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How Do We Know When Speech Is of Low Value?

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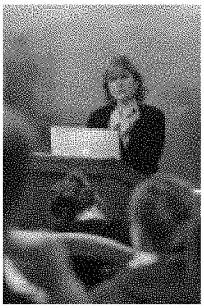
Genevieve Lakier, *The Invention of Low-Value Speech*, **Harv. L. Rev.** (forthcoming), available at SSRN.



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Bedrock First Amendment law calls for the Supreme Court to apply strict scrutiny to the government's content-based regulation of speech. Except when it doesn't. Over time, the Court has identified several categories of expression as sufficiently "low value" to trigger a First Amendment analysis less suspicious than strict scrutiny, thus enabling greater government regulation of that speech. These categories have included commercial speech, true threats, incitement to imminent illegal action, "fighting words," obscenity, defamation, fraud, child pornography, and speech that is integral to criminal conduct. This subject, and what we think we know about it, is the focus of Genevieve Lakier's valuable new article, *The Invention of Low-Value Speech*. Especially useful and novel for its strong historical look at the long first era of First Amendment law prior to the twentieth century, it is also important as a refutation of the Court's current approach that purports to rely entirely on historical analysis to identify categories of low-value speech.

Taking a categorical approach to First Amendment protection, of course, requires a methodology for determining which speech belongs in which categories. In its decision in *United States v. Stevens*, 559 U.S. 460 (2010), the Supreme Court surprised many observers with its insistence that historical tradition alone has driven its determination that a category of expression is of only low First Amendment value. The *Stevens* Court struck down a federal statute that prohibited the commercial creation, sale, or possession of depictions of animal cruelty. In so doing, the Court rejected as "startling and dangerous" what it characterized as the government's proposed "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits." To be sure, the Court started by acknowledging that, "[a]s the Government correctly notes, this Court 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.'" The Court went on to assert, however:

> But such descriptions are just that – descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor. When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. . . . [but we have instead] grounded [our] analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.

Stevens thus made the descriptive clam that the Court has relied only on historical analysis to identify categories

of low-value speech (i.e., that it has focused on whether courts have historically treated the contested expression as low-value), rather than on balancing analyses that identify contested expression as "low-value" when its threatened harms outweigh its capacity to further key free speech values.

The Court's claim has attracted considerable criticism, and Professor Lakier's is among the most powerful of these critiques. Lakier refutes the Court's claim as a descriptive matter, engaging in extensive historical research to find that the list of "low-value" speech categories generated by the Court in the twentieth century has no basis in courts' 18th and 19th-century understandings. She finds that for close to 150 years, courts did not divide speech into high- and low-value categories subject to differing levels of government regulation. Courts from the founding until the early 20th century instead consistently forbade prior restraints of all sorts of speech (including those today characterized by the Court as low-value), while remaining quite tolerant of government's after-the-fact efforts to punish all sorts of speech—including those today considered by the Court to be of high value—to address the harms inflicted by such speech or to further the government's asserted interests in morality and order. Lakier's careful historical analysis by itself is an important contribution to the field, as it examines thoughtfully and in detail the largely unexplored terrain of courts' actual approach to speech problems in the 18th and 19th centuries.

In addition to her descriptive claim that historical tradition does not actually explain the categories of speech currently identified by the Court as low-value, Lakier makes the normative claim that history *should* not drive that analysis. She argues that historical analysis not only would both under-protect and over-protect certain categories of speech, but that it also fails to deliver on its purported benefits. More specifically, she offers a thoughtful critique of historical analysis as a poor test of original meaning as well as a poor constraint on judicial discretion.

The Court's splintered decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), offers a recent example. There, the plurality and the dissent both purported to use historical analysis to reach very different conclusions about whether and when false statements of fact comprise a category of low-value speech. Each of the three opinions in *Alvarez* suggested that some category of lies is of sufficiently low value such that government should be permitted to prohibit it without satisfying the demands of strict scrutiny. Although both the plurality and dissent undertook to engage in historical inquiry in defining the contours of that category, each defined the relevant historical tradition quite differently. (Justice Breyer's concurring opinion, in contrast, relied on purpose-based and pragmatic arguments rather than historical analysis to identify another category of regulable lies altogether.) Justice Kennedy's plurality opinion concluded that only certain harm-causing lies have historically been treated as unprotected by the First Amendment, while Justice Alito's dissent concluded much more broadly that lies have been historically unprotected apart from any harm they cause. In short, the historical approach to identifying categories of low-value speech is not without its own considerable subjectivity, and thus does not consistently deliver on its promise to limit judicial discretion.

Lakier's nuanced prescriptions include a welcome refusal to pretend to make hard First Amendment questions easy. She recommends instead that courts more transparently engage in the challenging but important—and likely unavoidable—endeavor of examining whether and when contested speech furthers key First Amendment values in democratic self-governance, enlightenment, and autonomy.

As Lakier observes, "value-judgments in fact pervade First Amendment law. Attempting to hide these judgments under the cloak of history does not make them go away; it merely makes them harder to understand." Lakier's valuable work strips away this illusion and offers a much-needed return to reality.

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