A HALF-HEARTED DEFENSE OF THE CATEGORICAL APPROACH

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INTRODUCTION

One of Professor Magarian's more impressive achievements in *Managed Speech* is paying the Roberts Court the compliment of providing a *theory* that runs through its various First Amendment cases.[1] The book shows us surprising and hidden connections between disparate opinions by the Justices of the Court, and between different areas of First Amendment law. Importantly, the "managed speech" theory goes beyond just name-calling: "managed speech" is a coherent and even possibly defensible theory, not a label, like calling the Court "right-wing" or "pro-Business."[2] But there are some problems with Magarian's approach. The first is that it works better for some areas of First Amendment law (government speech, campaign finance) than others—as Magarian himself might admit. A second problem is that Magarian's alternative, "dynamic diversity," is not as fully fleshed out as "managed speech,"[3] so his book, in the end, operates more in the mode of diagnosis and critique rather than a positive blueprint for change. I will have something more to say about this in what follows.

But it is a third problem I mostly want to focus on in my short essay in this Symposium. Dynamic diversity, like managed speech, operates at the level of theory, not at the level of constitutional doctrine. So while it may be clear what *results* in cases dynamic diversity would like, it is less clear what *doctrinal route* we should take to get to those results.[4] In trying to figure out what route dynamic diversity could take, I make a partial—and somewhat half-hearted—defense of the Court's so-called categorical

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1. *See* GREGORY P. MAGARIAN, MANAGED SPEECH xv (2017) [hereinafter MANAGED SPEECH] ("I contend . . . that the Roberts Court's free speech jurisprudence fits a descriptive template that I call *managed speech*.").

2. *Id.* By "theory" in this context I mean broadly something that seeks to explain and even to justify the various cases in this area.

3. As discussed in Part II *infra*, "managed speech" is the idea that disruptive speech needs to be controlled, and the speech of powerful, established interests (whether governmental or private) should be privileged. "Dynamic diversity," by contrast, favors the speech of "outsiders," who oppose the status quo and lead to productive social and political change.

4. As I explain later, this is related to dynamic diversity's underdevelopment at the theoretical level.

approach, developed in *Stevens*,[5] *Brown*,[6] and *Alvarez*,[7] and about which Magarian seems ambivalent.[8] I think there is a lot to be said for the categorical approach, and even its reliance on the perhaps malleable and certainly vague idea of "tradition." Maybe the categorical approach is not our first choice or the choice for understanding the First Amendment. But it might just work as a second-best compromise in a lot of ways, and it may be the best way doctrinally to realize some of the goals of "dynamic diversity."[9]

My paper has three parts. In the first, I describe the appeal of the categorical approach, giving my own impressionistic view of where and why some people tend towards favoring First Amendment speech protections (including myself). In the second part, I try to list some of the problems with dynamic diversity. It is not only underdeveloped as a doctrinal matter—an objection I pursue more in the third part—but it is also strangely undermotivated as a theory. Stability has its appeal; less obvious is why disruption or social and political change *as such* are valuable. I also question whether dynamic diversity can support the results in *Brown*, *Stevens*, and *Alvarez*—which Magarian says he favors. In the third part, I turn more explicitly to doctrine and defend the categorical approach against some of Magarian's brickbats.

I. A HALF-HEARTED DEFENSE OF THE CATEGORICAL APPROACH[10]

I find the First Amendment hard to love, unlike some of my students who have an ability to defend the thought they really do hate,[11] up to and even sometimes beyond the point where that speech turns into incitement, causes harm, etc. My first instinct, instead, is to want to *limit* and maybe even

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

6. Brown v. Entm't Merchants Ass'n, 564 U.S. 786 (2011).

7. United States v. Alvarez, 567 U.S. 709 (2012).

8. *See infra* Part I; *see also* MANAGED SPEECH, *supra* note 1, at 11 (categorical approach cases make "serious contributions to constitutional speech protection"); *id.* at 252.

9. A brief word about what I mean by "doctrine" here. In contrast to theory, which seeks at an abstract level to describe and justify certain Supreme Court cases, "doctrine" is a method by which that theory can be realized in particular cases, by saying how the Court should rule and what moves it should make, etc. in those cases.

10. For a comparatively early look at the Courts' use of categorization in the First Amendment context, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

11. "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

suppress the thought that I hate—racist speech, sexist speech, hate speech of all sorts. Of course, I do not want to do that at all costs, but I do want to do it (and I find a little mysterious those who do not cop to having this desire even a little). Why should my initial impulse be to protect thought that I view as not only wrong, but also badly wrong and harmfully wrong? I do not support an unregulated market in goods; why should I want to defend one in ideas?

But then I end up backing into the First Amendment's protections through a familiar and well-traveled route. Sure, I want to limit those ideas that *I* find hateful, and if I were king of the world and if I were sure I were infallible, then I would limit them. But I am not king of the world, and I am not always right. So the First Amendment ends up for me as at least a pragmatic ideal. I will accept the compromise that I do not get to suppress my disfavored ideas (about which I might be mistaken) so long as you accept the deal, too. Out of this grudging abstinence, the virtue of tolerance and acceptance may be born. I learn to put up with you, and may find you are not *all* that bad, despite the terrible things you say. I might even someday find myself being persuaded by you: a possibility that would have never come about had I suppressed your ideas. This sort of tolerance and acceptance is not the main reason for protecting your speech, though. I really do doubt in most instances that I will be persuaded by your speech or think that there is something especially valuable in your autonomously being *badly* wrong.

Consider how this plays out in two cases, *Stevens* and *Brown*. I am one of those who probably would find nothing redeeming in even the material that falls under the (overbroad) law of *Stevens*, a case that involved a law designed to curtail the circulation of depictions of animal cruelty. What contribution to public debate do "crush videos" or films of dogs mauling one another provide? Should they even be considered a type of speech? I don't really understand why people would watch these things—I don't even understand why people would want to watch bullfighting (live or taped), or a documentary on pit bulls.[12] Or take violent video games, the subject of regulation in the *Brown* case: some of these are now much more graphic, much more explicit than even the ones discussed by Justice Alito in his concurring opinion. One which I was exposed to (although my memory is fuzzy) involves your character violently vomiting on everybody, and then somehow *also* dismembering them, urinating on them, and doing all of this

12. Although I might support efforts to secretly videotape what is going on at dairy farms. See the recent case, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

in a vaguely racist and homophobic way.[13] What is the good that comes from people playing these video games? And, I mean this not just as relates to the risk that these video games will cause people to be more violent; I just worry about the general coarsening of sensibilities that comes from being around these things.[14] I don't think I am alone in reacting in this way. So when I read about legislation that tries to restrict animal cruelty videos and violent video games, my first impulse is not that we should fight to the death to protect views that we loathe, and which may even be "fraught with death."[15] My first impulse is to ask, "Well, why not try to shut these things down?"

The answer to "why not?" comes in Justice Roberts's response to the approach favored by the government in *Stevens*: where and how do you draw the line? The government says the values here (preventing cruelty to animals; protecting kids from images of violence) outweigh protecting the speech that is at issue—but who decides which values are relevant and how to balance those values? Thatresults in a sort of "free-floating test" (Roberts' phrase), which invites all sorts of subjectivity and bias into the analysis.[16] What we need—and what Roberts gives us—is something that says: look, here is a brake on the sort of free form analysis we might be *tempted* to do. It is a list of those things we have "traditionally" said get no protection from speech. It is a relatively short list, but it is exhaustive, as far

13. I may be misremembering some details, but the game *Postal 2* does come close. *See* John Herrman, *No, Let's Talk About Video Game Violence*, BUZZFEED (Dec. 17, 2012, 4:46 PM), https://www.buzzfeed.com/jwherrman/no-lets-talk-about-video-game-violence [perma.cc/T47C-P5RM].

14. See Laura Miller, *How Video Games Change Us*, SLATE (Nov. 30, 2016), http://www.slate.com/articles/arts/culturebox/2016/11/do_video_games_make_us_more_cruel.html [perma.cc/UGC2-BGKB].

15. "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

16. The relevant quote from *Stevens* is this:

> The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."

Unites States v. Stevens, 559 U.S. 460, 470 (2010) (citing Brief for United States 8); *see also id.*, at 12.

> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."

Unites States v. Stevens, 559 U.S. 460, 470 (2010) (citing Marbury v. Madison, 1 Cranch 137, 178 (1803)).

as we know. And the thing the government wants to prohibit, depictions of animal cruelty, is not on the list. Justice Scalia does the same thing in *Brown*. Here is this list of things we can ban, Scalia says, and the thing you want to ban isn't on it.[17] The result is garbled in *Stevens* (because the case was decided on other grounds), clearer in *Brown*, and muddled again in *Alvarez* (because there was no majority), but the idea is the same. The list dictates what kinds of speech the government can regulate and even ban, and if the thing isn't on the list, the government does not just get a free hand (or "free-floating power"[18]) in regulating it. End of discussion, pretty much.

But does it not matter what the list has on it? How did we decide to use *this* list? Does not the list itself have to be interpreted? All of these are important questions, and I will get to them in the Part III. But the list of *categorical exceptions* to First Amendment protection (hence the name, the "categorical approach") has the right kind of feel to it—it's purported objectivity and straightforward application fills the right kind of space—especially as Justice Roberts defines it. It opposes itself to the idea that we can just do free-form balancing to decide speech questions. That involves too much subjectivity. If we can point to a list, a list to which categories cannot be added (but from which categories could possibly be subtracted), that puts the appropriate kind of brake on the temptation to limit the kind of speech we do not like—because next time, it may be our ox that is gored.

II. DYNAMIC DIVERSITY

How does dynamic diversity—Magarian's counter-theory to "managed speech"—deal with all this? That is, how does *it* rein in the inevitable temptation to suppress speech the government does not` like? The answer is unclear, because dynamic diversity is underdeveloped in two respects. First, dynamic diversity is not *doctrine*. It operates, or seems to operate, in the same conceptual space as managed speech. It is a theory about speech and the regulation of speech.[19] "Dynamic diversity" does not and cannot tell courts, at least not directly, how they should decide cases. The Court cannot rule on a case and say, "we strike down this law because it harms dynamic diversity," any more than it can say, "We uphold this law because it manages speech." So we have to engage in a sort of translation to see what

17. See Part II of the *Brown* opinion. Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 790–99 (2011).

18. *Id.* at 794 (Scalia, J.).

19. Magarian says the theory is only "descriptive" in the case of managed speech, but I think his analysis belies this claim—I think it may operate prescriptively as well. Dynamic diversity is, by contrast, a normative aspiration, and does not describe much current Court doctrine.

dynamic diversity means as a matter of constitutional doctrine. But there is a second way in which dynamic diversity is underdeveloped. It is not obvious why dynamic diversity is really all that valuable, and Magarian never really tells us in too much detail why it is. I know that Magarian thinks that stability (or at least the "aggressive preservation" of stability[20]) can be bad, but it does not follow that dynamic diversity is always good. Is political and social change *as such* good? Most agree it is not when we change from democracy to fascism. Nor is it good when that change leads to greater economic inequality and depression. Change is good when we have been going in the wrong direction, of course, but I think Magarian does not want to claim that dynamic diversity is only good when it leads to good things—that is a rather small circle (dynamic diversity is good when it is good, bad when it is bad). Moreover, it is not clear why we should only favor dynamic diversity when it comes to freedom of speech, as opposed to supporting in when it results in legislative *action* as well. Could it not be a part of "dynamic diversity" that we pass new laws that represent new and democratically-arrived-at approaches to problems? Isn't this *also* an example of disrupting the status quo?

Let me start with the doctrinal point first. Dynamic diversity does not directly say how the Court should decide cases. Dynamic diversity favors certain *results*—it likes it when outsiders and outsider speech wins. It likes when minority speech interests are protected, and not the interests of the government and large corporations. But again, we cannot decide cases on this basis; I do not think—we cannot just say, "Well, of the two sides here, this side is the little guy, and the other side is the big guy. The little guy wins." We have to say—I think this is not too controversial—why text, history, and precedent should lead to that result. We have to have some *principled* way of telling the good speech from the bad speech, one that is in some respect independent of our preferences from moment to moment. And when values are at play, we have say what those values are, and more importantly to specify in each case why *these* values apply and how to weigh those values against one another. To be sure, Magarian comes close to laying out a doctrinal method for dynamic diversity when he writes that instead of relying on a categorical list, courts should just go directly to a balancing of the interests at play. Dynamic diversity, he says, "take[s] a functional, substantive approach to categorical First Amendment questions, asking whether excluding a given category of speech from First Amendment protection would promote a diversity of ideas and participants in public

20. MANAGED Speech, *supra* note 1, at xv.

debate."[21] "The most transparent way for the Court to decide categorical exclusion cases," Magarian adds, "would be to talk openly about which values matter and why." The categorical approach, by contrast, "hides the analytic ball" by pretending to not make value choices when it actually and implicitly does. [22] I think that is a fair criticism of the categorical approach, and I will try to defend the approach against it in Part Three, because the question here may be less whether the categorical approach avoids *all* controversial value choices, and more about whether it does a better job of this than any other approach, dynamic diversity included..

For Magarian's own position sounds worryingly like the free-floating balancing test that Roberts declaims in *Stevens*.[23] It tells us to go straight to the weighing of values, where there seems to be little in the way given in guiding us how to do this, consistently, from case to case. "Dynamic diversity," in fact, looks a lot like the approach favored by Justice Breyer in his dissent in *Brown* and his concurring opinion in *Alvarez*.[24] We look at the values and we weigh them, and we come up with the answer. But in *Brown*, Breyer's balancing comes out the wrong way—at least according to Magarian, who favors the result reached by the majority—and I wonder where Magarian would object, or find fault. This is the problem when the command is simply to "weigh the values and get the answer." What if we weigh the values differently, as Breyer and Magarian do? If that's the case, then we need to understand *why* one side is right and the other is wrong.

So if Breyer gets it wrong, how does he get it wrong? Is it that Breyer misunderstood the value and significance of the speech at hand? I doubt it. I imagine the majority of people would agree the speech is pretty worthless,

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21. MANAGED SPEECH, *supra* note 1, at 31.

22. *Id.* at 16.

23. And—we might worry—makes the Supreme Court a much more active *manager* of speech than it is with the categorical approach. I won't push this objection, though, as the Court's role in all of this seems inevitable.

24. See MANAGED SPEECH, *supra* note 1, at 28 (stating that Breyer in *Alvarez* is "all about" using a "more flexible balancing analysis"). The clearest statement of Breyer's method comes in his concurring opinion in *Alvarez* (although Breyer also describes and employs this method in *Brown*):

> In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.

United States v. Alvarez, 567 U.S. 709 (2012) (Breyer, J., dissenting).

pointless, and even scary.[25] Did Breyer misconstrue the value of the disruptive speech—of *this* disruptive speech? But how disruptive *is* the speech here? Or how much does violent speech—dismayingly—represent the status quo in most of contemporary entertainment? Are there *not enough* people standing up for (virtually) vomiting and urinating on people? Do we need more? Or is Breyer not standing up for the little guy? But who *is* the little guy here?[26] It's not the major media companies, i.e., the people who sell the video games—even Magarian seems to agree with this. The little guy in this case might be the parents who want to try to protect their sons and daughters from images of slaughter and cruelty; and even the children themselves, who may have interests that need protecting.[27] How, precisely, is this balancing supposed to go so that the video game companies obviously win? Is it just that censorship is always bad? But is it?[28] If dynamic diversity in the end becomes just an opposition to regulation of any speech, it becomes less interesting: it does not tell us why any law suppressing speech in any given case should be void.

For dynamic diversity to be useful, it has to tell us when diversity is present, and why it is valuable in particular cases. As things stand, it is too fuzzy to be applied in deciding cases; it is more of an opposing stance to managed diversity rather a fully-worked out doctrine. I would want to hear more about how Magarian would employ the theory of dynamic diversity to the facts in *Brown*, and how he would respond to Breyer's dissent in that case.[29] The categorical approach, which is also still probably theoretically

25. Magarian at one point calls it "arguably frivolous." MANAGED SPEECH, *supra* note 1, at 11. Some might worry too about the especially interactive nature of the violence because of a potential antisocial impact it could have on the user's behavior (as Alito does in his concurring opinion). *See also* Michael McConnell, *A Free Speech Year at the Court*, FIRST THINGS (Oct. 2011), https://www.firstthings.com/article/2011/10/a-free-speech-year-at-the-court [http://perma.cc/797X-FNUH] ("Moreover, video games are not, in fact, the same phenomena as books, movies, or comic books. The gamer is not just 'exposed' to 'ideas,' he engages in conduct that simulates murder, rape, brutality, and torture. If virtue ethics has any experiential validity at all, repeated conduct over a period of time has an effect on human character.").

26. The issue is hard on both sides. Magarian says *Stevens* and *Brown* both favor commercial interests. I think this exaggerates, and also overstates the similarities between varied commercial enterprises. In other words, it's not obvious to me that the Court in these cases really is favoring just "the big guy." (What about the small-time, hunting video salesperson? Or the video game startup?) For reflections on a related problem in the campaign finance context, see Chad Flanders, *Super PACs and Politics of the Weird*, POLITICO (Mar. 6, 2012), https://www.politico.com/story/2012/03/super-pacs-unleash-politics-of-the-weird-073679 [perma.cc/76ME-ZZKV].

27. In *Stevens*, it might be the animal rights activists working against depictions of animal cruelty who are the "little guys."

28. And, in the end, what is the offensive idea here: the "speech" of the violent video games, or the idea that such speech should be modestly regulated?

29. *Cf.* William Baude, *Should Free Speech Doctrine Use "Purely Historical Tests"?*, WASH. POST (Mar. 28, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/28/

underdeveloped, gives us cleaner answers: in *Brown*, violent speech isn't on the list, so the law goes down. The categorical approach, as a theory anyway, lends itself to a simple, even simplistic analysis: is the category of speech on the list, or not? But maybe the problem of doctrinal translation points to something else, something deeper, which is that dynamic diversity as a *theory* is itself too fuzzy. According to Magarian, dynamic diversity is valuable because it promotes open speech and debate, and this can lead to social change.[30] I have already, in passing above, questioned whether social change as such is a good thing.[31] If things are going well, stability is good. And it cannot be that everything is up for grabs (as Magarian himself admits). There has to be some stability, some constraints on who can say what, when, or else we have a cacophony of voices, where no one gets heard—this is as true when it comes to speech in particular as it is for governance in general. Robert Post has put this paradox well, and I can't improve on him here.[32] What I want from Magarian is why *he* sees sheer variety in democratic discourse as valuable; and in his theory of dynamic diversity, I do not see it, or I do not see enough of why it is good.

But let me push this one step further and suggest that maybe dynamic diversity really supports the *opposite* result in *Stevens* and *Brown*, cases Magarian says were decided rightly, even if for the wrong reasons. The laws in *Stevens* and *Brown* were attempts at social change—and even against

should-free-speech-doctrine-use-purely-historical-tests/ [perma.cc/NV6V-2QPV] ("I highly doubt that if asked to consider the 'value' and 'costs' of the speech itself—divorced from the historical rules of free speech—that most of them would vote in favor of dog-fighting videos, hateful funeral protests, or violent video games in the hands of children. That suggests that cases like Stevens actually function to express a value judgment of their own—that judges should faithfully implement constitutional law rather than making it according to their will. It seems to me our constitutional doctrine needs more of that, not less.").

30. MANAGED SPEECH, *supra* note 1, at xvii ("[T]he underlying reason for wanting as many people . . . to engage in public debate about as many ideas as possible, posits free speech as an engine of political and social change."); *see also id.* at 242 ("Dynamic diversity views the capacity of speech to foster social and political change as central to the constitutional value of free expression."); *id.* at 243 (citing dynamic diversity's "vision of a First Amendment that enables social and political change"); *id.* at 253. One might wonder about this as an empirical matter as well—is free and open speech the best vehicle for social change? Maybe a lot of political and social change comes about when a limited number of people govern the conversation, not when it is open to "all comers" (who may debate and debate, but get nothing resolved). Or, more modestly, we might wonder whether we always need the *widest possible* range of speakers and views in order for there to be "dynamic diversity." *Cf.* MANAGED SPEECH, *supra* note 1, at 233 (noting the empirical question of whether managed speech promotes stability).

31. As Magarian allows: "Change is not an absolute good; societies need stable institutions." *Id.* at xviii.

32. *See* Robert C. Post, *Between Democracy and Community: The Constitution of Social Form*, *in* Democratic Community: Nomos XXXV 163, 164 (John W. Chapman & Ian Shapiro eds., 1993).

some pretty powerful interests:[33] the video game industry in *Brown* and possibly the hunting lobby and the NRA in *Stevens*.[34] They wanted to make a change, even a "dynamic" change, to the terms of the status quo, by limiting the ability of kids to buy violent games and for people to consume depictions of animal cruelty. There was proposed reform, presumably as the result of some degree of debate and dialogue, in one case by Congress and in the other case by the California Assembly. Why is dynamic diversity only good when we are *debating* change, but not also when we actually also *implement* that change through actually passing laws and changing the status quo?[35] Why, in other words, favor the *vehicle* of social change but prohibit the *result*?[36] And in fact, that is what *Brown* did.[37] Nor would the existence of the laws prevent further debate—of an undeniably political and undeniably valuable kind—about the wisdom of those laws. Maybe violent video games really represent a sort of safety valve on actual violence, and so kids should have this outlet; who knows? Maybe having an overbroad law against hunting videos chills speech that really works to help promote gun safety. And so on and so on. Passing the laws in *Brown* and *Stevens* does not stop debate and may even *spur* it.[38] Why isn't this a win for dynamic diversity—and for social change of a positive sort?

III. DEFENDING THE CATEGORICAL APPROACH MORE FORMALLY (AND A LITTLE LESS HALF-HEARTEDLY)

In Part I, I did not give a defense of the categorical approach so much as a description of why I found it somewhat congenial—it checked my impulse to repress speech *I* did not like with the recognition that having a free-

33. We might note, too, that these laws (almost by definition) challenge the status quo—in which people can sell animal cruelty videos, and children can buy violent video games.

34. The NRA filed a brief on behalf of Stevens. Brief of Amicus Curiae National Rifle America, Inc. in Support of Respondent, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_769_RespondentAmCuNRA.authcheckdam.pdf [https://perma.cc/8F4P-88GE].

35. One answer Magarian gives in his book is that speech is relatively harmless. But there are harms to *not* acting, and those harms—I think—are plausibly construed as harms to sometimes desirable social and political change.

36. Compare Kant's description of Frederick the Great:

> But only the man who is himself enlightened, who is not afraid of shadows, and who commands at the same time a well disciplined and numerous army as guarantor of public peace—only he can say what [the sovereign of] a free state cannot dare to say: 'Argue as much as you like, and about what you like, but obey!'

Immanuel Kant, An Answer to the Question: What is Enlightenment?, (September 30, 1784).

37. *See* McConnell, *supra* note 25 ("The majority effectively closes off any prospect of regulation." (discussing the effect of Brown)).

38. *Cf.* MANAGED SPEECH, *supra* note 1, at 31.

floating power to repress speech might not be so great in the wrong hands. And in Part II, I did not defend the categorical approach; I attacked Magarian's position as being both doctrinally and theoretically underdeveloped. So in this Part, I need to come to the defense of the categorical approach more directly. But I should add that in this case the best defense is a good offense. One does not pick the categorical approach as a first best option. One more or less backs into it; at least, that is what I did. And one sticks with the categorical approach because the other options are not much better; again, one does not so much champion the categorical approach as settle for it.

We do have to answer some basic questions about that approach. The list of categories of speech, Magarian says, seems problematic, because we do not quite know why these things are on the list and others are not. This is either a blind obeisance to tradition, or it is an example of previous act of balancing—the latter of which is in fact explicitly suggested by the famous passage in *Chaplinsky*[39] and taken as an invitation in *Ferber*.[40] I will get to the tradition point in a bit, but I think the way the Roberts Court has construed the list is that it is *limited* and *fixed*. Moreover, it is a *descriptive* list. The list should *not* be read as a kind of formula—hence the importance in *Stevens* of reinterpreting *Ferber* (while somewhat of a stretch) as a case involving crime facilitating speech and not as the creation of a new category.[41] Items on the list have to have a certain, very particular historical pedigree, which means that it is not very likely that any new items can be added to the list. At one point, maybe there was balancing, but, purportedly, *that is not what courts should do now*. The balancing has been done; the list remains. The categories purportedly have been set. Just like one cannot have new old friends, one cannot have a new old tradition.

But this just raises the stakes for the tradition objection. Why should we accept the list if it is only tradition that gives the list its imprimatur? Part of me finds this objection a little odd. Courts are all about "tradition." That's what precedent is.[42] The Constitution is an old text, surrounded by history and tradition. Courts have to work within that "tradition"—that is what

39. The relevant passage from *Chaplinsky* states:

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

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

40. New York v. Ferber, 458 U.S. 747, 754 (1982).

41. I agree with Magarian that *Ferber* is best read as creating a new category of disfavored speech. *See* MANAGED SPEECH, *supra* note 1, at 6.

42. *See generally* Anthony Kronman, *Precedent and Tradition*, 99 Yale L.J. 1029 (1990).

constrains them, at least in part, and prevents them from becoming "naked power organs," in Herbert Weschler's phrase.[43] "Tradition" is one very important kind of limiting thing that people assume is *independent* of our present-day values and wishes; and it certainly does not always align with them. Magarian is right that even tradition needs to be interpreted, and that "tradition" can be subject to different interpretations and can be manipulated.[44] Sure. But I do not think that tradition is *infinitely* malleable. History, when presented (ideally) by a neutral, disinterested party, at least presents itself as something out of our control that can surprise us, and constrain us—and act as a check on our wills.[45] It is something that we do not decide but have to look for.[46] Can we differ about history? Of course. But does that mean everything is fair game? I don't think so. Tradition seems more constraining than a direct appeal to values, going straight to balancing.[47] Justice Roberts is right: that *is* free-wheeling.[48]

Moreover, Magarian ignores something else about tradition: that we have a tradition of *freedom of speech*. We have to read the categorical approach in light of this tradition, too, and I think that is what Roberts does. The tradition of freedom of speech in part explains why the list of unprotected categories is not open-ended; it tells us to interpret the list as not really one that can grow, not something that we can add to in the *present*. It is only something that we can *discover* we had been doing all along, by doing the historical research necessary to find that tradition. So one broader tradition (that of U.S. freedom of speech) informs another (the fixed and limited nature of the list of categorical exclusions). It is a tradition that we exclude certain categories of speech, but it is also a tradition that we have "a profound national commitment to the principle that debate on public issues

43. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

44. Magarian is especially worried that we might find "new" categories of speech excluded from First Amendment protection. MANAGED SPEECH, *supra* note 1, at 16.

45. *See* Baude, *supra* note 29; *see also* Blocher, *supra* note 10, at 382 ("The creation of the category cuts off future adjudicators from the underlying value and prohibits the reweighing of interests.").

46. Magarian makes this point—indirectly—by citing places where Scalia and Alito got the history wrong in *Brown*. *See* MANAGED SPEECH, *supra* note 1, at 13–14. By making historical claims, Scalia and Alito open themselves to criticism, which shows the way in which history really is an independent standard. We can't just make it up.

47. And the competence question is a wash. Are courts better at "history" or better at assessing "which values matter" (and to whom)?

48. Related to this defense of tradition is a defense of the idea that *simple rules* are better than *complex rules*. But the two ideas are distinct. One might have a complicated tradition, or one might have a simple one (as with the tradition of the categorical exclusions, at least as described by Justice Roberts). *See* Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1474–75 (2017) (conclusion).

should be uninhibited, robust, and wide-open."[49] In fact, I think it is *this* tradition that has helped "whittle"[50] down and even eliminate some of the categories—incitement, fighting words, profanity—that were thought to be subject to no First Amendment protection. Tradition is not conservative, or inherently conservative. It is going to depend on, in part, to what tradition we are harkening back.[51] In fact, the influence of our longstanding free speech tradition suggests a sort of "one way ratchet" when it comes to the traditional categories: we cannot add to the list, but we can subtract from it.[52]

Magarian, I know, objects to some of the traditional categories in the list provided by Roberts, Scalia, and Kennedy (the list of course has some interesting and strange variations[53]). He objects especially to the categorical exclusion of obscenity from First Amendment protection.[54] I am less worried about this, partly because obscenity does not seem all that valuable, especially if interpreted to include what Catharine MacKinnon and others have articulated as "pornography."[55] It also strikes me that the *Miller* test, interpreted aright, gives communities a way to slowly increase the tolerance they allow to certain forms of obscenity.[56] I am not saying that there are not problems here. At the same time, that the list of "traditional" categories is not perfect is not a reason to reject the categorical approach wholesale. For one, the list is the list we have because the history is history we have (if it isn't, then this would be the basis for only an *internal* objection to the list[57]). If history is to operate as an effective constraint, at some point we will just have to accept the history we have, even if it isn't the history we would, ideally, want to have. For another, the list seems *mostly* OK.[58]

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49. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

50. MANAGED SPEECH, *supra* note 1, at 5.

51. One might here invoke the United States' revolutionary tradition as against Edmund Burke's understanding of French tradition in his *Reflections on the Revolution in France*. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).

52. And in fact, this seems to be how tradition works. Traditions can die, but you can't create a new tradition just like that.

53. One key difference seems to be whether child pornography is a separate item, or is subsumed under crime-facilitating speech.

54. MANAGED SPEECH, *supra* note 1, at 14.

55. Catharine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C. R.-C. L. L. REV. 1 (1985).

56. See the discussion of *Miller* in MAGARIAN, *supra* note 1, at 5.

57. In other words, one would be accepting that history fixes what categorical exclusions there are, but that his or her version of history differs.

58. I find nothing wrong with the law that criminalizes animal fetish videos, for example—a "fix" to the statute at issue in *Stevens*. *See* United States v. Richards, 755 F.3d 269, 271 (5th Cir. 2014). At the same time, there are serious problems with applying *Miller* in the age of the internet, some of which Magarian notes in his book.

But at the end of the day, one question for the opponent of the categorical approach has to be: *what do you have that is better*? What can do the same work that tradition in the hands of the Roberts Court does? If we go to values, whose values get to decide cases—and why *these* values? Tradition may not be the right thing to do the work of protecting speech, but I hope to have shown it is at least the right *kind* of thing. It constrains the Court from ad hoc balancing to determine which categories of speech are protected and which are not. And it seems to give the right results, at least if we are generally worried about government restrictions on speech (as I am, for the pragmatic reasons I articulated in Part I). Moreover, tradition is not exactly an alien thing when we are trying to determine the meaning and contours of the Constitution. Again, what else can really check off all of these boxes?

CONCLUSION

The categorical approach may seem to occupy only small part of First Amendment real estate. And it does only a limited amount of work. It is not a full-blown free speech *theory*. It says how we should decide a certain set of cases; it does not say why speech is valuable or not valuable. It just points to tradition—it leaves open why that tradition is valuable, if it is. But the categorical approach does represent a real doctrinal innovation, a sort of "back to the future" in First Amendment law. And the upshot *is*, as Magarian admits, surprisingly speech protective in *Brown*, *Stevens*, and *Alvarez*. It gives us the results that Magarian likes, if not for Magarian's reasons—although as I have argued, I am not sure Magarian's reasons *can* get us to those results, or at least not as cleanly as the categorical approach can.

There remains much work to be done on the categorical approach, both small and large. On the "small" front (and this is not really all that small), we do need to do the history to see if we've got the categories right.[59] As Magarian notes, there is disagreement here, and at least *in the terms of the*

59. Important in this regard are two recent articles. *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015); *see also* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017). Lakier's article, in particular, may seem to buttress Magarian's worries about tradition, although Campbell's may present a more radical challenge to the idea that our tradition is generally speech-protective. Lakier suggests that the notion that some categories have a historical imprimatur is a mistake, an "invented tradition." Lakier, *supra* note 59, at 2168. Looking at Lakier's incredibly thought-provoking piece in depth is beyond the scope of this brief comment, but I will make two quick points: 1) it is not obvious that Lakier shows that *all* of the history beyond the categorical approach is wrong, only some of it, and 2) even so, Lakier's critique may still only be what I have called, above, an "internal" critique: it does not suggest the turn to history is wrong in itself, but that (some parts of) the history has been done badly, even extremely badly. But we need a further argument to get from "we can't tell the history reliably" to "we should go straight to balancing values in deciding First Amendment cases."

approach, that debate can only be decided by good history, not by a balancing of values. The historical turn in First Amendment law is coming, and to my mind, it is long overdue.

On the "large" front, the categorical list seems to be somewhat at odds with another of the court's major free-speech jurisprudence, the idea of the permissibility of "content-neutral" distinctions. The categorical approach seems to be all or nothing: either the speech in question is on the list, and the government can regulate it, or it is not, and the government cannot regulate it. But behind content-neutral regulation is the idea that the government *can* regulate speech so long as that regulation does not discriminate on the basis of the content of ideas, that this kind of regulation does not present any real Constitutional problem. Some articulations of the content-neutrality principle even seem to say that any regulation on the basis of content is absolutely prohibited.[60] But this idea cannot be right, because of the tradition we have of regulating content, in particular, the content on the categorical list of exclusions.[61] So there exists a tension here, and something has to give—but what? If we agree that some things on the categorical list are rightly on there (for tradition or any other reason), then we must reject the idea that content-based distinctions as such are ruled out. What implications this has for regulations that are not content-based, however, remains to be worked out.[62]

60. "But, above all else, the First Amendment means that government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (emphasis added).

61. As Burger pointed out in his concurring opinion in *Mosley*. Mosley, 408 U.S. at 103 (Burger, J., concurring).

62. It may suggest that the whole idea of permissible content-neutral regulations is no good. One's speech is either on the list, or strict scrutiny applies. It may lead us to a sort of Justice Black-type absolutism. *See* Blocher, *supra* note 10, at 384 (describing Black's categorical approach). In general, it is simply unclear what accepting the idea of categorical exclusions means for content-neutral regulation. We know what it means for additional categorical exclusions, though: unless you can show that history (as construed by the Court) supports it (and this seems very unlikely), there can be no new categories.