QUALIFIED ABSOLUTISM, CATEGORICAL BALANCING, AND NEW CATEGORIES

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The First Amendment protects most political, ideological, and religious speech, not to mention the daily conversations of many millions of citizens. Speech, however, is not invariably protected under the First Amendment. Some categories of speech such as obscenity,[1] fighting words,[2] copyright violations,[3] child pornography,[4] perjury,[5] fraud,[6] some forms of advocacy of illegal action,[7] and some forms of defamation,[8] among many others[9] are not protected, even though the categories of speech are partly defined by their content.[10]

* Charles Frank Reavis, Sr., Professor of Law Emeritus, Cornell University Law School. Many thanks to the Editors of the *Albany Law Review* and three wonderful supporters and critics: Mike Dorf, Seana Shiffrin, and Nelson Tebbe. Thanks also to my first research assistant in some thirty years, Christopher Johnson, who did outstanding work for me and for Mike Dorf before me. I have also benefitted from long conversations in disagreement with Ed Baker over many years. I have been blessed with many classes of students primarily in Los Angeles and Ithaca, (but also Paris, Ann Arbor, Cambridge, Boston, Northridge, and Seattle), students who loved the First Amendment. The more they fought with me and with each other the happier and wiser I became.

[1] *See* Miller v. California, 413 U.S. 15, 23–24 (1973).

[2] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[3] *See* Harper & Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539, 559–60, 569 (1985).

[4] New York v. Ferber, 458 U.S. 747, 764 (1982).

[5] *See* United States v. Alvarez, 567 U.S. 709, 746–47 (2012) (Alito, J., dissenting). For an excellent discussion of *Alvarez*, see generally SEANA VALENTINE SHIFFRIN, SPEECH MATTERS 120–25, 135–39 (2014).

[6] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976); *see also* Ill. *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 612 (2003) (citing Donaldson v. Read Mag., Inc., 333 U.S. 178, 190 (1948); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

[7] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[8] *See Gertz*, 418 U.S. at 344–47.

[9] *See, e.g.*, Ronald K.L. Collins, *Foreword: Exceptional Freedom - The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 417–22 (2013). Any attempt to identify the unprotected categories of speech is bound to be controversial, but they are more numerous than those found in the listings provided by the Court. *See id.* (suggesting that there are at least forty-eight categories of unprotected expression); *cf.* Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alv*arez, 76 ALB. L. REV. 499, 502–03 (2013) (many cases not protecting speech beyond the *Chaplinsky* categories).

[10] Much ordinary language speech is not considered to be within the scope of the First Amendment (think of most of the securities laws, the antitrust laws, and the laws of evidence), but litigators press against those boundaries. *See* Frederick Schauer, *The Boundaries of the*

In determining that these categories of speech should not be protected, the Court engaged in an analysis of the factors it thought relevant without attempting to provide a general theory of when speech should be protected and when it should not and without stating a "level of scrutiny" to be applied.[11] Subsequently, the Court ordinarily[12] began to apply what it called "strict scrutiny" in cases in which it determined the government regulation was content-based.[13]

This was the state of First Amendment law involving content-based regulations when John Roberts became Chief Justice. The Roberts Court has changed this law in two ways. First, the Court has broadened the content discrimination definition, making more speech subject to strict scrutiny review. Second, it has made it more difficult for governments to establish that additional categories of speech are unprotected. It has ruled that any claims for additional categories of unprotected speech should be recognized only if they fit into a previously unrecognized tradition of proscription.[14] So when the federal government sought to regulate depictions of animal cruelty or California sought to prevent the sale of gruesomely violent video games to children, the Roberts Court rejected the claim that these regulations should be tested by determining whether the importance of furthering the state interests was outweighed by the free speech values that were impacted.[15] The Court characterized the contention

First Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765, 1773–74 (2004) [hereinafter Schauer, *Boundaries*]; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 268–69 (1981) [hereinafter Schauer, *Play*]. For important discussions of this phenomenon, see generally Schauer, *Boundaries*, *supra*; Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346 (2015) [hereinafter Schauer, *Out of Range*]; Schauer, *Play*, *supra*.

[11] *See* Miller v. California, 413 U.S. 15, 22 (1973); Clay Calvert, *Escaping Doctrinal Lockboxes in First Amendment Jurisprudence: Workarounds for Strict Scrutiny for Low-Value Speech in the Face of Stevens and Reed*, 73 SMU L. REV. 727, 738, 760 (2020). In this respect, the Court was closer to the balancing (or proportionality employed in Europe and Canada and more recently by Justices Breyer and Kagan) than it has been in the approach I criticize below. See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096–97, 3099, 3105 (2015).

[12] *See infra* note 287 and accompanying text. In some cases, the test has been less strict even though the regulation of the speech was content-based. *See infra* text accompanying note 288. In the religion context, the strict scrutiny test has been applied in a lackluster manner. *See* Nelson Tebbe, Comment, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 267–68 (2021); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1269 (2007).

[13] I use content-based, content discrimination, and content regulation interchangeably.

[14] *See* United States v. Alvarez, 567 U.S. 709, 722 (2012) (citing Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011)).

[15] *See* United States v. Stevens, 559 U.S. 460, 470–72 (2010); *see also Ent. Merchs. Ass'n*, 564 U.S. at 792. These cases are hardly new, but despite their maturity, they can helpfully frame the discussion.

that such a balancing methodology was previously used to create the unprotected categories as "startling and dangerous."[16] Instead, it purported to look for a history of proscription, and finding none (apparently the Framers did not regulate video games), refused to entertain the possibility of a new category. This has been characterized as the frozen categories approach.[17]

Ronald Collins refers to the Roberts Court's content-based jurisprudence as the "new absolutism."[18] This is the same Ronald Collins who has written an excellent book about Floyd Abrams called *Nuanced Absolutism*.[19] The debate between the absolutists and the balancers is part of a great First Amendment tradition. Of course, absolutism is always selective. The old absolutism was never absolute and neither is the new absolutism or the nuanced absolutism.[20] Absolutists are always forced to make exceptions, and too many of them do not justify the exceptions. In my view, justifying those exceptions without resort to balancing is often impossible. This does not mean that the absolutism/balancing debate was about nothing. It centers on the creation of new categories of unprotected speech. By definition, the absolutists are committed to making as few exceptions as possible to the protection of speech often by applying as few principles as possible. Balancers could advocate similar protection; most do not.[21] In my view, speech conflicts with too many important values in too many contexts to suppose that it should be invariably privileged, let alone that it should invariably prevail. Unprotected categories exemplify that point. On the other hand, absolutists criticize balancing on many grounds. Among other

[16] *Stevens*, 559 U.S. at 470.

[17] *See* Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1489 (2014).

[18] Collins, *supra* note 9, at 413.

[19] *See generally* RONALD K.L. COLLINS, NUANCED ABSOLUTISM: FLOYD ABRAMS & THE FIRST AMENDMENT (2013).

[20] Notwithstanding its historical pedigree, the claim that the First Amendment is in some sense "absolute," without putting too fine a point on it, is just "talk." Frederick Schauer, *Free Speech Overrides*, 2020 U. CHI. LEGAL F. 255, 255–56 (explaining that the amendment's protection of free speech is "not absolute now, has never been absolute in the past, and will not be absolute in the future").

[21] *See id.*; Schauer, *Out of Range*, *supra* note 10, at 346; Schauer, *Play*, *supra* note 10, at 276–77; STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? 1–112 (2016) [hereinafter SHIFFRIN, WHAT'S WRONG]. On the other hand, Shiffrin and other balancers typically believe that the First Amendment stands for important values that deserve to be protected and encouraged. *See e.g.*, STEVEN H. SHIFFRIN, THE FIRST AMENDMENT DEMOCRACY, AND ROMANCE 21–23 (1990) [hereinafter SHIFFRIN, ROMANCE]; STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 10–12 (1999) [hereinafter SHIFFRIN, DISSENT] (emphasizing the importance of dissent).

things, they claim that balancing is contrary to the rule of law, insufficiently constrains judges, and under protects rights.

In this Article, I will argue that both pillars of the new absolutism try to protect too much speech. I will provide only a limited discussion of the content discrimination principle because there is already a vast literature discussing it.[22] My basic argument here is that the Court's definition of the concept of content discrimination is too broad.[23] The argument given for that breadth is insufficiently connected to the purposes for concern about content discrimination. Some justices and commentators have worried that this broadening will permit further constitutional intrusions into desirable economic regulation. At this point, rather than producing constraint and uniformity, the lower courts have rebelled, and the result is doctrinal disarray.

The bulk of this Article will defend the proposition that examples like federal regulation of the depictions of animal cruelty or state regulation of the sale of violent video games to children should be subject to consideration of their advantages and disadvantages with due regard for any First Amendment values involved. In other words, I reject the absolutist frozen categories approach in favor of the balancing jurisprudence that has prevailed for many decades.[24] The frozen categories approach privileges speech of little value that threatens substantial state interests.[25]

I will argue that defenders of the frozen categories approach cannot provide an adequate answer to the following questions. If the Court has concerns about content discrimination, why didn't those concerns apply to the creation of unprotected categories? And what justifies its attempted ban on the creation of new ones? As Rodney Smolla has asked, "[W]hen new categories come knocking at the door that seem every bit as deserving as the categories that made the original

[22] Probably the most influential article placing emphasis on the content-based/content-neutral distinction is Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

[23] The failure to disaggregate different kinds of content discrimination is only part of the problem.

[24] For the factors that have been used and the factors I recommend in balancing, see *infra* text accompanying note 143.

[25] Indeed, Frederick Schauer makes the shrewd point that the frozen categories approach gives litigators incentives to challenge economic regulations that are not of long standing. *See* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1626 (2015). If it is difficult to establish that a category of speech is unprotected, economic regulations of speech might be subject to strict scrutiny. *See id.* at 1623.

list [of unprotected categories] why not grant them entry?"[26] The Court's primary arguments for the frozen categories approach are set forth in *United States v. Stevens*.[27] Those arguments primarily rely on misleading history and precedent. A more sophisticated analysis of the doctrine was filed in the *Stevens* case by a number of distinguished constitutional scholars.[28] They included Bruce Ackerman, Jack M. Balkin, Lee C. Bollinger, Erwin Chemerinsky, Daniel A. Farber, Craig Green (Lead Counsel), Sanford Levinson, Burt Neuborne, Lucas A. Powe, Rodney A. Smolla, Geoffrey R. Stone (Co-Counsel), Laurence Tribe, and William Van Alstyne.[29] I argue that their attempts to justify the frozen categories approach are unsuccessful and that the categories were arrived at through the very balancing process the Court was hoping to resist.

I then turn to a fuller discussion of absolutism and balancing. I discuss the rhetoric of absolutism and show that many arguments made in favor of an absolutist reading of the First Amendment, however effective as advocacy, are ad hominem in character and not worthy of substantive consideration. I discuss and assess the work of prominent scholars who have played an influential role in the absolutism/balancing debate.

In response to the criticisms of balancing, I will argue (1) that the claim that balancing violates the rule of law is simply wrong; (2) that in the frozen categories area limited[30] constraint is a vice, not a virtue, because, it interferes with government's ability to regulate harmful speech and that any small amount of constraint is mapping

[26] Smolla, *supra* note 9, at 525. Smolla himself supports the free speech side of the question. *See id.* at 525–26.

[27] *See* United States v. Stevens, 559 U.S. 460, 468–72 (2010).

[28] *See* Brief of Constitutional Law Scholars Bruce Ackerman et al. as Amici Curiae in Support of Respondent, United States v. Stevens, 559 U.S. 460 (2009) (No. 08-769) [hereinafter CLS]. Attorneys representing the American Civil Liberties Union, the Reporters Committee for Freedom of the Press, the American Publishers Incorporated, and the Thomas Jefferson Center for the Protection of Freedom of Expression also filed briefs on behalf of Stevens. *See* Brief of the DKT Liberty Project, American Civil Liberties Union, & Center for Democracy and Technology, as Amici Curiae in Support of Respondent, United States v. Stevens, 559 U.S. 460 (2009) (No. 08-769) [hereinafter ACLU]; Brief Amici Curiae of the Reporters Committee for Freedom of The Press and Thirteen News Media Organizations in Support of Respondent, United States v. Stevens, 559 U.S. 460 (2009) (No. 08-769) [hereinafter Reporters Committee]; Brief of Amici Curiae Association of American Publishers, Inc., et al., in Support of Respondent [hereinafter American Publishers]; Amicus Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression in Support of Respondent, United States v. Stevens, 559 U.S. 460 (2009) (No. 08-769) [hereinafter Thomas Jefferson Center].

[29] *See generally* CLS, *supra* note 28.

[30] It is limited because the cases are quantitatively small. Nonetheless, they are theoretically important.

a small amount of constraint on to a chaotic regime; and (3) that balancing to determine whether additional categories of speech should be unprotected poses little threat to important rights.

The Roberts Court has been criticized by many for its failures in protecting dissent.[31] At the same time, the Roberts Court has subscribed to a free speech jurisprudence that does not take seriously enough the values with which it comes into conflict.[32] By using an overbroad concern about content discrimination accompanied by the sledgehammer of strict scrutiny, its frozen categories approach has crept to new lows. Protecting harmful speech of no redeeming value, such as depictions of animal cruelty and gruesomely violent video games, at the same time it casts a blind eye on a wide variety of content-neutral measures suppressing dissent[33] is shameful. It protects what should not be protected and does not protect speech, which has a serious claim to be at the heart of the First Amendment.

I. THE COURT'S JUSTIFICATION

A fuller description of the two cases I have mentioned can help frame this discussion. In the first, *United States v. Stevens*,[34] a federal statute prohibited the commercial creation, sale, or possession of depictions of animal cruelty[35] "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if that conduct violates federal or state law where "the creation, sale, or possession takes place."[36] The statute exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[37] As the brief for the United States makes clear, the purpose of the statute was to "prevent depraved acts of animal cruelty"[38] by removing financial incentives to commit the acts.[39] As the brief puts it, the statute "targets the 'visible apparatus

[31] *See e.g.*, TIMOTHY ZICK, SPEECH OUT OF DOORS 57–59 (2009).

[32] Thus, my opposition to the frozen categories approach is in accord with the claim in Shiffrin's *What's Wrong with the First Amendment?* that First Amendment interpretation runs astray when, for example, it protects First Amendment freedoms over fair trial, privacy, fair elections, and the like. *See* SHIFFRIN, WHAT'S WRONG, *supra* note 21, at 13–132.

[33] *See* SHIFFRIN, WHAT'S WRONG, *supra* note 21, at 116–19.

[34] United States v. Stevens, 559 U.S. 460 (2010).

[35] *See id.* at 464–65; 18 U.S.C. § 48(a) (invalidated 2010).

[36] *Id.* § 48(c)(1).

[37] *Id.* § 48(b).

[38] Brief for the United States at 28, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769) [hereinafter U.S. Brief].

[39] *Id.* at 29.

of distribution' in order to stop the commission of illegal acts of animal cruelty, which are difficult to prosecute directly because of their clandestine nature."[40] Stevens was arrested and convicted for running a business in which he sold gruesome videos of pit bulls attacking dogs and other animals.[41] Stevens defended on First Amendment grounds.

In the second, *Brown v. Entertainment Merchants Association*,[42] California outlawed the sale or rental of gruesome video games to children "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted"[43] in a manner appealing to a "'deviant or morbid interest of minors,' that is 'patently offensive to prevailing standards in the community as to what is suitable for minors,'" and that renders "the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."[44] Companies representing the video-game and software industries challenged the statute, and the First Amendment issue was joined.[45]

In both cases, the Court held that the First Amendment foreclosed enforcement of these statutes. The primary arguments for doing so were put forward by Chief Justice Roberts in *Stevens*.[46] In my judgment, the arguments the Chief Justice made in *Stevens* are quite weak. He maintained that from 1791 to the present, the First Amendment had permitted restrictions on only a few categories of speech that were carefully defined,[47] that had never been thought to raise a constitutional problem[48] and had prohibited expansion of these categories by a consideration of the relative advantages and disadvantages.[49] By way of precedent, the Court distorted a passage from *R.A.V. v. St. Paul*.[50] On the Court's rendition, *R.A.V.* said, "'[f]rom 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these

[40] *Id.* at 29.
[41] United States v. Stevens, 559 U.S. 460, 466–67 (2010).
[42] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).
[43] *Id.* at 789.
[44] *Id.*
[45] *See id.* at 789–90.
[46] *See* Stevens, 559 U.S. at 464–82.
[47] For discussion, see *infra* notes 51–58 and accompanying text.
[48] For discussion, see *infra* notes 77–83 and accompanying text.
[49] *See Stevens*, 559 U.S. at 468–71.
[50] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

traditional limitations.'"[51] So written, the reader was led to believe that the freedom to *expand* on the restrictions was not present within the First Amendment.[52]

In fact, the *R.A.V.* Court was not writing about new categories. Instead, it was stating that the Court was not free to *abandon* the long-standing restrictions:

> Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which 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." We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations.[53]

R.A.V. recognized that "[o]ur decisions since the 1960's have narrowed the scope of the traditional categorical exceptions . . . but a limited categorical approach has remained an important part of our First Amendment jurisprudence."[54]

Not only is the reading of precedent garbled, but also the rendition of the tradition is simply fiction. Sound scholarship has shown that the purported tradition in *Stevens* draws upon a distorted picture of First Amendment history.[55] So too, as we will see, an analysis of the doctrine supports the view that the question of whether speech is protected or unprotected has long been influenced by judgments about the benefits and burdens of alternative rules. Even if the Court's reading of precedent and rendition of First Amendment tradition were accurate, it is a far cry from a normative justification.[56]

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[51] *Stevens*, 559 U.S. 460, 468 (2010) (citing *R.A.V.*, 505 U.S. at 382–83).

[52] *See* Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 87 (explaining that the *Stevens* Court "made abundantly clear" that it would be loath to expand the list of speech categories unprotected by the First Amendment).

[53] *R.A.V.*, 505 U.S. at 382–83 (citations omitted).

[54] *Id.* at 383 (omitting citations to cases narrowing the categories of unprotected speech).

[55] *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2169, 2212–32 (2015); *cf.* David M. Rabban, *The State of Free Speech Doctrine in 1917*, 50 ARIZ. ST. L.J. 911, 911–12 (2018) (following Blackstone, outside of prior restraints, most courts afforded no protection for dangerous or offensive speech adjudged to have a bad tendency). The notion that the categories referred to by the *Stevens Court* stretched back to 1791 is pure fiction.

[56] Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 670 (2002) ("In recent decades, the Supreme Court has dramatically expanded the scope of First Amendment

In that respect it was not helpful for the Court to claim that the "First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."[57] This is an attractive rhetorical slogan, but it is an unhelpful guide to determining what the restrictions on the government ought to be.[58]

However weak the Chief Justice's arguments may have been, the conclusions of *Stevens* are weighty and need to be challenged. They go to the heart of what separates protected from unprotected speech. In fact, I doubt that the frozen categories approach is actually motivated by a reading of history or by an analysis of precedents or by the power of a rhetorical slogan—although the latter comes closest to the heart of the matter. I believe that what drives the frozen categories approach is an opposition to balancing, a formal egalitarian concern against content discrimination, and a general, but selective, libertarian preference for free speech. Whatever the merits of those values, the Court does not adequately justify its decision to prevent governments from regulating speech whose value is outweighed by the harm caused.

II. EXPLAINING THE TRADITIONAL CATEGORIES OF UNPROTECTED SPEECH

Opposition to the frozen categories approach does not imply opposition to free speech generally, let alone to tolerating the suppression of dissent. Those who oppose the frozen categories

protections, and has steadily narrowed the traditional exceptions. Thus, the question of whether particular speech should receive constitutional protection cannot be resolved merely by reference to history, but calls for a normative standard."). More generally, a free speech theory whose touchstone is historical practice or tradition risks glossing over the critical perspective needed to evaluate the virtues and drawbacks of that history as well as its proper fit in modern free speech analysis. *See* Seana Valentine Shiffrin, *Methodology in Free Speech Theory*, 97 VA. L. REV. 549, 549–50 (2011) (arguing that free speech theories offering "theoretical foundations" separate from historical tradition are "essential" to distinguishing the traditions "worth valorizing" from those that ought to be "amended or abandoned").

[57] United States v. Stevens, 559 U.S. 460, 470 (2010).

[58] Only slightly better is this statement from Stevens's brief in the Supreme Court: "That focus on history and tradition is critical because it ensures that the First Amendment's shield is withheld only from those narrow categories of speech for which the Constitution never intended protection, but not from those forms of speech that the legislative majority just prefers not to protect." Brief for the Respondent at 27–28, United States v. Stevens, 559 U.S. 460 (2009) (No. 08-769). Here again is the begging of the question how the Constitution should be interpreted; there is, for example, no clear constitutional intent about violent video games. So, too, no one seeks to justify the limitation of speech just because a majority prefers not to protect it.

approach might have quite divergent views about the extent to which speech should generally be free and about the sanctity of the old categories of unprotected speech. What the opponents to the frozen categories oppose is the presumption that attempts to impose sanctions on a new category of speech should automatically be subject to a heavy presumption of unconstitutionality even when the state has quite substantial interests in regulating the speech.

As we have seen, the Court in *Stevens* claimed that state regulation on the basis of content is unconstitutional unless the regulation meets a test of strict scrutiny.[59] That claim does not account for too many exceptions to the principle, including obscenity, defamation, commercial speech, near obscene speech, perjury, and the like where the term "strict scrutiny" does not appear, and the analysis does not even reveal that a thumb was put on the scales to suggest a default in favor of expression. Without further explanation, it is more accurate to say that content regulation is permitted except when it is not.[60] But that provides no justification for a frozen categories approach, let alone a satisfying explanation of First Amendment doctrine.

Faced with this backdrop in *Stevens*, one might have expected the briefs for the First Amendment side to reflect on the criteria for creating a new category or, at least, to develop arguments for the proposition that there should be a strong presumption against new categories of unprotected speech. Nonetheless, most of the briefs begged the question. They argued that the speech in question did not fit into the existing categories of unprotected speech and then leaped to the conclusion that strict scrutiny was appropriate.[61] A welcome exception to this question begging is present in the constitutional scholars' brief.[62]

As we have seen, the Court uses an historical approach to explain the categories of unprotected speech. As I have indicated, scholars have torn that account apart.[63] The brief is more sophisticated. It provides an intricate defense of a position with which I disagree. It has the merit of recognizing that content regulation is sometimes permitted and that any form of nuanced absolutism must account for

[59] *See Stevens*, 559 U.S. at 467, 481–82.

[60] *Cf.* Heyman, *supra* note 56, at 652, 670 ("[T]he Court has never succeeded in explaining the rationale for these exceptions, or in squaring them with the general principle of content neutrality."). Scholars have been unsuccessful as well.

[61] *See, e.g.*, U.S. Brief, *supra* note 38, at 39.

[62] *See* CLS, *supra* note 28, at 32–34.

[63] *See supra* note 55 and accompanying text.

the categories of unprotected speech. The brief maintains, as Geoffrey Stone (one of the brief's co-authors) has argued for many years, that unprotected or less protected speech is speech of "low value,"[64] but it claims that depictions of animal cruelty do not fall within the category of low value.[65] This, of course, requires reflection of why categories of unprotected speech are of low value and reflection on the characteristics of those categories. Moreover, it requires an explanation that, in fact, the concept of low value fully explains the phenomenon of unprotected categories.

Like the *Stevens* Court,[66] the brief attempts to squeeze the unprotected categories into dictum found in *Chaplinsky v. New Hampshire*.[67] So, according to the brief, the unprotected categories are well-defined[68] and narrowly limited and "have never been thought to raise any Constitutional problem."[69] But this description ignores too much. Some types of defamation are not protected,[70] but defamation has never been well-defined,[71] and the concept of public figure is notoriously vague.[72] The determination of what counts as fair use in copyright cases is also vexed because fair use is not well-defined.[73] In addition, given the term's prurient appeal, patent offensiveness, and serious value,[74] it would be preposterous to

[64] *See* Stone, *supra* note 22, at 194–96.

[65] See CLS, *supra* note 28, at 5–18.

[66] See United States v. Stevens, 559 U.S. 460, 468–69 (2010).

[67] See Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."); CLS, *supra* note 28, at 3–4.

[68] *But see* Jeffrey M. Shaman, *The Theory of Low Value Speech*, 48 SMU L. Rev. 297, 301 (1995) (several categories not susceptible to precise definition).

[69] CLS, *supra* note 28, at 3.

[70] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974). *See generally* Thomas C. Galligan, Jr., *The Structure of Torts*, 46 FLA. STATE U. L. REV. 485, 519–22 (2019) (summarizing defamation law).

[71] Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RIGHTS L.J. 467, 498–99 (1994) (identifying eight different judicial approaches to one aspect of the defamation definition).

[72] See Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976) ("Defining public figures is much like trying to nail a jellyfish to a wall."); *see also* Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as "Public Figure": Nailing the Jellyfish*, 68 IOWA L. REV. 35, 35 (1982); Michael Coenen, *Characterizing Constitutional Inputs*, 67 DUKE L.J. 743, 788 (2018) ("It is not always easy to say whether a given defamation plaintiff qualifies as a public figure.").

[73] Haochen Sun, *Copyright Law as an Engine of Public Interest Protection*, 16 NW. J. TECH. & INTELL. PROP. 123, 124–25 (2019) ("[F]air use has become something of a legal monster, causing no end of troubles owing to its vague and shifting contours."); Jeremy N. Sheff, *Legal Sets*, 40 CARDOZO L. REV. 2029, 2090 (2019) ("'[F]air use' is a notoriously imprecise doctrinal category.").

[74] *See* Miller v. California, 413 U.S. 15, 23–24 (1973).

maintain that obscenity is well-defined,[75] but government can prohibit obscene materials under the Constitution.[76]

Obviously, some degree of vagueness is now and always has been consistent with the First Amendment. The notion that the First Amendment will not tolerate vagueness that risks chilling protected speech obviously depends on the context.[77] For example, the imprecision associated with the concept of defamation seems to be deemed tolerable in order to protect reputation.

Vagueness aside, if the criterion that only categories of long standing (those that had never been thought to raise a constitutional problem) were taken seriously, no new categories of unprotected speech could ever have been created. Yet, some sexually oriented but not obscene speech clearly receives less protection than fully protected speech.[78] Commercial advertising was once protected,[79] then unprotected,[80] then protected[81] though not fully so.[82] So too, child pornography was unknown as a category of unprotected speech at the time of the Court's decision in *New York v. Ferber*.[83] The CLS brief insists that the C*haplinsky* dictum has been adhered to for almost seventy years,[84] but that is clearly incorrect, and the brief, therefore, does not accurately explain the categories of unprotected speech.

The brief is designed to combat the idea that a weighing of the speech interests against the harm caused by the speech should be employed in determining whether a new category of unprotected speech should be created. The brief maintains that courts are not authorized to engage in "an open-ended balance of the value of the speech against the harm it causes."[85] It claims that "[s]peech is subject to regulation under *Chaplinsky* not because it is harmful, but

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[75] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 109 (1973) (Brennan, J., dissenting).

[76] *See id.* at 53–54 (majority opinion).

[77] Clearly the chilling of speech is not unconstitutional when the chilled speech is itself unprotected. *See* Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 931 (1979).

[78] *See* Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1682 n.80 (2019).

[79] *See* Lakier, *supra* note 55, at 2182–83.

[80] *See, e.g.*, Valentine v. Chrestenson, 316 U.S. 52, 53–55 (1942).

[81] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 780–81 (1976).

[82] *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 34 (2000).

[83] *See* New York v. Ferber, 458 U.S. 747, 763 (1982).

[84] *See* CLS, *supra* note 28, at 4.

[85] *See id.* at 18.

because it does not appreciably further the interests of the First Amendment. Harm enters the analysis only *after* it is established that the speech is of low First Amendment value."[86]

This is a crucial statement in the brief. First, note that the brief apparently acknowledges that harm does enter the analysis if low value is established.[87] In other words, balancing is part of the analysis leading to unprotected categories. So read, the brief is opposed to "open-ended" balancing, but endorses balancing only if a preliminary showing of low value speech, *as the brief characterizes it*, is made. As we shall see, even that form of restricted balancing cannot account for the unprotected categories. Only general balancing can.

The brief's claim runs into many obstacles. First, the Court has never stated that harm enters the analysis only after a showing of low value. For example, *Chaplinsky* did not say that harm enters the analysis only after a showing of low value. It has ordinarily considered them together without engaging in a lexical two-step analysis.[88] *Chaplinsky* concluded that fighting words had only "slight social value as a step to truth,"[89] but also that this value was "outweighed by the social interest in order and morality."[90] The Court has invoked this *Chaplinsky* balancing language on many occasions.[91] Indeed, the Court in *Bose Corp. v. Consumers Union,*

[86] *Id.*

[87] *See id.* This is the most charitable reading of the brief. The brief is susceptible to the view that the only weighing of the interests is on the First Amendment side of the balance, e.g., to see how much regulation would chill speech. *See* Stone, *supra* note 22, at 195 (detailing factors relevant to determining the level of protection for speech of low value but leaving out any reference to the government interest); *see also* Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 284 (2009) (same). Any such claim, however, could not possibly be squared with the cases.

[88] *See* SHIFFRIN, ROMANCE, *supra* note 21, at 21–23 (explaining the Court's judgments about the level of First Amendment protection owed particular categories of speech (if owed in the first place) based on their perceived lack of value, and quoting the *Chaplinsky* Court's classical description of unprotected categories).

[89] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1275 (2020) (citing *Chaplinsky* as an example of the Court deciding against strictly scrutinizing direct regulations of speech that have "nothing to contribute to public debate").

[90] Chaplinsky, 315 U.S. at 572; *see also* Heyman, *supra* note 56, at 671 ("Implicit in *Chaplinsky* is the notion that categorical judgments about First Amendment protection should be made by weighing the social value of the speech against the harm it causes to other social interests.").

[91] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (vulgar words); FCC v. Pacifica Found., 438 U.S. 726, 746–47 (1978) (vulgar words); Gertz v. Robert Welch, Inc., 418 U.S. 323, 327, 340 (1974) (libel).

Inc.[92] generally characterized the categories of unprotected speech as being unprotected not merely because they were of low value, but also because their slight value was outweighed by the social interests in order and morality.[93] In addition, the Court has recognized that the obscenity standard is "an accommodation between the State's interests . . . and the dangers of censorship,"[94] and in *Gertz*, the Court fashioned the rules of libel in public discourse by explicitly accommodating the interests of freedom of press and the interest of reputation.[95] So too, in the context of intellectual property, the Court's acceptance of fair use as an acceptable incursion on intellectual property accommodates free speech with property ownership.[96] Just as telling, in ruling that child pornography is not protected by the First Amendment, the Court surveyed the harm caused by it before mentioning that the value of the speech was quite low.[97] In no way did it suggest that the speech would have been protected if it had more value than the Court held it had. In other words, the cases do not support the contention that "[h]arm enters the analysis only *after* it is established that the speech is of low First Amendment value."[98]

Beyond this, in order to distinguish depictions of animal cruelty, the CLS brief falters when it attempts to explain *why* particular categories of speech are of low value. *Brandenburg v. Ohio*[99] held that advocacy of illegal action is protected unless it "is directed to inciting or producing imminent lawless action and is likely to incite

[92] Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984).

[93] *See id.* at 504 (libel).

[94] New York v. Ferber, 458 U.S. 747, 756 (1982). For cogent criticism of the reductionist treatment of *Ferber* by the *Stevens* Court, see *Leading Cases*, 124 HARV. L. REV. 179, 244–49 (2010).

[95] *See Gertz*, 418 U.S. at 344–48.

[96] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 551, 560 (1985).

[97] *See Ferber*, 458 U.S. at 756–63. John D. Moore describes *Ferber* as a "classic example of interest balancing." John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 45 (2014).

[98] CLS, *supra* note 28, at 18. David S. Han also takes a position that is contrary to that taken in the CLS brief. David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 366 (2015) ("'[L]ow-value' categories . . . are defined, at least in part, in terms of the social harm that they cause."). Similarly, Stephen Heyman argues that categories of unprotected speech are examples of harm-based regulation. *See* Heyman, *supra* note 56, at 650–52; *see also* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1358, 1383 (2006) (unprotected or less protected categories based on low value or potential for harm); Shaman, *supra* note 68, at 298–300, 309 (some unprotected speech based largely on harm without regard to value).

[99] Brandenburg v. Ohio, 395 U.S. 444 (1969).

or produce [imminent lawless] action."[100] The Constitutional Law Scholars brief maintains that express incitement of unlawful action is of low First Amendment value because it "cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state."[101] But this is simply wrong. Even express incitement of unlawful action is fully protected under the First Amendment unless it is likely to incite or produce imminent lawless action. It is worth reflecting why. The rules governing advocacy of illegal action are not designed for garden variety solicitation cases. They arise in a socio-political context involving anti-war protestors, anti-draft protestors, and those, such as Martin Luther King, who have advocated civil disobedience against injustice. Advocacy of illegal action cases inspired eloquent opinions from Justices Holmes and Brandeis precisely because the speech is so important.[102] Among other things, such speech calls public attention to perceived injustice. It deserves to be stifled only if it threatens harm in a realistic way,[103] and that is what the Court decided to do. Contrary to the Constitutional Scholars brief, the Court balances "the value of [the] speech against the harm it causes,"[104] and contrary to the Constitutional Scholars brief, advocacy of illegal action is subject to regulation only when it threatens harm, not "because it does not appreciably further the purposes of the First Amendment."[105]

The brief also does not explain why copyright violations are of low value. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Nation Magazine had published excerpts from a forthcoming memoir of Gerald Ford.[106] The article was clearly valuable, but it created harm; it interfered with Ford's property.[107] Like *Brandenburg*, valuable speech was unprotected because of harm.[108]

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[100] *Id.* at 447; *see* Schauer, *supra* note 77, at 906 (incitement test is a form of clear and danger regulation).

[101] CLS, *supra* note 28, at 7.

[102] *See generally, e.g.*, Schenck v. United States, 249 U.S. 47 (2019); Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

[103] *See* Schauer, *supra* note 20, at 262 (explaining that the *Brandenburg* test does not offer absolute protection to those who incite unlawful action and, at the very least, allows for the theoretical possibility that the freedom of speech must give way in "cases of intentional, explicit, advocacy of immediate substantial illegality when such illegality is likely to occur").

[104] *See* CLS, *supra* note 28, at 18.

[105] *See id.*; *see also* Schauer, *Play*, *supra* note 10, at 274 (regulated because of harm).

[106] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542 (1985).

[107] *See id.* at 559, 569.

[108] *See id.* at 569.

In other cases, the brief claims that an unprotected category results from its physical character. Here again, the Court says no such thing. First, the brief claims that "[f]ighting words . . . are more akin to a slap in the face than to expression."[109] In fact, if the category is defensible,[110] it is primarily because the expression in context presents a threat to order, i.e., it risks harm.[111] In most contexts, however, that risk is small. Imagine male law students trading insults. How often will there be a fight? Female law students? Male/female interactions? The fighting words doctrine seems to rely on the image of two persons in a bar who have been drinking. Indeed, in *Chaplinsky*, the defendant hurled insults at an officer of the law.[112] Such officers should be trained to accept such insults without resorting to violence. Wholly apart from all this, the risk of violence sharply escalates when someone slaps another in the face. Fighting words may be risky expression, but they are not a physical assault. On this analysis, it is not possible to maintain that the low value of the speech is established before consideration of the harm. On the other hand, one can find value in the speech in that it communicates anger about something to another person. This might be considered particularly important if the fighting words are directed at a public official.[113]

But this does not explain why the value is slight. Apart from the risk of harm to order, the Court maintains that fighting words are a breach of moral standards.[114] As we will soon see, the morality aspect of the *Chaplinsky* case runs counter to what the brief seeks to achieve.[115]

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[109] CLS, *supra* note 28, at 7.

[110] Perhaps it is worth saying that I am not here to defend the status of each of the unprotected categories. I am focused on the methodology for their creation. For example, I am by no means committed to the result in *Chaplinsky* or even to the category. For criticism of *Chaplinsky*, see Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 409, 420 (Michael C. Dorf ed., 2d ed. 2009).

[111] In addition to the interest in order, the Court in *Chaplinsky* refers to the interest in morality. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Harsh expressions of anger may be entirely moral. It depends on the circumstance. Consider such expressions directed at perpetrators of injustice.

[112] *See id.* at 569–70.

[113] The fighting words doctrine is itself of questionable validity, but particularly so when abusive language is directed against a police officer. *See id.* at 569, 572–73.

[114] *See Chaplinsky*, 315 U.S. at 572.

[115] For the argument that morality should play a robust role in analysis of free speech issues under the First Amendment, see Steven H. Shiffrin, *Morality and the First Amendment*, 18 FIRST AMEND. L. REV. 65, 66–67 (2020) (claiming that an "appropriate moral vision" of people's lives would produce "substantial changes in free speech doctrine," including permitting broader

The brief proceeds to claim that obscenity has low First Amendment value because its "primary effect is to stimulate a physiological response, much like a sex aid or a stroke on the thigh."[116] In fact, so long as the speech appeals to "normal" interests in sex, it is protected regardless of any physiological response produced.[117] Neither in *Chaplinsky* nor in the obscenity line of cases does the Court feel the need to transform expression into physical action. Indeed, speech that triggers emotional responses predictably creates chemical changes in the body.[118] Speech meeting the obscenity definition is not considered to be speech within the meaning of the First Amendment not because it creates physical changes in the body, but primarily (rightly or wrongly) because it is considered indecent.[119]

After claiming that advocacy of illegal action is low value speech (even though it is protected), and after insisting that the speech involved in fighting words and obscenity is unprotected because it amounts to physical action, the Constitutional Scholars maintain that depictions of animal cruelty are not low value because they are not similar to the other categories of unprotected speech as they understand them.[120] Recall from the statute and the facts that the depictions lack any "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[121] And they have been distributed for sadistic enjoyment.[122] Contrary to the brief's contention, it seems clear that these depictions are far removed from the core values of the First Amendment and are of low value.

Thus, the brief's interpretation of low value rests on questionable characterizations of the rationale for the unprotected categories. It is not the case that express advocacy of illegal action "cannot by any

content-based regulation of forms of speech like animal-cruelty depictions and commercial speech and more strongly emphasizing the importance of freedom of association).

116 CLS, *supra* note 28, at 7.

117 *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985).

118 *See* John Kaag, *William James, Yoga, and the Secret of Happiness*, WALL ST. J., Feb. 29–Mar. 1, 2020, at C4 ("In James's 1890 book 'Principles of Psychology,' he explains that most human feelings aren't just in our heads, so to speak. Our emotions are tightly bound to our actions and bodily states.").

119 *See* United States v. Williams, 553 U.S. 285, 288 (2008) (citing Roth v. United States, 354 U.S. 476, 484–85 (1957)). In addition, the Court defers to a legislative determination that anti-social behavior is or might be connected in some unspecified way with obscene material. *See id.* at 292.

120 *See* CLS, *supra* note 28, at 4, 8–9.

121 *See id.* at 3; 18 U.S.C. § 48(b) (2010) (amended 2019).

122 *See* United States v. Stevens, 559 U.S. 460, 467 (2010).

latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state."[123] It is not the case that fighting words and obscenity are low value categories because they are best equated with physical action. The brief is structured to lead us to the conclusion that speech causing or risking substantial harm is not low value unless it fits into the inventive characterizations of the unprotected categories it has described. It claims that harm does not come into the picture unless the speech meets its characterization of low value.[124] Unprotected categories of speech lack protection, however, not merely because they are of low value (if they are), but also and primarily because they cause or threaten harm. If harm is involved, it becomes appropriate to weigh the contribution of speech to First Amendment values of the speech against that harm. The *Chaplinsky* line of cases makes it clear that the Court has weighed the harm caused or risked against the contribution of the speech to First Amendment values.[125] This is true even in the problematic case of obscenity. In justifying that doctrine, the Court referred to the indecency of obscenity, but the Court also deferred to a legislative determination that anti-social behavior is or might be connected with obscene material.[126]

The brief worked hard to suggest that balancing took place only if a showing of low value of the right kind was made. On its theory, the sadism associated with depictions of animal cruelty were not instances of low value speech regardless of the harm caused, and the First Amendment, therefore, made the government powerless to interfere with the commercial market for depictions of animal cruelty and torture. Thus, depictions of animal cruelty were not incompatible with a democratic state as advocacy of illegal action was claimed to be, do not distort the market of ideas as do false statements of fact, and are not assaults or stimulants of a physical response as fighting words and obscenity are claimed to be. Instead,

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[123] *See* CLS, *supra* note 28, at 7.

[124] *See id.* at 7.

[125] This has long been the European approach, and Justice Breyer has imported a form of it in a string of recent cases. *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2304–05 (2019) (Breyer, J., concurring in part and dissenting in part) (citations omitted); *supra note* 11. Under this approach, which shifts the analytical lens from the speech itself to the free speech regulation, the proper approach is to eschew the "rigid" application of doctrinal categories, duly account for First Amendment "values," and inquire "whether the regulation at issue 'works speech-related harm that is out of proportion to its justifications.'" *See id.* at 2305 (emphasis added) (quoting United States v. Alvarez, 567 U.S. 709, 730 (2012)); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 164 (2010).

[126] *See* United States v. Williams, 553 U.S. 285, 292, 306 (2008).

the brief argues that speech that is offensive, lacks serious value, and that is coupled with the erosion of public morality is not low value.[127] If depictions of animal cruelty lacking serious value and marketed for their appeal to sadism were considered to be of low value, then the brief claims that a "photograph of a swastika, a painting of an individual burning an American flag, a video of a lynching, or an image of a dead fetus" would be equally unprotected.[128] Each of those examples, however, involves public discourse and serious value. The brief's argument simply does not follow. But what if the Society for the Prevention of Cruelty to Animals showed depictions of animal cruelty in order to create opposition to such cruelty? If it is permissible for the SPCA to disseminate such depictions, is it not point of view discrimination to deny others the right to do so as well? In fact not, primarily because the distributions of the SPCA's depictions do not create the harm caused by those who seek to create a commercial market for its depictions of torture and cruelty.

That helps to explain why the brief's claim that depictions of animal cruelty in *Stevens* communicate the message that pit bulls can be vicious and deadly is not helpful.[129] The depictions are not sold to communicate this message; they are not sold to communicate or advance a political, social, ideological, or moral viewpoint;[130] they are sold for viewers to experience the thrill of the bloody fights. At best, the brief's suggestion would show that the slight social value of the depictions is outweighed by the interests in morality and avoiding unnecessary harm to animals.

Thus, it was simply a cheap shot for the brief to assert at the end that the government was censoring speech because it was offensive.[131] The depictions were prohibited because they caused harm and their slight social value, if any, did not outweigh that harm. Of course, the brief is correct to point out that determinations by government that speech is offensive are not to be lightly made and can be dangerous.[132] But determinations of offensiveness, indecency, and immorality are peppered through the First Amendment doctrine

[127] *See* CLS, *supra* note 28, at 6, 10–11.

[128] *See id.* at 11.

[129] *See id.* at 14–15.

[130] *See* Meredith L. Shafer, Case Note, *Perplexing Precedent: United States v. Stevens Confounds a Century of Supreme Court Conventionalism and Redefines the Limits of "Entertainment,"* 19 VILL. SPORTS & ENT. L.J. 281, 320–21 (2012); *see also* Cass R. Sunstein, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 559 (1989) (describing the speaker's purpose as being an important factor in determining whether speech is of low value).

[131] *See* CLS, *supra* note 28, at 33–34.

[132] *See id.* at 11–12.

if, and only if, a showing of harm is made. So, the *Chaplinsky* doctrine speaks of order and *morality* in its numerous applications.[133] Even more telling, the obscenity doctrine is shot through with determinations of offensiveness, lack of serious value, and a condemnation of speech that appeals to prurient interests[134] as opposed to arousing a "'good, old fashioned, healthy' interest in sex."[135] If obscenity with its controversial assessments of harm can be unprotected, to suggest that speech creating a market for animal cruelty and torture appreciably furthers the purposes of the First Amendment is a form of constitutional blasphemy.

If the unprotected categories cannot be explained by the explanations of the Constitutional Law professors, what does explain them? The government contended that unprotected categories were based on "a categorical balancing of the value of the speech against its societal costs."[136] Balancing is a useful summary term, but it is imperfect. To be sure, balancing is an imprecise metaphor. It suggests a simple weighing of interests.[137] And obviously there is nothing mechanical or objective about balancing, and the judgments involved have implicated a multiplicity of factors.[138] Moreover, the term *balancing* does not capture cases based on precedent or history, though such cases are ratifying previous assessments of the advantages and disadvantages of regulation. But the Chief Justice's response is clearly over the top. Chief Justice Roberts claimed that the government's contention was "startling and dangerous."[139] Roberts' suggestion that the government's contention was "startling" is preposterous. Any person familiar with First Amendment doctrine would have expected the government to make precisely the claim it

[133] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[134] *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973).

[135] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499 (1985) (quoting J-R Distribs, Inc. v. Eikenberry, 725 F.2d 482, 490 (9th Cir. 1984)).

[136] U.S. Brief, *supra* note 38, at 8. Later in the Government's brief, it is said that such categories result because the harms greatly outweigh the expressive value. *See id.* at 12. I do not believe this adequately describes the rules in defamation or obscenity. The rules in defamation are based on difficult determinations of the relationship between harm and expressive value. The rules in obscenity are based on weak showings of harm. Also, in the defamation context, there are societal costs, but it is doubtful that the government meant to exclude individual costs from the balance.

[137] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–45 (1987) (criticizing the widespread use of balancing in constitutional law).

[138] *But cf. id.* at 945–47 (excluding many multiple factor cases from the balancing term when they do not involve weighing).

[139] United States v. Stevens, 559 U.S. 460, 470 (2010).

made.[140] Roberts' feigned horror does not make the government's contention any less competent and orthodox. Nor, as we have seen, does Roberts have a plausible alternative explanation for the unprotected categories. His resort to history cannot be supported by any plausible account. As scholars have shown, the Roberts history relying on *Chaplinsky* is bankrupt.[141] And, as we have discussed, the factors mentioned in *Chaplinsky* do not map on to the unprotected categories.

The government's contention is correct, and it is understandable why: social reality is too complicated to hope or expect that free speech doctrine could be reduced to a single value or a small set of values.[142] Among the factors relevant to assessing the constitutionality of a regulation are the strength of the government interests, the extent to which they are furthered by the regulation,

[140] The Court's use of balancing as its methodology for forming these categories is apparent in cases that long pre-date *Stevens*, even if the Court did not always explicitly identify its methodology as such in those cases. *See* Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 946–51 (1978) (discussing cases evidencing the Court's balancing approach, but lamenting the Court's not making public its methodology and failing to sufficiently elaborate its "crucial" factors when "formulating conclusions" with respect to the level and scope of protection owed particular types of speech); *see also* Han, *supra* note 98, at 391 (2015) (categorical balancing had long been employed in the cases); Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1347–48 (2015) (recognizing that *Stevens* marked a break with the past); *Leading Cases*, *supra* note 94, at 239 (*Stevens* redefined how courts define categories of unprotected speech); Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67, 79–80 (supporting the result in *Stevens*, but acknowledging that the case modified *Chaplinsky* in justifying the result); Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 703–10 (2016) (arguing that the Court integrates the weighing of speech's harms against its value in several of its First Amendment doctrines—including when deciding whether speech possesses low or high value and subjecting speech regulations to different levels of scrutiny and arguing that balancing speech's benefits against the harms it causes has been "normatively necessary" as well as "unavoidable" to adequately protect the values of speech—and that a no-balancing approach would lead to an "absolutist" First Amendment jurisprudence that produces "unpalatable results").

[141] *See, e.g.*, Lakier, *supra* note 55, at 2168–69.

[142] *See* Shiffrin, *supra* note 140, at 946 & n.201; *cf.* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 3 (Jamie Kalven ed., 1988) ("The Court has not fashioned a single, general theory which would explain all its decisions; rather, it has floated different principles for different problems."); SHIFFRIN, ROMANCE, *supra* note 21, at 35 (describing as "extraordinarily complicated" First Amendment law, whose "general features reveal no clearly outlined structure"); *see also* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2361 (2020) (Breyer, J., concurring in part and dissenting in part) (explaining that the First Amendment protection for a type of speech turns on its purpose, content, and nature, and describing how the Court's First Amendment jurisprudence has long "defied straightforward reduction to unyielding categorical rules"); David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 74 (2017) (no single rationale for protecting speech, instead a "patchwork approach").

and the possibility of furthering the interests without impacting free speech values, coupled with an examination of the impact of the regulation on free speech values (including liberty, self-expression, self-realization, autonomy, cathartic values, freedom of thought, association, truth, equality, dissent, deliberation, participation, democracy, and combatting injustice) and the possibility of crafting government action with less impact on First Amendment values while still furthering the government interests in a reasonable way.[143]

It is, of course, possible that a study of the Court's application of these factors could yield an explanatory general theory that explains the exceptions. It is not surprising, let alone startling, however, that none is to be found. In fact, when one examines just three lines of cases: e.g., advocacy of illegal action,[144] obscenity,[145] and libel,[146] it becomes obvious that the balancing involved is even broader than that described in *Chaplinsky* and certainly broader than that perceived in the Constitutional Scholars brief. Strict scrutiny has no explanatory power here. Its closest cousin—the clear and present danger doctrine—cannot explain the cases, though the advocacy of illegal action rules are a form of clear and present danger regulation.[147] For example, in the libel cases, it is clear that

[143] SHIFFRIN, ROMANCE, *supra* note 21, at 33 ("[T]he Court evaluates the importance of the state interest, the extent to which the state regulation advances the interest, and the extent to which the interest might have been furthered by means less restrictive of free speech values; compares the importance of the free speech values at stake; and judges the extent to which such values have been infringed."). In this way, the Court's decisionmaking is "not much different from decisionmaking in other policy-making contexts," notably in the way it accommodates "important values" such as reputation and order in the course of protecting the freedom of speech. *Id.* at 44–45. *See generally* Shiffrin, *supra* note 140; *cf.* Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 25 (2016) (explaining the need to balance the "commitment to safeguarding free speech as an essential value for individuals to pursue happiness, engage in deliberative democracy, and seek truth" against the societal need to proscribe speech "harmful to communities of dignified equals," such as child pornography and defamation). *See generally* SHIFFRIN ROMANCE, *supra* note 21.

[144] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (advocacy of illegal action protected unless directed to inciting or producing imminent lawless action and likely to produce such action).

[145] *See* Miller v. California, 413 U.S. 15, 20–21 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69, 81 (1973) (permitting prohibition of speech appealing to prurient interest, that is patently offensive to contemporary community standards, while lacking serious literary, artistic, political, or scientific value).

[146] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–46 (1974) (civil sanctions depend on classification of the plaintiff, the falsity and harmful character of the statement, the culpability of the defendant, and the nature of the defendant).

[147] Schauer, *supra* note 77, at 906. The point holds even though the clear and present danger doctrine represents the generally accepted "basic idea of requiring reasons of special strength to override the First Amendment." Schauer, *supra* note 20, at 262–63.

defamatory speech creates a clear and present danger of harm to reputation.[148] Nonetheless, the Court is prepared to accept the risks of that harm, notes the public interest in speech on public issues, and calibrates the risk with a different set of rules for public persons and private persons involved in a public issue.[149] In obscenity cases, the danger is less clear. Quite unlike its independent examination of the First Amendment issues in the prior lines of cases, the Court defers to a legislative determination that anti-social behavior is or might be connected in some unspecified way with obscene material and maintains that the states can act on that assumption in protecting the interests in order and morality. Wholly apart from whether this presents a danger, the "danger" is neither clear nor present.[150]

So, with respect to advocacy of illegal action, the Court permits prohibition only when a clear and present danger test is satisfied; with respect to libelous speech, it sometimes protects libelous speech despite a clear and present danger and sometimes does not; with respect to obscenity, it permits prohibition even though the danger is not obviously clear or present.

A politically centered theory of the First Amendment cannot explain the cases.[151] Some advocacy of illegal action is protected; some is not. Much speech relevant to public issues is protected under defamation rules[152] (non-malicious speech about public officials and public figures and non-negligent speech about private persons involving public issues), but much is not[153] (malicious speech about

[148] *See* Gertz, 418 U.S. at 344 n.9.

[149] *See id.* at 344–46. The Court also notes that public officials and public figures volunteer for their positions. *See id.* at 345. From this the Court concludes that they have voluntarily agreed to increased risks of injury from defamatory falsehoods. *See id.* It makes sense that they might expect increased public scrutiny from their positions, but absent concerns about deterring valuable speech, it does not follow that they should be required to accept unfavorable liability rules in the defamation area.

[150] *See Paris Adult Theatre*, 413 U.S. at 60–61. The Court also speaks of the right of the states to maintain a "decent society." *See id.* at 59 (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, J., dissenting)). The morality claim and the decent society claim are long on assertion, but short on explanation of why the speech is immoral. The indecent society claim is apparently based upon the idea that an adult theater invades the privacy of all by its very existence. *See id.* In a breathtaking moment, however, the Court maintains that the conclusion of indecency is "morally neutral." *See id.* at 69. It is bad enough that the Court cannot develop its moral premises. To hide that inability behind a pretense of neutrality is shameful.

[151] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 5–6 (1993); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT 16–19 (Lawbook Exchange, Ltd. 2000).

[152] *See Gertz*, 418 U.S. at 362–63 (Brennan, J., dissenting).

[153] *See id.* at 327–28, 350 (majority opinion).

public persons and negligent speech about private persons involving public issues).

So too, autonomy, liberty, and self-realization cannot explain the cases. Indeed, if autonomy was the driving force behind the decisions, corporations would receive no protection, not even media corporations.[154]

Thus, a variety of factors are relevant in these discrete contexts. In the advocacy of illegal action cases, the harm of concern is substantial, but not clearly risked by much of the advocacy, and the speech often involves self-expression, dissent, combatting injustice, and cathartic values, among others, and an intermixture with important speech. In the libel cases, the Court accommodates the need to protect dignity and reputation while safeguarding as much speech as seems appropriate taking into account the likelihood of harm to reputation, the public or private character of the speech into account, and the likelihood of significant speech being discouraged. In the obscenity cases, the Court clearly has little regard for the speech interests, characterizing the speech as so immoral and indecent that the knowledge that such speech is shown in a theater "intrudes upon us all."[155] At the same time, it defers to legislative judgements about harm to social order, a deference that is absent from the two other lines of cases.[156]

As the advocacy of illegal action cases show, the interests of the First Amendment are not confined to truth emerging in the marketplace, nor, as the defamation cases make clear, are the acceptable government interests confined to order and morality. And the cases are not confined to a simple weighing of one interest against another; often the substantiality of the impact on First Amendment interests or the government interests assessed by a causal analysis is crucial to the result.

I am not saying that the Court has made its methodology clear. I am saying that the Court has considered the kinds of general factors I have mentioned without referring to other pockets of unprotected categories. In short, prior to *Stevens*, nothing in the Court's holdings or in its actual methodology afforded a reason to conclude that new categories should generally be foreclosed.

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154 *See infra* notes 248–53 and accompanying text.

155 *See Paris Adult Theatre*, 413 U.S. at 59.

156 *See id.* at 60–61.

III. ABSOLUTISM AND BALANCING

At this point, we have seen that history has not been the exclusive or even primary basis for determining the nature and scope of the unprotected categories. We have seen that balancing, understood as a process of assessing the advantages and disadvantages of creating an unprotected category and defining its scope, has been the unstated methodology of the Court.[157] It is worth noting that the Court's decisions have sometimes produced unprotected categories that involve rules (e.g., fraud and perjury), but also they have produced categories that involve standards[158] (e.g., the definitions of obscenity and fighting words and the use of negligence in defamation).

From here we need not determine whether balancing is good or bad in the First Amendment generally. We need to determine whether it is wise to use in assessing claims for new unprotected categories. To that end, we need to determine whether the arguments against balancing have overriding power in this context or whether the government's argument for categorical balancing is stronger.

Many arguments against balancing have been made.[159] To be in favor of balancing is conceived by many to be a form of opposition to the First Amendment, and the First Amendment has a cultural luster in the United States. Some of that luster is supported by flag waving, chamber music, and ad hominem arguments. But protection for speech and opposition to balancing is supported by more serious substantive arguments as well. Balancing in particular is said to violate the rule of law;[160] it does not constrain judges, thereby leading to inconsistent results[161] and permitting them to indulge their

[157] *See supra* notes 87–98 and accompanying text.

[158] *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–59 (1992) ("Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.").

[159] *See, e.g.*, Goldberg, *supra* note 140, at 688–89. Goldberg endorses a modified harms-benefits balancing method through which courts do not balance unless the harms caused by a particular type of speech are similar to harms caused by conduct. *See id.* at 720–21 (describing, for example, the "retail" version Justice Breyer employed in his *Alvarez* concurrence and, regarding the author's proposed form of free speech consequentialism, claiming "strong reasons" for not balancing harms "uniquely" stemming from speech against its virtues). But many important harms are caused by pure speech including harm to privacy, reputation, and interference with a fair trial.

[160] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989); *see also* Morrison v. Olson, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) ("A government of laws means a government of rules.").

[161] *See* Scalia, *supra* note 160, at 1178–79.

political or policy prejudices.[162] Thus, balancing fails to give clear direction to speakers, courts, and legislatures.[163] The combination of vagueness and the failure to constrain judges leads to a chilling effect on speech and to the under protection of free speech.[164] In discussing these issues, I will refer to the anti-balancers as absolutists. In the sections that follow, little material is *focused* on the frozen categories issue, but all of it either helps to explain how we got to this point, is directly relevant to the issue, or both.

A. Ad Hominem Rhetoric in Favor of an Absolutist Approach to Speech

Rhetoric has two principal, but quite different, meanings. On the one hand, it can refer to a form of speech that is persuasive but is *mere rhetoric* lacking in meaningful content. On the other hand, Aristotle conceived the art of rhetoric as the "faculty of observing in any given case the available means of persuasion."[165] Aristotle discussed three modes of persuasion: logos, ethos, and pathos.[166] Ethos referred to the character of the speaker, i.e., you should believe the speaker because the speaker has good character.[167]

My contention is that many of the character arguments of the absolutists are overdrawn and often without substance. Advocates for free speech protection by that advocacy directly or indirectly portray themselves as tolerant, reasonable, fair, politically unbiased, and upholders of the American free speech tradition, especially in its opposition to censorship. To some extent, as we shall see, they portray those who disagree with them as intolerant, unreasonable, unfair, politically biased, censors who depart from American tradition.

The notion that free speech advocates are tolerant[168] is an easy impression to convey. It almost goes with the absolutist territory.

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[162] *See id.* at 1179.

[163] *See id.*

[164] *See* Han, *supra* note 98, at 398. Speech is already vulnerable because government interests are typically concrete and free speech interests are abstract. *See id.*

[165] Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 WASH. UNIV. JURIS. REV. 131, 131 (2014).

[166] *Id.* For a rhetorical analysis of the role of pathos in constitutional law, see generally Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013).

[167] *See* McCormack, *supra* note 165 at 131. For the first example of a law professor doing this kind of rhetorical analysis of which I am aware, see generally Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988).

[168] Columbia President Lee Bollinger extols the First Amendment as centrally concerned with toleration. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY 9–11 (1986). Bollinger's

Take this simple statement from Floyd Abrams, the leading First Amendment attorney for some fifty years: "The essence of the First Amendment . . . is that we don't all have to agree."[169] So the message here is "I'm tolerant toward you; you're tolerant toward me." Of course, there is nothing untoward about this bromide, but the decision not to protect speech is a decision not to tolerate the speaker's speech. Absolutists are for the most part silent about the categories of unprotected speech. Are they willing to roll all those categories back? How do they pick and choose? If they are not prepared to protect any and all speech, any claim that tolerance is their overriding virtue becomes untenable.[170] So too, the impression of reasonableness and fairness cannot be maintained. It may or may not be appropriate to protect speech that threatens a fair trial or that invades privacy, but the question of what is fair and reasonable is the issue to be decided. The mantle of fairness and reasonableness does not belong to the free speech advocate at the outset. The question of fairness and reasonableness is up for grabs.

Robert Corn-Revere, one of the nation's leading media attorneys,[171] seeks to convey the impression that the absolutists are politically unbiased, impartial, and neutral. He writes, "[l]iberals and conservatives are united in the common conviction that they know which forms of expression are unacceptable and that their choices should be enforced by law; they only differ in their preferences."[172] The suggestion that the absolutists, such as Corn-Revere, are politically impartial is open to at least some question. As Floyd Abrams remarks, "it is not uncommon for lawyers to persuade themselves of their clients' virtues."[173] If a media lawyer maintains

position is not a piece of rhetoric. It is a serious substantive position, but it is easy to infer from this that Bollinger is a tolerant person.

169 FLOYD ABRAMS, SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT xxiii (2005).

170 *See* RONALD K.L. COLLINS, NUANCED ABSOLUTISM: FLOYD ABRAMS AND THE FIRST AMENDMENT 108 (2013) (toleration is "bedrock principle" of First Amendment).

171 *See* David L. Hudson Jr., *Robert Corn-Revere*, FIRST AMEND. ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/1391/robert-corn-revere [https://perma.cc/ZA6F-9BBS]. Among other things, he has represented the Reporter's Committee for Freedom of the Press on numerous occasions. *See, e.g.*, *Reporters Committee Applauds Supreme Court Ruling that Even Repugnant Speech Must Be Protected*, REPS. COMM. FOR FREEDOM OF THE PRESS (Mar. 2, 2011), https://www.rcfp.org/reporters-committee-applauds-supreme-court-ruling-even-repugnant-speech-must-be-protected/ [https://perma.cc/7C49-NJL3].

172 Robert Corn-Revere, *Certainty and the Censor's Dilemma*, 45 HASTINGS CONST. L.Q. 301, 302, 312 (2018). Absent from this description is any sense that forms of expression might be considered unacceptable because of the harm caused.

173 ABRAMS, *supra* note 169, at 282.

that commercial speech should be protected, that corporate speech should be protected, or that the press should get greater protection than it currently does, opponents could claim that they take this position to advance the interests of their corporate clients and/or that their positions are influenced by their political positions. In fact, whatever the reasons, I believe that media attorneys sincerely believe in the positions they take; that is, they try to protect much speech that is alien to their political positions, and they think the First Amendment is best interpreted to support this. Frequently, the positions they take have little or no political import. But we should not forget that in an important sense, whether or not the absolutists are ideologically selective, the position that speech should be preferred over other values is itself a political position.

The final positive appeal by the absolutists is that they really believe in the First Amendment. So, Floyd Abrams says that "we cannot have our First Amendment *a la carte*."[174] The suggestion is that others pick and choose from First Amendment dictates instead of following them. The problem with this appeal is that it begs the question. It evades the hard questions associated with the unprotected categories. In fact, the First Amendment protects speech except when it doesn't. We cannot assume that the proper interpretation of the First Amendment is the absolutist one when the question to be decided is the proper scope of the First Amendment.

The absolutists criticize their opponents in a variety of ways. First, as Floyd Abrams puts it, they maintain that "too many people [are] selective in their support for First Amendment norms, because of their political or ideological views."[175] Indeed, Corn-Revere[176] in writing about my work and that of Burt Neuborne writes that the "various scholarly complaints about the First Amendment would be easier to credit if the resulting views of 'free expression' deviated materially—if at all—from the political outlook of the respective theorists."[177]

That claim is preposterous. Neuborne and I obviously believe that Corn-Revere's position is politically wrong-headed, but it would never occur to us to claim that his speech should not be protected. Both of us would impose sanctions against speech causing cognizable harm

[174] COLLINS, *supra* note 170, at 10.

[175] *Id.* at 106 n.192.

[176] He has represented the Reporter's Committee for Freedom of the Press on numerous occasions. *See supra* note 171.

[177] Corn-Revere, *supra* note 172, at 330.

in some cases, but it would not occur to us to bar the speech of right wingers or other political speech embracing an ideology with which we disagree. And it similarly would not occur to us to bar religious speech or ideological non-religious speech whether or not we agreed with it. Indeed, in the absence of threatened or actual harm, we would not consider imposing sanctions against speech within the scope of the First Amendment or take its value into account in a First Amendment balance.

Second, what counts as political or ideologically selective speech? Is it political to believe that speech depicting animal cruelty should not be protected?[178] Speech in the form of gruesomely violent video games sold to children? Speech intentionally causing severe emotional distress? Speech seriously invading privacy? Speech threatening a fair trial? In each of these cases even if the speech is more valuable than it appears to be, the primary reason to consider imposing sanctions (whether right or wrong) is the harm that accompanies the speech. And, if those issues are political, why is it not also political to rationalize the existing categories of unprotected speech such as threats, fraud, defamation, obscenity, child pornography, and more?

From the standpoint of the absolutists, the hot button issues appear to be racist speech, pornographic speech, and the limits on spending in election campaigns.[179] In the cases of racist speech and pornographic speech, the absolutists believe that their opponents want to impose sanctions because they are ideologically opposed to the speech. No doubt, the opponents are ideologically opposed to the speech. But the case for sanctions centers on the harm caused by the speech, and given that harm, there is no good reason to ignore the lack of value the speech contains. Finally, it is worth noting that those who would restrict some racist and sexist speech would permit a substantial degree (probably most) of the racist and sexist speech with which they disagree,[180] not to mention nearly all non-racist, non-sexist speech with which they disagree. So, the charge that the

[178] Recall that Neuborne signed the Constitutional Scholars brief. *See generally* CLS, *supra* note 28.

[179] Corn-Revere, *supra* note 172, at 329.

[180] The proposals to restrict racist speech and pornographic speech by Mari Matsuda (racist speech) and Catharine MacKinnon (pornographic speech) leave a considerable amount of racist and sexist speech not subject to regulation. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357–58 (1989); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 130–31 (1987).

absolutists' opponents simply want to censure the speech with which they disagree is wildly inaccurate.

The absolutists suppose that their opponents want to restrict campaign spending on speech[181] either because it would help the Democratic Party[182] or because it would limit the power of the powerful. Yet, there are substantial reasons to regulate independent campaign expenditures apart from their effect in favoring one party or another. Restricting the amounts spent on speech in election campaigns helps the integrity of the democratic process, limits political corruption, and frees office holders and candidates to spend less time raising money. On the other hand, conservatives value libertarian values over those interests.[183] The absolutists' accusations of partisan political motivation are uncivil and reckless shotgun attacks that are ill-suited when they are aimed at specific judges or academics.

On the other hand, it is fair to say that those who would regulate campaign finance seek to limit the power of the powerful in election campaigns. The absolutists maintain that liberty is the core of the First Amendment; the regulators point to civic republican values and again to concerns about integrity, corruption, and better representation. [184] It is wholly inappropriate to support restrictions on speech because it will help one party over another, and it would be even worse to say that a millionaire could not speak because he or she had too much money (no one is saying that). But the liberty/civic republican dispute in the campaign finance context is a disagreement about the meaning of the First Amendment. Although political bias *might* exist, the mere endorsement of one or another of these positions cannot properly be used to pin the label of political bias on those who take different sides in this dispute.

Yet, it is fair to wonder just how libertarian the absolutists might be. Would the absolutists protect the speech of foreign nationals calculated to influence the outcome of American campaigns? After

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[181] FLOYD ABRAMS, *Citizens United and Its Critics*, *in* FRIEND OF THE COURT 310, 311 (2013). They are right to observe that restricting the expenditure of money for speech can have substantial implications for the outcome of elections. Money is not itself speech, but regulating expenditures has important speech implications.

[182] James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena:* Citizens United *and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL'Y 273, 688–92 (2011). They would also claim that many conservatives have result oriented reasons for their failure to regulate.

[183] Richard W. Painter, *The Conservative Case for Campaign Finance Reform*, N.Y. TIMES (Feb. 3, 2016), https://www.nytimes.com/2016/02/03/opinion/the-conservative-case-forcampaign-finance-reform.html [https://perma.cc/QE4T-HF6V].

[184] *See* Shiffrin, *supra* note 115, at 68–70.

all, if the absolutists are committed to the marketplace of ideas argument, the speech of foreign nationals might be desirable and would be sorted out in any event. You would think they might be leery of government efforts to police the marketplace. When the issue arose,[185] however, the absolutists, who routinely are prepared to urge protection for free speech in the Supreme Court, were spectacularly silent. Clearly, in that context, they recognized that free speech values were outweighed by concerns about election integrity. Presumably, they understood that support for election integrity could be independent of which political party benefits from the infusion of such speech into the marketplace of ideas.[186]

Beyond the claim that their adversaries discriminate on the basis of political ideology, some absolutists claim that their adversaries are censors. In an eloquent defense of broad First Amendment protection, Floyd Abrams remarks that the amendment has an "anticensorial soul."[187] He does not define censorship, however. And as Corn-Revere remarks, "'censorship' is a word people use to mean many different things."[188] Censorship could mean a licensing scheme. For example, a licensing scheme for newspapers (apart from a general business license) would widely be regarded as censorship.[189] Also, it is common to use the term *censorship* to refer to the suppression of speech merely because it is offensive.[190] Similarly, media failure to publish because of legal concerns is sometime referred to as "self-censorship."[191] Using the term censorship to apply to the taking of the low value or morally objectionable aspects of speech into account, however, *when speech causes harm* would be a contested use of the term. The language of *Chaplinsky*, employed

[185] *See* Bluman v. FEC, 565 U.S. 1104, 1104 (2012) (mem.) (constitutional to limit the speech of foreign nationals in U.S. elections), *aff'g* 800 F. Supp. 2d 281, 288 (D.D.C. 2011).

[186] Libertarians frequently invoke marketplace theory as a basis for First Amendment protection. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964–66 (1978).

[187] FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT xiv (2017).

[188] Corn-Revere, *supra* note 172, at 305.

[189] *See* Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 78, 106–12 (2016). The licensing of fortune tellers and investment advisors has been litigated among others. *See id.* at 111. For discussion of these issues and general discussion of the First Amendment as applied to professionals, see generally *id.* at 106–12.

[190] *See, e.g.*, Rodney A. Smolla, *The Culture of Regulation*, 5 COMMLAW CONSPECTUS 193, 197 (1997) (traditional meaning of censorship is the suppression of unpopular ideas or information); *What Is Censorship?*, ACLU, https://www.aclu.org/other/what-censorship#:~:text=Censorship%2C%20the%20suppression%20of%20words,by%20the%20government%20is%20unconstitutional [https://perma.cc/JN7T-EFFB].

[191] *See generally* Robert A. Sedler, *Media Self-Censorship: Self-Censorship and the First Amendment*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 13 (2011).

many times by the Court, suggests that the objectionable aspects of speech that cause harm can be taken into account and is not "censorship."[192]

Nonetheless, if you come to these issues from the perspective of an absolutist, you would be tempted to regard the placing of limits on speech as itself censorship. Both Corn-Revere and Abrams use the term *censorship* in this way, though, so far as I can tell, neither of them specifically defines censorship. In a revealing passage, however, Corn-Revere says, "[r]estrictions on political expenditures and contributions *necessarily entail censorship*, and, while there is a meaningful debate to be had about the degree of regulation that might be acceptable under the First Amendment, there is no denying such measures limit speech."[193]

Having characterized the limiting of speech as censorship, Corn-Revere proceeds to link those who do not fly the flag of some form of absolutism with numerous undesirable psychological characteristics.[194] This is a profoundly counterintuitive claim. It would seem to suggest that most Canadians and Europeans whose views on free speech are different from his suffer from the psychological defects he identifies. Leaving the Canadians and Europeans aside, Corn-Revere supports his remarkable claim by an indefensible move: he treats all forms of limiting speech as the same. So, requiring speech to meet Puritanical standards under a licensing regime is equated with limiting expenditures in a campaign finance regime.

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[192] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) ("[False statements of fact] belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'").

[193] Corn-Revere, *supra* note 172, at 316 (emphasis added). Similarly, Abrams remarks that when we suppress speech because we are concerned about its harm, we should recall that concern about harm is often exaggerated and that censorship is contagious. See COLLINS, *supra* note 19, at 108 n.199. This is not an uncommon usage. *See* Laura E. Little, *Laughing at Censorship*, 28 YALE J.L. & HUMANS. 161, 162–63, 163 nn.11–12 (2016) (censorship is state restriction of expression for purposes of article, leaving open restrictions by non-state actors); *see* Barry P. McDonald, *Censorship and the Media: A Foreword*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 2, 11–12 (2011) (subsequent sanctions against speech amount to censorship, but some unprotected categories of speech are examples of good censorship); Rodney A. Smolla, *Report of the Coalition for a New America: Platform Section on Communications Policy*, 1993 U. CHI. LEGAL F. 149, 152 (because censorship is intolerable, freedoms of speech and press should be as free as possible).

[194] *See* Corn-Revere, *supra* note 172, at 304–05.

Corn-Revere starts with Anthony Comstock, a poster child for repression,[195] and before the rhetorical fog has lifted, he has linked Comstock with any and all those who believe that speech should not invariably be protected. Comstock was a proponent of Victorian morality who sought to suppress obscene materials.[196] Corn-Revere rightly described him as a censor and a "morals crusader."[197] He refers to "Comstockery" as the "unique blend of militant sanctimony and fascination with the lurid that marks American prudishness."[198] At the same time, he argues that Comstock was ultimately mocked, and that this is typical of censors:

> Censors may wield great power and enjoy political favor—for a time—and can ravage individual lives and reputations. But they also are the subject of popular derision and generally end up on the wrong side of history—in the United States, at least. This is why those who actively seek to suppress speech try vehemently to deny that their actions amount to 'censorship,' and why they often feel beleaguered even as they marshal the power of the state to serve their purposes. Defensiveness pervades their occupation. Those who engage in the business of censorship have an inferiority complex for a reason—at some level, they understand their enterprise is fundamentally un-American.[199]

Comstock died in 1915, but, according to Corn-Revere, there are no shortage of volunteers for moral crusades.[200] By the time he has finished, he insists that liberal academics who disagree with him simply have no reticence about censorship.[201] At the same time, he maintains that strong claims against his views are evidence of defensiveness.[202]

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[195] *See generally* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA 211–15 (2008).

[196] *See* Corn-Revere, *supra* note 172, at 301, 319.

[197] *Id.* at 302. The term *crusader* appears six times in the article. *See id.* at 301–03, 310, 331.

[198] *Id.* at 301.

[199] *Id.* at 304–05; *cf.* COLLINS, *supra* note 19, at 105 (Floyd Abrams maintained that "[t]he problem with censorship is that it leads to more censorship. It leads to a . . . state of affairs which is, in the most real sense, un-American.").

[200] *See id.* at 302–03.

[201] *See id.* at 330.

[202] *See id.* at 331.

Frankly, all this is just name-calling on Corn-Revere's part. His analysis does not provide any criteria for determining which categories of speech should be unprotected. Moreover, he offers no warrant to suppose that those who favor regulating the intentional infliction of mental distress causing harm, depictions of animal cruelty, or the sales of gruesomely violent video games to children are "beleaguered," defensive, or "have an inferiority complex."[203] Finally, it is true that the United States legal system supports speech over other values in ways that are more libertarian than other countries.[204] But to claim that those who would make this jurisprudence less libertarian understand that their enterprise is fundamentally un-American[205] draws far too close to McCarthyite and Trumpian rhetoric. First Amendment law should permit excessive rhetoric of this sort, but it is nothing short of reprehensible.

B. The Traditional Case for Absolutist Approaches to the First Amendment

The frozen categories position has been supported by media attorneys and by most of the conservatives on the Roberts Court, but the *Stevens* and *Brown* cases also received the support of the liberals on the Court as well. This actually is not surprising. Liberals draw from a tradition that wants to make sure the abuses of Joe McCarthy[206] and Anthony Comstock never happen again. They have associated free speech with the civil rights movement and the protection of political and cultural dissent. They believe that society is oppressive and unequal, and they have thought that free speech would help bring about needed reform. So, the liberal default principle has been to protect free speech. Liberals have long been influenced by the libertarian side of long-standing debates about balancing and absolutism.

Of course, no one has seriously contended that all speech should be protected.[207] Similarly, those who subscribe to balancing can be quite

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[203] *See id.* at 304–05, 326.

[204] *See* ABRAMS, *supra* note 187, at xv–xvi (providing an excellent defense of American exceptionalism); SHIFFRIN, WHAT'S WRONG, *supra* note 21, at 35–112 (providing a qualified critique of American exceptionalism).

[205] Corn-Revere recognizes that no Supreme Court case afforded free speech protection until *Near v. Minnesota ex rel. Olson*. *See* Corn-Revere, *supra* note 172, at 322–23, 323 n.67. Perhaps the suggestion is that the bulk of American history has been un-American.

[206] For discussion of McCarthy, see FELDMAN, *supra* note 195, at 431–50.

[207] Not even Justice Black actually went that far. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 141 (1959) (Black, J., dissenting) ("There are, of course, cases suggesting that a law

protective of speech or relatively non-protective. One can envision a spectrum running between protection and non-protection for speech. Similarly, one can envision a spectrum running between balancing (of a non-protective sort) and a form of nuanced absolutism. Eminent scholars have taken a variety of positions about First Amendment methodology and its relation to First Amendment protection. Among them are Laurent Frantz and Wallace Mendelson, Thomas Emerson, Melville Nimmer, C. Edwin Baker, and Ronald Dworkin. Despite the support of the liberals for the frozen categories approach, a brief review of that scholarship shows how empty any attempt to equate opposition to the frozen categories with censorship might be and how over the top the Chief Justice's assertion in *Stevens* that support for balancing to determine what categories should be unprotected is "startling and dangerous."[208]

Prominent in this regard was a debate in the 1960s between Laurent Frantz and Wallace Mendelson. Mendelson was both a conservative and a strong proponent of balancing.[209] Indeed, although Mendelson believed that courts had an obligation to enforce the First Amendment, he also believed that courts should ordinarily defer to the judgment of legislatures regarding what the First Amendment required.[210]

Given the passivity of Mendelson that Frantz opposed and given that Frantz strongly opposed *ad hoc* balancing,[211] it is understandable that Frantz is remembered as a strong opponent of balancing. But that recollection distorts the actual views of Frantz. Frantz recognized that the First Amendment did not protect all speech.[212] From his perspective, for example, it did not protect libel, fraud, or solicitation to criminal activity.[213] These exclusions, he recognized, were not dictated by the First Amendment, but by a consideration of the advantages and disadvantages of including such

which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct. With these cases I agree."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 516 (1969) (Black. J., dissenting).

[208] *See* United States v. Stevens, 559 U.S. 460, 464, 470 (2010).

[209] *See* Laurent B. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 729, 740 (1963).

[210] *See id.* at 740.

[211] *See* Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1434–35 (1962).

[212] *See id.* at 1436.

[213] *See id.*

categories within the scope of the First Amendment.[214] It is not ad hoc balancing because it is developing a rule, not focusing on the "particular litigant."[215] Or, as he later said, "[i]t is not my contention that the courts should *never* balance. My contention is that they should not, especially in free speech cases, employ balancing as a substitute for an effort to find a rule or principle that can guide decision."[216] I read Frantz overall to be saying that something like balancing might be used in time, place, and manner cases[217] or when a government regulation has an indirect impact on speech,[218] and that the courts rightly consider the advantages and disadvantages of including categories of speech within the scope of the First Amendment,[219] but when some speech falls within a rule that affords protection for the speech, that core protection for the speech obligates a judge to protect the speech.[220] Even then, the courts might hold that the rule has been drawn in the wrong place.[221]

In short, there is little First Amendment distance between Laurent Franz and another First Amendment giant, namely Melville Nimmer. Professor Nimmer, a member of the ACLU, who argued on behalf of Cohen in *Cohen v. California*,[222] maintained that the First Amendment was best interpreted to renounce ad hoc balancing, and to require what he called "definitional" balancing."[223] To put it another way, Nimmer recognized that there were many categories of speech that were excluded from the First Amendment,[224] but the task of judges was to formulate *rules* to be followed,[225] taking into account the purposes of the First Amendment,[226] the need for restricting the discretion of judges in applying the Amendment,[227] the need for protecting speech that advanced First Amendment purposes,[228] and

[214] *See id.* at 1434–35.
[215] *See id.*
[216] Frantz, *supra* note 209, at 732.
[217] *See* Frantz, *supra* note 211, at 1440.
[218] *Id.*
[219] *See id.* at 1440, 1443–44.
[220] *See id.* at 1435.
[221] *See id.* at 1436.
[222] Cohen v. California, 403 U.S. 15, 15–17 (1971) (wearing jacket with words "Fuck the Draft" protected under the First Amendment).
[223] Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942, 944–48 (1968).
[224] *See id.* at 937.
[225] *See id.* at 944–45.
[226] *See id.* at 949.
[227] *See id.* at 946–48.
[228] *See id.* at 950–51.

the adverse consequences of protecting too much speech such as antitrust conspiracies, perjury, fraud, theft of intellectual property and the like.[229]

There were differences, at least of emphasis, between Frantz and Nimmer. Frantz did not attempt to produce a set of First Amendment purposes; he left that to others, such as Nimmer.[230] Nimmer was quite clear that judges should have little discretion, so, it would not be surprising if he opposed a negligence standard in the defamation arena.[231] At least, on my reading, Frantz is unclear whether a negligence standard would be too vague to count as a rule or would be a borderline case. Nonetheless, Frantz and Nimmer agreed that neither language nor history dictated the nature of the categories that should or should not be included under the First Amendment.[232] They agreed on the necessity of rules and they agreed that those rules would flow from a sober assessment of the advantages and disadvantages of excluding or including categories of speech from or within the First Amendment.[233] There is nothing in their writing to suggest that categories of unprotected speech should be frozen. There is nothing in their writing to merit the epithet of "startling and dangerous" and still less is there any warrant to write them off as "censors."

Thomas I. Emerson remains to this day as the most prominent academic exponent of a form of absolutism. Emerson purported to argue that expression should be absolutely protected under the First Amendment,[234] but that action could be regulated without violating

[229] *See id.* at 937.

[230] *See id.* at 949.

[231] *See id.* at 946–48. He suggested that a law banning excessive speeding involved *ad hoc* balancing which would be inappropriate in speech cases. *See id.* at 946–47. It would seem that determinations of negligence require weighing the interest in publication, the evidence for the truth of the publication and the interest in reputation. *See id.* at 949. In any event, Nimmer thought that a showing of a knowing or reckless falsehood should be necessary to ground a defamation recovery with respect to public officials and public figures. *See id.* at 952–53. He would not have applied that standard to a private person involved in a public issue or presumably to speech involving private issues. *See id.* at 954–55. But the standard he would have applied is not clear.

[232] *See* Frantz, *supra* note 211, at 1436; Nimmer, *supra* note 223, at 946–47.

[233] *See* Frantz, *supra* note 211, at 1436; Nimmer, *supra* note 223, at 948–55. In Nimmer's case, this involved weighing the First Amendment's virtues against the interests of concern to the state. Nimmer, *supra* note 223, at 948–55.

[234] *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970) ("[E]xpression must be protected against government curtailment at all points, even where the results of expression may appear to be in conflict with other social interests that the government is charged with safeguarding.").

the Constitution.[235] Of course, the line between expression and action is often not obvious,[236] but Emerson argued that the judicial task was to determine whether expression or action predominated.[237]

Emerson's effort was magisterial; nonetheless, it was problematic in a number of respects. First, its absolutism was exaggerated. For example, Emerson conceded that some expression disclosing intimate details of a person's private life should not be protected, though he did not claim such a disclosure was outside the category of action.[238] Similarly, Emerson did not maintain that commercial expression or expression in the securities market deserved First Amendment protection.[239] More important, the expression/action distinction cannot handle many exceptions to First Amendment protection. Perjury is expression; if action is said to predominate, the reasoning is dominated by a weighing of the free speech interests against the government interest.[240] So too, subject to a fair use exception, the imposition of sanctions against speech that violates the copyright laws does not violate the First Amendment. Yet speech violating copyright laws is clearly expression; it is not clear how the line between expression and action is crossed, and the favoring of some speech in the fair use exception seems to compound the problem. Again, a balancing of the free speech interests against the property interests of authors seems to be a more sensible explanation of the factors involved in crafting the copyright exception.

Edwin Baker, another justly prominent scholar also had absolutist instincts. He spoke out against balancing and sought a First Amendment based in *principle*.[241] The foundation of his theory was the belief that for government to be legitimate, it had to treat its citizens with "equal respect and concern as autonomous persons."[242] To treat them with equal respect and concern was to avoid interfering with their liberty. Although many scholars did not think that liberty should be considered a First Amendment value, Baker regarded it as the almost exclusive free speech value. In particular, he opposed

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[235] *See id.* at 17–18.

[236] *See id.* at 18.

[237] *See id.*

[238] *See id.* at 556–57.

[239] *See id.* at 417.

[240] *Cf.* Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 242 (1978) ("How the empty speech-conduct distinction could have survived as long as it did in a world without extrasensory communication remains a mystery to me.").

[241] *See* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 45– 46 (1976).

[242] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 278 (1989).

reliance on the marketplace of ideas theory in part on the ground that truth was not objective.[243] Instead, he argued from his legitimacy principle that "[a]s long as speech represents the freely-chosen expression of the speaker while depending for its power on the free acceptance of the listener, freedom of speech represents a charter of liberty for noncoercive action."[244] From Baker's perspective, this test had the merit of being the best view of liberty. It also had the advantage of avoiding balancing, which he thought insufficiently protected rights,[245] led to inconsistent results,[246] and was legislative in character.[247]

But there was no escaping of balancing even for Baker. Significantly, as Baker appreciated, his liberty reasoning did not offer clear protection for business corporations.[248] His very first article maintained that business corporations should receive no First Amendment protection because their speech was determined by the market and was, therefore, not freely chosen.[249] But press corporations are business corporations. It would surely be a First Amendment embarrassment to offer a First Amendment theory that did not protect the press. Baker argued quite well from a utilitarian perspective that the press served unique and important public purposes, meriting constitutional protection,[250] but he could not avoid balancing in formulating rules for the press. Although Baker's press scholarship was outstanding,[251] the best he could do with respect to balancing was to insist that any such balancing be employed at a high level of abstraction.[252]

With respect to the speech clause, Baker avoided balancing, but that led to other difficulties. Of course, he did not argue for absolute protection for speech. For example, he argued that perjury and fraud were not protected because knowing lies were "designed to disrespect

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[243] *See id.* at 6–7.

[244] BAKER, *supra* note 242, at 7 (emphasis omitted).

[245] *See id.* at 46.

[246] *See id.* at 45.

[247] *See id.* at 47.

[248] *See* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1245 (1984). For discussion and criticism of Baker's position, see *id.* at 1239–51.

[249] *See* BAKER, *supra* note 242, at 14.

[250] *See id.*, at 225–34. *But see* Sonja R. West, *The Majoritarian Press Clause*, 2020 U. CHI. LEGAL F. 311, 311–13.

[251] *See generally* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 129–53 (2002) (discussing different conceptions of democracy and the role of the press).

[252] *See* C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 849–850 (1980).

and distort the integrity of another's mental processes"[253] and were, therefore, coercive.[254] Nonetheless, he flirted with the possibility that this coercive speech might be protected after all in the context of defamation.[255] I suspect he merely flirted with that possibility because of his commitment to "principled" systematic decision making. Nietzsche once said that to have a system is to lack integrity.[256] Nietzsche expected that systems invariably lead in some circumstances to unacceptable results and that people applying such systems will cheat to get better results.[257]

Nietzsche never met Ed Baker; Ed didn't cheat. From his principle, he would be required to deduce that speech should be protected even when it intentionally inflicted emotional distress, when it revealed intimate facts about a person's private life, when it amounted to fighting words, and when it negligently defamed an individual. Regardless of the harm occasioned, he also would be required to protect racist speech and pornographic speech. The facts would not matter. Respect for the formal autonomy of the individual was the controlling principle.[258]

I am not suggesting that Baker regretted these aspects of his principle. I would suggest three things. First, Baker read too much into the principle of respect. I can respect a person without respecting some of the choices made by that person. So, if that person wanted to reveal intimate facts about another person's private life, government might decide that privacy was more important than speaker liberty in that context, without sacrificing its legitimacy. Second, a system that does not take consequences into account across a broad range of issues has little to recommend it. Finally, I suspect or know that even Baker was not happy with some of the implications of his principle. For example, perhaps grudgingly, Baker argued under the First Amendment, that laws regulating public nudity were unconstitutional as applied to those who sought to confront the

[253] *See* Baker, *supra* note 186, at 1002.

[254] *See id.* at n.112. It is not clear to me why such speech is coercive though I agree it should not be protected. It is also not clear to me how Baker squared his contention that truth is not objective with his condemnation of the falsity involved in perjury and fraud. As Baker was aware, however, the marketplace argument has significant weaknesses apart from that claim. *See* BAKER, *supra* note 242, at 6–7.

[255] *Id.* at 289 n.39.

[256] *See* FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS (1889), *reprinted* in THE PORTABLE NIETZSCHE 463, 470 (Walter Kaufmann ed. & trans., 1976).

[257] *See id.*

[258] Steven H. Shiffrin, *Freedom of Speech and Two Types of Autonomy*, 27 CONST. COMM. 337, 338–39 (2011).

public.[259] By the same reasoning, Baker would have been forced to protect public sexual acts designed to confront the public. And I am sure, he would not have budged. So too, Baker was unwillingly forced by his system to accept the inequality presented by the system of campaign financing approved by the Supreme Court. After a long period in which Baker struggled to get out from under, he finally found a set of arguments that he thought satisfied the demands of his system.[260] He should not have had to wait that long.

Nietzsche had a point. Systems cannot account for the complexity of social reality. Fidelity to a system cannot take the range of relevant factors into account. Balancing can.

Finally, Ronald Dworkin also falls within this line of scholarship. Like Baker, he argued that government was required to treat its citizens with equal respect and concern.[261] And, for Dworkin, that meant that it was incumbent on government to take rights seriously.[262] In other words, government may not prevent the exercise of a right like free speech even if doing so would make the majority better off to do so.[263] Nonetheless, he conceded that speech could be limited when it conflicted with the rights of others or to "prevent a catastrophe."[264] Leaving aside what conditions amount to a catastrophe, the question is how one determines what the rights of others might be and for that matter how one arrived at the conclusion that free speech is a fundamental right.

The grounding for the system as I have indicated is the right to be treated with equal concern and respect. From that principle, Dworkin derives the notion that government must be neutral about the "good life."[265] This greatly complicates his analysis of what counts

[259] *See* Baker, *supra* note 186, at 1019 n.153.

[260] *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 2–3 (1998).

[261] RONALD DWORKIN, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 124, 125–27 (Stuart Hampshire ed., 1978).

[262] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 204–05 (1977). For a sophisticated challenge to Dworkin's "rights as trumps" approach, see Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 66–76 (2018) (providing a broadside criticism of U.S. treatment of rights in constitutional law—arguing for proportionality). In my terminology, proportionality overall is a form of balancing. *See* SHIFFRIN, WHAT'S WRONG, *supra* note 21, at 2, 5. For Greene, balancing enters the picture after the other factors have been considered and the weighing takes place. *See* Greene, *supra*, at 66–76. This difference appears to be terminological, not substantive.

[263] *See* DWORKIN, *supra* note 262, at 191.

[264] *See id.*

[265] *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985).

as a right and the question of which rights are to prevail when they come into conflict.

It is difficult to deduce rights from the concept of equal concern and respect without smuggling in a non-neutral conception of the good life. One can stare at the concepts of concern and respect without making any serious headway. So, Dworkin resorts to *ad hoc* pronouncements of rights. For example, Dworkin announces that there is a right not to have your reputation ruined by a careless statement.[266] This is a *right* that is denied to public figures and public officials in the United States and a right that would be denied altogether by Baker and Emerson. Indeed, Nimmer probably would reject the right as stated because applying the right would require *ad hoc* judgments. It is noteworthy that the one example Dworkin picks is subject to such serious question.

In the end, Dworkin's analysis presents many of the same difficulties associated with Baker's. Assuming substantial reasons, government can limit the speech of a person without denying their dignity or denying them concern and respect. To say that a person has made an unacceptable choice is not to deny his or her equality or humanity.[267] Finally, like Baker, Dworkin's theory based on equal concern and respect does not fit well with business corporations, including the corporate press.[268] Any press theory might be better supported by a less individualistic grounding for the First Amendment.

C. Content Discrimination and Standard Objections to Balancing

1.The Rule of Law

Justice Scalia famously argued that the rule of law demanded rules, not balancing or standards.[269] It is easy to understand the appeal of this position. It imagines a preexisting authoritative command with compliance leading to consistent and foreseeable

[266] *See id.* at 382.

[267] Dworkin later shifted to assert a right of moral independence, a right not to be disadvantaged by government because his or her life is deemed to be "ignoble or wrong." *Id.* at 353. Clearly, to limit speech is not invariably to say that someone's speech is ignoble or wrong.

[268] *See* Steven Shiffrin, *Rights v. Goals*, N.Y. TIMES, June 9, 1985 (§ 7), at 24 (reviewing Dworkin's book, A MATTER OF PRINCIPLE). Baker's theory is based on the liberty of the source, and any audience rights are derivative of the speaker's rights. Dworkin does not have that difficulty, but his ability to claim audience rights is limited by his rejection of utilitarian policy arguments including marketplace arguments. *See id.*

[269] See Scalia, *supra* note 160, at 1182.

results. It could easily be conceived of as a regulative ideal. But as Richard Fallon has shown, the rule of law is more complicated than Scalia understood.[270] Rules cannot provide the substantive values appropriate to a particular context.[271] Under the rule of law, for example, constitutional rules must have some footing in American historical traditions. Indeed, Justice Scalia claimed to follow the original meaning of the Constitution to provide a source for rules. Yet historical traditions strictly followed can lead to profoundly unjust results. Some prominent scholars have argued that the rule of law requires that legal rules respect and enforce the moral and political rights of equal citizens.[272] From this perspective, justice frequently trumps history when history leads to results that are not morally justifiable. [273] Others have argued that the rule of law assumes an "internal connection between notions of law and reasonableness,"[274] and conceives "the subjects of legal justice as reasonable persons, open to argument and persuasion, and deserving of reasoned explanations that the law should aspire to provide."[275] If a rule ordinarily cannot be justified by reasoned explanations other than the arbitrary force of history or rules, the failure of reason can trump history and rules. So understood, rules are not a sufficient condition for complying with the rule of law.

Accordingly, the claim that constitutional law should slavishly rely on the original public understanding of the document has not been heeded. History, of course, is an important source in constitutional interpretation, but, for example, equality in our constitutional

[270] *See generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997) (showing that rule of law as a concept ranges beyond the formalism of rules to the values of historicism, legal process, and political morality). For specific criticism of Scalia's approach in an article honoring Justice Stevens, see Jamal Greene, *The Rule of Law as a Rule of Standards*, 99 GEO. L.J. 1289, 1289 (2011). More generally, see Greene, *supra* note 262, at 66–76 (2018) (arguing against the formal conception of rights in American law in favor of a more contextualized approach).

[271] For the argument that Justice Scalia failed to consistently apply rules in First Amendment cases because following originalist principles would be excessively narrow, and he produced no independent substantive First Amendment theory, see Ashutosh Bhagwat, *Free Speech and "A Law of Rules,"* 15 FIRST AMEND. L. REV. 159 (2017). For insight into how far removed the conception of freedom of speech in the founding period was from our modern views, see sources cited *supra* note 55.

[272] *See, e.g.*, DWORKIN, *supra* note 265, at 11–12, 32; *see also* RONALD DWORKIN, LAW'S EMPIRE 254–57 (1986).

[273] According to Dworkin, however, there are limits as to how far a judge can go in enforcing morality when the resulting decision would not fit with the law overall. *See* DWORKIN, *supra* note 265, at 16–17; *see also* DWORKIN, *supra* note 272, at 255.

[274] Fallon, *supra* note 270, at 18.

[275] *Id.* at 19.

tradition has been interpreted to be an evolving value moving to guard against racial segregation and discrimination against women. At the same time, liberty has been interpreted to prevent the criminalization of same sex intimate acts, and it has also been interpreted to protect far more speech and press than was safeguarded at the founding.[276]

If rules are not a sufficient condition for complying with the rule of law, they also are not a necessary condition. The early public understanding of the First Amendment often produced balancing or standards instead of rules. For example, at the time of the founding, government could punish those who engaged in speech that was "improper, mischievous, or illegal."[277] At best, this functions as a standard—and a dangerous one at that—but certainly not a rule. Moreover, history aside, we should note that First Amendment doctrine is not entirely composed of rules. Even Justice Scalia did not suppose that rules can always be employed by judges. He recognized that balancing would sometimes be necessary.[278] But he suggested that a totality of the circumstances test was more like fact-finding than law.[279] Law, however, is inextricably and invariably involved in identifying the relevant circumstances, or the factors involved in balancing. Formulating the factors and weights involved in a balancing test is clearly a legal decision, not a factual one.

At best, Justice Scalia admits that balancing is admissible in a legal system, but his attempt to characterize it as factual and not legal demonstrates that his rule of law claim is excessively partial. Although the presumptive value of rules is undeniable, in our legal system that presumption is frequently overcome. Indeed, First Amendment doctrine is permeated by intermediate scrutiny tests.[280] And many understand that constitutional law has developed in a

[276] *See* Lakier, *supra* note 55, at 2168.

[277] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1878, at 736 (1833), *quoted in* Lakier, *supra* note 55, at 2180. Lakier observes that the First Amendment did not merely protect against prior restraint, but some post-publication sanctions against speech as well. *See id.* Nonetheless, it was a far cry from what is protected today. *See id.* at 2181.

[278] Scalia, *supra* note 160, at 1186–87.

[279] *See id.* at 1187.

[280] *See generally* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784–85. Of course, intermediate scrutiny is a form of balancing. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992) (intermediate scrutiny is an "overtly balancing mode").

common law manner.[281] It would be a form of shrill extremism to suppose that the common law violates the rule of law.[282] Similarly, it would be over the top to declare that the common law was illegitimate judicial legislation.[283] There are obvious differences between common law processes and legislative processes. The judicial process demands a form of reasoned justification not required in the legislative process, and the limits on judicial reasoning are greater than those taken into account by politicians. There are important advantages of rules, but neither balancing nor standards violate the rule of law. Scalia's argument proves too much. If true, prior First Amendment law, the use of standards for time, place, and manner restrictions, Europe's use of proportionality, and the common law itself would violate the rule of law.

2.The Need for Constraint

In this section I want to deal first with the other pillar of the new absolutism: the principle of anti-content discrimination; and second, the argument that definitional balancing insufficiently constrains judges.

Regulations of speech can generally be characterized as falling into two types. In the first case, regulations are characterized as "content regulation"[284] or "content discrimination"[285] or "content-based."[286] Strict scrutiny ordinarily applies to regulations of this type.[287]

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[281] *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

[282] *See* Frederick Schauer, *Is the Common Law Law?*, 77 Calif. L. Rev. 455, 455 (1989) (reviewing Melvin A. Eisenberg, The Nature of the Common Law (1988)).

[283] *See id. See generally* Strauss, *supra* note 281, at 926–28.

[284] Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA. L. REV. 1427, 1428 ("central tenet" of the First Amendment).

[285] Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232 (2012) (content discrimination has been the "touchstone" of First Amendment analysis for forty years).

[286] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996) (discussing how the distinction between "content-based" and "content-neutral" regulations is the "keystone" of First Amendment law).

[287] *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015). As a formal matter, the prohibition is a standard, not a rule. It provides that First Amendment protection is afforded unless the strict scrutiny test is satisfied. That is an ad hoc balancing test, a difficult one to meet, but a balancing test nonetheless. For elegant criticism of the U.S. focus on standard of review in its consideration of rights, see generally Greene, *supra* note 262, at 34–38 (arguing for proportionality); Kenneth L. Karst, *The Supreme Court, 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 41–42 (1977) (recommending a sliding scale of rights and interests in weighing competing claims); Kenneth L. Karst, *Cases and Materials on Constitutional Law (Ninth Edition)*, 89 HARV. L. REV. 1028,

Sometimes "strict scrutiny" is less than strict,[288] some falls outside the scope of the First Amendment altogether; and, as we have discussed at length, some speech falls into unprotected categories. In those circumstances, the Court does not *describe* the government regulations as content-based.

In the second case, regulations are regarded as content-neutral. Time, place, and manner regulations typically fall into this category or regulations with an incidental effect on speech, and they are typically upheld.[289]

Applying the distinction between content-based and content-neutral regulations has long been unpredictable. For decades, it has been unclear whether the terms applied to the purpose of the regulation or the face of the message to which the regulation has been directed.[290] It has also been unclear which regulations on the face of the statute mattered[291] and which purposes were sufficient.[292] Accordingly, the Court picked and chose among its approaches[293] leaving the lower courts the discretion to do the same.[294] Third, the sweep of the strict scrutiny standard has been perceived to be overly

1037 (1976) (book review) (criticizing Gunther casebook for focusing on standard of review instead of "flesh-and-blood conflicts about substantive rights").

[288] *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 193, 210 (1992) (permissible to outlaw distribution of literature near a polling booth); Williams-Yulee v. Fla. Bar, 575 U.S. 433, 439, 444 (2015) (permissible to bar judicial candidates from soliciting campaign contributions).

[289] *See* McDonald, *supra* note 98, at 1351 (stating that if a regulation is determined to be content-based, it is "categorically invalidated;" if it is determined to be content-neutral, it is "almost categorically upheld"). There are special rules involving access to government property for purposes of engaging in speech and for the speech of students, public employees, and prisoners in public institutions. Court rulings tend to uphold the bureaucratic perspective.

[290] *See* Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 234.

[291] For example, could it be said that a regulation of the content of political content without a malignant motive was content regulation, but a statute directed toward the content of ordinary signs announcing events without a malignant motive was not content regulation?

[292] Assuming hostility was not present, would it be sufficient that the harm of concern was caused by the message directly? Would it be sufficient that the harm was caused indirectly?

[293] *See* Lakier, *supra* note 290, at 244–50; *see also* McDonald, *supra* note 98, at 1353 (standards applied in a "strikingly inconsistent and unprincipled manner"). *See generally* McDonald, *supra* note 98, at 1377–82; Erwin Chemerinsky, *Content Neutrality as a Central Problem of Free Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50 (2000) (Court's applications inconsistent with the reasons for the principle's existence). For criticism of the difficulties associated with the content-based/content-neutral distinction, see generally R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

[294] *See* Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 598 (2003) (doctrine is confused and does not provide guidance to lower courts). For discussion of the conflicting lower court case law primarily prior to the *Reed* case, discussed *infra*, see Bhagwat, *supra* note 284, at 1433, 1438 n.71.

broad. As David S. Han has stated, "[O]ver forty years of experience with the strict scrutiny default rule has revealed courts' consistent willingness to surreptitiously evade the formal doctrinal framework when confronted" with regulations of speech that did not deserve strict scrutiny in their estimation.[295] No notion of constraint could well describe this state of affairs.[296]

Apparently oblivious to the passive aggressive behavior of the lower courts or overly confident of its ability to snatch order from the jaws of chaos, *Reed v. Town of Gilbert* doubled down on the strict scrutiny requirement. The town, among other things, distinguished between ideological signs, signs designed to influence an election, and temporary directional signs related to a qualifying event.[297] Ideological signs were favored over political signs, which in turn were favored over temporary directional signs to events.[298] The statute was challenged by a church which put up signs advertising the time and place of its Sunday services.[299] Under the ordinance, ideological and political signs were permitted to be larger than the church's signs and were permitted to be displayed longer than those signs.[300] Justice Thomas, for the majority, maintained that regulations which by their terms were directed at a message were content-based requiring a strict scrutiny justification[301] even if the motive for the regulation was entirely benign.[302] In addition, if the regulation was not directed at content by its terms, it would be content-based if it could not be "justified without reference to the content of the [regulated] speech" or was imposed "because of disagreement" with that speech.[303] Justice Breyer argued that the breadth of *Reed*, if

[295] David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 69 (2017).

[296] So, too, Ashutosh Bhagwat argued that the lower courts had rebelled against the guiding framework set by the Court even before *Reed*. *See* Bhagwat, *supra* note 284, at 1429. Like Han, Bhagwat contested the premise that all "fully protected" speech should be treated equally and argued that lower courts shared the criticism. *Id.* at 1429–30.

[297] *See id.* at 159–61.

[298] *See id.* at 159–160.

[299] *Id.* at 161.

[300] *Id.* at 159–60, 172.

[301] *Id.* at 173.

[302] *Id.* at 164–65. Justice O'Connor argued that this type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "*entirely reasonable*" will sometimes be "struck down because of their content-based nature." McDonald *supra* note 98, at 1352 n.10 (emphasis added). For the argument that purpose should play no role in determining whether speech should be protected, see Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1370 (2016).

[303] *See Reed*, 576 U.S. at 167 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

taken seriously, could imperil "governmental regulation of securities, of energy conservation labeling-practices, of prescription drugs, of doctor-patient confidentiality, of income tax statements, of commercial airplane briefings, of signs at petting zoos, and so on."[304]

Coupled with *Stevens*, it would be difficult to argue that Breyer's examples were new categories of unprotected speech. In this respect, the pillars of the new absolutism run together.

Reed stated that the Ninth Circuit Court of Appeals and the federal government in its brief had misread the doctrine by believing that regulations directed at content did not trigger strict scrutiny when the regulating motives were benign.[305] In that respect, *Reed* implied that it had not really changed the law. But in addition to the Ninth Circuit, the Third, Fourth, Sixth, Seventh, and District of Columbia Courts of Appeal all recognized that *Reed* had changed their understanding of content discrimination.[306] This, however, did not mean that *Reed* had successfully imposed its will. In a careful and fair minded study of the Court of Appeals cases applying *Reed* published in the spring of 2019, Dan V. Kozlowski and Derigan Silver concluded that the courts had not followed through on the radical implications of *Reed*, that *Reed* had not provided sufficient clarity as to differentiating between content-based and content-neutral regulations, that the jurisprudence was muddy and incoherent, and that the jurisprudence might even be worse than it was before.[307] Nor is the post-*Reed* reaction simply based on confusion (though that is present). As Kozlowski and Silver report, many of the decisions "seem to avoid, misapply or narrow *Reed* from below."[308] Given the observations of Han and Bhagwat regarding the actions of the lower courts prior to *Reed*, it is not surprising that the lower courts did not join happy hands in support of *Reed.* Still others had cautioned that the lower courts might play or had played a role in narrowing its

[304] *Id.* at 177–78 (Breyer, J., concurring) (citations omitted). More recently, Justice Breyer has cautioned against "reflexively" applying the *Reed* test to subject to strict scrutiny any content-based distinction of speech because doing so is "divorced from First Amendment values." Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2358 (2020) (Breyer, J., dissenting in part and concurring in part).

[305] *Reed*, 576 U.S. at 166–67 (citing *Ward*, 491 U.S. at 787).

[306] *See* Dan V. Kozlowski & Derigan Silver, *Measuring* Reed*'s Reach: Content Discrimination in the U.S. Circuit Courts of Appeal after Reed v. Town of Gilbert*, 24 COMMC'N L. & POL'Y 191, 262–63, 270 (2019); *see also* David L. Hudson, Jr., *The Content-Discrimination Principle and the Impact of Reed v. Town of Gilbert*, 70 CASE W. RESERVE L. REV. 259, 259 (2019) (discussing lower court cases after *Reed*).

[307] *See* Kozlowski & Silver, *supra* note 306, at 261–69.

[308] *Id.* at 270.

apparently broad scope.[309] As Kyle Langvardt remarked, "*Reed*'s hard line is almost certainly too extreme to hold."[310]

And it has not held. If *Reed* were applied seriously, strict scrutiny would have to be applied to the zoning regulations of adult bookstores and theaters, and the requirements that dancers in their erotic entertainment must at least wear G-strings and pasties.[311] Clearly, the application of the zoning ordinances to adult bookstores and theaters depends on the sexual content employed by the adult establishments. The *Reed* Court ruled that even benign purpose is irrelevant once it is established that the government regulation depends on the content of the regulated speech.[312] Yet, the Third Circuit,[313] the Seventh Circuit,[314] and the Eleventh Circuit[315] ruled that *Reed* did not apply to ordinances directed at sexually oriented businesses or expressed doubt that it did. To be sure, the Court could say that non-obscene sexually oriented speech is less valuable than other forms of speech: nonetheless, no such point was made in *Reed*.[316]

Second, *Reed* is flatly at odds with commercial speech doctrine. Content regulations of commercial advertising are not subjected to a

[309] *See* Lakier, *supra* note 290, at 292–94 (suggesting that formalism will not limit the lower courts when they believe the rules are unreasonable); *see also* Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 2000 (2016) ("[L]ower courts have resisted *Reed's* potential to create a unitary standard of strict scrutiny and upend settled First Amendment doctrine.").

[310] Kyle Langvardt, *A Model of First Amendment Decision Making at a Divided Court*, 84 TENN. L. REV. 833, 851 (2017).

[311] *See* Barnes v. Glen Theatre, 501 U.S. 560 (1991).

[312] Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015).

[313] *See* Free Speech Coalition, Inc. v. Att'y Gen. U.S., 825 F.3d 149, 162 (3d Cir. 2016) (expressing doubt that *Reed* meant to overturn secondary effects doctrine and, without a clearer signal, will interpret the doctrine in a non-expansive way).

[314] *See* BBL, Inc. v. City of Angola, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (expressing doubts that *Reed* wanted strict scrutiny to apply to nearly nude adult entertainment because such speech is barely within the First Amendment).

[315] *See* Flanigan's Enters., Inc. v. City of Sandy Springs, 703 F. App'x 929, 934–35 (11th Cir. 2017) (reasoning of sexually oriented business cases is called into question, but Supreme Court should decide whether those cases survive *Reed*).

[316] So-called secondary effects as a justification for saying that such regulations are not content-based has been properly criticized. *See* Marcy Straussy, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 ARIZ. L. REV. 291, 314–19 (1996); *see also* Chemerinsky, *supra* note 293, at 59–61; Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 114–17 (1987); Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 108–09 (1999) (secondary effects analysis is result-oriented); Mark Rienzi & Stuart Buck, *Neutrality No More: The Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187, 1203–04 (2013); David Hudson Jr., *The Secondary Effects Doctrine: The Evisceration of First Amendment Freedoms*, 37 WASHBURN L.J. 55, 93 (1997).

strict scrutiny test though some members of the Court might be pleased if it were.[317] Yet, regulations of commercial speech do not *incidentally* hit commercial speech; they *target* the content of commercial speech. Justices and commentators observed that *Reed* and the commercial speech doctrine are inconsistent with each other.[318]

The lower courts were not impressed. The Ninth Circuit dismissed the claim that *Reed* applied to commercial speech, employing conclusory language instead of an argument in two cases.[319] The Eleventh Circuit expressed the same view.[320] Here too, the lower courts were right in not taking *Reed*'s language seriously.

National Institute of Family and Life Advocates v. Becerra (*NIFLA*)[321] made that clear.[322] *NIFLA* involved a requirement that

[317] *See, e.g.*, Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (Stevens, J., joined by Kennedy & Ginsburg, JJ.,); *id.* at 517–18 (Scalia, J. concurring in part and concurring in the judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in the judgment).

[318] *See* Hudson, *supra* note 306, at 280, 281 (criticizing lower courts for adhering to the Supreme Court cases involving sexually oriented speech and commercial speech after Reed).

[319] *See* Contest Promotions, LLC v. City & County of San Francisco, 874 F.3d 597, 601 (9th Cir. 2017) (citing Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016)).

[320] *See* Dana's R.R. Supply v. Att'y Gen., 807 F.3d 1235, 1246 (11th Cir. 2015) (citing Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Wollschlaeger v. Governor of Florida, 797 F.3d 859 (11th Cir. 2015)) (stating that commercial and professional speech not subject to strict scrutiny, but not reaching the question because government regulation would not pass intermediate or strict scrutiny); *see also* Ocheesee Creamery LLC v. Putnam, 851 F.3d 1228, 1235 n. 7 (11th Cir. 2017).

[321] Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018). For a powerful critique, see Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 464–69 (2019). For a strong pro-speaker discussion of professional speech, *see* Smolla, *supra* note 189, at 74–106.

[322] *See* NIFLA, 138 S. Ct. at 2372–75. *See also* Matal v. Tam, 137 S. Ct. 1744, 1763 (2017), for a post-*Reed* trademark case presenting the issue whether a proposed trademark involved commercial speech or non-commercial speech. Justice Alito, on behalf of Chief Justice Roberts and Justices Thomas and Breyer, concluded that the Court need not resolve the issue because the regulation could not satisfy the "relaxed" scrutiny applicable to commercial speech. *See id.* at 1751, 1764. Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, argued that the case involved viewpoint discrimination, and strict scrutiny was appropriate even if the speech was commercial. *See id.* at 1765, 1767 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *IMS Health Inc.*, 564 U.S. at 556). But his opinion reaffirmed that in the absence of viewpoint discrimination, commercial speech is subject to greater regulation than non-commercial speech. *See id.* Only Justice Thomas maintained that even in the absence of viewpoint discrimination, strict scrutiny should apply to regulations of truthful commercial speech, but even he did not call for strict scrutiny of regulations of false and misleading commercial speech. *See id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment). One could imagine that Justice Thomas might have scolded the Court for not adhering to *Reed*, but it seems more likely he was not even thinking about commercial speech when he wrote the *Reed* opinion. In a topically similar case decided two years later, the Court relied on *Tam* to invalidate a federal trademark provision forbidding the registration of "immoral" or "scandalous" trademarks on the ground that the provision unconstitutionally

pro-life clinics disclose that California provides free or low-cost services including abortion.[323] The pro-life clinics objected on First Amendment grounds.[324] Justice Thomas, writing for the majority, cited *Reed* for the proposition that content discrimination is subject to strict scrutiny[325] and arrived at the unprecedented conclusion that forced disclosures are subject to strict scrutiny.[326] He stated that there was an exception for required disclosures of factual, non-controversial[327] information in "commercial speech" (his scare quotes) that avoided an unjustifiable or undue burden[328] as well as an exception for state regulations of professional conduct that incidentally involve speech.[329] At another point in the opinion he said that the Court did not "question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[330]

NIFLA makes clear that the commercial speech doctrine survives *Reed*[331] though it does not explain why, and even more interestingly, it does not explain how it arrived at the other exceptions to its approach. It does state, however, that the Court is reluctant to create exceptions, and that exceptions require "persuasive evidence . . . of a long (if heretofore unrecognized) tradition."[332]

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discriminated on the basis of viewpoint. *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019). Writing separately for himself, Justice Breyer picked up where Justice Alito left off in *Tam* by noting "reasons for doubt" on the question whether the federal trademark statute regulates "pure 'commercial speech.'" *Id.* at 2305 (Breyer, J., concurring in part and dissenting in part) (citations omitted) (acknowledging that trademarks "have an expressive component in addition to a commercial one" and explaining that while the trademark statute regulates the "commercial function of trademarks," it "does so in a limited way designed primarily to ensure that a mark identifies the product's source").

[323] *See NIFLA*, 138 S. Ct. at 2369.

[324] *See id.* at 2370.

[325] *See id.* at 2371 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

[326] *See id.* at 2371–72.

[327] Justice Thomas claimed that entirely *accurate* disclosures about California's services including abortion were controversial because the topic of abortion is controversial. *See id.* at 2372. He did not further define controversial. For criticism, see Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731, 735–36 (2000).

[328] *See NIFLA*, 138 S. Ct. at 2372 (citing Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985)).

[329] *Id.*

[330] *Id.* at 2376.

[331] *See id.* at 2371–72. At the same time, it changed the doctrine in significant ways. Although it stated that the commercial speech doctrine did not apply, it ultimately applied it anyway and used a more heightened (but not strict) scrutiny to the regulation of commercial speech disclosures than it had before. Andra Lim, Note, *Limiting NIFLA*, 72 STAN. L. REV. 127, 129–30, 139–40 (2020).

[332] *NIFLA*, 138 S. Ct. at 2372 (quoting United States v. Alvarez, 567 U.S. 709, 722 (2012)).

This is a libertarian's dream. The Court invokes a level of scrutiny never previously applied to governmental disclosure requirements and then imposes a standard for exceptions that the *Brown* Court insisted could rarely be met.[333] In fact, as we have seen, the Court in *Stevens* declared (falsely) that the categorical exceptions came to us from 1791.[334] Could the Court possibly be saying that exceptions to its disclosure regime must be rooted in a historical tradition with such deep roots? Circuit Judge Ikuta of the Ninth Circuit Court of Appeals thinks so. She recognized that *NIFLA* provided an exception for health and safety regulations, but only for those of long standing.[335] San Francisco required sugar-sweetened advertisements to include health warnings,[336] and Judge Ikuta would have none of it: "*NIFLA* did not specify what health and safety warnings date back to 1791, but warnings about sugar-sweetened beverages are clearly not among them."[337] Judge Graber, for an en banc Court, ruled that the warnings were unjustified and unduly burdensome,[338] but she did not agree with Judge Ikuta. She noted that Justice Thomas's disclaimer about health and safety regulations were in response to Justice Breyer's concern that mandatory advice about seat belts or disclosures about the availability of whooping cough vaccine would be endangered by the ruling.[339] As Judge Graber observed, those requirements are not "of ancient origin."[340]

Still the ad hoc and off-hand character of the *NIFLA* exemptions, does not inspire confidence in the capacity for consistent application of the law. Even without reference to *NIFLA*, the jurisprudence in this area was chaotic, as Justice Breyer remarked in *NIFLA*, permitting the application of strict scrutiny to mandatory disclosures seemed to license the reversal of economic and social regulations (many of them of long-standing) without apparent understanding of the implications.[341] If one thought an important goal of Supreme Court opinions was to provide guidance to the lower courts, *NIFLA*

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[333] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S.786, 792 (2011)).

[334] *See* United States v. Stevens, 559 U.S. 460, 468 (2010) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)).

[335] *See* Am. Beverage Ass'n v. City & County of San Francisco, 916 F.3d 749, 759 (9th Cir. 2019) (en banc) (Ikuta, J., concurring) (striking down the regulation).

[336] *See id.* at 761.

[337] *Id.* at 762.

[338] *See id.* at 753, 757 (majority opinion).

[339] *Id.* at 756 n.4 (citing Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2380–81 (2018) (Breyer, J., dissenting); *see NIFLA*, 138 S. Ct. at 2368 (majority opinion).

[340] *Am. Beverage Ass'n*, 916 F.3d at 756 n.4.

[341] *See NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting).

and *Reed* are models of failure. *NIFLA* reads like a case focused on abortion and the speech of professionals.[342] It wanted to protect the pro-life clinics and to rule that there was no professional speech exception to the First Amendment.[343] In the absence of Justice Breyer's dissent, *NIFLA* might not have dropped in its disclaimer about health and safety regulation.[344] It did not even see fit to indicate how its newly minted doctrine applied to required disclosures under the securities laws.[345]

So too, as we have seen, *Reed* has produced general inconsistency in the lower courts. On the other hand, the lower courts have consistently refused to hold that strict scrutiny applies to the regulation of sexually oriented businesses or of commercial speech.[346] *Reed*, of course, did not have to put them to the test. It could just have said that it did not intend to overturn its prior lines of cases in those areas. This might be dismissed as just sloppiness, but there is also something else worth discussing.

In the case of sexually oriented businesses, it seems clear that the conservatives feel that this speech is less worthy of protection than other speech. If it rested on the low value ground, it might have to discuss how this sexually oriented speech related to obscenity, and it might have to explore whether any distinction between the two goes back to 1791. Recall, it is the Constitutional Scholars brief that invoked low value theory, not the Court.[347] And, if *Chaplinsky* without the invented history relied upon in *Stevens* is the guide, the guide looks to both First Amendment value and government interests—the dreaded balancing the Court purports to avoid.

A similar problem applies to commercial speech. The conservatives have divided views on the level of scrutiny that should apply to regulations of commercial speech. History has played no significant role in those divisions at this point. Here too, it is embarrassing to the *Chaplinsky* view presented in *Stevens* that commercial speech at present receives intermediate protection despite no historical warrant for its content-based placement in the doctrine.[348]

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[342] *See id.* at 2368 (majority opinion).

[343] *See id.* at 2368, 2371–72.

[344] *See id.* at 2376.

[345] *See id.* at 2380 (Breyer, J. dissenting) (citing Reed v. Town of Gilbert, 576 U.S. 155, 177 (2015) (Breyer, J., concurring)).

[346] *See supra* notes 313–315 and accompanying text.

[347] *See supra* Part II.

[348] *See* Moore, *supra* note 97, at 55 (noting that the commercial speech exception is not integrated into the Court's historical approach).

Clearly, there are not just unprotected categories, but less protected categories, and the lower courts rebelling against the strict scrutiny regime have been affording protection to much speech outside the categories of sexually oriented and commercial speech.[349] The Supreme Court has internally teetered between different approaches to content regulation, then tried to straighten it all out, but the lower courts are unlikely to freeze the less protected categories. If one were to pick one word to describe this regime, it would not be constraint.

Finally, of course, if *Reed* meant what it said, unprotected categories of speech would all be up for grabs because they all involve instances in which the categories are identified by the content of their speech. Strict scrutiny could be struck against the categories. Of course, we know that will not happen. Although the lower courts have consistently adhered to prior precedent regarding unprotected speech and less protected speech despite *Reed*'s ham-handed opinion, we should not forget that the chaos of the content-based/content-neutral distinction still runs rampant.

Balancing is frequently criticized on the ground that it does not constrain judges. It, however, has allowed judges in a deliberative democracy to give the real reasons for their decisions.[350] In the context of frozen categories, however, we also need to recall that categorical or definitional balancing has been used to create the unprotected categories. So, the point of the argument is that if there can be no new unprotected categories, judges will be constrained.

In fact, it is helpful to see that constraint here would map a small amount of constraint on to a chaotic regime. And it comes at the cost (if it effectively produces constraint) of lack of candor[351] and of

[349] The lower courts have not consistently applied the term content regulation to cases involving everything from abortion protests to panhandling. *See* Judith Welch Wegner & Matthew Norchi, *Regulating Panhandling: Reed and Beyond*, 63 S.D. L. REV. 579, 632–34 (2019). For a sophisticated interdisciplinary discussion of panhandling with criticism of Reed, see generally Wegner & Norchi, *supra*.

[350] I refuse to believe, for example, that the Chief Justice is a poor student of history and is incapable of reading the *R.A.V.* decision. Say what you will about *Brandenburg*, *Gertz*, and *Paris Adult Theatre*. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). For the most part, balancing permitted the justices to write authentically about the basis for their rulings.

[351] When I first read Alvarez in 2012, I thought it might be significant that only four Justices cited Stevens with approval. *See* United States v. Alvarez, 567 U.S. 709, 713, 724 (2012) (plurality opinion) (citing United States v. Stevens, 559 U.S. 460, 470 (2010)). Two opposed its methodology and three did not even cite it. *See id.* at 730, (Breyer, J., concurring); *see also id.* at 739 (Alito, J., dissenting). What I missed in thinking it significant is that the dissent's author

preventing governments from regulating harmful speech of little value.

3.The Need to Protect Rights

Chief Justice Roberts claimed in *Stevens* with liberal and conservative support that permitting the production of new categories would be "dangerous."[352] What is the warrant for the cry that the failure to freeze the categories would be dangerous? For the liberals, of course, it harks back to a history of prohibitions that features Joe McCarthy and the jailing of Communist leaders with the approval of the Supreme Court in *Dennis v. United States*.[353] As Vicki C. Jackson observes, *Dennis* became a "negative precedent" presenting "cautionary notes of what not to repeat."[354] Also disturbing to liberals was the attempt to censor sexually oriented materials such as Henry Miller's *Tropic of Cancer* and D.H. Lawrence's *Lady Chatterley's Lover*.[355] In response, the left moved toward absolutism to head off similar abuses and to protect political and cultural dissent.[356] Finally, the left believed that free speech would assist in the reform of an unequal and oppressive society.[357]

This may explain the liberal commitment to free speech, but it does not explain how conservatives moved from *Dennis* to apparently strong commitments for freedom of speech today. The reasons are various. First, some among the conservatives have strong objections to balancing generally;[358] so strong protective rules appeal to their

was Alito. *Id.* at 739. He was joined by Scalia and Thomas. *Id.* Alito opposed *Stevens* from the beginning. *See Stevens*, 559 U.S. at 482 (Alito, J. dissenting). Scalia supported *Stevens*, and Thomas was even more hidebound than *Stevens*. *See id.* at 463 (majority opinion). Candor would have called for Scalia and Thomas to explain how their votes were consistent with *Stevens*.

[352] *See Stevens*, 559 U.S. 460, 470 (2010).

[353] *See* Dennis v. United States, 341 U.S. 494, 516–17 (1951).

[354] Jackson, *supra* note 11, at 3126. There is good reason to believe that the problem in the McCarthy era was not the balancing methodology, but insufficient regard for freedom of speech. Surely if a Court majority had been composed of Justices like Black and Douglas, a balancing methodology would have permitted them to protect free speech. Similarly, it is doubtful that the balancers on the Court who voted to uphold the convictions of the communists in *Dennis* would have arrived at a different result if they had to apply a real clear and present danger test. Indeed, they purported to do just that. *See Dennis*, 341 U.S. at 508.

[355] SHIFFRIN, WHAT'S WRONG, *supra* note 21, at 167–68.

[356] *See id.*

[357] *See id.* at 169.

[358] *See, e.g.*, *Scalia*, *supra* note 160, at 1178–79; Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 7 (1996); Brett M. Kavanaugh, Keynote Address, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1909 (2017).

formal dispositions. That was certainly true of Justice Scalia.[359] Second, conservatives are pro-markets and pro-business.[360] Their belief in a free market nicely coincides with a free market orientation to the First Amendment.[361] Third, conservatives felt marginalized and victimized in American universities and law schools and naturally were compelled to make free speech arguments.[362] Finally, the marginalization led to the Federalist Society which was brilliantly administered and where libertarians in the end outnumbered Burkeans.[363]

The result of this bipartisan support for speech is that the Roberts Court is perceived as a staunch defender of the First Amendment. Indeed, Joel Gora marked the ten-year anniversary of the Roberts Court by stating that it "may well have been the most speech-protective Court in a generation, if not in our history, extending free speech protection on a number of fronts and rebuffing claims by government and its allies to limit such protections."[364]

Nonetheless, this praise deserves to be significantly qualified. The conservatives and the liberals have been divided on free speech issues and the conservatives control the Court. Over liberal objections the conservatives upheld the authority of bureaucrats in public schools[365] and public workplaces[366] to override the free speech claims of students and public employees. They presided over a regime of defamation rules that made it easier for the Chair of Mobil Oil to sue than a famous singer or local school board member in a small town.[367]

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[359] *See* Scalia, *supra* note 160, at 1186–87.

[360] *See* J. Mitchell Pickerill, *Something Old, Something New—Something Borrowed, Something Blue*, 49 SANTA CLARA L. REV. 1063, 1091–93 (2009).

[361] *See* SHIFFRIN, WHAT'S WRONG, *supra* note 21, at 6.

[362] *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 232–35 (2008).

[363] *See id.* at 137–38; ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 144–45 (2008).

[364] Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 64 (2016).

[365] *See* Morse v. Frederick, 551 U.S. 393, 409–10 (2007); Jamin B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the Tinker Decision*, 58 AM. U. L. REV. 1193, 1196 (2009).

[366] *See* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006); Connick v. Myers, 461 U.S. 138, 154 (1983). For criticism of *Myers*, see SHIFFRIN, ROMANCE, *supra* note 21, at 74–80. *See generally* LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 131–140 (2014) (discussing repression of speech in schools, workplaces, and jails).

[367] The latter two must show a knowing or reckless falsehood in order to recover; the Chair of Mobil Oil need only show negligence unless he has voluntarily injected himself or has been drawn into a public controversy that relates to the defamatory claim. *See* Tavoulareas v. Piro, 817 F.2d 762, 771–72 (D.C. Cir. 1987). For criticism of this, see SHIFFRIN, WHAT'S WRONG, *supra* note 21, at 121–22.

They also afforded free speech protection for tobacco advertising.[368] Even more important, the conservatives also reinforced the power of wealthy individuals and corporations by overturning long-standing laws designed to promote equality and integrity in our elections.[369] In other words, with the conspicuous exception of the powerful institutional press (an institution that itself might threaten the powerful), the conservatives reinforced the power of the powerful.[370] Having granted free speech privileges to the powerful, the Court made it easier for government to outlaw the efforts of less powerful people to engage in demonstrations and otherwise use inexpensive means of communication.[371] The Court[372] and the lower courts over which it presides[373] have managed this suppression by routinely upholding "content neutral"[374] regulations without sensitivity to the impact of the regulations on dissent and other free speech values.[375] There may be an aesthetic neatness to invalidating content-based regulations on the one hand and upholding content-neutral regulations on the other. But in a country that cares about dissent and democracy, it is a neatness that properly can be called *dangerous*.

Meanwhile, the United States offers considerable protection for speech that comes into conflict with other important values. It protects speech interfering with a fair trial,[376] speech invading

[368] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001).

[369] The most conspicuous of these is *Citizens United v. FEC*, 588 U.S. 310 (2010), but most of the damage was already done by *Buckley v. Valeo*, 424 U.S. 1 (1976) and the interpretations of it that followed. *See* SHIFFRIN, WHAT'S WRONG, *supra* note 21, at 102–08.

[370] *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2118 (2018) ("[W]inners in First Amendment cases are much more likely to be corporations and other economically and politically powerful actors. . . . rather than . . . the powerless . . . ."); *see also* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015); Lincoln Caplan, *The Embattled 1st Amendment*, 84 AM. SCHOLAR 18, 20–21 (2015).

[371] *See* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 3–4, 53–59 (2009).

[372] *See* McDonald, *supra* note 98, at 1351–53; *see also* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 619–20 (1991) (noting the Court has devalued the threat posed by content-neutral regulations).

[373] *See* Bhagwat, *supra* note 280, at 805–06.

[374] *See id.* at 788–89 (cases have tended to systematically favor the government); *see also* Stone, *supra* note 316, at 50; Kendrick, *supra* note 285, at 237.

[375] *See* Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65, 93–100 (2017) (indicating that a significant weakness of First Amendment doctrine is downplaying a regulation's impact on speech); *see also* Bhagwat, *supra* note 280, at 822 (noting deferential treatment of content-neutral regulations has had the effect of suppressing a significant amount of dissenting speech).

[376] *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).

privacy,[377] speech causing severe emotional distress,[378] racist speech,[379] pornographic speech,[380] commercial speech,[381] and the massive spending of the wealthy in democratic elections.[382] Despite the failure to protect dissent in a number of different ways, we now live in a spectacularly different culture from the time of the framing. As Frederick Schauer has observed

> To an extent unmatched in a world that often views America's obsession with free speech as reflecting an insensitive neglect of other important conflicting values, the First Amendment, freedom of speech, and freedom of press provide considerable rhetorical power and argumentative authority. . . . The First Amendment not only attracts attention, but also strikes fear in the hearts of many who do not want to be seen as opposing the freedoms it enshrines.[383]

Given this culture, it is surely overwrought to fling the label "dangerous" on the prospect of new unprotected categories involving depictions of animal cruelty, the sale of gruesomely violent video games to children, and a prohibition on the making of knowing lies about receiving the Medal of Honor. There is a world of difference between censoring political dissenters in the 1950s and criminalizing the commercial purveying of material that depicts and encourages a market for the torture of animals.

If balancing is generally dangerous, we have been living under it for quite some time. As we have already seen, the doctrine has created unprotected categories by weighing free speech interests against government interests together with the impact on each by the regulation under review. This is not *ad hoc* balancing; it is a form of categorical balancing, a balancing functioning to create rules and

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[377] *See* Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989).

[378] *See* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011); *see also* Schauer, *supra* note 52, at 90 (describing *Snyder* as "among the clearest" statements the Court has made on the extent of First Amendment protection for "even personally harmful speech" and the consequent need for "victims to endure such harm").

[379] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

[380] *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 333–34 (7th Cir. 1985).

[381] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001).

[382] *See* McCutcheon v. FEC, 572 U.S. 185, 227 (2014). For criticism of these interpretations from a comparative perspective, see SHIFFRIN, WHAT'S WRONG, *supra* note 21, at 13–112 and many of the sources cited therein.

[383] Schauer, *supra* note 10, at 1790.

sometimes standards.[384] To be sure, there is no substantive theory that explains the resulting categories, but they are not the product of a dangerous methodology. And there is no reason to believe that the categories would be better if they had been frozen at some earlier time period.

In moving forward, whatever the specific results should have been in *Stevens* and *Brown*, given what we have seen, we should abandon the paranoid fear that permitting the creation of new categories of unprotected speech will actually endanger important free speech values.

IV. CONCLUSION

The First Amendment does not protect speech; it protects freedom of speech. Speech can impinge on important values, and when it does, tragic choices often have to be made. We need to have the courage, the wisdom, and the imagination to appreciate the complexity of social reality. Recognizing the pluralism of values is at war with an attempt to formulate simple answers to free speech questions. But it allows us to join with Vincent Blasi in celebrating an amendment that promotes a certain kind of character, one marked by

> inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil. Here we can add others: aversion to simplistic accounts and solutions, capacity to act on one's convictions even in the face of doubt and criticism, self-awareness, imagination, intellectual and cultural empathy, resilience, temperamental receptivity to change, tendency to view problems and events in a broad perspective, respect for evidence.[385]

As Blasi observes: "This is a character profile that is anything but vacuous. In the matter of character, the First Amendment is not a big tent."[386]

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[384] *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1269 (2005) (noting that there has always been a worry that *ad hoc* balancing would unduly constrict First Amendment rights).

[385] Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1571 (1999).

[386] *Id.*