scheme to be unconstitutional);