

History and Tradition in First Amendment Intellectual Property Cases: A Critique

Rebecca Tushnet

“History and tradition” as constitutional theory is originalism unconstrained by textualism. We look at what Founding- and Reconstruction-era generations did (or didn’t do) and identify lessons from those actions and inactions, not from the words they specifically chose to write laws.¹ We consult judicial interpretations—evolutions via the common law, that is via judges—not to bolster our understanding about what our written laws meant to the legislators who wrote them but as evidence of what kind of laws those legislators might have been willing to accept.²

Of course this is going to go badly. It already has, in at least one area, long before the Roberts Court entered the scene. Key Supreme Court decisions over the past forty years about the intersection of intellectual property (IP) rights and the First Amendment right to freedom of speech have relied on a history and tradition of allowing intellectual property rights to override speech interests. Although the “history and tradition” mantra has only developed recently, catalyzed by the Supreme Court’s invalidation of gun laws in *New York State Rifle & Pistol Association, Inc. v. Bruen*,³ and although a majority of the Court has not—yet—shown a clear inclination to apply this method to non-IP First Amendment cases, it matches the approach taken in multiple opinions on the First Amendment’s consistency with right of publicity, copyright, and trademark rights. The weaknesses of “history and tradition” have thus already been on full display in the First Amendment context. Unlike in the Second Amendment context, where the Court has reasoned from things earlier regulators *didn’t* do to strike down gun regulations today, in “history and tradition” First Amendment law the Court has reasoned by broad analogy to allow new speech restrictions.

One lesson is that the history and tradition approach does not meaningfully constrain Justices even in low-political-salience areas like copyright and trademark, outside the highly politicized Second Amendment context.⁴ We should not pretend that it does. The manipulability of levels of generality in making historical analogies has been justly criticized,⁵ but the IP cases provide a

¹ See, e.g., Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. 1477, 1487–88 (2023).

² See, e.g., Dov Fox & Mary Ziegler, *The Lost History of “History and Tradition,”* 98 S. Cal. L. Rev. 1, 6 (2024) (explaining that, in the cases of interest, “history and tradition” do not provide help interpreting text, but rather “a standalone criterion for adjudicating disputes about when and why the Constitution recognizes individual rights”). Here, I’m not arguing, as Fox and Ziegler do, that the Court’s current use of “history and tradition” has a conservative movement history, but rather looking at the use of the same kind of reasoning in specific IP/First Amendment cases. Fox and Ziegler attempt to rehabilitate the concept by advocating that the roots of any “history and tradition” relied upon must truly run deep in the United States, and also that a proper respect for history and tradition allows for evolution. My survey of the IP/First Amendment cases suggests that the demand for “deep roots” will be hard to realize because of the classic legal dynamic in which lawyers point to edge cases as providing the core rule.

³ 597 U.S. 1 (2022).

⁴ For the Second Amendment context, see, e.g., Rebecca L. Brown, Lee Epstein & Mitu Gulati, *Guns, Judges, and Trump*, 74 Duke L.J. Online 81, 84 (2025) (finding that judicial discretion seems to have increased in gun cases, based on partisanship measures).

⁵ See, e.g., Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. Pa. L. Rev. (forthcoming 2026) (setting out the levels of generality problem and the resulting hidden judicial discretion); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L. J. 99 (2023); Andrew Willinger, *History and Tradition As Heightened Scrutiny*, 60 Wake Forest Law Review __ (2025), manuscript at 47 (“[T]here is substantial debate over the proper level of generality to

particularly clear contrast in outcomes from those in the Second Amendment cases, despite putatively using the same method of looking to historical models before—and even in place of—applying a means-ends test or other non-analogic scrutiny.

A second lesson is that any further expansion of the history and tradition approach in the First Amendment context would be misguided.⁶ Most discussion of the risks of *Bruen*-izing the First Amendment has so far focused on the risks of reviving historical speech controls in their historical form (blasphemy, unfettered defamation law).⁷ The IP story shows that it's worse than that: it is fully possible to appeal to history and tradition to further expand control of speech beyond historic limits.⁸ At a bare minimum, the considerations present in other modes of free speech reasoning—the considerations involved in tailoring regulation to regulable harm—remain necessary even when consulting history and tradition.

This essay, adapted from a talk at Marquette, will briefly review strict scrutiny and the rise of history and tradition as an alternative mode of defining the scope of constitutional rights (and Article III standing). I will then discuss the IP/First Amendment cases and their use of history to approve new expansions of IP rights despite the resulting effects on others' freedom to speak—including reporting, copying, and parodying. I will conclude with some reflections about the flexibility of history and tradition in judging, and the remaining need to consider the tailoring of a speech-regulating law to its objectives.

I. Background: Strict Scrutiny and the Challenge of History and Tradition

A. Strict Scrutiny

The strict scrutiny test “evolved simultaneously in a number of doctrinal areas” by the 1960s and quickly came to “dominat[e] numerous fields of constitutional law.”⁹ Strict scrutiny as a standard

use when consulting historical evidence—a persistent frustration with historical approaches that is exacerbated when consistency with historical tradition becomes the sole test for constitutionality.... [T]he level of generality at which a judge views the “principle” extracted from historical regulations is often outcome-determinative.”).

⁶ Matthew Bunker and Emily Erickson have argued that, to date, the Supreme Court has only used history and tradition to identify (1) unprotected categories of speech and (2) traditional public fora. Matthew D. Bunker & Emily Erickson, Toxic Minimalism on the “Yolo” Court: The Supreme Court’s Dangerous Muddle In First Amendment and Speech-Adjacent Law, 47 UC Law SF Communications and Entertainment Journal 51, 66 (2024) (“In reality, tradition has only had a peripheral role in the free-speech doctrine, where it has served as 1) a rationale for categorizing speech as wholly unprotected by the Amendment (e.g., obscenity); and 2) a means of categorizing different types of public forums.”) (footnotes omitted). As this Essay attempts to show, that is not quite right.

⁷ See, e.g., Clay Calvert & Mary-Rose Papandrea, The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After *Bruen*, 18 Duke J. Const. L. & Pub. Pol’y 59, 74 (2023); Caroline Mala Corbin, Free Speech Originalism: Unconstraining in Theory and Opportunistic in Practice, 92 Geo. Wash. L. Rev. 633 (2024) (arguing against extension of original public meaning reasoning to the First Amendment); Jacob M. Schriener-Briggs, Against First Amendment Traditionalism, 114 Ky. L. J., manuscript at 10 (forthcoming 2026) (“First Amendment traditionalism would dislodge settled doctrinal understandings and risk reanimating anachronistic restrictions on expression”); Michael L. Smith & Alexander S. Hiland, Using *Bruen* To Overturn *New York Times v. Sullivan*, 50 Pepp. L. Rev. 80, 84 (2023); Emily Erickson & Matthew D. Bunker, The Jurisprudence of Tradition: Constitutional Gaslighting and the Future of First Amendment Speech Doctrine, 29 Widener L. Rev. 139, 140 (2023).

⁸ See also Willinger, at 41 (“Founding-era limits on speech are plentiful. A forgiving approach to analogical reasoning would give the government immense flexibility to craft speech regulations that repress heterodoxy and punish dissent.”) (footnote omitted).

⁹ Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1275 (2007).

means that the government must show that its actions were “narrowly tailored” to further a “compelling government interest,” and that they were the “least restrictive means” to further that interest.¹⁰ Strict scrutiny has, of late, applied to speech regulations that cover speech based on its content or its viewpoint, as opposed to neutral time, place, or manner regulations like limits on how loud a loudspeaker can be in a residential neighborhood, which get more relaxed scrutiny. Regulations rarely pass strict scrutiny, but they can.

By contrast, intermediate scrutiny applies to certain regulations of expressive conduct, commercial speech. Under intermediate scrutiny, a regulation will be constitutional only “if it furthers an important or substantial governmental interest” without a burden on the right that is larger than necessary to further that interest.¹¹ Thus, somewhat less tailoring to the government’s interest is required, and the interest can be an ordinary governmental interest rather than one of the highest order.

Not too long ago, the Roberts Court seemed destined to use strict scrutiny liberally to strike down many government speech regulations. In 2010, in *United States v. Stevens*, the Court held that legislatures can’t identify new categories of low-value and thus unprotected expression; only historically recognized exceptions counted.¹² In 2011, the Court cast doubt on its lower standard for commercial speech regulation, invalidating a restriction on commercial uses of prescription drug information designed to decrease the influence of drug companies on doctors’ prescription decisions.¹³ And, in 2015, the Court announced that strict scrutiny would apply to all content-based regulations, including noncensorious regulations like those of a city trying to specify which signs can go where and for how long.¹⁴

Stevens is of most direct interest to my topic here because it used history to define the exceptions to strict scrutiny. *Stevens* involved a federal law that was enacted to make animal crush videos illegal: these videos involved real animal cruelty, and were often promoted for sexual excitement. The majority opinion said: “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁵ The animal crush video law was therefore “‘presumptively invalid,’ and the Government bears the burden to rebut that presumption.”¹⁶ By contrast, “historic and traditional categories” aren’t subject to that presumptive invalidity: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.¹⁷ These were “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to

¹⁰ *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

¹¹ *United States v. O’Brien*, 391 U.S. 367, 377 (1968); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) (the state “must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest”).

¹² *United States v. Stevens*, 559 U.S. 460 (2010).

¹³ *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011).

¹⁴ Before *Reed*, the Court had regularly limited the application of strict scrutiny to cases where it found the government’s motives to be content-based, allowing content-neutral aims like fighting crime to be subjected to intermediate scrutiny. Intermediate scrutiny allows less-than-compelling but substantial government interests and does not require the least restrictive means, though a regulation will still fail intermediate scrutiny if it is too poorly targeted in its under- and overinclusiveness.

¹⁵ *Stevens*, 559 U.S. at 468.

¹⁶ *Id.*

¹⁷ *Id.* (citation omitted).

raise any Constitutional problem.”¹⁸ Because history merely defined the categories of speech whose prohibition didn’t get strict scrutiny, and strict scrutiny then did most of the actual work, *Stevens*’ logic was deregulatory.¹⁹

In defending the ban on crush videos, the government argued that the historic categories of unprotected expression were unified by a principle: These categories 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.’ ”²⁰ True enough, the majority held. However, because the class of such categories is closed by history, governments can’t put other speech outside the First Amendment by determining that other kinds of speech are also of such slight social value that their benefits are outweighed by their harms.²¹ But why not? That is, why can’t regulations target speech that is analogous, in its low value, to other unprotected speech? Can’t we just redefine obscenity to make it a bit more capacious now that crush videos have emerged as a lucrative genre?

Stevens, in fact, had to distinguish a previous instance of expansion by redefinition. Previously, the Court had upheld a ban on non-obscene sexual images of children.²² But, *Stevens* said, it didn’t do so by finding a new unprotected category of child pornography.²³ Instead, the Court found that the production of child pornography was integral to the underlying crime of child abuse of which the pornography was a record.²⁴ Because the conduct involved in producing the materials was illegal, distributing them could also be made so. Thus, the law was a standard prohibition on speech integral to criminal conduct. But *Stevens*’ explanation of the difference just moved the definitional question inside the category “speech integral to criminal conduct” instead of the category “low-value speech.” Prohibitions on illegal agreements or conspiracies to commit a crime have not historically included prohibitions on *disseminating the records* of such illegal agreements or conspiracies. Indeed, the *Stevens* majority emphasized that the long tradition of regulating animal cruelty did not equate to a tradition of regulating depictions of animal cruelty.²⁵ Yet the Court was unwilling to admit that it previously had extended the logic of the unprotected categories. This sleight of hand is a persistent feature of supposedly history-bounded inquiries.

Regardless of their soundness, as late as 2017, these and similar cases seemed to represent a firm *Lochner*-esque rejection of most speech regulations. But, the composition of the federal courts

¹⁸ Id. at 468-69 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942)).

¹⁹ Id. at 472-82; *see also* *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786 (2011) (similar holding about regulation of violent video games).

²⁰ Id. at 470 (citation omitted).

²¹ *Stevens*, 559 U.S. at 469-70 (rejecting the claim “that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation” under a “balancing test”).

²² *New York v. Ferber*, 458 U.S. 747 (1982).

²³ *Stevens*, 559 U.S. at 471. (Outside of the statutory context, the current preferred term is child sexual abuse material, but I will use child pornography here for consistency with the caselaw.)

²⁴ Id. (citing *Ferber*, 458 U.S. at 761-62).

²⁵ Id. at 469 (despite long history of prohibiting animal cruelty, “we are unaware of any similar tradition excluding *depictions* of animal cruelty from ‘the freedom of speech’ codified in the First Amendment, and the Government points us to none”).

has changed, another approach has become visible, and the Supreme Court is clearly open to throwing out decades of precedent.

B. The Rise of History and Tradition

Although history and tradition are being deployed in other vitally important ways, such as in Article III standing cases and in eliminating abortion rights, most of the history and tradition caselaw so far is concentrated in Second Amendment cases. In *Bruen*, the Supreme Court held that only gun restrictions that met a stringent historical compatibility test would be allowed.²⁶ But judges are rarely trained historians, and history tends not to speak in one voice. Therefore, the Court chose which period was relevant, as well as which regulations were not, such as regulations in the frontier West that disarmed people when they came into town. Reflecting some of the resulting problems, in *Rahimi*,²⁷ a majority of the Court reiterated that its test did not require a “historical twin,” but rather a “historical analogue.”²⁸ Apparently, legislators can’t enact a gun restriction just because (1) it would increase safety, and (2) safety has traditionally been a key consideration in gun regulation. They can, however, enact a gun restriction when it is sufficiently analogous to past restrictions.²⁹

To understate matters, it is not yet clear what constitutes a sufficiently close analogy. One possibility is that the Court will impose a Goldilocks test: the analogy is sufficiently close when the Court tells us it is. But a serious attempt to apply the standard has to grapple with the well-known challenges of analogical reasoning.³⁰ Joseph Blocher and Reva Siegel have persuasively argued that, at the very least, where the right at issue is defined at a high level of generality (everybody presumptively gets to bear arms of most types), then the historical analogues should also be defined at a high level of generality (safety regulations are exceptions).³¹ As I show below, this is certainly possible to get out of the history and tradition approach. It is the very logic has allowed substantial expansion of IP rights at the expense of others’ freedom of speech.

II. The Surprisingly Long History of History and Tradition in First Amendment IP Cases

This section goes through three IP rights that the Supreme Court has evaluated for consistency with the First Amendment, and approved on historical grounds: the right of publicity, copyright, and trademark law. In each case, the Court declined to apply any particular type of scrutiny. It thus followed what Joseph Blocher and Eric Ruben characterized as the distinctive method of today’s history and tradition test: “Rather than identifying the original public meaning of constitutional text (which might then be implemented through doctrinal tests), judges applying

²⁶ *Bruen*, 597 U.S. at 24.

²⁷ *Rahimi*, 602 U.S. 680 (2024).

²⁸ *Id.*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 30).

²⁹ *Rahimi* framed the question as “whether the challenged regulation is consistent with the principles that underpin the Nation’s regulatory tradition.” *Id.* The Court held that a prohibition on gun possession by people who were subject to domestic violence orders fit “comfortably within” a regulatory tradition of prohibiting those found to pose a threat of physical violence to others from possessing firearms. *Id.* at 690.

³⁰ See Cass R. Sunstein, On Analogical Reasoning, 106 Harvard L. Rev. 741 (1992) (generally defending the importance of analogical reasoning in law, while recognizing its complexities).

³¹ Blocher & Siegel, *supra*.

this new method are supposed to analogize modern laws directly to historical sources, unmediated by a legal rule or standard like tiers of scrutiny.”³²

The unifying factor in these First Amendment IP cases is their reliance on history and tradition to uphold a speech restriction whose contours had been substantially expanded from those known when the Constitution—or the Fourteenth Amendment—was adopted. Relatedly, these cases start from a different point than the gun cases. In the gun cases, the Court has begun with the presumptive coverage of gun rights (the people have such rights, for self-defense) and then looked for whether history approves of the challenged limits on those rights.³³ In the First Amendment IP cases, the Court has not begun with the presumptive coverage of “the freedom of speech,” but rather with the historical compatibility of intellectual property claims with free speech. This sets up the result: new IP rights are also fine.

A. Right of Publicity

The right of publicity is an offshoot of the right of privacy. It focuses on a person’s interest in controlling commercial exploitation of their name, image, or other indicia of identity. *Zacchini v Scripps-Howard*³⁴ involved a circus performer who was shot out of a cannon for audience delight. A TV news station recorded the entire performance and broadcast it as part of a story about the event. He sued for violation of his right of publicity, and the Court found that his claim was not barred by the First Amendment even though the incident was newsworthy. The Supreme Court consistently characterized the conflict in *Zacchini* as one between the television station’s First Amendment rights and the performer’s interest in his “entire act”—equivalent to a well-recognized common-law copyright claim, even if labeled as a right of publicity claim. Common-law copyright protected creative works before they were published, and for performances it protected them against unauthorized fixation, including unauthorized recording. Thus, even without the new label “right of publicity,” *Zacchini* would have had a claim against the TV station at common law.

The Court suggested that use of *Zacchini*’s entire act posed a “substantial threat to the economic value of that performance.”³⁵ But this concern was quite specific to broadcasting of the entire performance.³⁶ Indeed, the Court emphasized that “the broadcast of [*Zacchini*’s] entire performance, unlike the unauthorized use of another’s name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner’s ability to earn a living as an entertainer.”³⁷ Thus, according to the Court, “the State’s interest [in permitting a right of publicity claim] is closely analogous to the goals of patent and copyright law.”³⁸

³² Joseph Blocher & Eric Ruben, Originalism-By-Analogy and Second Amendment Adjudication, 133 Yale L.J. 99, 103 (2023) (footnotes omitted).

³³ When the Second Amendment’s so-called “plain text” covers the conduct at issue, “the Constitution presumptively protects that conduct.” Bruen, 597 U.S. at 24.

³⁴ 433 U.S. 562 (1977).

³⁵ *Id.*

³⁶ See *id.* at 573 n.10.

³⁷ *Id.* at 576.

³⁸ See *Zacchini*, 433 U.S. at 573; *id.* at 575 (“The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.”); *id.* at 576 (“the same consideration underlies the patent and copyright laws long enforced by this Court”); J. Thomas McCarthy & Roger

Lower courts then immediately disregarded the Court’s analogy and started approving almost anything called “right of publicity,” including lawsuits based on people reminding audiences of a celebrity—so now you can be sued for putting a digital version of Manuel Noriega in a video combat game (plaintiff failed),³⁹ making a bobblehead doll showing Arnold Schwarzenegger as the Governator (plaintiff secured a settlement),⁴⁰ using a blonde robot in a wig to imagine Wheel of Fortune in the future (plaintiff Vanna White succeeded),⁴¹ or using, in the background of a videogame, the name of a company that also happens to be the name of the company’s owner (the court refused to dismiss the claim).⁴² The California Supreme Court approved liability for an artist who drew pictures of the Three Stooges and sold them, because he was making art for profit.⁴³ Two circuits have held that creating a digital version of a football player in a football video game violated their publicity rights.⁴⁴

Indeed, arguably the very lack of attention to the Court’s use of history and tradition in *Zacchini* led subsequent courts to ignore the potential limits on its holding. Common-law copyright in an entire performance is very different from controlling any mention or evocation of an identity. *Bruen*-type attention to the right of publicity’s different subject matter (the “how” of regulation) and justifications (the “why” of regulation) compared to copyright could have helped limit overreaching claims. At least some courts eventually began asking about the fit between the right of publicity’s scope and its justifications, at least when celebrities sued over parodies,⁴⁵ but the project was too long delayed.

Most of us might not care much about freedom to evoke celebrities in ads, but we should care that the right of publicity now also covers art; we should also care that the right of publicity covers reminding people of celebrities, meaning that including a curvy brunette woman in an ad allows Kim Kardashian to file a lawsuit.⁴⁶ Indeed, given the expansion of the right of publicity, there is no existing doctrinal barrier to Donald Trump asserting a claim against truthful, nonmisleading advertising that compares Trump-branded bibles to other bibles, or offers to sell genuine Trump-branded memecoins, even though such ads would have to use his name to make the ad intelligible. We could certainly make up new limits on the right of publicity, but not all

E. Schechter, 2 The Rights of Publicity and Privacy § 8:104 (2d ed. 2025) (“The proper category for *Zacchini*’s claim was the state law of common law copyright, not the right of publicity.”); Dogan & Lemley, *supra*, at 1187 (same); Wendy J. Gordon, An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory, 41 Stan. L. Rev. 1343, 1365 n.97 (1989) (same); Diane Leenheer Zimmerman, Who Put the Right in the Right of Publicity?, 9 Depaul-Lca J. Art. & Ent. L. 35, 49–50 & n.43 (1998) (same); cf. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 806 (Cal. 2001) (“*Zacchini* was not an ordinary right of publicity case: the defendant television station had appropriated the plaintiff’s entire act, a species of common law copyright violation.”).

³⁹ Noriega v. Activision Blizzard, Inc., 2014 WL 12792585 (Cal. Super. Ct. Oct. 27, 2014).

⁴⁰ McCarthy & Schechter, *supra*, at § 4:24.

⁴¹ White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992).

⁴² VIRAG, S.R.L. v. Sony Computer Entertainment America LLC, 2015 WL 5000102, at *7 (N.D. Cal. Aug. 21, 2015).

⁴³ Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001).

⁴⁴ NCAA Student-Athlete Name & Likeness Licensing Litigation (Keller v. Electronic Arts Inc.), 724 F.3d 1268 (9th Cir. 2013); Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir. 2013).

⁴⁵ See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959 (10th Cir. 1996).

⁴⁶ Kardashian v. Gap Inc., No. 2:11-cv-05960 (filed C.D. Cal. Aug. 10, 2011).

lower courts are willing to do so, and, even when that happens, they make the doctrine more complicated and thus more likely to chill truthful, nonmisleading speech both in and out of ads.

The analogy to common-law copyright could also be used as a tailoring inquiry if we're thinking in tiers of scrutiny terms. Current attempts to limit the right of publicity on First Amendment grounds often focus on (1) newsworthiness, borrowed from privacy law and often reshaped by right of privacy statutes into an exclusion for news reporting rather than for newsworthy advertising,⁴⁷ or (2) transformativeness, borrowed from copyright law.⁴⁸ These are tailoring mechanisms, but how do we know whether to transfer over one or both limits from one or both regimes? The right of publicity as a distinct interest only dates, at the earliest, from the early twentieth century.⁴⁹ It has grown to encompass both an interest in avoiding false endorsement and an interest in controlling the monetary benefits of celebrity reputation. I would suggest that it can't be expanded beyond false endorsement and beyond banning reproduction of entire performances without disregarding key limits on privacy and copyright law. Currently, however, courts have been very receptive to liability for what they perceive as unfair free riding on a person's reputation.

B. Copyright

More recently, the Court used history and tradition to reject two First Amendment challenges to new copyright legislation, first by adding an extra twenty years to existing copyright terms and second by restoring foreign copyrights that had been lost in the US because the foreign publishers didn't comply with US requirements for claiming copyright. Term extension helped Mickey Mouse and George Gershwin's music stay exclusive for longer; restoration resurrected copyright in some significant works, including the Lord of the Rings. Rather than analyzing whether these changes were speech regulations subject to intermediate or strict scrutiny, the Supreme Court reasoned that term extension and creating federal copyrights where none had previously existed were both things Congress had done before, so no additional First Amendment analysis was required.

The first case, *Eldred v. Ashcroft*, upheld term extension.⁵⁰ In 1998, Congress extended the term of existing copyrights—which by definition needed no incentive to be created. Before Congress acted, people would have been free to reuse, quote, or adapt works at the end of their seventy-

⁴⁷ See, e.g., *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (discussing California's statutory exception for the use of a name, image, etc. "in connection with any news, public affairs, or sports broadcast or account," and finding it did not apply because although the plaintiff's "basketball record may be said to be 'newsworthy,' its use is not automatically privileged. GMC used the information in the context of an automobile advertisement, not in a news or sports account").

⁴⁸ See, e.g., *Comedy III*, 21 P.3d at 809-10.

⁴⁹ McCarthy & Schechter's treatise identifies the starting point in the first decade of the 1900s, while they date the idea of a general "right of publicity" to the 1950s. McCarthy & Schechter, *supra*, § 1:4; see also William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 401 (1960) (identifying commercial appropriation as one of four privacy torts that had developed over time). Jennifer Rothman has told the story of the same evolution somewhat differently, but regardless of differing characterizations, what we now know as the right of publicity (latterly often "name, image and likeness rights") was patched together from elements of privacy torts, common-law copyright, and misappropriation reasoning. See Jennifer Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* (2018).

⁵⁰ 537 U.S. 186 (2003).

five year term. Term extension inhibited the ability to retell *The Great Gatsby* from the perspective of an Asian-American Jordan Baker,⁵¹ or a scholar to compile early twentieth-century sources for use by students.⁵² The resulting challenge reached the Supreme Court, and the petitioner, Eric Eldred, included arguments that new copyright restrictions on previously permissible speech required some level of First Amendment analysis.

The Court disagreed. It emphasized that the Copyright Clause provided a robust foundation for federal copyright, and that the contemporaneous adoption of the Bill of Rights and the first federal copyright act showed their compatibility.⁵³ Further, it pointed to fair use and the idea/expression distinction that disallows any copyright in facts or ideas, reasoning that copyright included its own internal safeguards for free speech interests.⁵⁴ Because of these safeguards, no further First Amendment analysis was required when Congress added twenty years to the term of existing and future copyrights, delaying many important works from their scheduled entry into the public domain where they could be freely used by historians, artists, and anyone else.

The Court repeated this historical reasoning in 2012 in *Golan v. Holder*,⁵⁵ which challenged a different provision of copyright law. Congress had restored copyright to foreign works, like those of J.R.R. Tolkien and Stravinsky, that had failed to gain protection in the U.S. because of noncompliance with U.S. rules requiring certain “formalities”—requirements of U.S. manufacture of copies; a copyright notice displayed on the work; and a filing with the Copyright Office after a certain period. The Court reasoned that the first Congress had allowed existing works to claim a new federal copyright, even though those works hadn’t been created under a federal regime. This was an appropriate analogy, the Court concluded, because, like the federal copyright that displaced pre-Constitution state copyrights, copyright restoration gave federal copyrights to foreign works that had never had a valid U.S. copyright. As long as no one was punished for their pre-restoration conduct, it was legitimate to deprive the public of the right to make copies, publicly perform, or make derivative works based on those foreign works.⁵⁶

As long as Congress acted within the “traditional contours” of copyright, that is, its acts required no further scrutiny.⁵⁷ But what are those traditional contours, since we know after *Eldred* and *Golan* that those contours *don’t* include “a work’s term of protection is the term specified when it was created” or “a work in the public domain stays in the public domain”? Copyright has changed a lot since the time of the Founding. First, it covers far more kinds of works: it originally covered maps, books, and charts, and that’s it, even though visual art, music, and

⁵¹ After the copyright in *The Great Gatsby* expired—twenty years after it otherwise would have—Nghi Vo published *The Chosen and the Beautiful*.

⁵² See Rebecca Tushnet, Copy This Essay, 114 Yale L.J. 535, 555-56 (2004).

⁵³ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“The Copyright Clause and the First Amendment were adopted close in time This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”).

⁵⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003).

⁵⁵ *Golan v. Holder*, 565 U.S. 302 (2012).

⁵⁶ Congress allowed for a certain period to sell off copies for reliance parties that had relied on the public domain status of the restored works. 17 U.S.C. § 104A(h)(3)–(4).

⁵⁷ *Golan*, 565 U.S. at 328.

sculpture were well known to the Founders.⁵⁸ Nonetheless, apparently extending copyright to those things as well as to movies and computer programs is still within the traditional contours. Second, copyright as the Framers knew it also only covered *copying*, as the name suggests, but Congress has extended copyright to allow copyright owners to control many more acts, including public performance and creation of derivative works like sequels and translations. Implicitly, the Court was relying on the label “copyright” and the claim that the covered works and rights were sufficiently analogous to the traditional scope of copyright.

The Court did, as in *Eldred*, identify fair use and the idea/expression distinction as key traditional contours.⁵⁹ Perhaps, if Congress got rid of fair use or the idea/expression distinction, that would violate the First Amendment—but Congress *has* passed laws that cut sharply back on fair use in the digital context. Lower courts both before and after *Golan* have said it’s constitutional to prohibit “circumvention” of digital access controls even if that makes many fair uses impossible.⁶⁰ If your only guideline is “traditional contours” and there is a history of contracting freedom to use copyrighted works, then it’s difficult to tell when the traditional contours have been reshaped.

C. Trademark

Even more recently, trademark law has seen the same untethered use of history and tradition: implicitly in *Jack Daniel’s v. VIP*,⁶¹ in 2023, and explicitly in *Elster v. Vidal*,⁶² in 2024.

Jack Daniel’s involved a parody dog toy that made fun of Jack Daniel’s—it was a plastic bottle with a label “Bad Spaniels” that squeaks when squeezed: The federal trademark statute lacks a general, copyright-like “fair use” provision. Courts have instead created special tests for situations where greater scope for unauthorized use of a trademark seems justified—such as comparative advertising, resale of used goods, and artistic references. Artistic uses have, in recent decades, often been judged using the so-called “*Rogers* test”—this is named for *Rogers v. Grimaldi*,⁶³ in which the Second Circuit held that claims against titles of “expressive” works had to meet a very high standard before a court could find actionable confusion. The *Rogers* test generally refuses trademark liability for an expressive work regardless of evidence of confusion unless the defendant’s reference to a trademark lacks any relevance to the underlying work or is explicitly misleading.⁶⁴ Some version of *Rogers* had been adopted by every circuit to decide the issue, and the test had often been used in cases involving for-profit, nonadvertising speech.

In *Jack Daniel’s v. VIP Products*, the Court dodged the question of whether *Rogers* was the right test for harmonizing freedom of speech with trademark law in many contexts. So long as the defendant was using a similar term as a trademark to identify the source of its own goods (here, “Bad Spaniels” dog toys), trademark law’s ordinary multifactor test for consumer confusion

⁵⁸ Copyright Act of 1790.

⁵⁹ *Golan*, 568 U.S. at 328.

⁶⁰ *Green v. United States Department of Justice*, 111 F.4th 81 (D.C. Cir. 2024); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

⁶¹ 599 U.S. 140 (2023).

⁶² 602 U.S. 286 (2024).

⁶³ 875 F.2d 994 (2d Cir. 1989).

⁶⁴ *Id.* at 999.

“does enough work to account for the interest in free expression” in the context of trademark uses.⁶⁵ That is, the basic point of trademark law is to protect consumers from deception. That kind of trademark law has been around for centuries. Thus, although the Court didn’t say so in as many words, source-identifying uses that cause deception must not be part of the speech historically protected by the First Amendment.

But, as I have written elsewhere with Mark Lemley,

There is no Trademark Clause and no Founding Era federal trademark statute; indeed, the Court invalidated Congress’s first attempt to pass a trademark statute, nearly a century later, because it could not be justified under the IP clause. Nor would what current courts call “likelihood of confusion” be recognizable to post-Reconstruction courts, or even mid-twentieth century courts, both of which protected trademark owners in far more limited circumstances. Until recently, trademark law applied only in cases of “passing off,” where the defendant’s goods would substitute for purchases of the plaintiff’s goods. The Court’s statement that the multifactor likelihood of confusion test provides the only necessary protection for the First Amendment thus lacks the explanatory apparatus it offered in *Eldred*: a basis in text, history, or structure, including the substantive protections of fair use.⁶⁶

In other words, the claim in *Jack Daniel’s* bears little resemblance to a valid trademark claim even a hundred years ago. No one, no matter how drunk, would buy a bottle of Jack Daniels in place of a Bad Spaniels dog toy, or vice versa. Furthermore, the announcement of the result—the confusion test provides all the free speech protection necessary—is a poor guide for future cases, given that courts are often willing to find confusion if fifteen percent of consumers, or even fewer, think that a speaker needs a trademark owner’s permission to speak about the trademark owner.⁶⁷ Justice Sotomayor’s concurrence warned against finding confusion too easily,⁶⁸ a welcome caution, but one that only comes into play in the later stages of an infringement case, while the speech-deterrent effect of trademark threats is primarily in the ease with which an infringement claim may be asserted. By comparison, many defamation cases brought by public figures can be dismissed on the pleadings because of the high standards for pleading falsity and actual malice.

Then, in *Vidal v. Elster*,⁶⁹ the Court considered the trademark statute’s blanket prohibition on registering a trademark that includes a living person’s name without that person’s consent, known as Section 2(c). Trademark registration confers substantial procedural and substantive benefits compared to simply using a mark in the marketplace,⁷⁰ and the Court had previously

⁶⁵ *Jack Daniel’s*, 599 U.S. at 159.

⁶⁶ Mark Lemley & Rebecca Tushnet, *First Amendment Neglect in Supreme Court Intellectual Property Cases* 2023 Sup. Ct. Rev. 85 (2024) (footnotes omitted).

⁶⁷ See, e.g., McCarthy on Trademarks & Unfair Competition § 32:188 (5th ed. 2021) (“Where other evidence is supportive, courts have found a likelihood of confusion when survey results are between 10% and 20%.”).

⁶⁸ *Jack Daniel’s*, 599 U.S. at 163-64 (Sotomayor, J., concurring).

⁶⁹ 602 U.S. 286 (2024).

⁷⁰ See, e.g., *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138, 142-43 (2015) (listing several important benefits of registration over common-law rights, including providing constructive notice to other users, presumptive validity, and “incontestability,” which precludes various challenges to validity).

held that the government could not withhold registration on viewpoint-based grounds.⁷¹ Following those precedents, which treated a registration refusal like a penalty on speech, the Federal Circuit had held that 2(c) was insufficiently tailored to the relevant interests in preventing confusion. However, the Court unanimously agreed that the provision was constitutional even when it barred registration of a completely nonconfusing mark, such as TRUMP TOO SMALL.

However, although the *Elster* Court was unanimous in result, it was unable to cohere on exactly why. The Justices all agreed that the goal—protecting a person’s right to control the use of their name as a trademark—was legitimate,⁷² but, among the history and tradition crowd, there were different views about how close the historical analogy had to be. Should the analysis be at the level of the purpose of having a trademark registration system? A registration system needs to make content based distinctions to function. Does that mean that any content-based regulation is ok? That would allow Congress to, for example, deny registration to any trademark that made reference to birth control or abortion. That’s a very broad analogy.

The *Elster* majority said that “trademark rights have always coexisted with the First Amendment, despite the fact that trademark protection necessarily requires content-based distinctions.”⁷³ Unsurprisingly, as with copyright, this is only true in the broadest strokes—things recognized as trademarks today would not qualify in the Founding era or even in 1947, when the Lanham Act was enacted,⁷⁴ and of course trademark *registration* was unknown to the Founders.⁷⁵ Still, it’s fair to conclude that at least some content-based distinctions are legitimate because of this history—but which ones?

Justice Thomas’s opinion for the Court relied on the long tradition of providing unfair competition protection to names in tort lawsuits brought by the person whose name it is, as well as of allowing people to use their own names in commerce even when someone else has already used that name in a line of business. That is, “a tradition of restricting the trademarking of names has coexisted with the First Amendment, and the names clause fits within that tradition. Though

⁷¹ *Iancu v. Brunetti*, 588 U.S. 388 (2019); *Matal v. Tam*, 582 U.S. 218 (2017).

⁷² Justice Thomas referred to both “trademark law’s historical rationale of identifying the source of goods,” and trademark law’s protection of the trademark owner’s reputation. *Id.* at 305. Preventing confusion over the source of goods or services based on a misleading use of a well-known name serves both interests.

⁷³ *Vidal*, 602 U.S. at 295. See also *id.* at 296 (stating that trademarks have been recognized for centuries in Anglo-American law and, “for the duration of that history, the inherently content-based nature of trademark law has never been a cause for constitutional concern”).

⁷⁴ See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 776-79 (1992) (Stevens, J., concurring) (explaining that judicial interpretation expanded the coverage of unregistered trademarks far beyond what Congress anticipated); Glynn S. Lunney, Jr., *The Trade Dress Emperor’s New Clothes: Why Trade Dress Does Not Belong on the Principal Register*, 51 *Hastings L.J.* 1131, 1138-52 (2000) (arguing that the statutory text and legislative history both point to a far narrower scope).

⁷⁵ It’s illuminating to contrast the Court’s treatment of regulatory innovation in gun regulation: If a modern regulation confronted “unprecedented societal concerns or dramatic technological change,” *Bruen* required the government demonstrate that its challenged regulation was analogous to past regulations in both how and why it burdened Second Amendment freedoms. *Bruen*, 597 U.S. at 29. Registration created something unprecedented in the U.S.: nationwide rights without use, along with expanded rights in other ways. See Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 *Harv. L. Rev.* 867 (2017). Those changes could certainly be justified as a response to “unprecedented societal concerns or dramatic technological change,” but the Court has never undertaken that effort.

the particulars of the doctrine have shifted over time, the consistent through line is that a person generally had a claim only on his own name.”⁷⁶

This is true, but unhelpful: Even if we grant the substantial jump between a private cause of action and a bar on registering a trademark even in the absence of private opposition,⁷⁷ that common-law history has an obvious link with Section 2(a), which provides for a ban on registering marks that create a false suggestion of a connection with a person. Section 2(c) goes further—its only independent utility is when it applies to a mark that *wouldn’t* falsely suggest a connection because it is critical. Although Justice Thomas criticizes the other opinions in *Elster* for relying on “loose analogies,”⁷⁸ his own is incredibly loose—his conclusion is that the past case law is about misuse of names, and as a result we can ban any registration of marks containing names without the referenced person’s consent. It’s hard not to agree with Laura Heymann’s characterization of the Court’s survey of past tort cases as “history tourism.”⁷⁹ *Bruen* directed courts to consider whether new gun regulations were sufficiently analogous to past ones in the “how” and the “why” of their burden on a law-abiding citizen’s right to armed self-defense.⁸⁰ By contrast, in *Elster*, Justice Thomas’s opinion ignored both the how of past regulations—through infringement claims⁸¹—and the why—fraud prevention instead of protection for a free-floating interest in personality.⁸²

The key move made by the Court’s opinion is the acknowledgement that trademark’s focus on source identification, and its related focus on avoiding confusion over source, relies on evaluating the content of the claimed mark. Because the Court is certain that having a trademark system is legitimate, and that having a trademark *registration* system is legitimate (something it doesn’t even bother to distinguish from having an entirely court-based system of individual infringement lawsuits), it follows that “we need not evaluate a solely content-based restriction on trademark registration under heightened scrutiny.”⁸³ That is, because trademark law requires a specific type of content-based regulation—avoiding confusion over source—it allows content-based regulation of trademarks in general.

The problem with that argument is that Section 2(c) doesn’t inherently have much to do with protecting the source-indicating function of a trademark. Barring registration of DEMOCRATS AGAINST ELON MUSK and similar terms doesn’t seem like it’s going to facilitate source

⁷⁶ *Vidal v. Elster*, 602 U.S. 286, 307 (2024).

⁷⁷ But see *Rahimi*, 602 U.S. at 704 (Thomas, J., dissenting) (emphasizing the “careful parsing of regulatory burdens” demanded in *Bruen* and arguing against “stray[ing] too far from [history] by eliding material differences between historical and modern laws”).

⁷⁸ *Vidal*, 602 U.S. at 311.

⁷⁹ Laura Heymann, ‘Trump Too Small’ Trademark Case Morphs Into Free Speech Debate, *Bloomberg L.* (June 18, 2024), <https://news.bloomberglaw.com/business-and-practice/trump-toosmall-trademark-case-morphs-into-free-speechdebate>.

⁸⁰ *Bruen*, 597 U.S. at 29.

⁸¹ And liability carve-outs for people using their actual names even when a more well-known person used that name in the relevant industry and confusion might result. This was not a free-floating personhood interest justifying control over someone else’s use—it was a personhood interest that allowed a name-bearer to *resist* control.

⁸² Notably, although the Solicitor General and the amici supporting reversal focused on the link between Section 2(c) and the modern right of publicity, Justice Thomas did not mention the right of publicity in the opinion, presumably because of the lesser historical pedigree thereof.

⁸³ *Vidal*, 602 U.S. at 313 (Barrett, J., concurring).

identification, especially when we *already* have rules against registering deceptive marks or marks that falsely indicate an association with another person or entity. And that’s without even getting into the difference between registration and actual use: Even without a registration Elster can sell his TRUMP TOO SMALL T-shirts (for now). Maybe the Court meant that Congress can make *some* content-based rules, but not others—the opinion of the Court added that the name restrictions have “deep roots in our legal tradition.”⁸⁴

But Justice Barrett’s concurring opinion easily refuted that logic, given that the deep roots are limited to *confusing* uses of names (and some protection for people using their own actual names even when confusion results), and Section 2(c) is not. In order to justify the expansion of trademark concerns to cover nonconfusing uses, the Court’s opinion added that it’s not just fraud that can be banned, but misappropriation—“piggyback[ing]” off of another’s name.⁸⁵ Its historical foundation for *that* extension, though, comes from 1978, when Congress passed a law giving special rights to the U.S. Olympic Committee—hardly a founding era concern.⁸⁶ Equivocation about the meaning of “reputation” aided the Court: Preventing fraud, the Court reasoned, means protecting the reputation of the trademark owner, which is at risk if someone else sells products under its name. Banning free riding also protects the trademark owner’s reputation, the Court said (although free riding may not affect the trademark owner’s reputation in any way). Adding in “you can’t free ride off another” endorses an expansion of the “reputation” rationale far beyond the deception-based historical foundations of trademark.

Justice Barrett’s concurrence was attentive to this gap: “[T]he Court’s evidence, consisting of loosely related cases from the late-19th and early-20th centuries, does not establish a historical analogue for the names clause.”⁸⁷ The ability to cherry-pick a few cases out of the historical record allows for a lot of manipulation, especially in a common-law nation where there is no such thing as an unbroken, consistent line of cases.

As Justice Barrett further argued, the majority “presents tradition itself as the constitutional argument; the late-19th and early-20th century evidence is dispositive of the First Amendment issue. Yet what is the theoretical justification for using tradition that way?”⁸⁸ This approach has both a timing problem (why is that period important when it was neither the Founding nor immediately around Reconstruction?) and a conceptual problem: “[T]he Court never explains why hunting for historical forebears on the restriction-by-restriction basis is the right way to analyze the constitutional question.”⁸⁹ The latter is arguably a worse problem: what judges do once they’ve found their past cases is even more important, as they try to determine whether the past cases are sufficiently like the present legislation.

The founding era had comparatively few laws and more reliance on judicially recognized causes of action than we do now. That makes it more difficult to deal with a modern era of statutes by

⁸⁴ Vidal, 602 U.S. at 301.

⁸⁵ Id. at 306.

⁸⁶ Id. (citing *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987)); cf. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. 1477, 1488, 1501 (2023) (arguing that the Court increasingly is “relying on post-ratification practices without an obvious originalist argument,” including in *Bruen*).

⁸⁷ Vidal, 602 U.S. at 311 (Barrett, J., concurring).

⁸⁸ Id. at 323 (Barrett, J., concurring).

⁸⁹ Id. at 311 (Barrett, J., concurring).

analogizing, as the trademark and right of publicity cases did,⁹⁰ to common-law causes of action implemented on a case by case basis by judges around the country. Because there's a category shift there—from common law case by case adjudication to lawmaking—making an analogy is much more difficult, but that difficulty is hard to notice.⁹¹

Justice Barrett's concurrence, although it criticizes the majority's bad historical analogies, would have been even looser in her requirements: "I would adopt a standard, grounded in both trademark law and First Amendment precedent, that reflects the relationships between content-based trademark registration restrictions and free speech. In my view, such restrictions, whether old or new, are permissible so long as they are reasonable in light of the trademark system's purpose of facilitating source identification."⁹²

Barrett actually formulates the question two different ways. First, she would approve content-based trademark registration restrictions that are "reasonable in light of the trademark system's purpose of facilitating source identification."⁹³ Second, "[c]ontent-based criteria for trademark registration do not abridge the right to free speech so long as they reasonably relate to the preservation of the markowner's goodwill *and* the prevention of consumer confusion."⁹⁴ But those two statements are not the same. Goodwill can be harmed not just by confusion, but by truthful information, as the current state of Tesla demonstrates. Goodwill can also be harmed by nonfactual vibes. (That's why advertisers spend so much money trying to make you think their products are cooler than the competition.)

Justice Sotomayor's concurrence, joined by Justices Kagan and Jackson, likewise criticized the majority's cherry-picked approach, calling out the "indeterminacy of the Court's history-and-tradition inquiry, which one might aptly describe as the equivalent of entering a crowded cocktail party and looking over everyone's heads to find your friends."⁹⁵ She too would have used a reasonableness inquiry. And Justice Kavanaugh, elsewhere a primary proponent of history and tradition as supplying the relevant principles, concurred briefly to state that, in his view, "a viewpoint-neutral, content-based trademark restriction might well be constitutional even absent such a historical pedigree."⁹⁶

⁹⁰ *Zacchini* itself was brought as a common-law tort claim. See *Zacchini*, 433 U.S. at 565. But states around the country subsequently enacted ever-more-expansive right of publicity laws, covering more indicia of "identity" in more types of uses for longer and longer.

⁹¹ Even when judges articulated general principles, they were applying them to particular facts, so limiting principles that weren't presently relevant were often omitted. Perhaps more importantly, the analogy between the historical caselaw and the statute would have to come from identifying the rule emerging from the caselaw and comparing it to the statute. And any grouping of cases to give a "rule" has to have an underlying theory of what unites these cases: a classic level of generality problem. "Historical cases were about protecting rights when names were used as source-identifiers" is one theory, but so is "historical cases were about protecting rights when names were used *deceptively* as source-identifiers," which creates a completely different baseline.

⁹² *Id.* at 324 (Barrett, J., concurring).

⁹³ *Id.* at 311-12.

⁹⁴ *Id.* at 318.

⁹⁵ *Id.* at 327-28 (Sotomayor, J., concurring).

⁹⁶ *Id.* at 311. (Kavanaugh, J. concurring). Blocher & Siegel, *supra* at 47, suggest that this mealy-mouthedness could stem from Kavanaugh's view that precedent can sometimes override history and tradition. I respectfully disagree; I read it as a levels of generality dispute—if "protecting trademarks" is a sufficiently good interest, then Congress doesn't have to tailor its laws very well. And what, exactly, would be the precedent overriding history and tradition here? The only reason the Court had to decide *Elster* was that it had very recently, for the first and second time in

The point of my extended discussion of these conflicts is to point out that even if we say that history and tradition is our guide, rather than a specific level of scrutiny, we still have to answer key questions. Even after we identify the appropriate period of historical scrutiny (which turns out to be harder than it seems, since everyone is tempted to reach forwards or backwards in history when they see helpful precedents), the job is not over. For things like the bars on registering certain trademarks, we need to decide if the analysis should be at the level of the purpose of the specific restriction at issue, such as protecting personhood interests, or at the level of the trademark system as a whole. We should consider whether the provision at issue actually furthers the asserted interest. And we should be clear about whether, if denying *registration* to the mark TRUMP TOO SMALL is legitimate because of Elster’s putative free-riding on Trump’s reputation, it is constitutional to *punish* the sale of merchandise that bears the message TRUMP TOO SMALL for the same reason.

III. What Comes Next?

The Court didn’t use history and tradition reasoning at all in its first significant First Amendment case of 2025, upholding the so-called “TikTok ban.”⁹⁷ Instead, it relied on conventional tiers of scrutiny. Perhaps, given the expedited appeal in that case, there simply wasn’t time to think through any of the implications of importing the history and tradition method to the First Amendment. But some judges are already calling for full-fledged transposition of *Bruen*-type reasoning to First Amendment cases,⁹⁸ and another recent case suggests that the Court may soon be openly struggling with the question. The defenders of this approach primarily argue that history and tradition is a more neutral way of evaluating laws, compared to the policy analysis putatively required by tiers of scrutiny.⁹⁹ Their record so far should not give us confidence.

A. Free Speech Coalition v. Paxton¹⁰⁰

In 2025, the Supreme Court upheld a law that required age verification by commercial internet sites whose content was a third or more obscene as to minors. The majority, written by Justice Thomas, uses a hybrid approach. The Court used a history of regulating minors’ access to obscene-for-minors speech to identify a legitimate state interest in identity verification

the trademark statute’s history, struck down several other parts of Section 2 on First Amendment grounds. *Elster* used almost none of the reasoning of those decisions while also treating them as correctly decided. The *Elster* Court reversed the Federal Circuit, which had understandably treated the Court’s previous decisions as meaning what they said about applying constitutional scrutiny to the trademark statute. So there wasn’t really any precedent in the sense of court opinions upholding parts of the statute, only a post-1947 quiescence that lasted nearly eighty years (history and tradition again, if such recent practice is relevant). Of course, maybe he just wasn’t thinking that hard about it.

⁹⁷ *TikTok Inc. v. Garland*, No. 24-656, 2025 WL 222571, at *6 (U.S. Jan. 17, 2025) (per curiam).

⁹⁸ See, e.g., *Qatanani v. Att’y General*, --- F.4th ---, 2025 WL 1934523, at *23 (3d Cir. Jul. 15, 2025) (Matey, J., dissenting); *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1051 (11th Cir. 2022) (Newsom, J., concurring); *National Republican Senatorial Committee v. Federal Election Commission*, 117 F.4th 389, 391 (6th Cir. 2024). 215 *Id.* at 390 (Thapar, J., concurring, joined by three other judges).

⁹⁹ See, e.g., *Rahimi*, 602 U.S. at 718 (Kavanaugh, J., concurring) (“History is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people.”).

¹⁰⁰ *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. ----, 145 S.Ct. 2291 (Jun. 27, 2025).

legislation.¹⁰¹ In what may well have been a concession to keep a solid majority, the Court’s opinion then proceeded to apply intermediate scrutiny to the regulation whose purpose was thus approved. But its scrutiny was basically indistinguishable from rational basis scrutiny.¹⁰² And, as the dispute between the majority and dissent made clear, the remaining inquiries in strict or intermediate scrutiny—fit and tailoring—are where most of the tools of judicial scrutiny are really deployed.¹⁰³ As the dissent showed in biting detail, the costs to the speaker of implementing ID verification as well as the porousness of the ID-verification law made them different from past measures in ways that deserved much more consideration than the majority gave them.¹⁰⁴ In levels of generality terms, the majority thought the approved category at issue was “age verification,” whereas the dissent posited “age verification of the kind historically carried out by brick and mortar stores,” which is not potentially saved for government review or exposed to hackers and which has very low marginal cost to magazine-sellers.

A law’s overbreadth, underbreadth, and harms compared to the alternatives for achieving the government’s interests are necessary considerations, but ones not facially addressed by history and tradition. Sometimes, past legislatures or courts may have debated tailoring and alternatives in making their rules—indeed, the epochal *New York Times v. Sullivan*¹⁰⁵ ruling making it hard to prove defamation is, like many criminal procedure cases of the same era, an instance of the Court concluding that past attempts to avoid abuse were insufficient and adopting a stronger rule as a matter of constitutional common law evolution—but there is no requirement that they have done so. The past history of brick-and-mortar stores being required to check IDs for people who looked possibly underage when they brought pornography up to the counter of a store does not, without an additional interpretive structure, tell us anything about the constitutionality of checking everyone’s ID to access a website that has pornography (and other things) on it.

Unreassuringly, the majority opinion also signaled at least some openness to the kinds of unconstrained analogies that the Court previously deployed in the IP cases. A footnote explicitly refused to decide what would happen if Texas decided that a broader range of nonexplicit content was also “obscene as to minors,”¹⁰⁶ doubtless looking forward to controversies about drag shows, speech that acknowledges the existence of transgender people, and similar topics. Likewise, the Court did not decide what would happen if Texas decided that access to the whole internet, not just sites with more than one-third sexually explicit content obscene as to minors,

¹⁰¹ Id. at 2307-08, 2308-09, 2310, 2311 (“petitioners concede that an in-person age verification requirement is a ‘traditional sort of law’ that is ‘almost surely’ constitutional”; “H. B. 1181 thus falls within Texas’s traditional power to protect minors from speech that is obscene from their perspective”; “[s]trict scrutiny ... cannot apply to laws, such as in-person age-verification requirements, which are traditional, widespread, and not thought to raise a significant First Amendment issue”; “traditional in-person age-verification requirements” analogy made strict scrutiny for online age verification laws inappropriate).

¹⁰² Id. at 2315 (“And, an age-verification requirement is an ordinary and appropriate means of enforcing an age limit, as is evident both from all other contexts where the law draws lines based on age and from the long, widespread, and unchallenged practice of requiring age verification for in-person sales of material that is obscene to minors.”); *see also id.* (rejecting tailoring and underbreadth arguments).

¹⁰³ Which of course goes to show that the tiers-of-scrutiny approach is also deeply imperfect. My aim here is not to claim that tiers of scrutiny have solved classic interpretive problems; it is to argue that those problems will not go away, and may be harder to handle, if we abandon the tiers of scrutiny for history and tradition.

¹⁰⁴ Id. at 2321-22 (Kagan, J., dissenting).

¹⁰⁵ 376 U.S. 254 (1964).

¹⁰⁶ 145 S.Ct. at 2304 n.3.

should be subject to the same ID-verification requirements.¹⁰⁷ After all, the argument will go, these are just different in degree, not in kind, from the rules the Court just approved. And it's difference in degree that "history and tradition" has the least capability to assess.

B. What History and Tradition Can't Tell Us

We've seen the history and tradition movie already in First Amendment IP cases, and it hasn't gone well.¹⁰⁸ It doesn't supply its own analytic framework, and "sufficiently close analogy" is not all that helpful. The results can be seen in the sharply different trajectory of history and tradition in First Amendment IP cases (new limits on free speech rights are fine) compared to reasoning in Second Amendment cases (new limits on gun rights are not allowed). The flabbiness of history, that is, currently works differently for different constitutional rights. That should give us pause in further embracing history and tradition as a guide to the First Amendment more generally.

The First Amendment IP cases further demonstrate that, even outside of the gun rights context, history and tradition expands the sources for Justices to consult beyond constitutional text in ways that authorize them to do what they want.¹⁰⁹ Thus, while it has been deregulatory in gun control cases,¹¹⁰ it authorizes expanded state power in First Amendment cases. Most of the work of the history and tradition test in Second Amendment law comes from what legislators didn't do—they didn't regulate guns in particular ways. In the First Amendment context, by contrast, courts have extrapolated from private rights courts and legislatures granted in the past to allow them to grant new and expanded private rights in the present for the same reasons. Anti-gun regulation judges can dismiss inconvenient past examples of gun regulation as misunderstandings.¹¹¹ Pro-IP rights judges can seize on outlier cases, or simply use the general

¹⁰⁷ Id. at 2308 n.7 (stating that a broader law might be unconstitutional as applied, but that there was no relevant argument before the Court).

¹⁰⁸ Again, tiers of scrutiny analysis is no panacea. For example, in the Gay Olympics case, the Supreme Court upheld a super-trademark law that required no showing of confusion or even dilution to prohibit unauthorized uses of the Olympic marks. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987). It did so by reasoning that the desire to subsidize the U.S. Olympic Committee (USOC) was not a speech-suppressing motive. Id. at 536-37. (Notably, under *Reed*, that would still be a content-based regulation because prohibited uses were identified by their content.) Applying intermediate scrutiny, the Court reasoned that Congress could reasonably determine that most unauthorized uses of the Olympic marks would harm the USOC. Id. at 532-35. That is, the Court applied no serious inquiry into tailoring or the obvious alternatives (regular trademark law), even while purporting to work within the tiers of scrutiny framework. I make no claim that clear solutions to interpretive problems are being abandoned along with decades of precedent. It is merely that relabeling the analysis serves to confuse matters further.

¹⁰⁹ See Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 Sup. Ct. Rev. 49, 60 (2022) (arguing that "*Bruen* demonstrates the Court's tendency to curate a historical record and then to treat it as an objective basis for decision").

¹¹⁰ See Blocher & Siegel, at 55.

¹¹¹ *Bruen*, 597 U.S. at 65 (rejecting historical gun regulations as "outliers"); see Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 Wash. U. L. Rev. 1, 5 (2023) (discussing the inconsistent treatment of territorial law); cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (rejecting the 1798 Sedition Act as a misunderstanding/failure of the Congress to live up to the principles that the Framers had agreed on). Disregarding "outliers" works along with manipulable levels of generality to conclude that, because past decisionmakers acted inconsistently in one type of case from their broader rights commitments, they failed to appreciate the true implications of those broader commitments. Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. 99, 161 (2023) (describing conflicting originalist accounts of whether

justifications for IP rights expressed in past cases and treat them in isolation from the countervailing considerations that formerly limited those rights.

The expansion of relevant evidence beyond text to any practice (or nonpractice) of legal regulation aids in the project of judicial freedom: In such a vast corpus, who could deny that there must be some errors and misunderstandings in there? At the same time, judges can dismiss inconvenient past limits on IP rights as matters of legislative grace, and can always find at least some expansive descriptions of the private interest at issue, which then justifies further expanding the scope of the right.

I think we can do better. Two comparisons are easy to confuse but profoundly different in their implications: First, one might claim that the regulation at issue protects the same *entity* or has the same *name* as previous rules¹¹²—all of the IP cases I’ve discussed have essentially this form, but that leaves a huge amount of room to increase the amount of interference with *others’* speech interests in important ways. When a label seems to be dispositive of constitutionality, clever drafters relabel their interests to be intellectual property rights. There was a proposal, for example, to grant a copyright to the American flag to the US government—this would, its proponents said, allow the government to ban flag-burning.¹¹³ Likewise, right now there is no copyright in laws or regulations. The Supreme Court has treated the lack of protection for laws as a common-law limit on the copyright act even without specific statutory language setting it forth,¹¹⁴ and lower courts have also found that there is a right to reprint standards drafted by private parties and incorporated by reference in laws.¹¹⁵ There are currently proposals in Congress to grant copyright in those standards even when incorporated into law—which might be conceived of as using legislation to override the common-law limit.¹¹⁶ More recently, a dissenting judge argued for treating unauthorized recording of a conversation as an actionable “appropriation” of the nonconsenting public official’s speech.¹¹⁷

Second, one might claim that the regulation at issue protects the same *interest* as previous rules, even if there are new claimants. In *Bruen*’s terms, this is analogizing to the “how” and “why” of past gun regulations to judge new regulations’ constitutionality. The Court followed this

states can constitutionally prohibit interracial marriage: such marriages were regularly banned when the Reconstruction Amendments were adopted, but some recent originalist scholars look to “higher-level” traditions of respect for voluntary contracts).

¹¹² As others have noted, this method carries the risk that judges can easily “lapse into an analogical process driven by surface rather than structural similarities.” Darrell A.H. Miller, *Historical Analogy and the Role Morality of Reason-Giving*, 73 *Duke L.J. Online* 233, 244 (2024).

¹¹³ H.R. 2723, 102d Cong., 1st Sess. (Torricelli, June 20, 1991).

¹¹⁴ *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 266 (2020).

¹¹⁵ See, e.g., *American Society for Testing and Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262 (D.C. Cir. 2023).

¹¹⁶ See H.R. 1631, <https://www.congress.gov/bill/118th-congress/house-bill/1631>.

¹¹⁷ *Project Veritas v. Schmidt*, 125 F.4th 929, 955 (9th Cir. 2024) (Christen, J., dissenting) (invoking, inter alia, two copyright/free speech cases as part of deeming unauthorized recording to be “misappropriation”: *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (“The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; *it bears less heavily when speakers assert the right to make other people’s speeches.*”) (emphasis added by dissent), and *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (recognizing, along with the freedom to express one’s views publicly, the “concomitant freedom not to speak publicly”) (citation omitted)). It is hard to see how this reasoning could distinguish recording from (accurately) quoting.

approach at a high level of generality in *Rahimi*, where it reasoned that the *justifications* for depriving domestic abusers of Second Amendment rights were the same as those behind prior restrictions (once legislatures started recognizing that women were as entitled to protection from physical abuse by intimates as we are from strangers, and far more at risk from it). But this approach risks collapsing into the first, label-based approach. The manipulability of levels of generality in defining an interest grounded in history and tradition requires more tools than are currently on display—and those tools cannot be found in “the past.” They require interpretation and judgment.

The idea of focusing on analogies at the level of the government’s interest in the regulation leads to my strongest conclusion: Although the tiers of scrutiny may be shaky for various reasons, the concerns they implement will not go away. In the First Amendment, those animating concerns include: worry about government suppression of views it doesn’t like, whether by viewpoint-based laws or laws that in practice discriminate against particular viewpoints; related worry about government’s ability to identify when speech actually causes harm rather than just causing upset; not unrelated but separate concerns about overbreadth and underbreadth, where poor targeting of a regulation may reveal bad motives or just unwarranted discrimination against certain kinds of speakers when other speakers or speech causes the same harm but remains unregulated. Thus, one useful question is whether a speech restriction matches well to the putative harm it addresses. If its harm-prevention claim relies on an extended causal chain that could be interrupted by other factors, or is unpersuasive as a justification for the law at issue because of the amount of harmful speech it leaves untouched or the amount of harmless speech it suppresses, then we should identify a constitutional problem.

That is, considerations of *fit*—usually considered as part of the second and third prongs of strict or intermediate scrutiny—cannot and should not disappear even if the “compelling government interest” and “substantial government interest” standards are replaced by a test that requires the government interest asserted to be recognized by US history and tradition. Indeed, tailoring concerns are likely the *only* way to evaluate whether newly enacted laws are consistent with a history and tradition of allowing some speech regulations and not others. Historical analogies can start us off, but we will still need to ask about tailoring and alternatives.¹¹⁸

Specifically, history can help us identify legitimate government interests in suppressing speech, but we need a system for resolving competing claims when a new IP or other speech-restrictive rule affects the ability of people to exercise the speech rights that *they* historically had. *Zacchini*, the right of publicity case, could even offer us a potential model if we took the historical analogy seriously as a *limit* on what lawmakers can enact, as in the Second Amendment context. After all, there were reasons why common-law copyright in unfixed performances didn’t prevent most reporting about what people said. But better still would be to take on directly the project of identifying the relevant government interest and the extent of a regulation’s impact on speech that ought to be protected.

¹¹⁸ Cf. Andrew Willinger, History and Tradition As Heightened Scrutiny, 60 Wake Forest Law Review __ (2025), manuscript at 40 (noting that, after Bruen, “tailoring is no longer explicitly part of the judicial inquiry,” but “courts have struggled to apply [history and tradition] in a manner that parts ways, once and for all, with judicial analysis of how tailored a modern law is to its stated objective”).

Conclusion

Law should not be fundamentally unprincipled or unpredictable, even when some uncertainty is inevitable. Addressing the role of history and tradition in First Amendment doctrine is therefore vital to the project of maintaining the rule of law even in a time of rapid constitutional change.