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Against the Tiers of Constitutional Scrutiny

Joel Alicea

John D. Ohlendorf

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This year, for the first time in nearly a decade, the Supreme Court will return to the subject of the Second Amendment. *New York State Rifle & Pistol Association, Inc. (NYSRPA) v. City of New York* concerns a New York City licensing regime that, at the time the Court granted review, prohibited the transportation of any firearm outside city limits. (The City subsequently changed its licensing regime, perhaps in an effort to make the case go away before the Court could rule on the merits. It is unclear, at the time we write, whether that tactic will succeed.) Although most popular attention will focus on the outcome of the case, the long-term significance of *NYSRPA* could be how the justices arrive at that outcome, for *NYSRPA* poses a challenge to what has become a familiar feature of American constitutional law: the tiers of scrutiny.

The tiers of scrutiny are elements of a method of constitutional analysis in which courts examine the goal that a law purports to achieve and the means the law uses to accomplish it. It is usually said that there are three tiers. "Strict scrutiny," as the name implies, is the most stringent — it places the burden on the government defending a law to, first, identify a compelling governmental interest and, second, show that the means chosen by the government are narrowly tailored to achieve that interest. Laws that discriminate on the basis of race or viewpoint, for instance, receive strict scrutiny. So in theory, under current doctrine, a law that discriminates on the basis of race would be constitutional if the government could meet the two criteria of strict scrutiny. "Intermediate scrutiny" is similar to strict scrutiny, but the government's burden is

Joel Alicea and John D. Ohlendorf are attorneys at Cooper & Kirk, PLLC, in Washington, D.C.

reduced; generally, the government must show both an important or substantial interest, and that the means chosen to advance that interest are no more burdensome than reasonably necessary. Laws that discriminate on the basis of sex and content-neutral speech restrictions, for example, receive this form of scrutiny. Finally, a law will survive the third and lowest tier, "rational-basis review," if there is any conceivable, rational reason supporting the law. Rationality review is highly deferential and applies to many (perhaps most) economic regulations.

This three-tiered method of analysis has come to dominate the jurisprudence of the First Amendment's Free Speech Clause and the 14th Amendment's Equal Protection Clause. It remains an open question whether it will dominate Second Amendment jurisprudence. In *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010), the Supreme Court relied on the text, history, and tradition of the Second Amendment in establishing an individual right to keep and bear arms—striking down the gun laws challenged in those cases *not* because they flunked tiers-of-scrutiny analysis, but for altogether different, seemingly categorical reasons. Yet, in the aftermath of *Heller* and *McDonald*, federal courts have relied almost exclusively on the tiers of scrutiny to analyze Second Amendment cases, almost always purporting to apply intermediate scrutiny. The challengers in *NYSRPA*, by asking the Court to repudiate the use of the tiers of scrutiny in Second Amendment cases, have opened the way to reconsidering the legitimacy and continuing viability of the tiers-of-scrutiny framework for the first time in decades.

That framework ought to be abandoned. The tiers of scrutiny have no basis in the text or original meaning of the Constitution. They emerged as a political solution invented by the justices to navigate internal factions at the Supreme Court, and they do not withstand critical analysis even on their own terms. Not only do they have no place in Second Amendment jurisprudence; they have no place in American constitutional law. The Roberts Court would have few accomplishments of greater significance than the repudiation of the tiers of scrutiny and the reassertion of a method of constitutional analysis based on the text, history, and tradition of the Constitution.

THE CURIOUS HISTORY OF THE TIERS OF SCRUTINY

Today, analysis of constitutional questions through the lens of the tiers of scrutiny is commonplace, part of the unquestioned backdrop of

constitutional law. Yet, despite its familiarity, tiers-of-scrutiny analysis is in fact a relative latecomer to American constitutional law, dating back no earlier than the mid-20th century. Understanding the origins of the tiers of scrutiny is essential to understanding the hollowness of their claim to constitutional dominance.

At the time of the founding, American courts did not use "strict scrutiny" or "rational-basis review" to sift the constitutionality of federal or state laws; instead, they engaged in the more mundane task of attempting to determine the *scope* of constitutional rights and legitimate governmental powers. As Harvard professor Richard Fallon states in his article "Strict Judicial Scrutiny," "Through most of constitutional history, the Court conceived its task as marking the conceptual boundaries that defined spheres of state and congressional power on the one hand and of private rights on the other."

This method is well illustrated by Chief Justice John Marshall's landmark opinion upholding the first Bank of the United States in the 1819 case *McCulloch v. Maryland*. As Marshall saw the case, the constitutionality of the bank, and of Maryland's attempt to tax it, was to be determined by demarcating "the conflicting powers of the government of the Union and of its members, as marked in th[e] constitution." And the great chief justice sought to limn these boundaries through textual and conceptual analysis: inquiry into the words of the constitutional text, as understood in "common usage," and explication of the nature of sovereignty, taxation, and the federal union itself. Indeed, Marshall explicitly prescinded from the type of policy analysis emblematic of the tiers of scrutiny — the weighing of the importance of legislative ends and the sufficiency of legislative means. "[W]here [a challenged] law is not prohibited, and is really calculated to effect any of the objects entrusted to the government," he insisted, "to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Such judicial modesty was not to last. For complex reasons having to do in part with the rise of progressivism at the beginning of the 20th century, the vision of the judicial role reflected in *McCulloch* came under assault, creating a legal environment that eventually led to the development of the tiers of scrutiny. A deferential test resembling what we now call "rational-basis review" was the first to emerge, establishing

itself in the aftermath of the New Deal (though rationality review has its origins in the late 19th century). But it was not until mid-century, when the Court began to apply a form of heightened scrutiny, that an analysis recognizable as a tiers-of-scrutiny approach took shape. As Professor Stephen Siegel explains in "The Origin of the Compelling State Interest Test and Strict Scrutiny," the leading historical account of the rise of the tiers of scrutiny, the interest-balancing approach that ultimately developed into the strict-scrutiny test "was established in First Amendment litigation in the late 1950s and early 1960s."

At that time, the Supreme Court was bitterly divided on free-speech issues between the First Amendment *minimalists* (justices Frankfurter, Harlan, and Clark) who were inclined to "balance" the interest in free expression against the government's countervailing interests in suppressing it, and the First Amendment *absolutists* (justices Black and Douglas) who sought to enforce the Free Speech Clause's protections categorically. Significantly, the "compelling-interest" standard was pioneered by the minimalists, who saw it as a means of balancing away the Free Speech Clause's command that "Congress shall make *no law* . . . abridging the freedom of speech" (emphasis added). The tiers of scrutiny were thus born as a means to *evade* the categorical language of the Free Speech Clause, not to faithfully implement it.

The notion that the government may justify infringing a constitutional right if it has a "compelling" interest first appeared in arch-minimalist Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, a case overturning the conviction of a New Hampshire college professor for refusing to answer questions during a state investigation of subversive activities. In cases involving academic freedom, Justice Frankfurter wrote, the government may act only "for reasons that are exigent and obviously compelling." And while the 1957 decision in *Sweezy* was a rare victory for First Amendment rights during the Red Scare, Justice Frankfurter's formulation was swiftly embraced by his fellow minimalists on the Court as a means of *upholding* restrictions on free expression. Justice Clark's 1959 opinion for the Court in *Uphaus v. Wyman*, for example, upheld the contempt conviction of the director of a leftist summer camp for refusing to cooperate in a similar state legislative investigation, reasoning that "the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy" of suspected subversives.

In 1962, however, the First Amendment tide turned, due to a series of membership changes on the Court that gave the pro-speech block a working majority. For contingent and largely political reasons, the task of reorienting the Court's First Amendment doctrine fell to Justice Brennan. Brennan spurned the categorical approach advocated by Black, instead latching on to Frankfurter's "compelling-interest" formulation as a way of bridging the gap between the Court's various factions.

The key move came in *NAACP v. Button*, a 1963 case involving an attempt by Virginia officials to use state legal-ethics laws to prevent the NAACP's lawyers from engaging in school-desegregation litigation in the commonwealth. While conceding that Virginia had a "valid . . . interest" in regulating the practice of law within its borders, Justice Brennan wrote for the Court's new pro-speech majority that the "decisions of this Court, have consistently held that only a compelling state interest . . . can justify limiting First Amendment freedoms." And while this compelling-interest formulation was the same one used by justices Frankfurter, Harlan, and Clark to *allow* speech regulations only a few years earlier, Justice Brennan had quite obviously poured new wine into the old wineskin: Henceforth, the compelling-interest test would become known as one of the most exacting tests in constitutional law.

Justice Brennan's 1963 opinion in *Sherbert v. Verner* adopted the same analysis under the Free Exercise Clause. His decision in *Shapiro v. Thompson* employed the test to invalidate welfare statutes in Connecticut and the District of Columbia on equal-protection grounds. And, as Siegel recounts, "From there its spread within equal protection analysis, and throughout general legal consciousness, was rapid." The tiers-of-scrutiny approach had gone from a formulation designed by judicial minimalists to uphold restrictions on free expression to the Warren Court's dominant method of muscularly protecting its favored constitutional rights. Yet, this revolution in constitutional law happened not for reasons of principle and fidelity to the original meaning of the Constitution; it happened for reasons of contingency and political expediency.

Originalism and the Tiers of Scrutiny

For those who believe that the Constitution should be interpreted according to the meaning it had when it was enacted, this history of the tiers of scrutiny provides a good and sufficient reason for rejecting them (leaving aside considerations of *stare decisis*, to which we will return

later). While it is logically conceivable that the original meaning of one or more constitutional provisions could itself require a balancing approach akin to the tiers of scrutiny, two features of the historical account just described make it extraordinarily unlikely that the tiers-of-scrutiny analysis is part of the original meaning of the Constitution. First, this mode of analysis was not applied at the founding. Indeed, strict scrutiny did not come into being until 1957. And while rational-basis review can be traced back slightly earlier, no one believes that rationality review would constitute a viable framework for constitutional analysis on its own, without strict or intermediate scrutiny available to provide more meaningful review in at least some cases. Second, the tiers of scrutiny developed as an essentially political expedient, not as a good-faith effort to recover the original understanding of the constitutional text. As Professor Fallon has said, strict-scrutiny analysis — and therefore tiers-of-scrutiny analysis — lacks "any foundation in the Constitution's original understanding."

Sometimes, however, courts develop jurisprudential tests that, while not *required* by the original meaning of the Constitution, are nonetheless *consistent* with it and help courts apply the Constitution to specific fact patterns. Some originalist scholars — such as Keith Whittington, Randy Barnett, and Lawrence Solum — call this form of constitutional analysis "constitutional construction" and distinguish it from the process of uncovering the original meaning of the text, which they call "constitutional interpretation." Might the tiers of scrutiny potentially be justified as a permissible "construction" of the constitutional rights they are used to enforce?

The short answer is "no," because they are not consistent with the original meaning of the text. It is in the very nature of the tiers of scrutiny that they contradict the constitutional provisions in question, by purporting to find those rights "outweighed" by the government's interest in violating them.

While tiers-of-scrutiny analysis is not a naked "cost-benefit" test, it *is* a *balancing* inquiry, even if the balancing is structured into distinct stages. After all, scrutiny analysis generally begins only after the court has determined that the challenged restriction does indeed fall within the *scope* of the constitutional right in question. Thus, the avowed purpose of the inquiry — even in the form of rational-basis review — is to determine when that right has been validly "outweighed" by the

government's interest in suppressing it. And there lies the root difficulty, for the Constitution does not provide a ranking or hierarchy of constitutional values and governmental interests, many of which appear incommensurable. The scrutiny analysis therefore asks judges to *impose* on the Constitution a hierarchy of values and interests that — due to their incommensurability — is not objectively justifiable.

At this point, some may try to turn this interest-balancing defect into a justification. If Chief Justice Marshall was right that the Constitution must be "adapted to the various *crises* of human affairs," it cannot be ruled out that *some* of these crises will be so acute that the government's compelling interest in taking action *outweighs* the value of any constitutional restrictions that stand in the way. Similarly, looking at the point from the other direction, some scholars have argued that "balancing" is a necessary component of a just regime, since, as Harvard professor Vicki Jackson puts the point, it is "a principle and . . . goal of constitutional government" that "larger harms imposed by government should be justified by more weighty reasons."

What unites these two arguments for judicial balancing is a kind of perfectionism, a fairy-tale constitutionalism in which every constitutional dispute has a happy-ever-after ending that can be discovered by judges on a case-by-case basis. This impulse is contrary not only to originalism but to the very nature of American-style constitutionalism. The basic premise of a written constitution, at least in the American tradition, is that due to some combination of uncertainty about the nature and content of justice, disagreement over its demands, or skepticism that future government actors can be trusted to pursue them, those future officials must be bound by an external, objectively discernible set of restraints that are established *in advance*. A theory of constitutional practice that promises happy-ever-after endings in every case — and empowers judges to achieve them via balancing tests — is in fundamental conflict with such a regime. As Columbia professor Henry Monaghan observed nearly four decades ago, we do not have "a perfect constitution" that always achieves the normatively best outcome. A society capable of drafting and implementing such a document would have no need of it.

Some have sought to avoid these objections by constructing an alternative theory of the tiers of scrutiny, casting the inquiry as a means of preventing the government from pre-textually pursuing constitutionally

illegitimate motives or purposes. Thus, Professor John Hart Ely famously justified strict scrutiny under the Equal Protection Clause as "a way of 'flushing out' unconstitutional motivation." Then-professor Kagan offered a similar theory in the First Amendment context. As Ely explained, the idea is that the "interest" prong prevents the government from justifying the challenged law by pointing to sanitized goals "so unimportant that you have to suspect it's a pretext that didn't actually generate the choice." The "tailoring" prong ensures that the interest put forward by the government was its genuine motivation — on the theory that "[t]here is only one goal the classification is likely to fit" closely enough to pass muster, "and that is the goal the legislators actually had in mind."

But even assuming that the original meaning of constitutional provisions like the First Amendment proscribe certain motives (rather than certain actions or outcomes), this theory cannot justify the tiers of scrutiny. Even if application of the scrutiny tests will occasionally succeed in "smoking out" illicit government motives for the reasons Ely described, the inquiry is remarkably ill-suited to the task. In many cases, the tiers of scrutiny will result in the invalidation of laws that were in fact motivated by the genuine desire to pursue legitimate objectives the government believed were compelling. And in many others, illicitly motivated laws will nonetheless be upheld because the government chose its pretext carefully, enacting a law that passes the scrutiny gauntlet despite its sinister purpose. In the end, if certain constitutional rights really do forbid otherwise-valid government action motivated by illegitimate purposes, the way to enforce them is to *ask whether a challenged government act is motivated by an illegitimate purpose*. The courts already directly inquire whether the government has acted for impermissible purposes in many contexts; there is no reason to resort to the tiers of scrutiny as a hamfisted way of asking the same question.

FAILING ON THEIR OWN TERMS

But one need not be an originalist to reject the tiers of scrutiny; any good-faith interpreter of the Constitution can — and should — just as readily condemn them. That is because the tiers of scrutiny lack the essential characteristic of any jurisprudential test whose aim is the faithful application of the law: serving as a meaningful guide to legal analysis. Instead, each step of the scrutiny process is marked by indeterminacy and manipulability.

Consider, as Fallon has correctly pointed out, that "there will often be an important 'level of generality' question involving purportedly compelling governmental interests." For example, in the statutory context, the Religious Freedom Restoration Act requires courts to apply a form of strict scrutiny to federal laws that substantially burden the exercise of religion. When the Obama administration was defending its contraception mandate, it consistently described the governmental interest in broad terms, such as "public health" and "gender equality." These formulations made the government's interest sound more compelling than those framed at a lower level of generality, such as "providing free contraceptives to employees of certain types of employers offering certain types of health-insurance plans."

The manipulability of the first step of the analysis, in turn, infects the second step's tailoring requirement. If the government's interest is stated broadly, there will likely be more ways of achieving that interest than if it is stated narrowly, which makes it less likely that the government can show the necessary tailoring of its interest to its chosen means. The contraception mandate again provides a case in point. If the government's interest had been stated narrowly — providing free contraceptives to employees of a particular type of employer — the mandate would have had a better (though perhaps not convincing) claim to being the only way to accomplish it. (Of course, this raises a separate manipulability problem: defining the interest to precisely match the chosen means.) But cast at a relatively high level of generality — as achieving broader access to contraceptives — it seemed likely that the interest could have been achieved in ways other than forcing employers with religious objections to provide the contraceptives for free. Indeed, this is precisely why the Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.* (2014) that the contraception mandate failed strict scrutiny as applied to closely held corporations with religious objections.

Thus, in many cases, to decide the level of generality is to decide the case. Yet, as Fallon has observed, despite the importance of this level-of-generality inquiry, the Supreme Court has *never explained* how the level of generality of the government's interest is to be determined. The Court's failure to provide an answer to this critical question is no surprise: There is no answer. Courts forced to choose between characterizing the government's interest as "public health," "increased access to contraceptives," or "free access to a particular type of contraceptive

for employees with a certain type of insurance" simply have no principled way of making the determination.

But even if they did, the tiers of scrutiny would still pose intractable problems for the rule of law. How, for instance, is a court to determine whether an interest is important or compelling? The Court has tended to treat the question as a normative one reserved for its own judgment, but that makes the constitutionality of governmental action dependent on each judge's own subjective assessment of questions that can only be described as quintessentially political. And when the meaning of constitutional provisions rests on a judge's controversial political decisions, the courts become no more than a continuation of politics by other means, a way in which one faction comes to dominate another through repeated 5-4 majority opinions. This makes the resolution of controversial constitutional questions difficult for the losing side to accept, since the judicial decision rests on political judgments rather than law, which undermines the very purpose of American-style constitutionalism.

When we reach the tailoring prong, the situation does not improve. Whether a challenged law will, in fact, achieve its stated goal is often a contested empirical question, as is the question of whether there are other, less-restrictive means of achieving the same end. That does not mean that there is no right answer to such questions, but there is something farcical about a federal judge hearing testimony about fraught and quintessentially legislative questions and pronouncing his conclusions as settled fact. As Justice Alito observed in his dissent in *United States v. Windsor* (2013), "[o]nly an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously."

TIERS OF SCRUTINY AND *STARE DECISIS*

Even if the argument against the tiers of scrutiny is strong, there remains the question of what role *stare decisis* should play in considering whether to abandon them. For some justices, the *stare decisis* question should be an easy one. Last term, Justice Thomas authored a concurring opinion in *Gamble v. United States* in which he argued that the Court should not adhere to precedents that, under an originalist analysis, are "demonstrably erroneous," regardless of any other considerations. As shown above, the tiers of scrutiny have no apparent basis in the text or original meaning of the Constitution and were simply adopted as a political compromise. Under the standard of Justice Thomas's concurrence

in *Gamble*, that is the end of the analysis, and the tiers of scrutiny should be set aside.

Other justices take a more robust view of *stare decisis*, though the Court has consistently emphasized that *stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution." Although there is no definitive list of *stare decisis* factors, in its most recent cases overruling prior precedents, such as *Knick v. Township of Scott, Pennsylvania* (2019), the Court has looked at "the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions . . . and reliance on the decision." All of these factors favor getting rid of the tiers of scrutiny.

As recounted above, the tiers of scrutiny did not emerge out of a careful analysis of the Constitution's text or original meaning. Chief Justice Roberts once observed that "these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up." Indeed, the Court has *never* provided a systematic analysis of the basis for, or a sustained defense of, the tiers of scrutiny. It is not hard to see why: The tiers of scrutiny have no apparent basis in the Constitution's text or history, and they arose through political compromise, not sound legal reasoning. Like the doctrinal rule the majority reversed in *Knick*, "[b]ecause of its shaky foundations, the [tiers-of-scrutiny framework] has been a rule in search of a justification for over [60] years," and while various scholars have offered potential justifications, "[t]he fact that the justification for the [tiers of scrutiny] continues to evolve is another factor undermining the force of *stare decisis*."

Nor are the tiers of scrutiny workable. In *Janus v. American Federation of State, County, and Municipal Employees* (2018), the Court overruled a First Amendment precedent dating back over four decades. It observed, citing earlier opinions by justices Scalia and Kennedy, that "each part of the [precedent's] test 'involves a substantial judgment call,' rendering the test 'altogether malleable' and 'no[t] principled.'" The tiers-of-scrutiny analysis is no less malleable, and no more principled; as shown above, its every step is marked by manipulable, arbitrary assessments leading to indeterminate outcomes.

And just as the tiers-of-scrutiny analysis leads to inconsistencies across cases, it is inconsistent with the approach the Court has taken to other provisions of the Bill of Rights. As then-judge Kavanaugh observed in

a dissenting opinion in *District of Columbia v. Heller* (2011), "Strict and intermediate scrutiny tests are not employed in the Court's interpretation and application of many other individual rights provisions of the Constitution." From the Confrontation Clause to the Establishment Clause, the Court routinely strikes down — or sustains — challenged government restrictions without asking whether they are tailored to achieving the government's interests. Because the scrutiny analysis is foreign to the great bulk of the Bill of Rights anyway, there is no reason for retaining it in the few enclaves where it does apply.

Finally, just as in *Janus*, the tiers-of-scrutiny analysis "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.'" There can be no serious reliance on such a manipulable and unpredictable test. While throwing out the tiers of scrutiny might cause distress to those law professors who would have to revise their syllabi, it is hard to imagine what other reliance interests would be affected.

REPLACING THE TIERS OF SCRUTINY

And so the question arises: What should replace the tiers of scrutiny? At a general level, the answer is straightforward: Any sound jurisprudential test must reflect the text, history, and tradition of the constitutional provision at issue. That is necessarily a provision-by-provision — and perhaps even a context-by-context — analysis. Fully answering the question would thus entail a comprehensive historical description of the original meaning of every constitutional right where the tiers of scrutiny are currently employed, a task far beyond the scope of this essay.

The Court can, however, start by refusing to *extend* the tiers of scrutiny to provisions that heretofore have not been subject to them, especially where a test that *is* faithful to the original meaning is readily available. The most obvious and immediate example is the Second Amendment. As Justice Kavanaugh wrote when he was on the D.C. Circuit, the exhaustive historical analyses of *Heller* and *McDonald* show that the Second Amendment, when properly interpreted, requires that only "traditional, 'longstanding' regulations" of specific firearms or individuals are constitutional. Whatever claim it may have in doctrinal areas where it currently prevails — and where alternative, originalist tests have not yet been developed — scrutiny analysis as of yet has no claim on the Second Amendment, and the Court should take the

opportunity in *NYSRPA* to endorse the "text, history, and tradition" approach described by Justice Kavanaugh and firmly reject application of the tiers of scrutiny.

For those provisions already colonized by the tiers of scrutiny, the prudent course would be to reclaim constitutional territory in stages, which would allow the Court sufficient time to do the difficult historical and theoretical work of developing replacement tests grounded in originalism. The Court is already doing something like this in the Establishment Clause context. In *Lemon v. Kurtzman* (1971), the Court adopted a subjective, ahistorical test for Establishment Clause cases that has been subject to relentless criticism from scholars and jurists ever since. But in recent years, the Court has begun to roll back *Lemon*'s domain. Just last term, a majority of the justices in *American Legion v. American Humanist Association* rejected the applicability of the *Lemon* test at least to cases involving "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies," relying instead on the long tradition of accepting the constitutionality of these religious references and images. The Court has shown that it knows how to chip away at an ahistorical jurisprudential test and replace it, bit by bit, with one grounded in the original meaning of the Constitution.

The same could be done in the areas governed by the tiers of scrutiny, such as the Free Speech Clause. For example, in his separate opinion in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, Justice Kennedy argued that the tiers of scrutiny have "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 considerations of time, place, and manner or the use of public forums." Such laws, in Justice Kennedy's view, were per se unconstitutional. If historical analysis bears Justice Kennedy's suggestion out, the Court could adopt his proposed categorical rule; and over time, the Court could evaluate other types of speech restrictions as well to see how they should be treated under the original meaning of the Free Speech Clause. In this way, the Court could go about the labor of burrowing out the tiers of scrutiny one spadeful at a time — carefully shoring up the excavation with sound constitutional timber each step of the way.

If last term is any indication, the Supreme Court is poised to re-evaluate doctrines and tests whose tenuous reasoning and dubious origins make

them ripe for reconsideration. It could start nowhere better than with the tiers of scrutiny. They are not grounded in the text or original meaning of the Constitution; they were adopted for political reasons; they are inherently manipulable and indeterminate; they place judges in the position of making controversial policy and political judgments; and they have no refuge in *stare decisis*. The Court has the opportunity in *NYSRPA* to stop the spread of this ahistorical and unmoored analysis to new constitutional contexts. It should do so, and begin the process of eliminating the scrutiny tests from constitutional jurisprudence for good.