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THE END OF BALANCING? TEXT, HISTORY & TRADITION IN FIRST AMENDMENT SPEECH CASES AFTER *BRUEN*

By Clay Calvert[⊗] & Mary-Rose Papandrea[⊕]

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ABSTRACT

This Article examines the potential impact on First Amendment free-speech jurisprudence of the U.S. Supreme Court's increasing reliance on text, history, and tradition in 2022 decisions such as *New York State Rifle & Pistol Association v. Bruen*. In *Bruen*, the Court embraced a new test for examining Second Amendment cases. It concentrates on whether there is a historical tradition of regulating the conduct in question, and it eliminates any use of constitutionally common means-end standards of review such as strict and intermediate scrutiny. Those two scrutiny standards often guide the Court's free-speech decisions. The *Bruen* majority, however, asserted that its novel Second Amendment test eliminating their usage actually "comports" and "accords with" how the Court protects free-speech rights. This Article initially illustrates how that assertion is partly correct but largely inaccurate. It then explores critical problems that likely would arise were the Court to impose its text, history, and tradition methodology from *Bruen* on First Amendment speech cases. In doing so, the Article addresses how this originalistic approach might affect the continued viability of the Court's actual malice standard in defamation law adopted nearly sixty years ago in *New York Times Co. v. Sullivan*.

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INTRODUCTION

In 2022, the United States Supreme Court held in *New York State Rifle & Pistol Association v. Bruen*[1] that a New York licensing statute restricting public carriage of firearms for self-defense violated the Second Amendment to the U.S. Constitution.[2] In penning the Court's opinion for the six-Justice conservative majority, Justice Clarence Thomas fashioned a new test for discerning when the Second Amendment is violated.[3]

Thomas explained that if the "plain text" of the Second Amendment "covers" the conduct in question, then the conduct is presumptively safeguarded and governmental authority over it is permitted only when a "regulation is consistent with this Nation's historical tradition."[4] Justice Thomas stressed that in determining if a firearm regulation is constitutional, the Court will not apply a constitutionally common means-end test such

[1] 142 S. Ct. 2111 (2022).

[2] The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Second Amendment was incorporated in 2010 through the Fourteenth Amendment Due Process Clause to protect against state laws that restrict an individual's right to possess a handgun in their home for self-defense purposes. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010). In *Bruen*, the Court went further, holding "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Bruen*, 142 S. Ct. at 2122.

[3] *See infra* notes 4–15 and accompanying text (addressing the test).

[4] *Id.* at 2126; *see also id.* at 2129–30 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

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as strict or intermediate scrutiny.[5] Those two standards focus on the strength of the government's interest underlying a regulation and on how carefully crafted the regulation is in serving that interest.[6] Instead of adopting such a methodology, Justice Thomas wrote that the government now must "identify an American tradition justifying" the regulation.[7] That squares with Justice Thomas's long-standing reliance on history to resolve other constitutional issues, including ones affecting the First Amendment

[5] *Id.* at 2129. The notion that means-end tests are constitutionally common is supported by Justice Stephen Breyer's dissent in *Bruen*, where he observed that "beyond the right to freedom of speech, we regularly use means-end scrutiny in cases involving other constitutional provisions." *Id.* at 2176 (Breyer, J., dissenting).

[6] To pass strict scrutiny review, as that standard applies in free-speech cases under the First Amendment, a statute must use "the least restrictive means of achieving a compelling state interest." McCullen v. Coakley, 573 U.S. 464, 478 (2014). *See* United States v. Playboy Ent. Grp., 529 U.S. 803, 813 (2000) (noting that under strict scrutiny, a statute "must be narrowly tailored to promote a compelling Government interest. . . . If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative"). Under intermediate scrutiny, the government must demonstrate an important, significant or substantial interest and that the means chosen to achieve that interest do not burden substantially more speech than is necessary. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017); Holder v. Humanitarian Law Project, 561 U.S. 1, 26–27 (2010). *See also* Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 346 (2022) ("Intermediate scrutiny asks the government to show that the law is narrowly tailored to serve an important government interest. Strict scrutiny, the most demanding method of review, asks whether the challenged law is necessary to effectuate a compelling government interest."); R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 293 (2016) (noting that under intermediate scrutiny, the "government ends" must be "important / significant / substantial," while the means must "not [be] substantially more burdensome than necessary to advance those ends").

[7] *Bruen*, 142 S. Ct. at 2156.

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freedom of speech.[8] It also aligns with Justice Thomas's prominence as an originalist,[9] although originalism has multiple varieties.[10]

[8] The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly 100 years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties governing the actions of state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925). Several examples exist of Justice Thomas's originalist approach to First Amendment free-speech cases. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2059 (2021) (Thomas, J., dissenting) (dissenting from the Court's decision in favor a public school student's First Amendment right to engage in offensive language while off campus, and reasoning that "[a] more searching review reveals that schools historically could discipline students in circumstances like those presented here" and that "the majority entirely ignores the relevant history"); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 835, 839 (2011) (Thomas, J., dissenting) (dissenting from the Court's decision striking down a California statute that restricted minors' access to violent video games, and contending that "the historical evidence here plainly reveals" that "'[t]he freedom of speech,' as originally understood, does not include a right to speak to minors without going through the minors' parents or guardians"); Morse v. Frederick, 551 U.S. 393, 419 (2007) (Thomas, J., concurring) ("In light of the history of American public education, it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools."); *see also* Michael R. Ulrich, *Second Amendment Realism*, 43 CARDOZO L. REV. 1379, 1401 (2022) (describing Justice Thomas as "a fervent proponent of using history"). Justice Thomas's focus on history in cases such as *Mahanoy, Brown* and *Morse* mentioned in this footnote comports with his embrace of originalism when interpreting the U.S. Constitution. *See* Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMMC'N. L. & POL'Y 385, 396 (2012) (noting that Justice Thomas "has embraced originalism as an approach to constitutional interpretation," and adding that "[l]egal scholars have also strongly associated Justice Thomas with the originalist movement"); *see also* Vikram David Amar, *Morse, School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 637 (2009) (critiquing Justice Thomas's use of originalism in *Morse*); William C. Nevin, *In the Weeds with Thomas: Morse,*

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In short, the *Bruen* majority's approach to Second Amendment cases focuses first on the amendment's "plain text"[11] and then, if the regulated conduct is covered by it, on "this Nation's historical tradition of firearm regulation."[12] Justice Brett Kavanaugh, concurring in *Bruen*, crisply encapsulated this as a "text, history, and tradition test."[13] It is a standard that, while serving on the U.S. Court of Appeals for the District of Columbia, Justice Kavanaugh contended should replace the use of strict or intermediate

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in Loco Parentis, Corporal Punishment, and the Narrowest View of Student Speech Rights, 2014 BYU EDUC. & L. J. 249, 251 (characterizing Justice Thomas's concurrence in *Morse* as "fundamentally originalist").

[9] *See* Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 79 (2014) ("During his first two decades on the Court, Justice Clarence Thomas has been associated with originalism and is often viewed as its leading judicial proponent. Justice Thomas has linked originalism with the effort to limit judicial discretion and to promote judicial impartiality."); Lee J. Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 876 (2011) (noting that Justice Thomas "has consistently advocated originalist constitutional interpretations" and contended that the Court "that the Supreme Court clear away accumulated nonoriginalist precedent to make room for the Constitution's original meaning").

[10] *See* Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 7 (2011) ("There are multiple strands of originalism, with additional versions proliferating as rapidly as law reviews can publish them."); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 245 (2009) (asserting that "there are today countless variations of originalism, and the differences among them are sometimes so stark that it is difficult to treat them as one coherent interpretive methodology").

[11] *Bruen*, 142 S. Ct. at 2135.

[12] *Id.*

[13] *Id.* at 2161 (Kavanaugh, J., concurring).

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scrutiny.[14] It also mirrors the test Justice Thomas articulated in his 2020 dissent from the Court's denial of a petition for a writ of certiorari in the Second Amendment case of *Rogers v. Grewal*.[15]

Justice Stephen Breyer, authoring a dissent in *Bruen* for a bloc of three liberal-leaning Justices, criticized the majority's "rigid history-only approach."[16] He called it "anomalous,"[17] pointing out that it did not comport with the common use of means-end standards such as strict and intermediate scrutiny in First Amendment free-speech cases.[18] Others have joined the dissenters' criticism of the Court's analytical approach in *Bruen*. For example, Dean Erwin Chemerinsky argues that the problem with any history-centric methodology is that "[n]o constitutional analysis can make sense when it focuses exclusively on history, such as the conditions of 1791 when the 2nd Amendment was

[14] Heller v. District of Columbia, 670 F.3d 1244, 1271 (Kavanaugh, J., dissenting) (holding there is "little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny").

[15] 140 S. Ct. 1865, 1865 (Thomas, J., dissenting).

[16] *Id.* at 2174 (Breyer, J., dissenting).

[17] *Id.* at 2177.

[18] *Id.* at 2176 (observing that "beyond the right to freedom of speech, we regularly use means-end scrutiny in cases involving other constitutional provisions"). Strict scrutiny also applies in cases brought under the Free Exercise Clause of the First Amendment. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426 (2022) ("Under the Free Exercise Clause, a government entity normally must satisfy at least 'strict scrutiny,' showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end.").

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adopted, to decide what regulations can be allowed now in a vastly different society."[19] Chemerinsky also criticizes *Bruen* for expressly scrapping any balancing of the interests, such as weighing public safety goals against Second Amendment rights.[20]

The Court in 2022 additionally emphasized the primacy of history, historical practices, and original meaning in determining when the First Amendment's Establishment Clause is violated.[21] The six-Justice majority in *Kennedy v. Bremerton School District*[22] embraced this approach, killing off the three-part test in *Lemon v. Kurtzman*[23] in the process.[24] The half-century old *Lemon* test, which had commanded courts to analyze

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[19] Erwin Chemerinsky, *Forget History. Forget Safety. The Supreme Court Prizes Unfettered Gun Rights Above All Else*, L.A. TIMES (June 23, 2022), https://www.latimes.com/opinion/story/2022-06-23/supreme-court-concealed-carry-gun-rights-decision.

[20] Erwin Chemerinsky, *Supreme Court Gun Ruling Puts Countless Firearms Regulations in Jeopardy*, ABA J. (June 29, 2022), https://www.abajournal.com/columns/article/chemerinsky-supreme-court-gun-ruling-puts-countless-firearms-regulations-in-jeopardy.

[21] The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. The Establishment Clause has been incorporated to apply to state and local government entities and officials through the Fourteenth Amendment Due Process Clause. Cantwell v. Conn., 310 U.S. 296, 303 (1940).

[22] 142 S. Ct. 2407 (2022).

[23] 403 U.S. 602 (1971).

[24] *Kennedy*, 142 S. Ct. at 2427 (explaining the Court had "long ago abandoned *Lemon*") (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). In addition, Justice Neil Gorsuch wrote a concurrence joined by Justice Thomas in *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), stressing the importance of a "historically sensitive understanding of the Establishment Clause." *Id*. at 1610 (Gorsuch, J., concurring). They added that "a proper application of the Establishment Clause" requires "a careful examination of the Constitution's original meaning." *Id*. at 1609.

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whether a statute has "a secular legislative purpose"[25] and whether the means serving it produce an excessive entanglement between government and religion,[26] entailed a variation of balancing and means-end scrutiny.[27] But Justice Gorsuch wrote for the *Kennedy* majority that the *Lemon* test had been replaced by a historical-practices-and-understanding methodology,[28] stating "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[29] Writing for the three-Justice dissent in *Kennedy*, Justice Sonia Sotomayor criticized the majority's "history-and-tradition test" for analyzing

[25] *Lemon*, 403 U.S. at 612.

[26] *Id.*

[27] The *Lemon* test represents a means-end test because it focuses on the fit between the government's asserted interest or objective (i.e., its end) and the rule's methods and terms for carrying it out (i.e., its means). *See Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting) ("Judges understand well how to weigh a law's objectives (its 'ends') against the methods used to achieve those objectives (its 'means')."); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2364 (2021) (Kagan, J., dissenting) (describing a "means-end standard" as one that evaluates the "fit between means and end – that is, between the terms of the rule and the State's asserted interest"); *see also* Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 296 (1994) (noting that the *Lemon* test "seemingly reflects a balancing approach in dealing with the Establishment Clause").

[28] *See Kennedy*, 142 S. Ct. at 2428 (asserting that "[a]n analysis focused on original meaning and history . . . has long represented the rule" in Establishment Clause cases).

[29] *Id.* at 2427. To support his assertion that *Lemon* was dead, Gorsuch cited *Town of Greece v. Galloway*, 572 U.S. 565 (2014), which held that the constitutionality of legislative practices must be evaluated "'by reference to historical practices and understandings.'" *Id.* at 576 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 670 (Kennedy, J., concurring in judgment in part and dissenting in party)). Under the endorsement test, the Court "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *County of Allegheny*, 492 U.S. at 592.

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Establishment Clause cases.[30] She derided it for "elevating history and tradition over purpose and precedent" and for offering "essentially no guidance for school administrators."[31]

Adding to this emphasis on history and tradition during the Court's 2021 term, of course, was the majority opinion overruling *Roe v. Wade*[32] in *Dobbs v. Jackson Women's Health Organization*.[33] In holding that the right to obtain an abortion was not a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment, the six-Justice majority was "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty."[34] It concluded that abortion was not historically and traditionally protected in the United States, thus allowing the Court to erase *Roe* and the federal constitutional right to obtain an abortion.[35]

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[30] *Kennedy*, 142 S. Ct at 2450 (Sotomayor, J., dissenting). Sotomayor also called the majority's rejection of the *Lemon* test and endorsement inquiry "erroneous, and despite the Court's assurances, novel." *Id.* at 2447.

[31] *Id.* Justice Neil Gorsuch, in a concurrence joined by Justice Thomas in *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), decided shortly before *Kennedy* in the 2021 Term, likewise emphasized the importance of a "historically sensitive understanding of the Establishment Clause." *Id.* at 1610 (Gorsuch, J., concurring). There, they argued that "a proper application of the Establishment Clause" requires "a careful examination of the Constitution's original meaning." *Id.* at 1609.

[32] 410 U.S. 113 (1973).

[33] 142 S. Ct. 2228 (2022).

[34] *Id.* at 2248. The Fourteenth Amendment provides in relevant part that states shall not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV.

[35] *Dobbs*, 142 S. Ct. at 2253–54 ("The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.").

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Furthermore, just as Justice Thomas began his new framework for Second Amendment rights in *Bruen* by focusing on whether an amendment's "plain text covers an individual's conduct,"[36] so too did the *Dobbs* majority begin its analysis with "the constitutional text."[37] Writing for the *Dobbs* majority, Justice Samuel Alito found "no express reference to a right to obtain an abortion,"[38] which then led him to concentrate on history and tradition, as described immediately above.[39]

What might this vigorous, laser-like focus on text, history, and tradition in Second Amendment, Establishment Clause and Substantive Due Process cases mean for the future of First Amendment free-speech disputes? It is an exceedingly relevant and important question. That is partly because Justice Thomas in *Bruen* asserted that the Court's new test for Second Amendment disputes "accords with how we protect other constitutional rights," including "the freedom of speech in the First Amendment."[40] In other words, he contended that a text, history, and tradition approach agrees with how speech is protected.

Part I of this Article explains that Justice Thomas's assertion here is partly correct, but largely wrong.[41] The Article then addresses what might happen, however, if the conservative majority in *Bruen* were to graft or otherwise superimpose its Second Amendment framework on First Amendment free-speech cases going forward. Part II

[36] *Bruen*, 142 S. Ct. at 2126.

[37] *Dobbs*, 142 S. Ct. at 2245.

[38] *Id.*

[39] *Supra* notes 34–35 and accompanying text.

[40] *Bruen*, 142 S. Ct. at 2130.

[41] *Infra* notes 50–119 and accompanying text.

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initially explores problems that would result from applying the first part of the *Bruen* test—namely, determining whether the "Second Amendment's *plain text* covers an individual's conduct"[42]—in free-speech cases that would similarly query whether the First Amendment's plain text covers an individual's speech.[43] Under this first step, if the expression at issue "falls beyond the Amendment's original scope," then the expression is "categorically unprotected," and the analysis stops.[44] Part II then turns to the back-half of the *Bruen* framework, addressing likely difficulties in searching for historical and traditional regulatory analogues to support new restrictions on speech and contemporary communication technologies.[45]

Part III then illustrates how *Bruen's* text, history, and tradition methodology might be applied if the Court were to reconsider—as Justices Thomas and Gorusch have repeatedly urged—the actual malice standard established for public-official defamation cases in the landmark decision of *New York Times Co. v. Sullivan*.[46] To wit, Justice Thomas in 2021 pointed to the "lack of historical support for this Court's actual-malice requirement,"[47] while in 2019 he found "little historical evidence suggesting that the . . .

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[42] *Bruen*, 142 S. Ct. at 2129–30 (emphasis added).

[43] *Infra* notes 120–241 and accompanying text.

[44] *Bruen,* 142 S. Ct. at 2126.

[45] *Infra* notes 120–241 and accompanying text.

[46] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that the First Amendment mandates "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'"); *infra* notes 242–284 and accompanying text.

[47] Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari) (quoting *Tah v. Global Witness Publ'g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)).

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actual-malice rule flows from the original understanding of the First or Fourteenth Amendment."[48] Despite Justice Thomas's arguments that *Sullivan* should be overruled, the Article argues that such an outcome is far from clear, given the Court's failure to articulate clear guidance for conducting a text, history, and tradition inquiry. Finally, Part IV concludes by synthesizing the Article's analysis and by pointing out that the Court's relatively youthful, six-Justice conservative majority may well have plenty of opportunities over the next decade or so to refine and firmly insert its preferred text, history, and tradition methodology into First Amendment free-speech jurisprudence.[49]

I. JUSTICE THOMAS'S TENUOUS ANALOGY IN *BRUEN* TO FIRST AMENDMENT FREE-SPEECH JURISPRUDENCE: SOMEWHAT CORRECT, LARGELY WRONG

Prior to the Court's 2022 ruling in *Bruen*, lower courts had "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny."[50] Under this approach, courts would first rely on historical evidence to determine whether the regulated conduct fell outside of the Second Amendment's scope.[51] If the regulated conduct was outside of it, then it would not be protected. Under the second step, if the historical evidence was either inconclusive or demonstrated that the conduct was protected, then the courts would conduct either a

[48] McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

[49] *Infra* notes 285–293 and accompanying text.

[50] *Bruen*, 142 S. Ct. at 2125; *see also id.* at 2174 (Breyer, J., dissenting) ("[E]very Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment").

[51] *Id.* at 2126.

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strict or intermediate scrutiny means-end inquiry, with strict scrutiny being reserved for regulations coming close to the "core" Second Amendment right of protecting self-defense in the home.[52] Those two means-end standards focus on the strength of the government's interest underlying a regulation and on how carefully crafted the regulation is in serving that interest.[53]

In *Bruen*, however, the Court held that "despite the popularity of this two-step approach, it is one step too many."[54] Justice Thomas explained that if the "plain text" of the Second Amendment "covers" the conduct in question, then it is presumptively safeguarded and government control over it is permissible only when the "regulation is consistent with this Nation's historical tradition."[55] He acknowledged difficulties with historical analysis, but argued it was "more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their lack of expertise in the field.'"[56] Thomas added that judicial deference to legislative interest-balancing is misplaced; instead, the Court must defer to "the balance [] struck by the traditions of the American people."[57]

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[52] *Id.*

[53] *See supra* note 6 (addressing both strict and intermediate scrutiny).

[54] *Bruen*, 142 S. Ct. at 2127.

[55] *Id.* at 2126; *see also id.* at 2129–30 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

[56] *Id.* at 2130 (quoting McDonald v. Chicago, 561 U.S. 742, 790–91 (2010)).

[57] *Id.* at 2131.

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Bruen's methodology comports with Justice Thomas's prominent stance as an originalist.[58] Of course, originalism comes in multiple varieties,[59] and Thomas has not consistently embraced a particular form of it.[60] Regardless, it suffices to say that Thomas has long deployed the use of text, history, and tradition when resolving constitutional issues, including ones affecting the First Amendment freedom of speech.[61]

In *Bruen*, the Court was clear that text, history, and tradition – not balancing – would define the analysis of Second Amendment rights. But in the course of reaching this conclusion, Thomas made the remarkable statement that the Court's new test for Second Amendment disputes "accords with how we protect other constitutional rights," including "the freedom of speech in the First Amendment."[62] In drawing this connection between the Court's First and Second Amendment methodologies, Justice Thomas wrote that the Court's current formula for determining whether a category of expression falls outside the scope of First Amendment protection centers on whether that category historically and traditionally has been prohibited.[63] Justice Thomas's assertion here is partly correct, but largely wrong, as this Part describes.[64] He is correct on the narrow point that the Court uses history and tradition to define new categories of unprotected or

[58] *See supra* note 9 and accompanying text (addressing Justice Thomas's originalist position).

[59] *See supra* note 10 and accompanying text (noting there are several versions of originalism).

[60] Justice Thomas's use of history and tradition is considered in more detail in Part III.

[61] *See supra* note 8 and accompanying text (addressing Justice Thomas's originalistic reliance on history for reaching conclusions in free-speech cases).

[62] *Id.* at 2130.

[63] *Id.*

[64] *Infra* notes 65–114 and accompanying text.

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lesser-protected expression.[65] He is not correct, however, that the Court's First Amendment jurisprudence has foresworn balancing.

The Supreme Court held in 1942 that some varieties of speech are not safeguarded by the First Amendment.[66] Nearly seventy years later, the Court explained in *United States v. Stevens*[67] that when carving out a new category of unprotected expression from the First Amendment, it would not use "a simple balancing test" that, on an ad hoc basis, weighs the "relative social costs and benefits" of safeguarding the speech in question.[68] Instead, there must be a "long-settled tradition of subjecting [the] speech to regulation."[69]

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[65] *See infra* notes 67–79 and accompanying text (noting how the Court uses history and tradition to identify unprotected categories of expression.

[66] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court wrote in *Chaplinsky* that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.* at 571–72. It explained that among these unprotected categories of speech are "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. Other varieties of speech today also fall outside the sweep of First Amendment protection, such as fraud, incitement, child pornography, and speech that is integral to criminal conduct. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2361 (2020) (Breyer, J., concurring in part, dissenting in part) ("The Court has held that entire categories of speech – for example, obscenity, fraud, and speech integral to criminal conduct – are generally unprotected by the First Amendment entirely because of their content."); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.")

[67] 559 U.S. 460 (2010).

[68] *Id.* at 470

[69] *Id.* at 469.

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In short, as Chief Justice Roberts wrote for the eight-Justice *Stevens* majority, the precluded category of speech must have been "historically unprotected," even if the Supreme Court had not addressed it.[70] To be sure, the Court conceded that it had not always been clear that history and tradition governed its analysis of unprotected categories, noting it "has often described historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[71] The Court asserted, however, that "such descriptions [of the Court's approach] are just that—descriptive."[72] *Stevens'* methodology, as Professor Wayne Batchis observes, therefore is rooted in "the history and tradition rubric."[73]

The Court reiterated this historical approach for identifying categorical carveouts in 2011 in *Brown v. Entertainment Merchants Association*.[74] Justice Antonin Scalia reasoned for the *Brown* majority that there must be "a historical warrant" to preclude a variety of speech from First Amendment protection.[75] He added that this requires "persuasive

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[70] *Id.* at 472.

[71] *Id.* at 470 (internal quotations and citations omitted).

[72] *Id.* at 470–71 (internal quotations and citations omitted).

[73] Wayne Batchis, *On the Categorical Approach to Free Speech – and the Protracted Failure to Delimit the True Threats Exception to the First Amendment*, 37 PACE L. REV. 1, 27 (2016). Samuel Alito, the lone dissenting Justice in *Stevens*, argued that the restrictions on animal crush videos were constitutional under the logic of the Court's ruling in the child pornography case of *New York v. Ferber*, 458 U.S. 747 (1982). *See Stevens*, 559 U.S. at 497 (Alito, J., dissenting) (arguing that *Ferber* controlled the analysis). Although Justice Alito noted that all fifty states ban animal cruelty, *id.* at 491, he did not rely on a history-and-tradition analysis.

[74] 564 U.S. 786 (2011).

[75] *Id.* at 792.

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evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[76] Justice Scalia suggested that courts should focus on whether there is "a longstanding tradition in this country" of restricting access to the particular species of content.[77] As Justice Anthony Kennedy wrote for the plurality in 2012 in another case, unprotected categories of speech all have "a historical foundation."[78] The Court again reaffirmed this principle in 2015.[79]

The Court has also examined history and tradition in other isolated cases, particularly in recent years, although its invocation of such arguments is inconsistent at best and typically is coupled with other methodological approaches. In *Houston Community College System v. Wilson*,[80] for example, a unanimous Court relied extensively on history and tradition in holding that the public censure of a member of a community college's board of trustees did not give rise to a First Amendment retaliation claim.[81] Justice Gorsuch, authoring the majority opinion, held that "[w]hen faced with a dispute about the Constitution's meaning or application, long settled and established practice is a consideration entitled to great weight."[82] The Court did not stop with a history and

[76] *Id.*

[77] *Id.* at 795.

[78] United States v. Alvarez, 567 U.S. 709, 718 (2012).

[79] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015) (observing that "a history and tradition of regulation are important factors in determining whether to recognize 'new categories of unprotected speech'") (quoting Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011)).

[80] 142 S. Ct. 1253 (2022).

[81] *Id.* at 1264.

[82] *Id.* at 1259.

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tradition analysis, however; it also noted that "[w]hat history suggests, we believe our contemporary doctrine confirms."[83]

The Court has taken, or at least incorporated elements of, a history-and-tradition approach in only a handful of other contexts. Perhaps the most notable area is the public forum doctrine, where the Court asks whether government property has historically and "time out of mind" been made available to the public for expressive purposes.[84] The Court also incorporates a historical inquiry as one of several factors when determining whether the government speech doctrine applies.[85]

Likewise, the Court has included a historical inquiry in its test for the right of access to government proceedings. In *Richmond Newspapers, Inc. v. Virginia*, the Court held that the public has a First Amendment right of access to criminal trials under the First and Fourteenth Amendments.[86] In recognizing this new constitutional right, the *Richmond Newspapers* plurality traced the history of the modern criminal trial from "the days before the Norman Conquest" to colonial America to demonstrate that "throughout its evolution, the trial has been open to all who care to observe."[87] The plurality also cited Matthew Hale, William Blackstone, and Jeremey Bentham, as well as other observers,

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[83] *Id.* at 1260.

[84] Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679-80 (1992) (holding airport terminals are not public fora).

[85] *See*, *e.g.*, Shurtleff v. City of Boston, 142 S. Ct. 1583, 1589 (2022) (noting, among other considerations, that the Court examines "the history of the expression at issue" in deciding whether it constitutes government speech); Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 209-11 (2015) (considering the history of license plates in determining if they are government speech).

[86] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

[87] *Id.* at 564 (Burger, C.J., plurality).

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who noted that the openness of criminal trials in the United States was "indispensable" for "the proper functioning of a trial."[88] In his concurrence, Justice Brennan suggested a two-prong test for right-of-access claims that a majority of the Court later embraced: (1) whether there is a historical tradition supporting public access; and (2) whether granting access to a particular government proceeding serves a specific structural value.[89]

In perhaps a crucial deviation from the text, history, and tradition approach, however, the Court did not base its decision on text at all. Instead, it held that although a right of access is not explicitly mentioned in the First Amendment, the right is essential for "other First Amendment rights" because it safeguards ''a major purpose of that Amendment . . . to protect the free discussion of government affairs.'"[90] Furthermore, the *Richmond Newspapers* test does not rely on history alone; it plainly includes both historical and balancing elements.

Other times, history and tradition arguments have popped up in concurring and dissenting opinions. For example, in *Citizens United v. Federal Election Commission*,[91] Justice Kennedy's majority opinion does not rest its analysis on history and tradition, relying instead on precedent and First Amendment theory to reject restrictions on independent corporate election expenditures.[92] But Justice Stevens (joined by Justices

[88] *Id.* at 569-70 (Burger, C.J., plurality).

[89] *Id.* at 589 & 598 (Brennan, J., concurring); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Press-Enterprise Co. v. Superior Ct., 464 U.S. 501 (1984); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

[90] *Globe Newspaper Co.*, 457 U.S. at 604 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[91] 558 U.S. 310 (2010).

[92] *See infra* notes 95–96 and accompanying text (describing how the majority reached its decision in *Citizens United*).

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Ginsburg, Breyer, and Sotomayor) and Justice Scalia (joined by Justices Thomas and Alito) argued about the relevance of history and tradition in separate opinions. Justice Stevens, perhaps in an effort to beat the conservatives at their own game, asserted that at the founding, very few corporations existed, and the Framers "took it as a given that [they] could be comprehensively regulated in the service of the public welfare."[93] In response, Justice Scalia averred that Justice Stevens improperly "ignores the Founders' views about other legal entities that have more in common with modern business corporations than the founding-era corporations."[94] Again, however, history and tradition did not drive the majority decision in *Citizens United*, which instead relied extensively on an interpretation of precedent that prohibits distinctions among speakers,[95] as well as speech restrictions intended to balance out the marketplace of ideas.[96]

In sum, Justice Thomas is correct that history and tradition play a fundamental role in free-speech jurisprudence, at least when it comes to deciding if a variety of speech falls beyond the reach of First Amendment protection. History also arises in a handful of special First Amendment contexts, such as the public forum doctrine, the government speech doctrine, and the right of access to government proceedings. Furthermore, the Court sometimes has mentioned history as part of a more extensive analysis.[97]

[93] *Id.* at 427-28 (Stevens, J., concurring in part and dissenting in part).

[94] *Id.* at 388 (Scalia, J., concurring).

[95] *Id.* at 340-41.

[96] *Id.* at 349 (rejecting the "antidistortion" rationale).

[97] *See, e.g.*, Houston Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253 (2022).

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That, however, is where the use of a history-and-tradition methodology typically ends in free-speech cases; it does not usually extend into the analysis of whether a regulation imposed on a *protected* variety of speech is constitutional.[98] Specifically, if the speech in question does *not* fall into an unprotected category – in other words, if it is presumptively safeguarded by the First Amendment – then the constitutionality of a government regulation imposed on it hinges on whether the regulation passes muster under a means-end test such as strict or intermediate scrutiny.[99] Justice Breyer pointed

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[98] *See infra* notes 99–102 and accompanying text (addressing the means-end standards that apply in First Amendment speech cases to discern whether a regulation imposed on presumptively protected speech passes constitutional muster).

[99] Under this methodology, the overarching principle is that content-based statutes are subject to strict scrutiny while content-neutral statutes face intermediate scrutiny. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346 (2020) ("Content-based laws are subject to strict scrutiny. . . . By contrast, content-neutral laws are subject to a lower level of scrutiny.") (internal citation omitted); *see also* David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 68 (2017) (noting that "the longstanding default rule of First Amendment doctrine" is that "outside of the low-value speech categories, content-based restrictions on speech are evaluated under strict scrutiny, which effectively dooms them to failure"); R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 ST. MARY'S L. J. 973, 1016 (2021) (observing that "regulations of speech in a public forum or on private property that are content-neutral receive intermediate review"); Helen Norton, *Manipulation and the First Amendment*, 30 WM. & MARY BILL OF RTS. J. 221, 241 (2021) (noting that regulations "characterized as content-neutral receive 'only' intermediate scrutiny, as compared to the strict scrutiny generally applied to the government's content-based regulation of protected speech"). The Court has also embraced amorphous balancing tests in some recent high-profile decisions. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (holding 8-1 that punishing a student cheerleader for her Snapchat stating "fuck cheer" and "fuck everything" was unconstitutional); Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015) (considering several factors in holding that Texas's specialty license plates are government speech).

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this out in his *Bruen* dissent.[100] In addition, in some instances where speech is restricted or compelled, an even more lenient third tier of means-end review that approaches rational basis is applied.[101] This tiers-of-scrutiny framework in free-speech cases migrated from Equal Protection Clause cases, starting in the 1970s.[102]

All three tiers of scrutiny (strict scrutiny, intermediate scrutiny and something akin to rational basis review) possess two things in common. Namely, they focus on: 1) the government's interest in regulating speech – whether it is compelling, significant,

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[100] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2176 (2022) (Breyer, J., dissenting) (noting that "if conduct falls within a category of protected speech, we then use means-end scrutiny to determine whether a challenged regulation unconstitutionally burdens that speech"); *see also id.* at 2174 ("Although I agree history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court's near-exclusive reliance on that single tool today goes much too far.").

[101] The Supreme Court has adopted reasonableness standards that approach the deferential level of rational basis review in cases involving: 1) inmate speech rights; 2) student speech rights; and 3) situations where advertisers are compelled to disclose factual information. *See* Beard v. Banks, 548 U.S. 521, 528 (2006) (observing "that restrictive prison regulations are permissible if they are 'reasonably related to legitimate penological interests' . . . and are not an 'exaggerated response' to such objectives") (quoting Turner v. Safley, 482 U.S. 78, 87 (1987)) (internal citation omitted); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (holding that when the government compels an advertiser to disclose purely factual, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers").

[102] *See* Robert Post, *NIFLA and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1081 (2022) (asserting that the "tiers-of-scrutiny framework . . . in the early 1970s began to infiltrate First Amendment doctrine from the distant field of Equal Protection jurisprudence").

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important, substantial or legitimate; and 2) the precision of the fit between the statute's terms and the government's interest – whether the statute restricts no more speech than is necessary to serve the interest, whether it burdens substantially more speech than is necessary, or whether there simply is a reasonable relationship between the means and the end.[103] In short, they all entail means-end review and balancing of interests.[104] The fact that Justice Thomas in *Bruen* jettisoned from the Second Amendment framework the use of *any* tier of scrutiny, however, is somewhat unsurprising. That is because he previously has derided tiers of scrutiny as easily manipulable, non-Constitutionally prescribed tests that allow judges to implement their policy preferences in any given case.[105]

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[103] *See supra* notes 6 and 101 (describing the requirements of strict scrutiny, intermediate scrutiny, and reasonableness review in First Amendment speech cases).

[104] *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 122 (2013) (observing that "[t]he traditional tiers of scrutiny all involve some degree of interest-balancing"); Edward V. Heck, *Constitutional Interpretation and a Court in Transition: Strict Scrutiny from Shapiro v. Thompson to Dunn v. Blumstein – and Beyond*, 3 USAFA J. LEG. STUD. 6567 (1992) (asserting "that strict scrutiny is merely one distinctive form of 'means-end scrutiny'"); Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 U. FLA. J.L. & PUB. POL'Y 170, 190 (2020) (noting that "means-end analysis" may be "conducted under the rubric of intermediate and strict scrutiny"); Andrew White, *In Defense of Self and Home: The Problems With Limiting Second Amendment Rights for Young Adults Based on Their Age*, 90 U. CIN. L. REV. 1241, 1249 (2022) ("Currently, there are three primary levels of means-end scrutiny commonly applied by courts: rational-basis review, intermediate scrutiny, and strict scrutiny.").

[105] Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 638–41 (2015) (Thomas, J., dissenting). Justice Thomas wrote in *Hellerstedt* that:

> the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right – be it "rational basis," intermediate, strict, or something else – is

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Indeed, Justice Thomas's 2022 dissent in the First Amendment free-speech case of *City of Austin v. Reagan National Advertising of Austin*[106] – a dissent penned merely two months before he authored the majority opinion in *Bruen* – makes it abundantly clear that Justice Thomas fully understands that history and tradition generally play a limited role in free expression cases while means-end scrutiny is a large and essential component. The Court in *City of Austin* considered whether a municipal ordinance that treated on-premises signs differently from off-premises ones was content based or content neutral and, in turn, whether it was subject to strict scrutiny or intermediate review.[107]

Justice Thomas in *City of Austin* objected to the majority's methodology for determining whether a law is content based or content neutral.[108] In doing so, he cited the Court's ruling in *Brown v. Entertainment Merchants Association* to support the proposition that "history and tradition are relevant to identifying and defining"[109] unprotected categories of speech.[110] As noted earlier, he is spot-on regarding the role that

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> increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separate our constitutional decisions from judicial fiat.

Id. at 638.

[106] 142 S. Ct. 1464 (2022).

[107] *See id.* at 1475–76 (concluding that the sign ordinance was content neutral and thus subject to intermediate scrutiny, and remanding the case to the U.S. Court of Appeals for the Fifth Circuit to determine if the ordinance would survive intermediate scrutiny).

[108] *See id.* at 1481 (Thomas, J., dissenting) (asserting that the majority adopted "an incoherent and malleable standard" for distinguishing content-based laws from content-neutral laws).

[109] *Id.* at 1490.

[110] *See supra* notes 74–77 and accompanying text (discussing *Brown*).

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history and tradition play in this categorical-carveout process.[111] He then stressed, however, that history and tradition should play no role in determining whether a regulation on presumptively protected speech is content based or content neutral.[112] Furthermore, Justice Thomas readily acknowledged that content-based regulations on speech "may generally be upheld only if the government proves that the regulation is narrowly tailored to serve compelling state interests."[113] In short, he recognized that they are subject to a means-end, strict-scrutiny analysis.[114]

Before turning to Part II's examination of some probable pitfalls of applying a version of the Court's *Bruen*-based Second Amendment jurisprudence in First Amendment free-speech cases, it is worth noting that the use of means-end review in free-speech cases was contested by at least one former Justice in the not-too-distant past. Specifically, Justice Anthony Kennedy asserted in 1991 that strict scrutiny "has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from any

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[111] *See supra* notes 66–79 and accompanying text (discussing unprotected categories of speech and the role that history and tradition in identifying new categories of speech that not shielded by the First Amendment).

[112] *See City of Austin*, 142 S. Ct. at 1490 (Thomas, J., dissenting) (asserting that "content neutrality . . . is an empirical question, not a historical one," and adding that "the majority's historical argument is not only meritless but misguided").

[113] *Id.* at 1482.

[114] *See id.* at 1484 ("In sum, the off-premises rule is content based and thus invalid unless Austin can satisfy strict scrutiny.").

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considerations of time, place, and manner or the use of public forums."[115] Noting that the Court had imported strict scrutiny "from our equal protection jurisprudence,"[116] Justice Kennedy contended that "[b]orrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content based restriction" because "the test might be read as concession that States may censor speech whenever they believe there is a compelling justification for doing so."[117] Pushing back against the use of strict scrutiny as a form of "ad hoc balancing"[118] that invites further encroachments on free speech, Justice Kennedy preferred a bright-line rule – namely, that "raw censorship based on content . . . [is] forbidden by the text of the First Amendment and well-settled principles protecting speech and the press."[119] Kennedy's position, albeit articulated in a concurrence rather than a controlling opinion, might gain new traction today in a constitutional world where text, history, and tradition are increasingly valued and means-end review is disparaged.

With this in mind, the next Part examines difficulties that likely would arise were the Court to import its text, history, and tradition methodology from *Bruen* into First Amendment speech cases.

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[115] Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring).

[116] *Id.*

[117] *Id.*

[118] *Id.* at 127.

[119] *Id.* at 128.

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II. PROBLEMS WITH IMPOSING A PLAIN-TEXT COVERAGE MANDATE AND A HISTORY-AND-TRADITION APPROACH ON FREE-SPEECH CASES

The first part of the *Bruen* framework involves determining whether "the Second Amendment's *plain text* covers an individual's conduct."[120] If it does, then the conduct is presumptively protected by that amendment.[121] To address this issue in *Bruen*, the Court focused on the Second Amendment's phrase "the right of the people to keep and bear Arms" and, specifically, whether the petitioners were covered by "the people" and whether the "definition of 'bear' naturally encompasses public carry."[122]

What might happen if this threshold "plain text" step were applied to First Amendment speech cases? The plain text admonishes that "Congress shall make no law . . . abridging the freedom of speech."[123] For the last 100 years, the Court has all but ignored the plain language of the First Amendment. It also has rarely relied extensively on history in determining the constitutionality of speech regulations. This Part explores what a text, history, and tradition approach in First Amendment cases might look like.

A. Threshold Issues

Before discussing the application of *Bruen*'s "coverage" approach to free-speech questions, it is worth noting the full ramifications of text-first approach to expressive rights were the Court to embrace it wholeheartedly. At least three items are crucial here.

[120] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (emphasis added).

[121] *Id.*

[122] *Id.* at 2134–35.

[123] *See supra* note 8 (setting forth the relevant text of the First Amendment to the U.S. Constitution).

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First, considering the amendment's plain meaning might lead the Court to reconsider its incorporation doctrine. In *Gitlow v. New York*, the Court declared nearly one hundred years ago that "the freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[124]

Arguably, the freedoms of speech and press are individual liberty interests incorporated into the Fourteenth Amendment; the fact that the First Amendment expressly restricts the power only of "Congress" is irrelevant in defining those interests. But the argument against incorporation, or at least in favor of different standards for evaluating state and federal laws that abridge the freedom of speech, is not frivolous, and the word "Congress" plays a key role. In *Terminiello v. Chicago*, Justice Jackson contended in dissent[125] that the Fourteenth Amendment's terms "gave no notice to the people that its adoption would strip their local governments of power to deal with . . . problems of peace and order . . . . ."[126] Even Justices Holmes and Brandeis suggested that while "[t]he general principle of free speech . . . must be taken to be included in the Fourteenth Amendment . . . perhaps it might be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."[127] To be clear, no Justice on today's Court has expressed interest in revisiting incorporation of the First Amendment, but perhaps

[124] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[125] 337 U.S. 1, 906-07 (1949) (Jackson, J., dissenting).

[126] *Id.*

[127] Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

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Justice Thomas and others would revisit *Gitlow v. New York*[128] if the question were squarely presented.[129] If they did, then the Court might conclude the Constitution places fewer limits on state power to restrict speech.

Second, a text-first approach might require the Court to overrule cases that recognize rights that are not expressly covered by First Amendment's text. For example, the text of the First Amendment does not expressly protect the freedom of association, yet the Court has held that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas" is constitutionally protected.[130] Likewise, and as mentioned above, the Court relied extensively on history and tradition when recognizing a right of access to criminal proceedings, but it did not require an explicit textual hook for this recognition,[131] explaining "we have long eschewed any 'narrow, literal conception' of the Amendment's terms."[132] Under a plain-text approach, it would

[128] 268 U.S. 652 (1925) (holding the Fourteenth Amendment incorporated the First Amendment to apply to the states).

[129] Although Justice Thomas has argued against incorporating the Establishment Clause on the ground that it is a "federalism provision intended to prevent Congress from interfering with state establishments," he has said he "accepts" the incorporation of the Free Exercise clause because it is an individual right. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (Thomas, J., concurring in judgment); *see also* Town of Greece v. Galloway, 572 U.S. 565 & n.1 (2014) (Thomas, J., concurring in part and concurring in judgment) (arguing against the incorporation of the Establishment Clause).

[130] NAACP v. Alabama, 357 U.S. 449, 460 (1958).

[131] *See, e.g.*, *Globe Newspaper Co.*, 457 U.S. at 604 ("Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment.").

[132] *Id.* (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)).

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be irrelevant if history and tradition supported the recognition of a right, unless the Court stretches the term "speech" to include actions that are corollaries of the speech process.[133]

Third, the Court would need to address whether the "freedom of speech" simply means "freedom from prior restraints," as William Blackstone famously asserted.[134] Under this interpretation of the First Amendment, subsequent civil or criminal sanctions for speech would not raise any constitutional issues. The Court suggested this was not the proper reading of the First Amendment as early as 1919 in *Schenck v. United States*.[135] Yet, it also has reasoned that preventing prior restraints "was a leading purpose in the adoption of the constitutional provision."[136] Given that Justice Gorsuch cites Blackstone approvingly in his 2021 *Berisha* dissent,[137] determining whether Blackstone's cramped view of free speech is correct would seemingly be a necessary threshold question for the Court under a text, history, and tradition methodology.

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[133] This is the approach many lower courts have taken in holding that the First Amendment presumptively protects videotaping the police. *See*, *e.g.*, ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

[134] BLACKSTONE, COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., Philadelphia, Birch & Small, 1803).

[135] 249 U.S. 47, 51–52 (1919) ("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose."). *See also* Near v. Minnesota, 283 U.S. 697, 715 (1931) (noting with seeming approval criticism that immunity from prior restraints "cannot be deemed to exhaust the conception of liberty guaranteed by State and Federal constitutions," but holding that "[i]n the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment").

[136] Lovell v. City of Griffin, 303 U.S. 444, 451–52 (1938).

[137] *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting from denial of certiorari).

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Relatedly, the Court would need to address whether the "freedom of speech" and the "freedom of the press" carry the same meaning. From the 1930s to 1960s, some Court decisions rested on the freedom of the press.[138] Since then, however, the Court has typically rested its decisions on the Speech Clause or cited both clauses in the same breath.[139] To date, the Court typically does not give the Press Clause independent meaning.[140]

On the one hand it has said that "[n]or is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[141] At the same time, the Court has refused to give the press any specific constitutional protections because defining who qualifies for these protections "would present practical and conceptual difficulties of the highest order."[142] Scholars such as Eugene Volokh have argued that affording the Press Clause a small constitutional role makes sense because it only protects technology—the

[138] *See*, *e.g.*, *Lovell*, 303 U.S. at 451–52 (holding unconstitutional licensing for the distribution of publications); *Near*, 283 U.S. 697 (1931) (holding that enjoining publication violated freedom of the press). *See also* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256-58 (1974) (citing both clauses in striking down a right-of-reply statute).

[139] For more discussion of this issue, *see* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 489 (2002) (noting that "most constitutional protection of the press derives from the Speech Clause and other constitutional provisions that apply to everyone").

[140] *See* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2439 (2014) (noting the Court has interpreted the Speech Clause expansively while largely neglecting the Press Clause).

[141] Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

[142] *Id.* at 704.

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printing press or equivalent modern communications technology.[143] Other scholars such as Sonia West assert that the Press Clause refers not merely to a form of technology but also to speakers who gather newsworthy information, disseminate it to the public, and check abuses of government power.[144]

B. What Does "Speech" Mean and What Does It "Cover"?

Moving beyond threshold issues that would undermine most of the Court's extant free-expression jurisprudence, the key textual interpretative issues for the Court are the meaning of "speech" and whether it—to use Justice Thomas's term in *Bruen*—"covers" whatever the form of communication that is at stake.[145]

Justice Samuel Alito, in his 2022 concurrence in *Shurtleff v. City of Boston* that was joined by both Justice Thomas and Justice Gorsuch, wrote that "'[s]peech,' as that term is used in our First Amendment jurisprudence, refers to expressive activity that is 'intended

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[143] *See*, *e.g.*, Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463 (2012) (arguing for an interpretation of the Press Clause as protecting "press as technology").

[144] *See* West, *supra* note 140, at 2443–44.

[145] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022) (holding that "that when the Second Amendment's plain text *covers* an individual's conduct, the Constitution presumptively protects that conduct") (emphasis added). Of course, other words in the First Amendment could become important for answering this coverage question, such as what constitutes the "press." Although the Court has not, to date, relied on the Press Clause in determining the scope of First Amendment rights, it is certainly possible that the Court would one day do so. Scholars deeply disagree about the meaning of this provision. *Compare* Eugene Volokh, *supra* note 143 (arguing that "'press" referred to a specific means of communication, the printing press), with Sonia West, *supra* note 144 (arguing that the "press" referred to entities performing a specific type of function in a democracy).

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to be communicative' and, 'in context, would reasonably be understood . . . to be communicative.'"[146] The problem, however, is that this definition is not what the plain text of the First Amendment says at all. Rather, it is how the Supreme Court has stretched, via its own interpretation, the word "speech" to encompass not just "abstract discussion"[147] but also conduct that symbolically communicates a message (i.e., expressive conduct).[148] If the focus, however, becomes what the plain text of the First Amendment historically or originally meant in the late 1700s and early 1800s, then perhaps "speech" might very well include such expressive conduct.[149] Under this perspective, the plain-text meaning of "speech" is "communication," regardless of its form.[150]

[146] 142 S. Ct. 1583, 1598 (2022) (Alito, J., concurring) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U. S. 288, 294 (1984)).

[147] NAACP v. Button, 371 U.S. at 429.

[148] *See* Spence v. Wash., 418 U.S. 405, 410–11 (1974) (holding that conduct may rise to the level of speech for purposes of possible First Amendment protection when there is "[a]n intent to convey a particularized message" with the conduct and when "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it").

[149] *See* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1059 (2009) (contending that "[t]he equivalence of symbolic expression and verbal expression is consistent with the First Amendment's original meaning"); *but see* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 285–86 (2017) (arguing the Founders were concerned with protecting "writing, publishing, and speaking" but not expressive conduct).

[150] *Cf.* John Fee, *The Freedom of Speech-Conduct*, 109 KY. L.J. 81, 90 (2020) ("There are several strong normative, practical, and historical reasons for interpreting the First Amendment as protecting a general freedom of communication.").

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Sometimes the Court uses the term "pure speech" in First Amendment speech cases.[151] It seemingly does this to distinguish speech from expressive conduct.[152] Elsewhere, it has stated rather broadly that "the creation and dissemination of information are speech within the meaning of the First Amendment."[153]

In *Bruen*, Justice Thomas stressed that the meaning of the words in the Constitution's text should be "historically fixed."[154] For instance, he wrote that "the Second Amendment's definition of 'arms' is fixed according to its historical understanding."[155] The problems then become, from a First Amendment perspective, deciding exactly whose historical understanding of "speech" controls—is it the understanding of the drafters and ratifiers of the First Amendment, for example, or the understanding of the public in 1791 when the amendment was adopted or 1868 when the Fourteenth Amendment was ratified?—and how, in turn, one ferrets out exactly what their understanding was. As Ronald Collins previously has pointed out, *Chaplinksy* does not explain how to conduct this historical analysis.[156] Not only is there a long list of

[151] *See* Virginia v. Black, 538 U.S. 343, 360, n.2 (2003) ("While it is of course true that burning a cross is conduct, it is equally true that the First Amendment protects symbolic conduct as well as pure speech."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (observing the wearing of black armbands "the purpose of expressing certain views" in a public school is "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment").

[152] *See supra* notes 146–149 (addressing expressive conduct).

[153] Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011).

[154] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

[155] *Id.*

[156] Ronald Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 444–45 (2013).

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possible places to search for historical evidence,[157] but it is unclear how much weight to afford each record or what to do when early historical records are nonexistent or vague.[158] As Section C of Part II discusses in more detail, *Bruen* itself left open a multiple essential questions for conducting an inquiry into history and tradition.[159]

Even in those areas of the Court's First Amendment jurisprudence where history and tradition play a role, the Court has not made explicit how the inquiry should be undertaken. Furthermore, some of the Justices most known for being "originalists" disagree. For example, in the free-speech case of *McIntyre v. Ohio Elections Commission*,[160] Justice Thomas asserted more than twenty-five years ago that whether the freedoms of speech and press protect a given activity—in *McIntyre*, it was anonymous political leafletting—must be guided by the "original meaning" and "original understanding" of the Free Speech and Free Press Clauses.[161] For Justice Thomas in *McIntyre*, the key for determining the original meaning and understanding was to examine "what the phrases 'free speech' or 'free press' meant to the people who *drafted* and *ratified* the First Amendment."[162] As the emphasized terms in that quotation indicate, meaning is derived from the understanding of the First Amendment's drafters and ratifiers, not by the meaning that the general reading public in 1791 would have ascribed to the amendment's words.

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[157] *Id.* at 444–45.

[158] *Id.* at 445 (2013).

[159] *See supra* Part II, Section C.

[160] 514 U.S. 334 (1995).

[161] *Id.* at 359 (Thomas, J., concurring).

[162] *Id.* at 370 (emphasis added).

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Justice Thomas's originalistic methodology in *McIntyre* is different in this respect from that of the late Justice Antonin Scalia, who came to focus on the original public meaning of the text of the Constitution.[163] For Justice Scalia, this allowed for some elasticity and flexibility, in accord with a "reasonable construction" of the "original meaning" of the text.[164] Justice Scalia elaborated that "[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear."[165] Thus, when it came to the First Amendment's explicit textual protections of "speech" and "press," he asserted that those terms were merely constituent parts representing the larger concept of "communicative expression."[166] As such, Justice Scalia reasoned that handwritten letters, although neither literally speech nor press, would be safeguarded from government censorship.[167]

Justice Scalia therefore ultimately became linked to the notion of public meaning originalism.[168] At the heart of public meaning originalism is the principle "that the original meaning of the Constitution is the original public meaning of the constitutional

[163] *See* Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, 95 TUL. L. REV. 281, 288 (2021) (noting that "original public meaning made its first appearance in a now well-known speech by the late Justice Antonin Scalia").

[164] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

[165] *Id.* at 37.

[166] *Id.* at 37–38.

[167] *Id.* at 38.

[168] Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1224–25 (2021) (calling Justice Scalia "a founding member of the public meaning originalist school").

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text."[169] As Lawrence Solum encapsulates it, the public meaning thesis pivots "roughly [on] the meaning that the text had for competent speakers of American English at the time each provision of the text was framed and ratified."[170] This is different from original intent originalism, under which "the original meaning of the constitutional text is the meaning that the framers intended to convey."[171] Justice Scalia rejected such an original *intent* perspective in favor original *meaning* when it came to interpreting the text of the Constitution.[172]

Bruen's plain-text approach thus would send the Justices scrambling either, per Justice Thomas's *McIntyre* opinion, to determine what "speech" meant to the drafters and ratifiers of the First Amendment or, in accord with public meaning originalism, to figure out what "speech" meant to a hypothetically-imagined informed reader of the First Amendment back in either 1791 or 1868.[173] To make this work in a clear and consistent manner, of course, all of the Justices would need to agree on one approach or the other,

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[169] Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 933 (2009).

[170] Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1957 (2021).

[171] Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1627.

[172] *See* SCALIA, *supra* note 164, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

[173] *See* Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 584 (2011) (asserting that "public meaning originalists treat the Constitution primarily as a legal text, and their interpretive goal is to understand how an informed reader of the time would have understood the legal commands it issued," and adding that this approach "supposes . . . that the imagined reader of the past exists in a disinterested world, detached from political commitments").

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and such agreement currently is lacking.[174] Additionally, interpreting "speech" when it regards state regulations might require turning to the understandings of 1868 when the Fourteenth Amendment, which makes the First Amendment applicable to states, was adopted.[175]

Closely tied to the problems raised by deploying *Bruen's* notion of "plain text" and deciding what "speech" historically means in free-expression cases is the concept of coverage. Specifically, Justice Thomas stressed that the threshold inquiry in Second Amendment cases is whether the "plain text *covers* an individual's conduct."[176] If the conduct is covered, then it presumptively is safeguarded.[177] The issue thus becomes what Justice Thomas means by "covers."

"Covers" seemingly refers to whether a term's historically fixed definition can be interpreted more expansively to encompass things that did not exist when the Constitutional provision in question was adopted.[178] To wit, Justice Thomas wrote that "even though the Second Amendment's definition of 'arms' is fixed according to its

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[174] *See* Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 336 (2013) ("While original-public-meaning originalism has emerged as the favored variant in the academy today, even the judges most committed to originalism have arrived at no such methodological consensus. The result is that even when the Justices pursue an originalist inquiry, there remains disagreement . . . about which version to apply.").

[175] *See supra* note 8 (noting the First Amendment's incorporation through the Fourteenth Amendment's Due Process Clause).

[176] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (emphasis added).

[177] *See id.* at 2129–30 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.").

[178] *Id.* at 2132.

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historical understanding, that general definition *covers* modern instruments that facilitate armed self-defense."[179]

Justice Thomas suggested that this same understanding of "covers" applies in free-speech cases.[180] Here, he quoted Justice Scalia's majority opinion in the 2008 Second Amendment case of *Heller v. District of Columbia*[181] for the proposition that "the First Amendment protects modern forms of communications."[182] Justice Scalia had indicated back in 1997 in *A Matter of Interpretation* that, indeed, this might be the case.[183]

In particular, and in answering his own query regarding whether the Free Speech Clause applies "to technologies that did not exist when the guarantee was created," Justice Scalia contended that "the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires – and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment."[184] More bluntly and critically put, determining coverage can be squishy and subjective. The notion of "following the trajectory of the First Amendment, so to speak" intimates that the Court's current path of expanding the coverage of "speech" to include technologies such as video games and the internet might very well continue for not-yet-invented methods and modes of speech.[185] In fact, in holding that video games are a protected mode of speech

[179] *Id.* (emphasis added).

[180] *Id.*

[181] 554 U.S. 570 (2008).

[182] *Bruen*, 142 S. Ct. at 2132 (quoting *Heller*, 554 U.S. at 582).

[183] SCALIA, *supra* note 164, at 45.

[184] *Id.*

[185] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("California correctly acknowledges that video games qualify for First Amendment protection."); Reno v. ACLU, 521 U.S. 844, 870 (1997) (involving

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in *Brown v. Entertainment Merchants Association*, Justice Scalia suggested that whether a new technology is covered by the First Amendment freedom of speech hinges on whether it can "communicate ideas."[186]

Justice Thomas's and Justice Scalia's conception of whether the plain text of the Constitution covers a particular artifact – be it a modern-day firearm or a contemporary communication technology—and therefore presumptively protects it conflicts with how some scholars understand the notion of First Amendment coverage. Professor Frederick Schauer explains that just because speech may be involved in a particular activity or behavior, it does not mean that the First Amendment is implicated and applies to (i.e., covers) it.[187] He illustrates this by noting that "laws dealing with contracts, wills, trusts, gambling, warranties, and fraud all involve legal regimes that specify consequences, including negative ones, for using certain words – speech – in certain ways, but routinely present no First Amendment issues whatsoever."[188] In brief, only when a regulation of speech triggers some heightened level of First Amendment review, such as strict or intermediate scrutiny, can it be said that First Amendment coverage exists.[189] Conversely,

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regulation of speech on the internet, and concluding that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").

[186] *Brown*, 564 U.S. at 790.

[187] *See* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1619 (2015) ("If the coverage of the First Amendment were even close to the ordinary meaning of the word 'speech,' then vast segments of human life would remain shielded by the First Amendment from regulation or other legal consequences.").

[188] *Id.*

[189] Professor Schauer elaborates that:

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when First Amendment coverage does *not* exist, then, as Professor Mark Tushnet points out, regulations on speech are "permissible if they satisfy a standard of minimal rationality."[190]

This notion of coverage is somewhat akin to Justice Stephen Breyer's belief that heightened First Amendment review is not warranted simply because an economic or social regulation affects speech, and that a more deferential form of rational basis review is appropriate in such situations.[191] It also taps into Justice Elena Kagan's recent objection to the majority of the Court applying heightened First Amendment scrutiny in a challenge to a statute regulating money paid to unions by non-union members in *Janus v. American Federation of State, County and Municipal Employees*.[192] She pointed out there, in arguing that heightened review was inappropriate and that a version of rational basis review was warranted, that "[s]peech is everywhere – a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all

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> When an act (whether a regulatory act of government or a communicative or expressive act of a speaker) is held to implicate the First Amendment – when a First Amendment-inspired test or standard of review applies – the act can be considered to be covered by the First Amendment. Conversely, when the First Amendment does not even apply – when a restriction is ordinarily evaluated only in accordance with a rational basis standard – we can say that the activity is uncovered.

Id. at 1618. *See supra* note 6 and accompanying text (addressing strict and intermediate scrutiny).

[190] Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech – An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL OF RTS. J. 1073, 1076 (2017).

[191] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Breyer J., dissenting) (providing an extensive elaboration of this point throughout his dissent).

[192] 138 S. Ct. 2448 (2018).

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economic and regulatory policy affects or touches speech."[193] In sum, First Amendment coverage is not justified merely because speech is being regulated.

Of course, were the *Bruen* approach to Second Amendment cases to be extended and superimposed on First Amendment speech disputes, then *no* tier of heightened First Amendment review—strict or intermediate scrutiny—would ever apply to measure a statute's constitutionality.[194] In other words, the scholarly notion of First Amendment coverage would be rendered nugatory. Instead, assuming that the plain text of the First Amendment's Speech Clause covered the expression being regulated, then—under *Bruen's* logic—it would be presumptively protected.[195] The next step, per *Bruen*, would entail examining the history and tradition of regulating the type of speech in question, rather than subjecting the regulation to means-end scrutiny.[196] The next section examines what that inquiry might look like.

C. Applying a History and Tradition Approach in Free Speech Cases

Bruen suggests that once a court determines that the plain text of the First Amendment's Speech Clause covers the regulated expression, it is presumptively

[193] *Id.* at 2502 (Kagan, J., dissenting). As Justice Samuel Alito wrote for the majority, Justice Kagan and the dissent "propose[d] that we apply what amounts to rational-basis review." *Id.* at 2465.

[194] *See supra* note 5 and accompanying text (noting how the *Bruen* methodology eliminates the use of means-end tests such as strict and intermediate scrutiny).

[195] The Court in *Bruen* reasoned that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

[196] Under *Bruen*, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

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protected.[197] For speech that is presumably protected, the next step requires examining the history and tradition of regulating it.[198] In other words, the issue under a *Bruen*esque approach would become whether the specific form of regulation—albeit not a complete ban—imposed on it had historically and traditionally been permitted.[199] If the government could demonstrate that the regulation had historically and traditionally been allowed in the United States, then the presumption in favor of First Amendment protection would be rebutted and such a regulation would be permissible.[200]

For modern-day regulations imposed on speech, Justice Thomas's analysis in *Bruen* indicates that the Court would need to search for analogies and similarities to historical and traditional regulations.[201] He elaborated that "analogical reasoning requires only that the government identify a well-established and representative

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[197] The Court in *Bruen* reasoned that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

[198] Under *Bruen*, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

[199] *Id.*

[200] *See supra* notes 67–77 and accompanying text (addressing *Stevens* and *Brown*, including the test they fashioned for identifying unprotected categories of expression).

[201] Justice Thomas explained in *Bruen* that:

> When confronting . . . present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy – a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar."

Id. at 2132.

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historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[202] Determining the representative historical analogue is easier said than done, sparking fierce disagreement at the Court. For example, in *Bruen* Justice Breyer attacked the majority for "offer[ing] many and varied reasons to reject potential representative analogues, but very few reasons to accept them."[203]

Identifying the relevant historical tradition is a familiar problem in the Court's substantive due process cases, where it sometimes has (and most recently did in *Dobbs*) required a historical tradition to support the recognition of a substantive right.[204] The Court, or some subset thereof, asks whether the right is "rooted in our Nation's history and tradition and whether it is an essential component of what we have described as 'ordered liberty.'"[205]

For decades, the Court has quarreled over how broadly or narrowly to define the relevant historical tradition. Typically, the more general the relevant historical tradition, the more likely it is that the Court will conclude that the right at issue is constitutionally protected. Over the years, the Court has flipped back and forth on how broadly or narrowly to define the relevant right. In *Bowers v. Hardwick*, for example, the Court in the 1980s took a very narrow approach, asking whether there was a history and tradition of protecting the right to engage in sodomy, and held that there was not.[206] Seventeen years

[202] *Id.* at 2133.

[203] 142 S. Ct. 2180 (Breyer, J., dissenting).

[204] *See supra* notes 33–35 (addressing *Dobbs*).

[205] *Dobbs*, 142 S. Ct. at 2246.

[206] 478 U.S. 186, 190 (1986).

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later, the Court in *Lawrence v. Texas* overruled *Bowers*, defining the relevant liberty interest more sweepingly as the right to make choices "central to personal dignity and autonomy."[207] Similarly, in *Obergefell v. Hodges*, which held that the Fourteenth Amendment protects the right to same-sex marriage, the Court defined the relevant liberty interest was not the right to marry someone of the same sex but the right to make "intimate choices" that "shape an individual's destiny."[208] In *Dobbs*, the pendulum swung back to a more narrow, conduct-specific definition of the relevant liberty interest. There, the Court held that the proper inquiry is whether there is history and tradition protecting the right to an abortion, not "the freedom to make 'intimate and personal choices' that are central to personal dignity and autonomy" (as defined in *Casey*) or "the right to privacy" (*Roe*).[209]

Determining the scope of the relevant history and tradition is fraught with unresolved methodological complications. With respect to interpreting the constitutionality of laws that limit individual liberties, one of the most important issues is whether the relevant historical time period is 1791, when the Bill of Rights was ratified, or the 1860s, when the Fourteenth Amendment, which makes the First Amendment applicable to the states, was ratified. In *Bruen*, the Court specifically declined to decide what historical materials are determinative and which time period is most relevant.[210] In

[207] 539 U.S. 558, 574 (2003).

[208] Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015).

[209] *Dobbs*, 142 S. Ct. at 2258.

[210] *Bruen*, 142 S. Ct. at 2138 (acknowledging the "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth amendment was ratified in 1868 when defining its scope" but declining to resolve it because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with

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Kennedy, the Court announced that "historical practices and understandings" must govern the resolution of Establishment Clause claims,[211] but as the dissent noted, the majority failed to offer "any meaningful explanation of this history-and-tradition test for another day."[212] *Dobbs* likewise offers little meaningful guidance, given that it considers historical evidence from the thirteenth century through the twentieth century.[213]

In its categorical analysis, determining the correct analogy has played a determinative role in some free speech cases. For example, in *Brown v. Entertainment Merchants Association*, which centered on a law restricting minors' access to violent video games, the Court rejected California's argument that the relevant historical tradition was protecting children from harmful materials, as the Court had previously recognized in *Ginsberg v. New York*.[214] Justice Scalia, writing for the Court in *Brown*, equated violent video games with violent-themed books, movies, and comic books, which enjoyed a long

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respect to public carry"); *see also id.* at 2162-63 (Barrett, J., concurring) (noting the Court "does not conclusively determine the manner and circumstances in which postratification practices may bear on the original meaning of the Constitution" or "whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 or when the Bill of Rights was ratified in 1791").

[211] *Kennedy*, 142 S. Ct. at 2428.

[212] *Id.* at 2450 (Sotomayor, J., dissenting).

[213] At one point in the opinion, the Court's attack on abortion-rights advocates suggests that the existence (or lack thereof) of abortion laws in 1868 is most relevant. *Dobbs*, 142 S. Ct. at 2254 (criticizing the abortion-rights advocates for being "unable to show any evidence to show a constitutional right to abortion when the Fourteenth Amendment was adopted").

[214] *Brown*, 564 U.S. at 793–94 (discussing *Ginsberg v. New York*, 390 U.S. 629 (1968), which upheld a state statute regulating obscenity for minors)).

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history of constitutional protection.[215] In contrast, Justice Alito's concurring opinion embraced the broader "harmful for minors" analogy to *Ginsberg* and attacked the majority for failing to "proceed with caution" in order "to understand the new technology."[216]

The Court has struggled to determine the relevant representative analogue in prior cases, even when it might seem that the historical precursor is obvious. In *Citizens United v. Federal Election Commission*, for example, Justice Stevens and Justice Scalia disagreed about the relevant historical analogy for corporations. Stevens insisted that the Court should look at corporations that existed in the early founding period, which, he argued, the Framers would not have considered to have speech rights.[217] In contrast, Scalia asserted that it is inappropriate to consider those early corporate entities because they had state-granted monopoly privileges, something modern corporations lack. As a result, Scalia contended, it is more appropriate to consider "the Founders' views about other legal entities that have more in common with modern business corporations than the founding-era corporations."[218]

Lower courts currently are struggling to determine the appropriate analogy for evaluating the First Amendment rights of social media platforms and the constitutionality of law imposed on them. The platforms argue that they are analogous to newspapers and other publishers that are entitled to exercise editorial control and

[215] *Id.* at 795–96 (noting the lack of a "longstanding tradition in this country of specially restricting children's access to depictions of violence").

[216] *Id.* at 806 (Alito, J., concurring).

[217] Citizens United v. Federal Election Comm'n, 558 U.S. 310, 426–28 (2010) (Stevens, J., dissenting).

[218] *Id.* at 387–88 (Scalia, J., concurring).

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judgment over content, free from government interference.[219] If this analogy holds, they are entitled to the same constitutional protections established in cases like *Miami Herald Publishing Co. v. Tornillo*.[220] The U.S. Court of Appeals for the Fifth Circuit emphatically rejected this analogy in September 2022, holding that "[t]he platforms are nothing like the newspaper in *Miami Herald*."[221] Instead, it concluded that the platforms are akin to common carriers like telegraph and telephone companies.[222] Conversely, the Eleventh Circuit embraced the analogy to newspapers and emphatically rejected the analogy to common carriers.[223]

In the First Amendment context, defining the relevant historical tradition broadly or narrowly can dramatically impact whether a court finds a challenged regulation constitutional. For example, in *American Beverage Association v. San Francisco*, which considered a challenge to a required health warning on advertisements for soft drinks, Ninth Circuit Judge Ikuta wrote a concurring opinion arguing that "only 'health and

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[219] *See* NetChoice v. Attorney General, 34 F.4th 1196, 1208 (11th Cir. 2022) (noting that "NetChoice responds that platforms' content-moderation decisions—i.e., their decisions to remove or deprioritize posts or deplatform users, and thereby curate the material they disseminate—are 'editorial judgments' that are protected by the First Amendment under longstanding Supreme Court precedent").

[220] 418 U.S. 241, 258 (1974) (holding a right-of-reply statute unconstitutional because it interfered with the exercise of editorial choices made by the editors of print newspapers, and reasoning that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment").

[221] NetChoice, L.L.C. v. Paxton, _ F.4th __, 2022 WL 42285917, *13 (5th Cir. Sept. 16, 2022).

[222] *Id.* at *25-29.

[223] NetChoice, LLC v. Attorney General, 34 F.4th 1196, 1210–22 (11th Cir. 2022).

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safety warnings long considered permissible' would be excepted" from heightened scrutiny.[224] The language Ikuta quoted comes from the Supreme Court's decision in *NIFLA v. Becerra*,[225] but Ikatu significantly changed the quotation's meaning by adding the qualifier "only."[226] Rather than considering the relevant historical tradition to be the tradition of "health and safety warnings," Judge Ikuta demanded evidence of a tradition of health and safety warnings for soft drinks. With this as her standard, it was unsurprising that she concluded, that "*NIFLA* did not specify what sorts of health and safety warnings date back to 1791, but warnings about sugar-sweetened beverages are clearly not among them."[227]

In addition to the difficulties of determining the relevant historical analogy, the Court would then need to decide what to make of whatever historical evidence it could find about that analogue. Justice Barrett's *Bruen* concurrence points out "just a few unsettled questions" that the Court did not resolve there because it did not feel the answers would impact the case's resolution.[228] These critical questions include what are "the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution"[229]; "[h]ow long after ratification may subsequent

[224] 916 F.3d 749, 761 (9th Cir. 2019) (Ikatu, J., concurring in part).

[225] 138 S. Ct. 2361 (2018).

[226] For a more thorough analysis of Judge Ikatu's confusing opinion in *American Beverage*, *see* Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 258–69 (2021).

[227] 916 F.3d at 762 (Ikatu, J., concurring in part).

[228] 142 S. Ct. at 2162–63 (Barrett, J., concurring).

[229] *Id.* at 2162.

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practice illuminate original public meaning?"[230]; "[w]hat form must practice take to carry weight in constitutional analysis"[231]; and "whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 or when the Bill of Rights was ratified in 1868."[232] Justice Breyer's dissent noted additional unanswered questions, such as "[h]ow will judges determine which historians have the better view of close historical questions?"[233] and how many cases, laws, or other historical examples are sufficient to show a historical tradition (and not dismissed as "outliers"?).[234]

Might some version of this text, history and tradition methodology actually take hold in First Amendment jurisprudence? In fact, the U.S. Court of Appeals for the Fifth Circuit in September 2022 embraced sub silentio *Bruen's* plain text approach and expressly adopted public meaning originalism in the free-speech case of *NetChoice, LLC v. Paxton*.[235] That case centers on whether a Texas statute that generally bars large social media platforms from censoring users based on their viewpoints violates the platforms' First Amendment right of free speech.[236] In analyzing the merits of the platforms' claim, Judge Andrew Oldham wrote for the Fifth Circuit majority that "we start with the

[230] *Id.* at 2163.

[231] *Id*.

[232] *Id*.

[233] *Id.* at 2177 (Breyer, J., dissenting).

[234] *Id.* at 2179.

[235] 2022 U.S. App. LEXIS 26062 (5th Cir. Sept. 16, 2022).

[236] *Id.* at *4–8.

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original public meaning of the Constitution's text."[237] In doing so, Judge Oldham concentrated on how "the Speech Clause [was] originally understood."[238]

Judge Oldham's plain-text methodology is, in the authors' view, highly unusual for examining a First Amendment challenge to a statute.[239] It may not be surprising, however, that Judge Oldham engaged it, given his status as a conservative jurist who was appointed to the Fifth Circuit by former President Donald Trump and who previously clerked for Supreme Court Justice Samuel Alito.[240] As *Vox* bluntly put it, the ruling in *Paxton* was issued by an "especially right-wing panel of the already conservative United States Court of Appeals for the Fifth Circuit."[241] In short, conservative jurists like those

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[237] *Id.* at *23.

[238] *Id.*

[239] The typical methodology for examining the constitutionality of a statute regulating speech is first to determine whether, in fact, speech (as opposed to conduct) is at issue, and then, if speech is at issue, to determine whether it falls into an unprotected category of expression. If the speech does not fall into an unprotected category of speech, then the focus becomes determining whether the statute regulating it – the statute being challenged on First Amendment grounds – is content based or content neutral. The resolution of that question then generally determines whether a court will apply strict or intermediate scrutiny to test the statute's constitutionality. *See* Clay Calvert, *Curing the First Amendment Scrutiny Muddle Through a Breyer-Based Blend Up? Toward a Less Categorical, More Values-Oriented Approach for Selecting Standards of Judicial Review*, 65 WASH. U. J.L. & POL'Y 1, 5–10 (2021) (explaining this categorical methodology).

[240] *See* Andrew Stephen Oldham, Federal Judicial Center, https://www.fjc.gov/history/judges/oldham-andrew-stephen.

[241] Ian Millhiser, *Two Republican Judges Just Let Texas Seize Control of Twitter and Facebook*, VOX (Sept. 19, 2022), https://www.vox.com/policy-and-politics/2022/9/19/23361050/supreme-court-texas-twitter-facebook-youtube-social-media-fifth-circuit-netchoice-paxton.

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in the *Paxton* majority may be drawn to extending *Bruen's* Second Amendment framework to free-speech cases.

III. APPLYING TEXT, HISTORY, AND TRADITION TO RECONSIDER *NEW YORK TIMES CO. V. SULLIVAN*

To understand how the Court's text, history, and tradition methodology might play out in First Amendment speech cases, it is useful to consider a concrete example. Given Justice Thomas's repeated attacks on *New York Times Co. v. Sullivan*, it makes sense to use defamation claims against public officials as that example.[242]

Sullivan considered whether the First Amendment limited the common law tort of defamation when brought by a public official against a newspaper. L.B. Sullivan served as a city commissioner in Montgomery, Alabama during the civil rights movement, and his duties included overseeing the police department.[243] The *New York Times* published a paid advertisement placed by the Committee to Defend Martin Luther King; in an effort to raise money for King's legal defense, the ad detailed civil rights abuses in Montgomery.[244] Although Sullivan was not named in the ad, he argued that readers

[242] This Article limits its analysis to *Sullivan* itself and not its progeny, which included the extension of the actual malice requirement to public figures, *see* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154 (1967) (plurality opinion), and to claims for punitive and presumed damages in cases involving a matter of public concern, *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (concluding that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth").

[243] 376 U.S. 254, 256 (1964).

[244] *Id.*

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would attribute its criticisms of the Montgomery police department to him.[245] As the U.S. Supreme Court noted, it was "uncontroverted that some of the statements [in the advertisement] were not accurate descriptions of events which occurred in Montgomery."[246] Sullivan sued, alleging libel per se under Alabama common law.[247] In accordance with Alabama law, a jury rendered a verdict of $500,000 in presumed damages, and the Alabama Supreme Court affirmed.[248] At that time, the *New York Times* and other publications were facing a series of expensive defamation claims brought by Southern public officials unhappy with the media coverage of the civil rights movement.[249]

In an opinion by Justice Brennan, the Court held that public officials must demonstrate "actual malice"—knowledge of falsity or reckless indifference to truth or falsity—to succeed on defamation claims based on statements relating to their public duties.[250] Three Justices disagreed with Brennan's analysis, contending that the newspaper was entitled to an "absolute, unconditional constitutional right" to "criticize officials and to discuss public affairs with impunity."[251] As Richard Epstein wrote, the

[245] *Id.* at 260–64, 270.

[246] *Id.* at 258–59.

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.* at 279–80.

[251] *Id.* at 293–97 (Black, J., concurring) (joined by Douglas); *see also id.* at 297–305 (Goldberg, J., concurring) (joined by Douglas) (arguing that "the Constitution affords citizens and the press unconditional freedom to criticize official conduct").

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decision was a victory not only for the freedom of speech but also for the civil rights movement.[252]

Justice Thomas has made clear he would overrule *Sullivan* because he believes the actual malice standard that the case adopted "bears 'no relation to the text, history, or structure of the Constitution.'"[253] He claims that *Sullivan* and its progeny were "policy-driven decisions masquerading as constitutional law" and that the Court should consider whether the "original meaning" of the First and Fourteenth Amendments support the actual malice standard.[254] Justice Gorsuch also has expressed the view that *Sullivan* is inconsistent with the Constitution's original meaning,[255] although his arguments for reconsidering *Sullivan* rest extensively on what he regards as a shifting media landscape.[256] In addition, unlike Thomas, Gorsuch professes to be less certain of the outcome of any such reconsideration, stating he does "not profess any sure answers" and is "not even certain of all the questions we should be asking."[257]

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[252] Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 787 (1986).

[253] Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari) (quoting *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)).

[254] McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

[255] *See Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting from denial of certiorari) (arguing that it was the "accepted view" in this country "for more than two centuries" that States could permit defamation actions); *id.* at 2429 ("Departures [like the holding in *Sullivan*] from the Constitution's original public meaning are usually the product of good intentions.").

[256] *Id.* at 2427–30 (arguing that "[t]he Nation's media landscape" has changed in vast and important ways since *Sullivan* was decided in 1964).

[257] *Id.* at 2430.

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As discussed in Part II, the first step in the methodology Justice Thomas sets forth in *Bruen*, as applied to First Amendment issues, requires courts to consider whether the plain text of the Constitution covers the challenged regulation. If that step is not met, the inquiry comes to an end. If it is met, however, then courts must consider whether the "historical tradition" supports the challenged law.[258] Under this *Bruen*esque approach, if the type of speech in question had *not* been historically and traditionally barred in the United States, then the issue would become whether the specific form of regulation (albeit not a complete ban) imposed on it had historically and traditionally been permitted.[259]

Thus, under *Bruen*'s text, history, and tradition approach, any reconsideration of *Sullivan* would need to start with the text of the First Amendment, including the nature of the incorporation of the First Amendment.[260] If the Court refused to reconsider—or reaffirmed—*Gitlow*, it would still need to address the amendment's plain admonition that "no law" could "abridge the freedom of speech, or of the press." Given that any honest plain-text approach would have trouble avoiding the clear import of "no law," those seeking to overturn *Sullivan* would want to focus on defining what the "freedom of

[258] *See Bruen*, 142 S. Ct. at 2127 ("the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms"); *see also id.* at 2130 (if the plain text covers the conduct at issue, "[t]he government must then justify its regulation by demonstrating that the regulation is consistent with the Nation's historical tradition of firearm regulation").

[259] Under *Bruen*, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126.

[260] *See* Epstein, *supra* note 252, at 788 (noting the "first step" toward the constitutionalizing of common law torts "had taken place a long time ago when the prohibitions of the first amendment were held to apply to the states").

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speech" and "freedom of the press" mean. As discussed in Section A of Part II,[261] the Court would first have to address Blackstonian arguments that the First Amendment prohibits only prior restraints and not subsequent punishments.[262] Because the Court seemingly has no appetite for embracing Blackstone's approach, notwithstanding that both Thomas and Gorsuch favorably cite him,[263] it then will need to determine whether the freedom of speech (or the press) provides constitutional protection for defamatory speech.[264]

The next question would be whether the First Amendment "covers" defamatory statements. This is where things get particularly interesting. Defining the relevant historical analogy at higher level of generality—for example, speech that is critical of the government—would make it more likely for the Court to reaffirm *Sullivan*. Without stating so directly, *Sullivan* itself took this approach by not focusing narrowly on the state of defamation law in either 1791 or 1868, but rather on whether there is a history and tradition of protecting false speech about the government.

Indeed, although Justice Thomas and others have criticized *Sullivan* for its failure to rest its decision in history, this attack is misplaced. Justice Brennan, writing for the

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[261] *See infra* notes 134–37 and accompanying text (regarding Blackstone).

[262] *See* Epstein, *supra* note 252, at 791 ("The great step in *New York Times* was to breach the wall between prior restraint and tort liability.").

[263] *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting from denial of certiorari); *McKee*, 139 S. Ct. at 678 (Thomas, J., dissenting from denial of certiorari).

[264] Indeed, some of the Court's decisions in this area have left open the possibility that the press is entitled to more extensive First Amendment protections. *See*, *e.g.*, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (holding that a private-figure plaintiff had the burden of proving falsity of a press defendant's speech about a matter of public concern).

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majority, spent several pages analyzing the nation's early history of laws restricting criticism of the government because the Court believed the relevant history and tradition analogue was whether there have historically and traditionally been protections for criticism of the government.[265] As a result, *Sullivan* relied extensively on "the great controversy over the Sedition Act of 1798," which it claimed "first crystallized a national awareness of the central meaning of the First Amendment."[266]

Critics of *Sullivan*, such as Justice Thomas, would instead search for the narrowest relevant historical analogy possible. In his *McKee* opinion, Thomas contends that evidence of a broad consensus that the Sedition Act was unconstitutional is irrelevant because that is not equivalent to objecting to libel laws.[267] Instead, Thomas points to evidence that state common-law defamation actions existed at the founding and that, in fact, libels against public officials were considered more serious than ordinary libels.[268] Thomas also claims that criminal libel prosecutions occurred in the colonies through the ratification of the Fourteenth Amendment.[269] He notes that the common law did not permit truth to be a defense,[270] and that while it privileged statements about a public official's fitness for office, this privilege applied only when the statement was true.[271] Thomas also cites several opinions from the 1800s in which public officials brought

[265] *See* Lee Levine & Stephen Wermiel, *What Would Justice Brennan Say to Justice Thomas?*, COMMC'N. LAW. Spring 2019, at 1, 23 (making this observation).

[266] *Sullivan*, 376 U.S. at 273.

[267] *McKee*, 139 S. Ct. at 682 (Thomas, J., dissenting from denial of certiorari).

[268] *Id.* at 679.

[269] *Id.*

[270] *Id.* at 678.

[271] *Id.* at 679.

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defamation suits without needing to prove actual malice.[272] Thomas's narrow focus on libel laws specifically, rather than on the history and tradition of protecting speech critical of the government more generally, might explain why he does not address in either *McKee* or *Berisha* the jury's acquittal of printer John Peter Zenger back in the 1730s, even though Justice Thomas cited that case extensively in his *McIntyre* concurrence.[273]

Matthew Shaffer recently wrote an article attacking Justice Thomas's historical arguments in detail.[274] Reviewing the history with that level of detail is beyond the scope of this Article, but it should be noted that Shaffer argues that, in key respects, Justice Thomas has overstated the historical record.[275] For example, Shaffer asserts that the early 1800-era libel cases that Thomas cites fail to support his argument that the United States embraced the English tradition; instead, Shaffer contends, they demonstrate precisely the opposite, with courts attempting to reconcile libel law with a Republican form of government.

In addition, even assuming state common law universally recognized strict-liability or negligence defamation claims in 1791, it is not clear that it is the relevant historical time period. Thomas himself recognizes the common law of defamation evolved over time, and that by 1868 "many States by then allowed truth or good motives

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[272] *Id.* at 681.

[273] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 361–62 (1995) (Thomas, J., concurring). *See* CLAY CALVERT, DAN V. KOZLOWSKI & DERIGAN SILVER, MASS MEDIA LAW 41–42 (22nd ed. 2023) (providing a synopsis of the arrest and prosecution of John Peter Zenger in the 1730s).

[274] Matthew L. Schafer, *In Defense:* New York Times v. Sullivan, 82 LA. L. REV. 81 (2021).

[275] Schaffer concedes "not all of Thomas's and Gorsuch's historical authority can be swept away." *Id.* at 96.

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to serve as a defense."[276] To be sure, a defense is not the same as giving the plaintiff the burden of proof, but it nevertheless undermines the argument that an actual malice requirement is inconsistent with history and tradition. It thus becomes important to determine whether the relevant historical time period is 1791, when the First Amendment was ratified, or 1868, when the Fourteenth Amendment was adopted. As discussed above,[277] the Court expressly dodged this issue in its recent decisions.

Another difficulty the Court would face in reconsidering *Sullivan* is figuring out how to interpret the history and tradition of defamation law as a whole, when the history and tradition of the common law defamation is different throughout the fifty States. State common law is full of privileges for otherwise defamatory speech, and these privileges developed as a result of a perceived need to protect public discourse.[278] As Matthew Schafer argues, "libel law in the United States is not now, nor ever way, tidy. And the history of the First Amendment, let alone the Fourteenth, is not a monolith."[279]

Sullivan critics like Thomas appear to suggest that it is wrong for the Court to interfere in any way with the common law tort of defamation. But as Richard Epstein once wrote, Alabama common law and, in particular, its application in *Sullivan*, was not consistent with the common law of most other states. Surely it cannot be the case that states are free to develop their common law in any way they please, shielded entirely

[276] McKee v. Cosby, 139 S. Ct. 675, 678 (2019) (Thomas, J., concurring in denial of certiorari).

[277] *See supra* notes 210–213 and accompanying text.

[278] Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1427-28 (2020) (noting the common law of privacy and defamation "is *itself* limited in speech-favorable ways"); Epstein, *supra* note 245 ("the common law operates from a deep conviction in the importance of freedom of speech").

[279] Schafer, *supra* note 274, at 97.

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from constitutional scrutiny.[280] Although Thomas asserts that "States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm,"[281] *Sullivan* itself demonstrates this is not the case.[282] At the same time, determining a single, coherent history and tradition of defamation law becomes exceedingly difficult when the states had radically different laws, and the potentially relevant historical period sweeps broadly from pre-colonial England to modern times.[283]

Similarly, it is worth noting that while Thomas has focused his ire on the actual malice standard, in *Sullivan* the Court could have ruled in favor of the *New York Times* on other grounds that also involved constitutionalizing a state-law tort. Although determining the precise contours of a text, history, and tradition approach to these questions is beyond the scope of this Article, it is at least plausible that this methodology would have supported a decision for the newspaper. For example, it was hardly obvious that the general statements in the challenged advertisement were "of and concerning" plaintiff Sullivan. Likewise, the advertisement, while containing errors, was (at least arguably) substantially true. Other holdings, such as one that the plaintiff bears the burden of proving falsity, might not have made a difference in *Sullivan* but would impact defamation litigation more generally.[284]

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[280] *See* Epstein, *supra* note 245, at 790–91 ("The states cannot, either through their courts or their legislatures, circumvent the constitutional prohibitions by deft manipulations of common law rules.").

[281] McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

[282] *See* Levine & Wermiel, *supra* note 265, at 22.

[283] *See supra* notes 210–213 and accompanying text (noting the Court's failure to define the relevant historical time period for a text, history, and tradition analysis).

[284] Epstein, *supra* note 245, at 794–95.

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In sum, exactly how the Court would decide if it revisited the actual malice rule of *Sullivan* largely depends on answers to knotty methodological questions about the First Amendment's text, history, and tradition approach that the Court has yet to answer.

IV. CONCLUSION

The U.S. Supreme Court placed a heightened emphasis during its 2021 term on the role that text, history, and tradition—originalism, in short—should play in resolving questions affecting both First Amendment and Second Amendment rights.[285] At the same time, it jettisoned the means-end tests of strict and intermediate scrutiny in Second Amendment cases, and it scuttled the means-end standard from *Lemon v. Kurtzman* in Establishment Clause disputes.[286]

Significantly, Justice Thomas and the majority believed that the Court's newfound approach in *New York State Rifle & Pistol Association v. Bruen* for evaluating Second Amendment issues was in harmony with the Court's extant First Amendment free-speech framework.[287] As Justice Breyer pointed out in *Bruen* and as this Article elaborated

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[285] *See supra* notes 1–39 and accompanying text (addressing the various uses of or references to text, history, and tradition in cases including *New York State Rifle & Pistol Association v. Bruen*, *Shurtleff v. City of Boston*, *Kennedy v. Bremerton School District*, and *Dobbs v. Jackson Women's Health Organization*); *see also* Stephen F. Rohde, *Triumph of Originalism Over Human Dignity*, 45 L.A. LAW. 22, 25 (Sept. 2022) (noting that the Court in *Bruen* "relied on originalism to strike down New York's concealed weapon law").

[286] *See supra* notes 5–7 and notes 22–29 accompanying text (addressing, respectively, the demise of means ends scrutiny in *Bruen* and the end of the *Lemon* test).

[287] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, (2022) (asserting that the Court's "Second Amendment standard accords with how we protect other constitutional rights," including "for instance, the freedom of speech in the First Amendment").

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on, however, that simply is not the situation because free-speech cases regularly pivot on the application of means-end tests while *Bruen* explicitly rejects them.[288]

This Article explored what might happen if the Court's conservative majority were to more fully impose its *Bruen* framework on speech cases under the First Amendment. It illustrated several problems that almost certainly would arise, from discerning what the word "speech" in the First Amendment covers from a plain-text perspective to fathoming whether modern-day regulations of speech might be sufficiently analogous to or different from historical and traditional regulations of speech.

Ultimately, deploying *Bruen's* methodology on free-speech cases probably would severely hamper the ability of government to enact new regulations on speech. As Dean Erwin Chemerinsky notes, the Court in *Bruen* "made it very difficult for governments at all levels to enact gun regulations, holding that they are allowed only if they were a type that historically existed in 1791 or perhaps 1868."[289] For instance, a federal district court used *Bruen's* methodology to enjoin a Texas statute barring "law-abiding 18-to-20-year-olds from carrying a handgun in public for self-defense."[290] There seemingly is little reason to doubt that the difficulty in fashioning new rules governing firearms would also arise for creating new rules affecting speech.

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[288] *See id.* at 2717 (Breyer, J., dissenting) (pointing out that "[j]udges . . . regularly use means-end scrutiny, including both strict and intermediate scrutiny, when they interpret or apply the First Amendment," and adding that "[t]he majority therefore cannot have intended its opinion, consistent with our First Amendment jurisprudence, to be read as rejecting all traditional forms of means-end scrutiny"); *see also supra* notes 40 and 62–65 (addressing Justice Thomas's comparison between free-speech and Second Amendment frameworks).

[289] Erwin Chemerinsky, *Looking Ahead*, 45 L.A. LAW. 16, 18 (Sept. 2022).

[290] Firearms Policy Coal., Inc. v. McCraw, 2022 U.S. Dist. LEXIS 152834, *4 (N.D. Tex. Aug. 2022).

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Some might consider it purely speculative whether the originalistic text, history, and tradition methodology of *Bruen*—one devoid of strict and intermediate scrutiny tests –would ever fully migrate to the realm of free-speech cases.[291] What is almost certain, however, is that the six-Justice conservative majority in *Bruen* will have the opportunity to do so if it desires over the next decade.[292] This Article illustrates why the majority should be more than a little bit chary of doing so.[293]

[291] The speculative nature of this issue arises because originalism—setting aside Justice Thomas's approach –currently plays little role in First Amendment free-speech jurisprudence. *See* Michael T. Cahill et al., Transcript, *The Roberts Court and Free Speech Symposium*, 87 BROOKLYN L. REV. 289, 294 (2021) (quoting First Amendment scholar Ronald K.L. Collins for the proposition that "practically speaking, originalism – whatever one may make of it – is really not part of the Court's First Amendment free speech jurisprudence").

[292] *See* Chemerinsky, *supra* note 289, at 20 ("It is . . . easy to imagine these six justices being together for another decade or more. Moreover, if they can time their retirements for when there is a Republican president to replace them, conservative control of the Court may be secure for a long time to come.").

[293] Other scholars might well concur with this sentiment. *See, e.g.*, Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 13 (2011) (asserting that an "originalist approach to interpretation of the First Amendment is easier said than done" and contending that "[t]he historical evidence concerning the original meaning of the Speech and Press Clauses is frustratingly inconclusive").

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