FOREWORD

EXCEPTIONAL FREEDOM—THE ROBERTS COURT, THE FIRST AMENDMENT, AND THE NEW ABSOLUTISM

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ABSTRACT

Yesterday we had one view of the First Amendment; today we have another. Yesterday liberals hailed the First Amendment; today it is conservatives. Yesterday the First Amendment was the rallying cry of anti-federalists, abolitionists, Bolsheviks, Communists, and anti-war demonstrators; today it is the banner flown by corporations, big-money political PACs, tobacco companies, and advertising agents along with a motley crew of crackpots. Yesterday the liberty principle of the First Amendment coexisted with the equality principle of the Fourteenth Amendment; today they often war. Yesterday lofty free speech theories reigned; today various and varying judicial doctrines rule the roost. Yesterday the First Amendment was a treasured freedom; today many deem it to be an amendment in need of amending. And so it has come to pass.

"Nothing endures but change." Heraclitus's maxim takes on new meaning in modernity. Change is here; modernity has arrived. The era of the Roberts Court and the First Amendment is well into the groove of its constitutional mark. To date, the work-product of the Court has produced twenty-nine First Amendment free expression opinions. Constitutional claims were sustained in 14% of those cases. While a notable portion of the cases in which claims were

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denied were rendered by a unanimous or near-unanimous vote, the Roberts Court has nonetheless been badly divided (and ideologically so) on several key issues such as student speech, government employee speech, and expression related to support for so-called anti-terrorism groups. In that cluster of cases the Court has diminished the staying power of the First Amendment. But in another class of cases involving certain kinds of content-discrimination, the Court has been quite vigorous in its defense of free speech freedom. What emerges from the latter is a new kind of First Amendment absolutism largely premised on the maxim that expression is protected unless it clearly falls within one of the traditional categories of unprotected speech. This "exceptional freedom" is the main focus of what follows in this Foreword. While it represents a new high water mark of constitutional protection for speech, it also signals a stark point of demarcation, on the other side of which certain kinds of speech receive little meaningful protection.

Absolutism may have a place in a *sensible theory of freedom of speech, but not as* the *comprehensive methodology.*
—Rodney Smolla[1]

What a Court Term it was, what with the health care[2] and immigration[3] cases and all the fanfare afterwards. For the First Amendment community, the 2011–2012 Term was also quite significant: there were the Court's rulings in the indecency case,[4] the criticism of the Vice President Cheney immunity case,[5] the copyright extension case,[6] the public sector union fee case,[7] the

[1] 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.06[4], 2–57 (1994) (emphasis added).

[2] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

[3] Arizona v. United States, 132 S. Ct. 2492, 2497 (2012).

[4] FCC v. Fox Television Stations, Inc. 132 S. Ct. 2307, 2320 (2012) (holding that because the FCC failed to give Fox or ABC fair notice prior to the broadcasts in question, fleeting expletives and momentary nudity could be found actionably indecent, and the Commission's standards as applied to said broadcasts were unconstitutionally vague); *see also* FCC v. CBS Corp., 132 S. Ct. 2677, 2677 (2012) (Roberts, C.J., concurring) (regarding Janet Jackson, wardrobe malfunction, and fleeting expletives), *denying cert. to* 663 F.3d 122 (3d Cir. 2011); *id.* at 2678 (Ginsburg, J., concurring) (same).

[5] Reichle v. Howards, 132 S. Ct. 2088, 2091 (2012).

[6] Golan v. Holder, 132 S. Ct. 873, 878 (2012).

[7] Knox v. Serv. Emps. Int'l Union, Local 1000 132 S. Ct. 2277, 2295–96 (2012) (upholding First Amendment challenge to a public-sector union policy that required objecting non-members to pay a special fee for the purpose of financing the union's political and ideological activities).

Stolen Valor case,[8] and the Court's 5–4 refusal to revisit[9] the *Citizens United v. Federal Election Commission*[10] issue. In one way or another, four of the six free expression claims prevailed in the Court this past Term, this to the partial dismay of liberals who took exception to the Court's "anti-labor" ruling and its *sub silentio* reaffirmation of *Citizens United*,[11] while conservatives took exception to the Court's ruling in the lying about military medals case.[12]

Such First Amendment cases, and yet others by the Roberts Court, inform several of the articles in this Symposium. Simply consider some of the questions explored in this issue: to what extent and in what ways does the *Alvarez* ruling shape the future of false speech, particularly in the case of lying about military medals?[13] In light of the Court's most recent ruling concerning the law of broadcast regulation, what posture should the Federal Communications Commission take concerning indecency?[14] To what extent does the First Amendment protect corporate speech insofar as commercial expression is concerned, particularly in the case of the regulation of tobacco product-image advertising?[15] What

[8] United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012).

[9] Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2491 (2012) (5–4 decision).

[10] Citizens United v. Fed. Election Comm., 130 S. Ct. 876, 929 (2011).

[11] *See, e.g.*, Erwin Chemerinsky, *High Court's Union Dues Case May Change the Political Landscape*, A.B.A. J. (July 2, 2012), http://www.abajournal.com/news/article/chemerinsky_high_courts_union_dues_case_may_change_the_political_landscape.

[12] *See, e.g.*, Cindy Galli et al., *Supreme Court Decision Won't Stop Stolen Valor Supporters*, ABC NEWS (June 28, 2012), http://abcnews.go.com/Blotter/supreme-court-decision-stop-stolen-valor-supporters/story?id=16671826#.UJB2p4ap2Q4.

[13] *See* Jeffery Barnum, *Encouraging Congress to Encourage Speech: Reflections on* U.S. v. Alvarez, 76 ALB. L. REV. 527 (2013); Rodney Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of* United States v. Alvarez, 76 ALB. L. REV. 499 (2013).

[14] *See* Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 ALB. L. REV. 631 (2013).

[15] *See* R. George Wright, *Are There First Amendment "Vacuums?": The Case of the Free Speech Challenge to Tobacco Package Labeling Requirements*, 76 ALB. L. REV. 613 (2013); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012) (striking down on First Amendment grounds nine graphic warnings proposed by the FDA re cigarette packaging by a 2-1 vote); *see also* Garrett Epps, *Does Cigarette Marketing Count as Free Speech?*, THE ATLANTIC (Aug. 29, 2012), http://www.theatlantic.com/national/archive/2012/08/does-cigarette-marketing-count-as-free-speech/261680 ("The hidden message of the [majority] opinion—a message correctly deduced from much of the Roberts Court's First Amendment jurisprudence—is that the Constitution requires us to live in a make-believe world, where, for example, gross imbalances of wealth have no effect on political campaigns, and 'smoking isn't addictive' is as protected as 'I pledge allegiance to the flag.'").

about restrictions on online advertising?[16] Mindful of the Court's ruling in *Snyder v. Phelps*[17] and other cases,[18] to what extent can the government outlaw race-hate speech?[19] What about certain forms of political dissent or communications with people whom our government deems dangerous to national security?[20] And how does current First Amendment law affect the way we think about the question of academic freedom[21]—a question that has received renewed attention in the scholarly literature recently.[22] Finally, two of the contributors return to an old question that retains currency; it was one raised in *Schenck v. United States*,[23] namely, how does the law of conspiracy interact with the law of the First Amendment?[24] Such questions illustrate the scope and complexity of the contributions to this issue of the *Albany Law Review*.

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[16] *See* Marvin Ammori & Luke Pelican, *Media Diversity and Online Advertising*, 76 ALB. L. REV. 665 (2013).

[17] Snyder v. Phelps, 131 S. Ct. 1207 (2011). Legislation has recently been introduced to rein in the *Snyder* ruling. *See* Sanctity of Eternal Rest for Veterans Act of 2011, S. 815, 112th Cong. (2011). The companion bill in the House is H.R. 1591, 112th Cong. (2011). The proposed law would amend the federal criminal code concerning the prohibition on disruptions of funerals of members or former members of the Armed Forces to increase the period covered under such prohibition from one to two hours before and after a military funeral. S. 815 § 3(a). Under the proposed law, it would be unlawful to cause any disturbance or disruption within 500 feet of the residence of a surviving member of a deceased's immediate family. *Id.* § 3(a)(2)(A). The measure provides civil remedies, including actual and statutory damages. *Id.* § 4(b)–(d). It also makes identical changes under federal veterans' provisions concerning the prohibition on certain demonstrations and disruptions at national cemeteries, including Arlington National Cemetery. *Id.* § 4.

[18] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 379–80 (1992) (reviewing a city ordinance that forbade offensive symbols); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43–44 (1977) (per curiam) (reversing a lower court's injunction that forbade various actions connected with the National Socialist Party of America).

[19] Robert O'Neil, *Hate Speech, Fighting Words, and Beyond—Why American Law is Unique*, 76 ALB. L. REV. 467 (2013).

[20] *See* Marjorie Heins, *The Supreme Court and Political Speech in the 21st Century: The Implications of* Holder v. Humanitarian Law Project, 76 ALB. L. REV. 561 (2013).

[21] Owen Fiss, *The Democratic Mission of the University*, 76 ALB. L. REV. 735 (2013).

[22] *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM 61–62 (2012) (discussing the state of academic freedom today); Ronald K.L. Collins & David M. Skover, *Foreword: The Guardians of Knowledge in the Modern State: Post's Republic and the First Amendment*, 87 WASH. L. REV. 369, 369–70 (2012) (discussing Robert Post's book and the relationship between the First Amendment and truth). The Post book was the subject of a symposium in the *Washington Law Review* with commentaries by Thomas Ambro, Paul Saifer, Joseph Blocker, Paul Horwitz, Bruce Johnson, Sarah Duran, and Stephen Vladeck with a response to all of them from Dean Post. *Id.* at 549.

[23] Schenck v. United States, 249 U.S. 47, 49, 51–53 (1919) (rejecting the defendants' arguments that distributing papers opposing the draft was protected by the First Amendment rights of freedom of the press and freedom of speech).

[24] *See* Martin H. Redish & Michael J. T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697 (2013).

Though its free speech jurisprudence is still developing, the twenty-nine First Amendment free expression cases handed down by the Roberts Court[25] tell us much about how the Court would view the questions raised by the contributors in this symposium. One tenet of that jurisprudence is especially important and worthy of treatment in its own right. In that regard, in what follows I outline a few preliminary ideas regarding that tenet of the Roberts Court's jurisprudence and what it may portend for the future of our free speech law, or at least parts of it. I refer to that tenet as *the new absolutism*,[26] by which I mean that line of cases in which the Court has extended near absolute protection to expression for a particular reason, about which I will say more shortly. To be sure, and as I discuss in the conclusion, there are other cases in which the Roberts Court has been quite parsimonious in its protection of free speech.[27] Even granting that, there is nonetheless something remarkable in how the Roberts Court has re-conceptualized the way we think about certain free speech issues and has likewise reinvigorated a measure of free speech liberty, albeit to the consternation of many.

How did this come to be? Well, the answer is a strange one: the new absolutism has its roots in an old dictum designed to limit First Amendment protection. Strange how the doctrinal phoenix rises and reshapes itself, but such is the way of law in our times. Permit me to explain.

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[25] *See infra* Appendix.

[26] Such absolutism, as described in this Foreword, is confined to *Chaplinsky*-type cases (i.e., regarding categories of exceptions to the First Amendment). Chaplinsky v. New Hampshire, 568, 572 (1942). Of course, there is more to this new absolutism than what is herein discussed. I consider that something more in my examination of ways of thinking about the First Amendment that bear some resemblance to the kind of free speech absolutism championed by Floyd Abrams in his many years of litigating free expression cases. *See* RONALD COLLINS, NUANCED ABSOLUTISM: FLOYD ABRAMS AND THE FIRST AMENDMENT (2013).

[27] *See infra* Appendix; Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712 (2010) (upholding material support for terrorist organizations law over First Amendment challenges); Morse v. Frederick, 551 U.S. 393, 397 (2007) (limiting students' free speech rights at schools); Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (limiting the scope of government employees' free speech). *See generally* Adam Liptak, *Study Challenges Supreme Court's Image as Defender of Free Speech*, N.Y. TIMES, Jan. 8, 2012, at 25 (discussing the Robert's Court's record on free speech); Monica Youn, *The Roberts Court's Free Speech Double Standard*, AM. CONSTITUTION SOC'Y BLOG (Nov. 29, 2011), http://www.acslaw.org/acsblog/the-roberts-court's-free-speech-double-standard (analyzing the Robert's Court's free speech record).

AN OLD DICTUM IN NEW CLOTHES

It's a true story, but who would have believed it? Absolutism is coming back into vogue, though not the old, battered and purportedly comprehensive absolutism once touted by Justice Hugo Black.[28] This new absolutism came about, by and large,[29] by lawyers and jurists looking back in time to something said by a largely forgotten jurist (Justice Frank W. Murphy)[30] in an opinion he wrote, one that was long frowned upon in the First Amendment community.[31] I refer, of course, to Justice Murphy's seminal opinion

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[28] *See, e.g.*, HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 45 (1968); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874–75 (1960); *see also* HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 188–200 (1996) (listing and discussing Black's First Amendment absolutist opinions); JAMES J. MAGEE, MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT 5 (1980) (discussing the legacy of Black's First Amendment absolutism). Professor Charles Black argued as persuasively as possible in defense of Black's absolutist views. *See* Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court and the Bill of Rights*, HARPER'S, Feb. 1961, 63, 63 (discussing Justice Black's absolutism). *See generally* 1 SMOLLA, *supra* note 1, § 2:47–2:54 (discussing and critiquing free speech absolutism). For a categorical rejection of textual absolutism in this area, see 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, at 731–32 (Fred B. Rothman & Co. 1991) (1833), denying any "absolute right to speak, or write, or print, whatever he might please," and ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 92–93 (1962), referring to Black's First Amendment absolutism as an "illusion."

[29] My discussion of the new absolutism is, of course, duly mindful of the important and key role played by the overbreadth, void for vagueness, and content discrimination doctrines in vindicating free expression claims. Those doctrines often work in tandem with the new absolutism. Regarding the important topic of content discrimination, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996), noting that "[t]he distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law", and Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 702 (2011), which notes that "[a]lthough there is very little agreement about the core 'purpose' of the First Amendment, there is near unanimity that *one* such purpose—and certainly a core function—is to protect private viewpoints from government regulation. Thus the Amendment flatly prohibits the government from engaging in viewpoint discrimination, even within classes of speech that could otherwise be completely proscribed." (citations omitted).

[30] For the most part, Frank Murphy was a real progressive. For example, Murphy "established the first civil liberties unit in the Justice Department" while he was Attorney General. Eugene Gressman, *Frank Murphy*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 394, 394 (Roger K. Newman ed., 2009). Murphy also registered a courageous dissent in Korematsu v. United States, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting) ("This exclusion of 'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.").

[31] *See* 1 SMOLLA, *supra* note 1, § 3.04[2][a] (deeming *Chaplinsky*'s approach "outdated"); *see also* John F. Wirenius, *The Road Not Taken: The Curse of* Chaplinsky, 24 CAP. U. L. REV. 331, 339 (1995) (tracing the history of *Chaplinsky*).

in *Chaplinsky v. New Hampshire*,[32] wherein the Court rejected First Amendment absolutism.[33] Here (yet again) is the infamous passage from Murphy's 1942 opinion for the Court:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. 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. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[34]

Incredibly, Justice Murphy's "casual dictum became the

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[32] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The case was argued by Hayden Covington, the appellate counsel for the Jehovah's Witnesses. *Id.* at 568. Covington had argued many First Amendment cases in the High Court, including Cantwell v. Connecticut, 310 U.S. 296 (1940), W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), and Marsh v. Alabama, 326 U.S. 501 (1946). Between 1938 and 1955, he prevailed in thirty-six of the forty-five cases he took to the Supreme Court. *See* Shawn Francis Peters, *Hayden Covington*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 131, 131–32 (Roger K. Newman ed., 2009). *See also* John R. Vile, *Hayden C. Covington*, *in* 1 ENCYCLOPEDIA OF THE FIRST AMENDMENT 353, 353 (John R. Vile et al. eds., 2009). In commenting on the factual posture of the case, the late professor Walter Murphy noted:

> The *Chaplinsky* case was the first Jehovah's Witness controversy decided by the Court during Jackson's tenure, and its overtones could scarcely have impressed the new [and very Catholic] Justice with the righteousness of the Witnesses' cause. The excesses of [Walter] Chaplinsky may have made it easier for Jackson to remark in a later case "that the singular persistence of the turmoil about Jehovah's Witnesses, one which seems to result from the work of no other sect, would suggest to this Court a thorough examination of their methods to see if they impinge unduly on the rights of others."

Walter F. Murphy, *Mr. Justice Jackson, Free Speech, and the Judicial Function*, 12 VAND. L. REV. 1019, 1025–26 (1959) (quoting Douglas v. City of Jeannette, 319 U.S. 157, 181 (1943) (Jackson, J., concurring in the result)). "The only nonunanimous decision involving Jehovah's Witnesses in which Jackson voted for the Witnesses was *West Virginia State B*[*oard*] *of Educ*[*ation*] *v. Barnette*." Murphy, *supra*, at 1026 n.29. Professor Murphy, however, overlooked Justice Murphy's vote and concurrence in another Witnesses' case, Martin v. City of Struthers. 319 U.S. 141, 149 (1943) (Murphy, J., concurring) (striking down a local ordinance that prohibited any person from distributing handbills, circulars or other advertisements to ring the doorbell of a private home, by a 5–4 vote).

[33] *Chaplinsky*, 315 U.S. at 571.

[34] *Id.* at 571–72 (footnotes omitted).

constitutional orthodoxy"[35] of First Amendment law and has remained so for decades afterwards. More importantly, it "provided a First Amendment technique, categorization, so influential that it continues to rival the clear-and-present-danger test today."[36] For Harry Kalven, as with other defenders of free speech, that "unfortunate" and "broad dictum . . . haunted constitutional law."[37] Perhaps that explains why, as late "as June of 1992 the Court was still describing the *Chaplinsky* approach as operative only in 'a few limited areas.'"[38] Two years later, Professor Rodney Smolla labeled the *Chaplinsky* dictum as "mechanical and conclusory."[39] Predictably, that dictum came to be "largely . . . discredited and abandoned."[40] Or as Terry Eastland put it: "[t]ime has weathered the two-tier theory."[41] But nothing endures quite like change, and as we will soon see, *Chaplinsky*'s two-level theory of the First Amendment has regained some of its doctrinal staying power, albeit of a different kind, and used for different purposes.

Before proceeding further, it is useful to note something significant when considering *Chaplinsky*'s two-level theory of First Amendment analysis.[42] That is, it is important to bear in mind that

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[35] Wirenius, *supra* note 31, at 342. *See Martin*, 319 U.S. at 155 (Reed, J., dissenting) ("Freedom to distribute publications is obviously a part of the general freedom guaranteed the expression of ideas by the *First Amendment*. It is trite to say that this freedom of expression is not unlimited. Obscenity, disloyalty and provocatives do not come within its protection.") (emphasis added); Winters v. New York, 333 U.S. 507, 510 (1948) (repeating *Chaplinsky*'s categories).

[36] WILLIAM M. WIECEK, 12 THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 160 (2006).

[37] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 18 (Jamie Kalven ed., 1988). Kalven added, "[d]oubtless, Justice Murphy," who was otherwise liberal on free speech issues, "would have been appalled, had he been confronted with an effort to apply his general premise outside the context of [the facts of the case:] an immediate threat to order." *Id.*

[38] Jeffrey M. Shaman, *The Theory of Low-Value Speec*h, 48 SMU L. REV. 297, 303 (1995) (quoting R.A.V. v. City of St. Paul, 505 U. S. 377, 382–83).

[39] 1 SMOLLA, *supra* note 1, § 3.04[2][a].

[40] *Id.* One commentator has observed:

> Serious questions also exist about the basic validity of the low-value speech theory. Constitutional scholars have said that it is a theory at odds with fundamental First Amendment principles, that the government has no business evaluating the content of speech and may regulate speech only when it is the cause of serious harm.

Shaman, *supra* note 38, at 300 (footnotes omitted).

[41] FREEDOM OF EXPRESSION IN THE SUPREME COURT: THE DEFINING CASES 54 (Terry Eastland ed., 2000).

[42] In a perceptive article, Michael Coenen has recently observed: "First Amendment litigation tends to proceed as a winner-take-all affair. Speech is either protected, in which case it may not be punished, or unprotected, in which case it may be punished to a very great degree. In this respect, the standard method of First Amendment analysis is *penalty*-

Justice Murphy's dictum consisted of *two* separate prongs. The first prong—what I refer to as the *categories prong*—consists of the specific categories of unprotected speech as set out by the *Chaplinsky* Court[43]:

(1) lewd expression;[44]
(2) obscene expression;[45]
(3) profane expression;[46]
(4) libelous expression;[47] and
(5) fighting words.[48]

Beyond the above five categories listed in *Chaplinsky*, there are *at*

neutral." Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 994 (2012) (footnote omitted).

[43] *See* DAVID M. O'BRIEN, CONGRESS SHALL MAKE NO LAW: THE FIRST AMENDMENT, UNPROTECTED EXPRESSION, AND THE SUPREME COURT 11 (2010). Commercial speech was also unprotected at the time *Chaplinsky* was handed down. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). *But see* Bigelow v. Virginia, 421 U.S. 809, 819, 825–26 (1975) (holding that newspaper editor's First Amendment rights were infringed by Virginia statute even though a commercial advertisement was involved); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 760, 770 (1976) (concluding that commercial speech is protected). Likewise, at the time of the *Chaplinsky* ruling, cinematic movies were not protected under the First Amendment. *See* Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244–45 (1915), *overruled by* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

[44] *Cf.* Reno v. ACLU, 521 U.S. 844, 858–59, 885 (1997) (striking down two provisions of the Communications Decency Act of 1996).

[45] *See* Miller v. California, 413 U.S. 15, 25 (1973) (providing examples of what could be considered "obscene" and thus regulated by the states).

[46] *But see* Lucas v. Arkansas, 416 U.S. 919, 919 (1974) (vacating judgment that upheld conviction for use of profane and hostile language); Gooding v. Wilson, 405 U.S. 518, 526, 528 (1972) (quoting Elmore v. State, 83 S.E. 799, 799–800 (Ga. Ct. App. 1914)) (striking down "'opprobrious [words] or abusive language'" law on vagueness and overbreadth grounds); Cohen v. California, 403 U.S. 15, 26 (1971) (upholding First Amendment right to wear jacket with profane message in public place).

[47] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (footnotes omitted) ("Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."). There is also the matter of *trade libel*. *See, e.g.*, Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990) (holding that the tort of trade libel is constitutional provided there is "actual malice").

[48] *Compare* R.A.V. v. City of St. Paul, 505 U.S. 377, 388–89 (1992) (prohibiting a city ordinance from placing restrictions on individuals with objectionable views), *with Cohen*, 403 U.S. at 16, 20 (limiting *Chaplinsky*'s definition of "fighting words" to face-to-face verbal challenges likely to provoke an instant breach of peace, in the course of reversing a conviction for wearing the words "Fuck the Draft" on a jacket in a Los Angeles courthouse corridor).

least forty-three other *additional* types[49] of unprotected expression:

(1) blackmail;[50]
(2) bribery;[51]
(3) misleading or fraudulent commercial expression;[52]
(4) incitement to lawless action;[53]
(5) expression that violates an intellectual property right;[54]
(6) criminal conspiracy expression;[55]
(7) threatening expressions;[56]
(8) expression that endangers national security;[57]
(9) insider trading expression;[58]
(10) perjurous expression;[59]
(11) harassment-in-the-workplace expression;[60]

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[49] To be clear, a category of speech may include within it several kinds or types of speech, all of which might loosely be categorized under a single topic. But in the end, this may prove to be of little real practical moment. For consider: does it make much real difference if the forty some exceptions are tagged categories or types? This speaks to Professor William Wiecek's point, namely, that "*Chaplinsky*['s] categories tend not only to multiply but to bifurcate, as well." WIECEK, *supra* note 36, at 166. *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1783–85 (2004) (exploring the absence of First Amendment issues in a variety of subject areas); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 265–66 (1981) (analyzing the three different categorizations prevalent in First Amendment doctrine). I gladly acknowledge my partial reliance in what follows on the informative amicus brief filed by Professors Eugene Volokh and James Weinstein in *United States v. Alvarez*. Brief of Professors Eugene Volokh & James Weinstein as Amici Curiae Supporting Petitioner, United States v. Alvarez, 132 S. Ct. 2537 (2011) (No. 11-210) [hereinafter Volokh & Weinstein Brief].

[50] *See* Comment, *Coercion, Blackmail, and the Limits of Protected Speech*, 131 U. PA. L. REV. 1469, 1477–78 (1983).

[51] THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 6 (Saul Levmore & Martha C. Nussbaum eds., 2010).

[52] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

[53] Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam).

[54] *See* Eldred v. Ashcroft, 537 U.S. 186, 217 (2003); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557–58 (1985).

[55] *See* KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 59 (2004).

[56] Virginia v. Black, 538 U.S. 343, 368 (2003) (Stevens, J., concurring); Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam). *See also* Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 340 (2011) (explaining the difficulties lower courts face in determining what type of speech the Supreme Court would "characterize[] as both advocating and threatening," and thus be unprotected speech).

[57] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 737–40 (1971) (White, J., concurring).

[58] Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 296 (1988).

[59] *See* TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 55 (2012); WERHAN, *supra* note 55, at 70.

(12) expression in contempt of court;[61]
(13) plagiaristic expression;[62]
(14) criminal solicitation (*e.g.*, prostitution or murder for hire);[63]
(15) child pornography;[64]
(16) speech that amounts to bullying;[65]
(17) intentionally false speech likely to create a dangerous public panic;[66]
(18) intentionally misrepresenting oneself as a government official;[67]
(19) intentionally false statements made to voters concerning authorship or endorsement of political campaign materials;[68]
(20) certain kinds of intentionally false statements made by a candidate in an election campaign;[69]
(21) certain kinds of prisoner expression;[70]

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[60] Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 465 (1995).

[61] Toledo Newspaper Co. v. United States, 247 U.S. 402, 414, 421 (1918); *cf.* Wood v. Georgia, 370 U.S. 375, 396 (1962) (Harlan, J., dissenting) (citing Patterson v. Colorado, 205 U.S. 454, 462 (1907)).

[62] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985).

[63] *See* WERHAN, *supra* note 55, at 66, 75.

[64] New York v. Ferber, 458 U.S. 747, 754, 763 (1982) (noting support for upholding a New York child pornography law) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

[65] *See, e.g.*, *Policies & Laws*, STOPBULLYING.GOV, http://www.stopbullying.gov/laws/index.html (last visited Jan. 23, 2013) (providing information on anti-bullying laws by state).

[66] *See, e.g.*, United States v. Brahm, 520 F. Supp. 2d 619, 621–22, 626 (D.N.J. 2007) (upholding 18 U.S.C. § 1038(a)(1) (2006) against a constitutional challenge regarding posting a false message on the Internet about purported detonation of explosive devices in targeted cities).

[67] *See, e.g.*, 18 U.S.C. § 912 (2006) (prohibiting the impersonation of federal officials).

[68] *See, e.g.*, United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86, 93 (2d Cir. 1997) (explaining that there is no First Amendment right to confuse voters using false statements in campaign materials).

[69] *See, e.g.*, Treasurer of the Comm. to Elect Gerald D. Lostracco v. Fox, 389 N.W.2d 446, 449 (Mich. Ct. App. 1986) (rejecting First Amendment challenge regarding false claims made in an advertisement that candidate was the incumbent).

[70] *See* Beard v. Banks, 548 U.S. 521, 528 (2006). As Justice Breyer noted in *Beard*: while "imprisonment does not automatically deprive a prisoner of certain important constitutional protections, . . . the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere. . . . [C]ourts owe 'substantial deference to the professional judgment of prison administrators.'" *Id.* (quoting Overton v. Bazzetta, 539 U.S. 126, 132 (2003)). Here, the level of judicial scrutiny is so low as to make the First Amendment "right" almost meaningless. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). To my knowledge, the

(22) certain kinds of government employee expression;[71]
(23) certain kinds of government-funded expression;[72]
(24) certain kinds of student expression;[73]
(25) certain kinds of expression by those in the military;[74]
(26) expression deemed secret, owing to a private contract or a government regulation or law;[75]
(27) expression that unfairly places another in a false light;[76]
(28) intentional expression that causes emotional distress;[77]
(29) expression in violation of anti-trust laws;[78]
(30) expression that causes prejudicial publicity that interferes with a fair trial;[79]

Court has never sustained a prisoner's free speech rights claim (as distinguished from a religious claim) under the First Amendment. *See Overton*, 539 U.S. at 131 ("The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.").

[71] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that a deputy district attorney's statements in a memorandum to his superiors were made pursuant to his official duties as a prosecutor and thus were not protected under the First Amendment).

[72] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 583, 587–88, 590 (1998) (holding that the statute governing the award of federal grant money to support the arts, and its requirement that general standards of "decency and respect" be taken into consideration, did not violate the First Amendment).

[73] Morse v. Frederick, 551 U.S. 393, 406 (2007) (concluding that students' First Amendment rights are more limited and are put in the context of proper school administration); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (concluding that a school could constitutionally punish a student-delivered sexually charged monologue which contained vulgar and lewd speech as undermining the school's mission in furthering strong civility in the student body).

[74] Brown v. Glines, 444 U.S. 348, 354 (1980) (holding a U.S. Air Force regulation that restricted the circulation of petitions on air force bases as protecting a substantial governmental interest and thus not infringing upon the First Amendment); Parker v. Levy, 417 U.S. 733, 758 (1974) (holding that articles of the Uniform Code of Military Justice which permitted court martial for unbecoming conduct did not violate the First Amendment, in part, because of the unique needs of ensuring obedience and discipline within the military).

[75] *See* United States v. Aguilar, 515 U.S. 593, 605 (1995) (upholding a statute prohibiting dissemination of wiretaps against a First Amendment challenge)

[76] Time, Inc. v. Hill, 385 U.S. 374, 389–90 (1967) (holding that the First Amendment does not shield calculated falsehoods from liability, in damages arising out of a New York right of privacy statute).

[77] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48, 56 (1988) (declining to uphold tort liability for infliction of emotional distress arising from a pornographic parody of Reverend Jerry Falwell by Larry Flynt and Hustler Magazine as Flynt failed to show actual malice).

[78] Lorain Journal Co. v. United States, 342 U.S. 143, 155–56 (1951); *see* Citizen Publ'g Co. v. United States, 394 U.S. 131, 139 (1969) (holding that a private agreement between two newspaper companies that had the effect of restraining competition did not enjoy First Amendment protection).

[79] *See* Sheppard v. Maxwell, 384 U.S. 333, 350–51 (1966). *But see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (explaining that the First Amendment prohibits the

(31) intentionally disclosing the identity of secret government agents;[80]
(32) certain kinds of expression that invade the privacy of another;[81]
(33) certain kinds of expression limited by time, place, and manner restrictions;[82]
(34) certain kinds of expression that involve intentional lying;[83]
(35) certain kinds of expression by sitting judges;[84]
(36) certain kinds of expression aired on the public airwaves;[85]
(37) certain kinds of panhandling;[86]
(38) certain kinds of telemarketing;[87]
(39) certain kinds of speech harmful to minors;[88]
(40) certain kinds of commercial solicitation (*e.g.*, lawyers soliciting business);[89]
(41) certain kinds of expression concerning the unauthorized practice of some licensed profession (*e.g.*, medicine or law);[90]
(42) certain kinds of intentional lying to government officials (e.g.,

government "from summarily closing courtroom doors . . . to the public," which would otherwise "eviscerate[]" the freedom of the press).

[80] Robert W. Bivins, Note, *Silencing the Name Droppers: The Intelligence Identities Protection Act of 1982*, 36 U. FLA. L. REV. 841, 846 n.38, 855 (1984).

[81] *See* Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1273 (1976); Alice Marie Beard, The Right to Privacy vs. The First Amendment: Is a Private Person Protected Against the Publicizing of His Private Facts? (1974) (unpublished essay, University of Maryland), *available at* http://alicemariebeard.com/law/privacy.htm (last visited Jan. 23, 2013).

[82] Hill v. Colorado, 530 U.S. 703, 725, 730 (2000).

[83] *See, e.g.*, Volokh & Weinstein Brief, *supra* note 49, at 2–11 (listing varieties of intentional lying regulated by various federal and state laws).

[84] *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886–87 (2009).

[85] *See* FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (quoting *Chaplinsky* in the course of upholding FCC sanctions against a radio broadcaster for airing comedian George Carlin's infamous "Filthy Words" monologue); *id.* at 750–51 (Stevens, J., plurality opinion) (finding that radio was uniquely accessible to children and as such, the sanction was valid).

[86] Gresham v. Peterson, 225 F.3d 899, 903, 905–07 (7th Cir. 2000); Smith v. City of Fort Lauderdale, 177 F.3d 954, 955–56 (11th Cir. 1999).

[87] *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 618–19, 623–24 (2003).

[88] Ginsberg v. New York, 390 U.S. 629, 635, 641–43 (1968).

[89] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–66 (1980).

[90] *See* Bhd. of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 6 n.10 (1964) (noting that a state has broad powers to regulate the unauthorized practice of law, notwithstanding a First Amendment challenge, though ruling that the restriction at issue was unconstitutionally broad).

lying to Congress while under oath, or false police reports);[91] and

(43) certain kinds of evidence introduced into court and in-courtroom expression governed by the rules of evidence.[92]

Since the *Chaplinsky* Court considered its five categories to be illustrative,[93] there remains the real possibility that some or all of the forty-three examples listed above will come into the sunlight of their own doctrinal illumination.[94]

The second level of *Chaplinsky*—what I refer to as the *low-value speech prong*—was premised less on particular categories of speech than on the value of the expression in question.[95] By that measure, and given what Justice Murphy wrote, unprotected speech was any kind of expression that either is (i) unessential to the exposition of ideas or (ii) expression that has little instrumental value in pursuing truth.[96] If a certain kind of speech lacked such normative values,[97] then it could easily be added to any list of unprotected speech. Traces of this line of thinking appeared during Justice Sonia Sotomayor's exchange with Solicitor General Donald B. Verrilli in *Alvarez*.[98] At one point in that argument, Justice Sotomayor stated: "That there are no circumstances in which this

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[91] *See, e.g.*, State v. Bailey, 644 N.E.2d 314, 317, 318 (Ohio 1994) (holding that lying to a police officer in order to interfere with the officer's attempt to apprehend a criminal constitutes obstruction of justice).

[92] *In re* Williams, 414 N.W.2d 394, 397 (Minn. 1987).

[93] *See Chaplinsky*, 315 U.S. at 572 (utilizing the word "include" to describe classes of speech).

[94] I will say a bit more about this when I discuss Justice Kennedy's plurality opinion in *United States v. Alvarez*. *See infra* text accompanying note 225.

[95] *Chaplinsky*, 315 U.S. at 572.

[96] Justice Antonin Scalia drew on this prong in his majority opinion in *R.A.V.*:

> 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."

R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (quoting *Chaplinsky*, 315 U.S. at 572).

[97] Consider Justice Edwin L. Page's dictum in *State v. Chaplinsky*: "The fundamental basis of the constitutional rule is the necessity for full and free discussion of all subjects which affect ways of life, including religious, social and governmental questions. This is 'essential to the very existence and perpetuity of free government.'" State v. Chaplinsky, 18 A.2d 754, 759 (N.H. 1941) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 596 (University Press, 7th ed. 1903) (1896)).

[98] Transcript of Oral Argument at 4, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11-210), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-210.pdf.

speech has value. . . . I believe that's your bottom line."[99] To which General Verrilli replied: "[T]his Court has said in numerous contexts . . . that the calculated factual falsehood has no First Amendment value for its own sake."[100] Later in the argument, during an exchange between Chief Justice John Roberts and Jonathan Libby (counsel for Mr. Alvarez), the Chief Justice asked: "What is . . . the First Amendment value in a lie, a pure lie?"[101] To which Mr. Libby replied (though not by way of the most persuasive of answers): "Just a pure lie? There can be a number of values. There's the value of personal autonomy."[102]

If the value prong is indeed the jurisprudential touchstone, then it matters not whether a certain kind of expression was or was not historically exempted from First Amendment coverage, provided that such expression is of low value (i.e., unimportant to the exposition of ideas or to the pursuit of truth).[103] While *Chaplinsky*'s two prongs could work in tandem, they need not so. For example, employing the low value speech prong, one might reasonably argue that crush-video expression of the kind discussed in *Stevens*[104] is worthless in light of the norms articulated in *Chaplinsky*.[105] In other words, *Chaplinsky*'s second prong can readily cannibalize its first prong.

As we will see in what follows, the Roberts Court has, on the one hand, slightly *expanded* the list of *Chaplinsky*'s stated categories of unprotected expression.[106] On the other hand, that same Court has shown no signs of moving away from the jurisprudence of its predecessors in *diminishing* the domain of *Chaplinsky*'s original exceptions. (For example, pre-Roberts Courts have held that

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[99] *Id.*

[100] *Id.* at 5.

[101] *Id.* at 27.

[102] *Id.*

[103] *See* Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 358 (2009). Regarding the *Chaplinsky* opinion, Smolla wrote:

> I wish to isolate Justice Murphy's theoretical justification that such words may be banished from society because such classes of expression 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."

Id. at 318 (quoting *Chaplinsky*, 315 U.S. at 572).

[104] United States v. Stevens, 130 S. Ct. 1577, 1583 (2010).

[105] *See Chaplinsky*, 315 U.S. at 571–72.

[106] *See supra* note 48 and accompanying text.

defamation is not entirely unprotected,[107] and lewd and profane speech is sometimes protected.[108]) Moreover, the current Court has generally declined to expressly invoke *Chaplinsky*'s low-value speech prong as a rationale for enlarging the realm of unprotected expression.[109] In fact, the Court seems to have moved in the opposite conceptual direction. Simply consider what Justice John Paul Stevens said for a unanimous Court in *Meyer v. Grant*[110]: "The First Amendment is a value-free provision whose protection is not dependent on the truth, popularity, or social utility of the ideas and beliefs which are offered."[111] The result of that line of thinking has produced a sea of change in how *Chaplinsky* is used and how we perceive it. While some earlier Courts relied on *Chaplinsky*'s two-level theory to cabin free speech protection,[112] the Roberts Court has sometimes taken an entirely different approach, one that expands the domain of protected speech.[113] In doing so, it has produced an exceptional kind of freedom in which certain kinds of speech are sometimes categorically protected unless they are among the designated kinds of expression definitely exempted from First Amendment protection.

EXCEPTIONAL FREEDOM: FOUR ROBERTS COURT CASES

Years after many proclaimed the demise of the *Chaplinsky* dictum, Patricia Millett, an exceptionally skilled appellate lawyer[114]

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[107] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

[108] *See* Reno v. ACLU, 521 U.S. 844, 849, 874–75, 885 (1997) (striking down two provisions of the Communications Decency Act of 1996 while stating that at times, lewd behavior may be proscribed, especially where children have likely access).

[109] *See* Nicole B. Cásarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 517–18 (2000).

[110] Meyer v. Grant, 486 U.S. 414 (1988).

[111] *Id.* at 419 (quoting Grant v. Meyer, 828 F.2d 1446, 1455 (10th Cir. 1987)) (internal quotation marks omitted).

[112] *See, e.g.*, Roth v. United States, 354 U.S. 476, 484–85 (1957) (discussing obscenity as historically not protected under freedoms of speech and press as being without social value, as opposed to unorthodox, controversial ideas).

[113] *See, e.g.*, the cases discussed in the next section of this Foreword.

[114] Ms. Millett has argued some thirty-one cases before the U.S. Supreme Court (the most of any woman in history) and approximately thirty-six in the federal courts of appeals. *Patricia Ann Millett*, AKIN GUMP STRAUSS HAUER & FELD LLP, http://www.akingump.com/pmillett (last visited Nov. 9, 2012). "She has briefed scores of cases in the Supreme Court and appellate courts across the nation." *Id.* From August 1996 to September 2007, Ms. Millett served as an Assistant to the Solicitor General in the Office of the Solicitor General at the U.S. Department of Justice, in Washington, D.C. *Id.* For a sampling of her views on the First Amendment and the Roberts Court, see Patricia Millett et

with Akin Gump Strauss Hauer and Feld,[115] revisited that dictum, but did so to *advance* her First Amendment arguments in *Stevens*.[116] In her merits brief, Ms. Millett argued[117] that the government ran afoul of the First Amendment when it enacted an animal crush video law and engaged in content discrimination.[118] Taking exception to the government's argument,[119] Millett began by arguing that "Congress [c]annot [c]reate [c]ategories [o]f [u]nprotected [s]peech [t]hrough [*a*]*d* [*h*]*oc* [b]alancing."[120] "If the First Amendment meant to permit such a balancing test, then the First Amendment would read more like the Fourth Amendment, proscribing only 'unreasonable' prohibitions on speech."[121] And then, to expand her argument for robust free speech protection, Ms. Millett drew on *R.A.V. v. City of St. Paul*[122] and noted that "the constraints of history and tradition explain why, 'since the 1960's,' this Court has steadily 'limited' and 'narrowed the scope of the traditional categorical exceptions.'"[123] That is, the *Chaplinsky* categories of unprotected speech had "gotten narrower, not broader,"[124] she argued. Not only had the *Chaplinsky* dictum come to be severely confined, it had come to be seen as a bar to prevent Congress from "writ[ing] itself out of the First Amendment's prohibition"[125] against abridging speech except in a *narrowly* defined class of specified exceptions.[126]

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al., *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1, 38–39 (2010).

[115] Ms. Millett heads Akin Gump's Supreme Court practice and co-heads the firm's national appellate practice. *Patricia Ann Millett*, *supra* note 114.

[116] United States v. Stevens, 130 S. Ct. 1577, 1582 (2010).

[117] Brief for the Respondent, *Stevens*, 130 S. Ct. 1577 (No. 08-769). Thomas Goldstein, who was then at Akin Gump Strauss Hauer & Feld LLP, was also on the brief. *Id.*

[118] *Id.* at 38, 41. See 18 U.S.C. § 48 (2006), the "animal crush videos" statute that was struck down by the Court in *Stevens* as unconstitutionally overbroad and in violation of the First Amendment. *Stevens*, 130 S. Ct. at 1592.

[119] Elena Kagan, then Solicitor General, had helped draft the government's brief in *Stevens*, and her name appeared on that brief. Brief for the United States at 49, *Stevens*, 130 S. Ct. 1577 (No. 08-769). Neal Katyal, then Deputy Solicitor General, argued the case for the government. Transcript of Oral Argument at 1, *Stevens*, 130 S. Ct. 1577 (No. 08-769) [hereinafter Transcript of Oral Argument for *Stevens*], *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-769.pdf.

[120] Brief for the Respondent, *supra* note 117, at 14.

[121] *Id.* (quoting U.S. CONST. amend. IV).

[122] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[123] Brief for the Respondent, *supra* note 117, at 16 (quoting *R.A.V.*, 505 U.S. at 383).

[124] *Id.*

[125] *Id.* at 18.

[126] It was also significant, though, for non-jurisprudential reasons, that the National Rifle Association filed an amicus brief in support of the Respondent, Robert J. Stevens. Brief for

Patricia Millett's arguments[127] were well received by the Roberts Court, which sustained her First Amendment arguments by an 8-1 margin.[128] For our purposes, what is noteworthy[129] is how Chief Justice John Roberts built on Ms. Millett's arguments in his majority opinion and how that opinion smacked of a new kind of First Amendment absolutism. His comments, which I will quote shortly, came on the heels of the following argument made by then-Solicitor General Elena Kagan and then-Deputy Solicitor General Neal Katyal in their merits brief for the government: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."[130] The Chief Justice took strong exception to that expansion of *Chaplinsky*:

> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.[131]

And then drawing on *Chaplinsky* and other cases, Roberts stressed *five* areas of unprotected speech:

> "From 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 traditional limitations."[132] . . . These "historic and traditional categories [are] long familiar

Nat'l Rifle Ass'n of America, Inc. as Amici Curiae Supporting Respondent at 3, United States v. Stevens, 130 S. Ct. 1577 (2009) (No. 08-769).

[127] *See* Lyle Denniston, *Analysis: Animal Cruelty Law in Trouble*, SCOTUSBLOG (Oct. 6, 2009, 11:29 AM), http://www.scotusblog.com/?p=11476 ("Katyal had been challenged rigorously throughout his argument, but Millett did not encounter any serious pressure, until Justice Alito opted to join actively in the questioning.").

[128] United States v. Stevens, 130 S. Ct. 1577, 1582 (2010).

[129] Central to the ruling in *Stevens* was the fact that the federal law in question explicitly regulated expression based on content, which rendered it presumptively invalid. *See* Nadine Strossen, United States v. Stevens*: Restricting Two Major Rationales for Content-Based Speech Restrictions*, CATO SUP. CT. REV. 67, 77 (2010).

[130] Brief for the United States, *supra* note 119, at 8.

[131] *Stevens*, 130 S. Ct. at 1585.

[132] *Id.* at 1584 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)).

> to the bar,"[133] . . . [and include] *obscenity*,[134] . . . *defamation*,[135] . . . *fraud*,[136] . . . *incitement*,[137] . . . and *speech integral to criminal conduct*[138] . . . . [They] are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[139]

In hewing closely to *Chaplinsky*'s traditional exceptions, the *Stevens* majority refused either to analogize to other exceptions to uphold the animal crush video law,[140] or to employ a balancing test by which to evaluate that law. As the Chief Justice put it ever so succinctly: "we decline to carve out from the First Amendment any novel exception."[141]

Since the animal cruelty law, as written,[142] did not fall within one of the narrowly defined class of *Chaplinsky* exceptions, the law was struck down as facially unconstitutional and impermissibly

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[133] *Stevens*, 130 S. Ct. at 1584 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment)).

[134] *Stevens*, 130 S. Ct. at 1584 (citing Roth v. United States, 354 U.S. 476, 483 (1957)).

[135] *Stevens*, 130 S. Ct. at 1584 (citing Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952)).

[136] *Stevens*, 130 S. Ct. at 1584 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

[137] *Stevens*, 130 S. Ct. at 1584 (citing Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam)).

[138] *Stevens*, 130 S. Ct. at 1584 (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).

[139] *Stevens*, 130 S. Ct. at 1584 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

[140] The Stevens majority rejected the following argument tendered by Justice Samuel Alito in dissent:

> It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty. . . . But before the enactment of [the federal animal crush video law], the underlying conduct depicted in crush videos was nearly impossible to prosecute.
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> . . . .
>
> In light of the practical problems thwarting the prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only effective way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct.

Stevens, 130 S. Ct. at 1598 (Alito, J., dissenting) (citations omitted).

[141] *Id.* at 1586 (majority opinion).

[142] After *Stevens*, the Act was rewritten to squarely place and confine the actions prohibited to a traditional *Chaplinsky* exception, namely, obscenity. *See* Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177 (2010). In that regard, Congress specifically found that "[t]he United States has a long history of prohibiting the interstate sale, marketing, advertising, exchange, and distribution of obscene material and speech that is integral to criminal conduct," and "[i]n the judgment of Congress, many animal crush videos are obscene." *Id.* §§ 2(1), 2(6), 124 Stat. at 3177.

overbroad.[143]

The *Stevens* case, as first argued by Ms. Millett and then as ruled upon by Chief Justice Roberts in his majority opinion, reveals how *Chaplinsky* has been limited by a most narrow reading of its exceptions, and has likewise been further constrained by judicial doctrines such as overbreadth. The result is a kind of near-absolutist tenet of First Amendment jurisprudence, which establishes a virtually impossible bar for the government to overcome. Moreover, the proverbial default position is protected expression unless the government can show that the speech in question falls within one of the recognized *Chaplinsky* exceptions.[144]

There was also another aspect of the *Stevens* case that warrants highlighting. It concerns what I have previously referred to as the low-value speech prong of *Chaplinsky*.[145] Despite Chief Justice Roberts's queries during oral arguments in *Stevens*,[146] in the end he seemed little concerned about the low-value speech prong. As he put it in his majority opinion: "[*m*]*ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation."[147] In this respect, the Chief Justice seemed to be giving new staying power to Justice Anthony Kennedy's dictum in *United States v. Playboy Entertainment Group, Inc.*[148]: the government cannot justify regulation of expression on the premise that "the speech is not very important."[149] Thus understood, much of the worth of *Chaplinsky*'s second prong was likewise undermined.

Stevens was not, however, the end of the new absolutism story; rather, it was just the beginning, as the next case reveals.

Snyder v. Phelps—the case of the small and bizarre religious sect that felt called by God to protest at military funerals—was one of those First Amendment cases that tested the steel of one's commitment to free speech principles.[150] Walter Dellinger, a liberal

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143 *See Stevens*, 130 S. Ct. at 1592.

144 *See* Paul E. Salamanca, Snyder v. Phelps*: A Hard Case that Did Not Make Bad Law*, CATO SUP. CT. REV. 57, 78 (2011).

145 *See supra* text accompanying notes 95–105.

146 Transcript of Oral Argument for *Stevens*, supra note 119, at 37, 41, 57.

147 *Stevens*, 130 S. Ct. at 1591 (quoting 18 U.S.C. § 48(b) (2006)).

148 United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000).

149 *Id.* at 826.

150 Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011).

defender of some First Amendment causes,[151] argued against the rights claimed by Reverend Fred W. Phelps, Sr.[152] In urging that the Court let stand a substantial damages award against the Kansas preacher and his anti-gay crusade,[153] Dellinger (a partner at O'Melveny & Myers LLP and a former law professor)[154] argued that the speech in question was simply too offensive to deserve constitutional protection.[155] Much to the same effect, the amicus brief for the state of Kansas, and forty-seven other states and the District of Columbia, essentially urged the Court to create a new exception ("The [s]anctity [a]nd [p]rivacy [o]f [f]unerals [i]s [u]nique"[156] and thus warrants unique treatment) or shoehorn the facts of this case into an existing exception (the intentional infliction of emotional distress).[157]

On the other side there was Margie J. Phelps, lawyer and daughter of Reverend Fred Phelps, the Respondent.[158] Though nowhere as seasoned a constitutional lawyer as Mr. Dellinger, Ms. Phelps realized the importance of following in the analytical steps of Ms. Millett, and in drawing on *Stevens* to buttress her case. Here is the way she put it in her merits brief to the Court:

> Liability in this case would, essentially, carve out a

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[151] *See* Tony Mauro, *Walter E. Dellinger III*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 159 (Roger K. Newman ed., 2009).

[152] Brief for Senator Harry Reid et al., as Amici Curiae Supporting Petitioner at 4–5, *Snyder*, 131 S. Ct. 1207 (No. 09-751).

[153] As Lyle Denniston, reporting for SCOTUSblog, described the case: "The family of the dead soldier had won a verdict before a jury, but that was overturned by the Fourth Circuit Court, finding that the signs displayed at the funeral in western Maryland and later comments on an anti-gay website were protected speech. The petition for review seeks the Court's protection for families attending a funeral from 'unwanted' remarks or displays by protesters." Lyle Denniston, *Court to Rule on Funeral Pickets*, SCOTUSBLOG (Mar. 8, 2010, 10:36 AM), http://www.scotusblog.com/?p=17263.

[154] Mauro, *supra* note 151, at 159. Currently on leave from Duke Law School, Dellinger served as a law clerk to Justice Hugo Black during the 1968–69 Term. *Id.*

[155] Brief for Senator Harry Reid et al., *supra* note 152, at 4–5 ("State tort laws supplement [state and federal anti-]funeral picketing regulations in deterring harmful conduct at private funerals and protecting the rights of mourners to express their own private messages of grief and tribute. . . . The right to speak freely about matters of public concern does not encompass insults and verbal abuse intended to invade a private memorial ceremony and injure its participants. Respondents were and are free to convey their repugnant message in virtually any public manner they choose. But they were not free to hijack petitioners' private funeral as a vehicle for expression of their own hate.").

[156] Brief for the State of Kansas et al., as Amici Curiae in Support of Petitioner at 5–17, Snyder v. Phelps, 131 S. Ct. 1207 (2010) (No. 09-751).

[157] *Id.* at 2–5.

[158] Tony Mauro, *'Hurtful Speech on Public Issues' Ruled Protected*, N.Y.L.J., Mar. 3, 2011, at 1.

> category of speech based on viewpoint, and strip it of constitutional protection, simply because society dislikes (or deems valueless or unnecessary) speaking ill of the dead (especially if the dead is a soldier). "As a free-floating test for *First Amendment* coverage, [that proposal] is startling and dangerous. The *First Amendment's* guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social cost and benefits." This is what Petitioner seeks – treating speech that speaks ill of the military-dead or is subjectively deemed outrageous to mourners of the military-dead as unprotected. The Court should decline to carve out such a "novel" exception that is "highly manipulable."[159]

And the *Snyder* Court, by an 8–1 majority, with Roberts again writing for the Court and Alito again in dissent, agreed. It elected not to create a "novel" exception or to cabin the facts into one of *Chaplinsky*'s traditional exceptions.[160] Writing with absolutist-like fervor in response to Justice Alito's claims, and rejecting arguments that the speech in question involved a captive audience,[161] inflicted emotional distress,[162] amounted to defamation,[163] or fighting words,[164] the Chief Justice declared: "[A]s the court below noted, there is 'no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or fighting words.'"[165]

Also noteworthy, and again reminiscent of what he wrote in *Stevens*, is how little credence, if any, the Chief Justice gave to *Chaplinsky*'s low-value speech prong. To reiterate what Professor Paul Salamanca has keenly observed about the majority opinion, Roberts stressed that the First Amendment protects speech that is "disagreeable,"[166] "distasteful,"[167] "unsettling,"[168] "misguided,"[169]

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[159] Brief for Respondents at 53, *Snyder*, 131 S. Ct. 1207 (No. 09-751) (alteration in original) (quoting United States v. Stevens, 130 S. Ct. 1577, 1585–86 (2010)).

[160] Snyder v. Phelps, 131 S. Ct. 1207, 1219–21 (2011) (finding instead that the speech was "entitled to 'special protection' under the First Amendment" because it was made in a public place and was about a topic of public interest, and therefore Phelps could not be held liable for this speech under any tort action).

[161] *Id.* at 1220.

[162] *Id.*

[163] *Id.* at 1215 n.3.

[164] *Id.*

[165] *Id.* (quoting Snyder v. Phelps, 580 F.3d 206, 218 n.12 (4th Cir. 2009), *rev'd*, 131 S. Ct. 1207 (2011).

[166] Salamanca, *supra* note 144, at 58 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

"scurrilous,"[170] provocative,[171] "contemptuous,"[172] vulgar,[173] "insulting,"[174] "outrageous,"[175] and even "hurtful."[176] Against that backdrop, it would seem to be difficult to prevail on a values argument.

In *Snyder*, as in *Stevens*, the operative presumption[177] given the posture of those cases is that speech is to be protected unless it *clearly* falls into a *designated* category of unprotected expression.[178] By that conceptual yardstick, the default is "protection, or at least presumptive protection."[179]

Paul M. Smith is most well known as the lawyer who successfully argued *Lawrence v. Texas*,[180] the landmark gay rights case.[181] A partner in the Washington, D.C. office of Jenner & Block,[182] the former Lewis Powell law clerk is another skilled Supreme Court advocate and one who had also litigated some important First Amendment cases[183] such as *United States v. American Library Association*.[184] More recently, he argued *Brown v. Entertainment Merchants Association*,[185] the violent video game case.[186] Like

[167] Salamanca, *supra* note 144, at 58 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

[168] Salamanca, *supra* note 144, at 58 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

[169] Salamanca, *supra* note 144, at 58 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995)).

[170] Salamanca, *supra* note 144, at 58 (quoting *Cohen*, 403 U.S. at 22).

[171] Salamanca, *supra* note 144, at 58 (citing *Terminiello*, 337 U.S. at 4).

[172] Salamanca, *supra* note 144, at 58 (quoting Street v. New York, 394 U.S. 576, 593 (1969)).

[173] Salamanca, *supra* note 144, at 58 (quoting *Cohen*, 403 U.S. at 25).

[174] Salamanca, *supra* note 144, at 58 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

[175] Salamanca, *supra* note 144, at 58 (quoting *Boos*, 485 U.S. at 322).

[176] Salamanca, *supra* note 144, at 58 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995)).

[177] That is, at least in cases of content discrimination. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

[178] Salamanca, *supra* note 144, at 78.

[179] *Id.*

[180] Lawrence v. Texas, 539 U.S. 558, 561 (2003).

[181] *See* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 182–83, 270–71 (2012).

[182] *Paul M. Smith*, JENNER & BLOCK, http://jenner.com/people/PaulSmith (last visited Jan. 23, 2013). At Jenner & Block, "[Mr.] Smith is Chair of the Appellate and Supreme Court Practice and Co-Chair of the Media and First Amendment, and Election Law and Redistricting Practices." *Id.* In 2010, the American Bar Association's Section of Individual Rights and Responsibilities awarded Mr. Smith its Thurgood Marshall Award "for his work promoting civil rights and civil liberties." *Id.*

[183] *Id.*

[184] United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 197 (2003) (upholding the Children's Internet Protection Act over a First Amendment challenge).

[185] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732 (2011).

Patricia Millett before him, Smith made an important contribution to the new First Amendment absolutism. Early on in his merits brief in *Brown*, Mr. Smith argued:

> In *Stevens*, the Court powerfully reaffirmed that the First Amendment leaves unprotected only a handful of "historic and traditional categories long familiar to the bar," including "obscenity," "incitement," and "defamation." "'From 1791 to the present,' . . . 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 traditional limitations.'"[187]

By that logic, Mr. Smith argued that, per the logic of *Stevens*, the historical exceptions should be narrowly construed; hence government cannot extend the obscenity exception to cases involving violent depictions.[188] Similarly, he took analytical exception to the state's attempt to "[c]arve [o]ut" a First Amendment exception for "'[o]ffensively [v]iolent' [v]ideo [g]ames."[189] No such new exception could be created, even if, as here, the case involved "offensive" speech marketed to minors.[190] Wrote Smith: "At times, California backs away from claiming the right to regulate offensive material generally and instead asserts the right to regulate the supposedly distinct category of 'offensive violence.' But that narrower approach is still fundamentally contrary to the established First Amendment framework, as reiterated in *Stevens*."[191]

In an amicus brief, Robert Corn-Revere, a renowned First Amendment lawyer at the Washington, D.C. office of Davis Wright Tremaine,[192] added to the Millett-Smith chorus when he argued

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[186] *Id.* at 2732–33.

[187] Respondents' Brief at 19, Schwarzenegger v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2010) (No. 08-1448) (alterations in original) (quoting United States v. Stevens, 130 S. Ct. 1577, 1584 (2010)).

[188] Respondents' Brief, *supra* note 187, at 19–23.

[189] *Id.* at 23 (quoting Petitioners' Brief at 7, *Brown*, 131 S. Ct. 2729 (No. 08-1448))

[190] *See id.*

[191] *Id.* at 30.

[192] *Robert Corn-Revere*, DAVIS WRIGHT TREMAINE LLP, http://www.dwt.com/people/robertcornrevere (last visited Jan. 23, 2013). Mr. Corn-Revere successfully argued *United States v. Playboy Entertainment Group, Inc.*, which struck down section 505 of the Telecommunications Act of 1996, a federal law that required cable television operators to scramble or block channels that are "primarily dedicated to sexually-oriented programming" from 10 p.m. to 6 a.m. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 806 (2000) (quoting 47 U.S.C. § 561(a) (Supp. III 1994)) (internal quotation

that "Petitioners[] demand that this Court recognize a new category of 'historically unprotected' speech" particularly in regards to a "new and emerging media."[193] Here again, the litigation strategy was to expand First Amendment protection by constricting the reach of *Chaplinsky*'s exceptions.

As in *Stevens* and *Snyder*, the *Brown* Court sustained the First Amendment claim,[194] this time by 7–2 margin with Justice Antonin Scalia writing for the majority and Justices Clarence Thomas and Stephen Breyer in dissent.[195] In what was becoming an increasingly familiar mantra, Justice Scalia declared: "Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."[196] In a clear pronouncement that the majority was holding firm to that principle, Scalia emphasized:

> [W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs." That holding controls this case.[197]

Notably, unlike the *five* exceptions identified in *Chaplinsky* (lewd, obscene, profane, and defamatory speech along with fighting words),[198] or the *five* singled out in *Stevens* (obscenity, defamation, fraud, incitement and speech integral to criminal conduct),[199] the *Brown* majority listed but *three* exceptions (obscenity, incitement, and fighting words).[200] And then, by way of an absolutist-like

marks omitted). He was also the lawyer who successfully petitioned Governor George Pataki to posthumously pardon the comedian Lenny Bruce. Ronald K.L. Collins, *Comedy and Liberty: The Life and Legacy of Lenny Bruce*, 79 SOC. RES. 61, 80–84 (2012). For a profile of this First Amendment lawyer, see David L. Hudson Jr., *Robert Corn-Revere*, *in* 1 ENCYCLOPEDIA OF THE FIRST AMENDMENT 349 (John R. Vile et al. eds., 2009).

193 Brief of Comic Book Legal Defense Fund as Amicus Curiae Supporting Respondents at 31, *Brown*, 131 S. Ct. 2729 (No. 08-1448) (quoting Petitioners' Brief, *supra* note 189, at 13).

194 Here, as in *Stevens*, the law in question imposed a restriction on the content of protected speech and was thus invalid unless the state could demonstrate that its law could satisfy strict scrutiny, which it could not do. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

195 *Id.* at 2732. Justice Samuel Alito wrote a narrowly framed concurrence in which the Chief Justice joined. *Id.* at 2742 (Alito, J., concurring).

196 *Id.* at 2734 (majority opinion).

197 *Id*. (quoting United States v. Stevens, 130 S. Ct. 1577, 1585 (2010)).

198 *See supra* notes 43–48 and accompanying text.

199 *See supra* text accompanying notes 133–39.

200 *Brown*, 131 S. Ct. at 2733.

jurisprudential panache, Justice Scalia added:

> Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an "actual problem" in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible."[201]

Think of that passage. Does it not smack of First Amendment absolutism? How often, if ever, will the government be able to muster up the kind of evidence required to satisfy such a demanding standard of review? Neither Justice Alito's minimalist procedural due process approach[202] nor Justice Thomas's constraining historicism[203] managed to convince a majority of the *Brown* Court to budge from its brand of free speech absolutism. Similarly, Justice Breyer was no more successful in urging the Court to veer from its absolutism and recognize a category of protection of children, buttressed by what he saw as a compelling state interest.[204]

With its opinions in *Stevens*, *Snyder*, and *Brown*, the Roberts Court was well poised to defend, yet again, its own variation of First Amendment absolutism. And it ventured to do just that the year after *Brown*, this time in a case involving military medals.[205]

The new absolutism suffered its first cracks when its metal was tested in *United States v. Alvarez*[206]—the lying about military medals case. Before proceeding further, let me echo a few astute points made earlier by Chief Judge Alex Kozinski[207] when the case was before him and his Ninth Circuit colleagues. Kozinski began his separate opinion this way:

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[201] *Id.* at 2738 (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818, 822 (2000)) (other citations omitted).

[202] *Brown*, 131 S. Ct. at 2742–43 (Alito, J., concurring).

[203] *Id*. at 2751–52 (Thomas, J., dissenting).

[204] *Id*. at 2767 (Breyer, J., dissenting).

[205] United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012).

[206] *Id.*

[207] United States v. Alvarez, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, C.J., concurring in denial of rehearing en banc), *aff'd*, 132 S. Ct. 2537, 2542 (2012).

> According to our dissenting colleagues, "non-satirical and non-theatrical, knowingly false statements of fact are *always* unprotected" by the First Amendment. Not "often," not "sometimes," but always. Not "if the government has an important interest" nor "if someone's harmed" nor "if it's made in public," but *always*. "Always" is a deliciously dangerous word, often eaten with a side of crow.[208]

Note, at the outset, how the Chief Judge took issue with the *categorical* approach taken by his colleagues, how he contested the soundness of any approach that would absolutely exclude all non-satirical, non-theatrical, knowingly false statements from the domain of free speech protection. That approach, narrowed as it was, proved too broad to withstand the challenge of analytical scrutiny, as his following observations ventured to prove:

> So what, exactly, does the dissenters' ever-truthful utopia look like? In a word: terrifying. If false factual statements are unprotected, then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit. Phrases such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis review."[209]

To be sure, there is a "big picture" First Amendment lesson here—a lesson about the role of truth in our modern-day jurisprudence of free speech. I will say a little more about that on another occasion.[210] For now, my concerns are far more modest.

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[208] *Id.* (citations omitted)

[209] *Id.*

[210] It is a telling point: In 1952, Justice William O. Douglas boldly proclaimed that "the First Amendment was designed to protect" the "pursuit of truth." Adler v. Bd. of Educ., 342 U.S. 485, 511 (1952) (Douglas, J., dissenting). In the sixty some years since then, the Court has invoked the *pursuit of truth* maxim but a *single* time. Univ. of Pa. v. EEOC, 493 U.S. 182, 196 (1990) (quoting *Adler*, 342 U.S. at 511). Compare in this general regard Justice Robert Jackson's powerful admonition:

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In

That is, Kozinski's arguments prompt us to pause about the idea of categorical exceptions to the First Amendment. They teach us that even tempered exceptions like the ones championed by the Chief Judge's colleagues can prove problematic and do not always lend themselves to easy resolution. If rigidly applied, so-called utopian rationales can produce dystopian results.[211] Kozinski's arguments thus suggest a point relevant to our discussion here: even if intentionally false speech were to be seen as a *Chaplinsky* exception, that exception would have to be relaxed in much the way

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> this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

Thomas v. Collins, 323 U.S. 516, 545 (Jackson, J., concurring) (citations omitted).

Whatever currency it may have in the academic realm, the pursuit of truth dictum has been eclipsed by a far more popular Holmesian-inspired phrase—"the marketplace of ideas," which need not be seen as synonymous with the acquisition of truth. In the past twenty years (1992–2012) alone, the marketplace of ideas metaphor has been invoked in twenty-four different Supreme Court opinions. Search Terms in LexisNexis: Supreme Court Cases, Lawyers' Edition: "marketplace of ideas." The search results were only within the specified time period from January 1, 1992 to October 1, 2012. *See also* THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 281–85, 302–03 (Ronald K.L. Collins ed., 2010) (detailing the history of metaphor and its relationship to the idea of the pursuit of truth). Recent attempts to reinvigorate the pursuit of truth ideal in First Amendment jurisprudence have proven problematic. *See, e.g.*, Ronald K.L. Collins & David M. Skover, *Foreword: The Guardians of Knowledge in the Modern State: Post's Republic and the First Amendment,* 87 WASH. L. REV. 369, 384–93 (2012) (discussing problems of theories concerning truth and the protection of academic freedom under the First Amendment).

[211] In this regard, Professors Eugene Volokh and James Weinstein offered a counter argument:

> We recognize that our proposed approach [that the government can criminalize many categories of intentionally false speech] means that, in principle, the government could criminalize a wide range of lies, including on comparatively minor matters, such as lying about one's age on a dating service or lying to a spouse about how much one lost at poker. And we agree that many such lies should not be criminalized.
>
> But the very fact that such lies are generally not illegal shows that the political process can generally be trusted to prevent the imposition of criminal liability for casual social lies. Indeed, the very fact that many such social lies are common is a powerful political check on the growth of the criminal law in this area.
>
> Yet when lawmakers think that a particular kind of lie is harmful enough, they should generally be free to prohibit it.

Volokh & Weinstein Brief, *supra* note 49, at 28–29 (citing United States v. Alvarez, 638 F.3d 666, 673–75 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc), *aff'd*, 132 S. Ct. 2537, 2542 (2012)). While there is some merit here, my initial sense is that this argument can be seen as *buttressing* the case for false speech. That is, the political process, so we are assured, recognizes the need for a certain degree of falsity in speech. Hence, it does not penalize it. In that sense, it is not categorical in how it deals with intentionally false expression. If the political process makes that concession, why in principle should the judiciary act otherwise in how it interprets the First Amendment? Why, absent real, present and demonstrable harm should it view the matter differently? And is this not, at least in principle, what Justice Kennedy's plurality opinion ventured to do in *Alvarez*?

that the *Sullivan* court relaxed the law of libel.[212] Or as the Chief Judge put it: "[W]hen it comes to pure speech, truth is not the sine qua non of First Amendment protection. That the government can constitutionally regulate some narrow categories of false speech—such as false advertising, defamation and fraud—doesn't mean that all such speech falls outside the First Amendment's bounds."[213]

With that as our conceptual backdrop, let us now return to the *Alvarez* case when it was before the Supreme Court. After oral arguments and deliberation, the vote in the case was 4-2-3, with Justice Anthony Kennedy writing for the plurality (joined by the Chief Justice and Justices Ruth Bader Ginsburg and Sonia Sotomayor).[214] Justice Stephen Breyer wrote a concurrence (joined by Justice Elena Kagan).[215] And Justice Samuel Alito wrote a dissent (joined by Justices Antonin Scalia and Clarence Thomas).[216] Mindful of this division in *Alvarez*, our discussion of the Roberts Court's free speech record may be illuminated by pausing to note the Justices' voting record in their more recent cases in this area.

{continued on the next page}

[212] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268 (1964) (footnote omitted) (citations omitted) ("Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here.").

[213] *Alvarez*, 638 F.3d at 673–74 (citing Meyer v. Grant, 486 U.S. 414, 419 (1988)).

[214] United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012).

[215] *Id.* at 2551 (Breyer, J., concurring in the judgment).

[216] *Id.* at 2556 (Alito, J., dissenting).

VOTING LINEUP OF ROBERTS COURT JUSTICES

Roberts	Scalia	Kennedy	Thomas	Alito	Ginsburg	Breyer	Sotomayor	Kagan
Votes to affirm First Amendment claim under strict scrutiny review								
4	**4**	**5**	**3**	**1**	**4**	**1**	**4**	**3**
Votes to affirm free speech claim (on strict scrutiny or alternative less protective grounds)								
5	**4**	**5**	**3**	**2**	**5**	**3**	**5**	**4**
United States v. Stevens[217]								
✓[218]	✓	✓	✓	○	✓	✓	✓	✓
Snyder v. Phelps[219]								
✓	✓	✓	✓	○	✓	+	✓	✓
Brown v. Entertainment Merchants Association[220]								
+	✓	✓	○	+	✓	○	✓	✓
Knox v. Service Employees International Union, Local 1000[221]								
✓	✓	✓	✓	✓	+	○	+	○
United States v. Alvarez[222]								
✓	○	✓	○	○	✓	+	✓	+

This chart, incomplete as it is,[223] does tell us something important, namely, that while Justice Kennedy, Chief Justice Roberts, and Justices Scalia and Sotomayor are most likely to lean towards a kind of near-absolutism, Justices Breyer and Alito are just as likely to move in the opposite direction.[224] Notice, too, how

[217] United States v. Stevens, 130 S. Ct. 1577, 1582 (2010); *id.* at 1592 (Alito, J., dissenting).

[218] Key:

✓ = sustains First Amendment claim under strict scrutiny review.

+ = concurs in affirming free speech claim on First Amendment or alternative grounds but without strict scrutiny review.

○ = denies First Amendment claim.

[219] Snyder v. Phelps, 131 S. Ct. 1207, 1212 (2011); *id.* at 1222 (Alito, J., dissenting).

[220] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2731, (2011); *id.* at 2742 (Alito, J., concurring in the judgment); *id.* at 2751 (Thomas, J., dissenting); *id.* at 2761 (Breyer, J., dissenting).

[221] Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2284 (2012); *id.* at 2296 (Sotomayor, J., concurring in the judgment); *id.* at 2299 (Kagan, J., dissenting).

[222] United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012); *id.* at 2551 (Breyer, J., concurring in the judgment); *id.* at 2556 (Alito, J., dissenting).

[223] For a comprehensive account of the Roberts Court's voting record in First Amendment free speech cases, see *infra* Appendix.

[224] Were one to exclude the *Knox* opinion (the anti-union free speech case), Justice Alito's First Amendment free speech record would be even less sympathetic to affirming rights claims in free expression cases. *See supra* notes 217, 219–22. *Cf.* Ronald K.L. Collins, *Judge Alito & the New First Amendment Defenders*, FIRST AMENDMENT CTR. (Nov. 21, 2005), http://archive.firstamendmentcenter.org/analysis.aspx?id=16090 (noting Justice Alito's occasional liberality in deciding First Amendment free speech cases).

uncertain votes from Justices Thomas and Kagan's to affirm a First Amendment free speech claim can be. With this in mind, simply consider how conceptually divergent were the approaches outlined by Justice Kennedy in his plurality, Justice Breyer in his concurrence, and Justice Alito in his dissent. Let us begin with how Justice Kennedy viewed the matter:

> The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. In assessing content-based restrictions on protected speech, the Court has not adopted a free-wheeling approach, but rather has applied the "most exacting scrutiny." Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny.[225]

This approach smacks of the new absolutism, of the near absolute protection of free speech in certain cases. Contrast that with the approach urged by Justice Breyer:

> I agree with the plurality that the Stolen Valor Act of 2005 violates the First Amendment. But I do not rest my conclusion upon a strict categorical analysis. Rather, I base that conclusion upon the fact that the statute works First Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways.
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> . . . .
>
> Sometimes the Court has referred to this approach as "intermediate scrutiny," sometimes as "proportionality" review, sometimes as an examination of "fit," and sometimes it has avoided the application of any label at all.[226]

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[225] *Alvarez*, 132 S. Ct. at 2548 (citing United States v. Stevens, 130 S. Ct. 1577, 1585 (2010)). "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Alvarez*, 132 S. Ct. at 2548 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994))

[226] *Alvarez*, 132 S. Ct. at 2551–52 (Breyer, J., concurring in the judgment) (citations omitted). For a discussion of what Congress might do after *Alvarez*, see Barnum, *supra* note 13, at 546–56, and Jeffery C. Barnum, Comment, *False Valor: Amending the Stolen Valor Act to Conform with the First Amendment's Fraudulent Speech Exception*, 86 WASH. L. REV. 841, 866–69 (2011). On September 13, 2012, the House passed the Stolen Valor Act of 2012 by a 410–3 margin. *See* Stolen Valor Act of 2012, H.R. 1775, 112th Cong. (2012); Larry Shaughnessy, *House Passes Revamped Stolen Valor Act*, CNN.COM (Sept. 13, 2012, 8:04 PM), http://security.blogs.cnn.com/2012/09/13/house-passes-revamped-stolen-valor-act. Section 2(b) of

At a certain level of generality, what we see here is reminiscent of the kind of First Amendment balancing once championed by Justices Frankfurter and Harlan[227] and contested by Justices Black and Douglas.[228] Finally, we come to Justice Alito, the Roberts Court's most consistent critic of expanding First Amendment free speech rights. With *Chaplinsky*-like fervor, Justice Alito[229] drew on precedents that referred to both prongs of *Chaplinsky*'s dictum. To make the point, I have taken the liberty of quoting a wider swath of his opinion: "Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value."[230]

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that then proposed law provides: "Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both." H.R. 1775 § 2(b). As of December 2012, the Senate passed its own amended version of the Stolen Valor Act. *See* Stolen Valor Act of 2012, H.R. 1775, 112th Cong. § 503(b)(1) (2012) ("Whoever, with the intent of securing a tangible benefit or personal gain, knowingly, falsely, and materially represents himself or herself through any written or oral communication (including a resume) to have served in the Armed Forces of the United States or to have been awarded any decoration, medal, ribbon, or other device authorized by Congress or pursuant to federal law for the Armed Forces of the United States, shall be fined under this title, imprisoned for not more than 6 months, or both."); Stolen Valor Act of 2012, H.R. 1775, 112th Cong. § 503(b)(2) (2012) (defining "tangible benefit or personal gain"). *See also* Rick Maze, *Senate Passes Revised Stolen Valor Act*, AIR FORCE TIMES (Dec. 3, 2012), http://www.armytimes.com/news/2012/12/military-senate-passes-revised-stolen-valor-act-120312 (discussing differences between House and Senate bills).

[227] *See, e.g.*, RONALD K.L. COLLINS & SAM CHALTAIN, WE MUST NOT BE AFRAID TO BE FREE: STORIES OF FREE EXPRESSION IN AMERICA 8–10 (2011) (contrasting the views of balancers and absolutists); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 792–94 (2d ed. 1988) (same).

[228] COLLINS & CHALTAIN, *supra* note 227, at 9–10.

[229] *See* Clay Calvert, *Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115, 152–53, 171 (2011).

[230] *Alvarez*, 132 S. Ct. at 2560 (citing Illinois *ex rel.* Madigan v. Telemarketing Ass., Inc., 538 U.S. 600, 612 (2003) ("Like other forms of public deception, fraudulent charitable solicitation is unprotected speech."); BE & K Constr. Co. v. NLRB, 536 U.S. 516, 531 (2002) ("[F]alse statements may be unprotected for their own sake."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) ("There is 'no constitutional value in false statements of fact'" (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974))); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech."); Brown v. Hartlage, 456 U.S. 45, 60 (1982) ("Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements."); Herbert v. Lando, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.");

What is, I think, significant about Justice Alito's line of string citations and quotations is that many of the very cases he cited discounted the *Chaplinsky* categorical dictum and allowed for a degree of First Amendment protection.[231] In fairness, Justice Alito might reply that there was a certain subset of false-speech cases that were categorically unprotected. But even on that score, and as evidenced by the bold plurality opinion and the timid concurring opinion, a majority of the Roberts Court would not yield.

Still, while the plurality opinion took yet another conceptual swipe at the *Chaplinsky* dictum, it nonetheless did something noteworthy—something that might be seen as adding a dollop of vigor to that infamous dictum. Unlike the five exceptions identified in *Chaplinsky* (lewd, obscene, profane, and defamatory speech along with fighting words),[232] or the five flagged in *Stevens* (obscenity, defamation, fraud, incitement and speech integral to criminal conduct),[233] or the three cited in *Brown* (obscenity, incitement, and fighting words),[234] Justice Kennedy's plurality opinion listed the following *nine* categories of unprotected expression, which he conceded were not all inclusive:

(1) incitement
(2) obscenity
(3) certain kinds of defamation
(4) speech integral to criminal conduct
(5) fighting words
(6) child pornography
(7) fraud
(8) true threats, and
(9) "speech presenting some grave and imminent threat the government has the power to prevent."[235]

Gertz, 418 U.S. at 340 ("T]he erroneous statement of fact is not worthy of constitutional protection."); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("[T]he constitutional guarantees [of the First Amendment] can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function.") (emphasis added); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.")).

[231] *See e.g.*, *Madigan*, 538 U.S. at 611–12 (stating that the First Amendment protects charitable solicitation, spreading ideas, etc., but fraud is not protected); *Va. State Bd. of Pharmacy*, 425 U.S. at 761 (asserting that the First Amendment protects commercial speech).

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

[233] United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

[234] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011).

[235] *Alvarez*, 132 S. Ct. at 2544 (citations omitted).

Although the *Alvarez* plurality followed *Stevens*, *Snyder*, and *Brown* in applying a near-absolutist level of First Amendment protection at least where content-based restrictions were involved, it is noteworthy that its list of exceptions was longer than any identified in either *Chaplinsky* or the three cases mentioned immediately above. Still, it was far shorter than the list of forty-three exceptions identified earlier.[236]

EIGHT POST-*CHAPLINSKY* OBSERVATIONS

It is difficult to deny: All legal doctrines, if they are to have staying power, must have a limiting principle. Otherwise, they become senseless pap or, worse still, reckless excuses for injustice. To be sure, unchecked absolutism wars with any and all limiting principles, including those grounded in the sober soil of contextualism. In meaningful measure, that is the lesson of legal realism. All of which brings us back to Professor Smolla's comment quoted at the outset of this Foreword: "Absolutism may have a place in *a* sensible theory of freedom of speech, but not as *the* comprehensive methodology."[237] All right. That seems reasonable enough (note Smolla's use of the adjective "sensible"). Absolutism cannot be categorical; if it is to garner any respect it must yield some sensible room. Fair enough. So that rules out Justice Hugo Black's bold First Amendment absolutism, qualified as it was for his own peculiar purposes.[238] But what of absolutism that is not comprehensive and broad but rather comprehensive within a *narrow* realm? Here, I am reminded of Alexander Meiklejohn's absolute protection for a narrow category of speech, namely, political speech.[239] Unlike Justice Black's absolutism, which was seen by some as granting too much constitutional protection, Meiklejohn's absolutism was often criticized as granting too little

[236] *See supra* text accompanying notes 50–92.

[237] 1 SMOLLA, supra note 1, at 27.

[238] *See* MAGEE, *supra* note 28, at 144–81 (discussing Justice Black's absolutism and how he qualified it).

[239] *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 250, 259; *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government.").

protection.[240] And then a categorical rule, such as that of *Miranda v. Arizona*,[241] can be riddled over time by a bevy of exceptions that can render the original rule almost meaningless.[242] Such are the downsides of a categorical (or should I say non-nuanced categorical) approach to constitutional decision-making.

What then about balancing? *Ad hoc* balancing of the kind once espoused by Justices Felix Frankfurter[243] and John Marshall Harlan II,[244] or today embraced by Justice Stephen Breyer[245] often tends to diminish the domain of free speech rights. When there is too much play in the doctrinal joints the temptation to be risk adverse, even to hypothetical lengths, is often too great to shun. Moreover, as Stephen Feldman has duly noted, *ad hoc* balancing all too easily becomes a form of judicial decision-making "without principles, without law."[246]

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[240] *See, e.g.*, Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 897 (1949) (reviewing MEIKLEJOHN, *supra* note 239). However, Meiklejohn was far from the most rigid champion of this form of limiting absolutism. That honor may go to the recently deceased federal appellate judge Robert Bork, who not only believed that the First Amendment was instituted to absolutely protect only political speech, but also specifically excluded art, literature, and science from any First Amendment discussion. *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–28 (1971).

[241] Miranda v. Arizona, 384 U.S. 436, 468–69 (1966).

[242] *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 16–25 (2010) (detailing the subsequent court decisions which limited the application of *Miranda*); Yale Kamisar, *The Rise, Decline and Fall (?) of* Miranda, 87 WASH. L. REV. 965 (2013),.

[243] *See* Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J. concurring in the judgment) (denying First Amendment claim) ("This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict. If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds."); *see also* PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 75–107 (1971) (excerpting Frankfurter's free speech opinions).

[244] For example, see Harlan's majority opinions in Barenblatt v. United States, 360 U.S. 109, 134 (1959), where the Court upheld the House Un-American Activities Committee convictions for contempt of Congress, and see *In re* Anastaplo, 366 U.S. 82, 97 (1961), where the Court denied a First Amendment claim in a bar admission case. Of course, there were occasions when, oddly enough, Harlan's balancing test secured First Amendment rights denied under Justice Black's view of the law. *See, e.g.*, Cohen v. California, 403 U.S. 15, 16, 26 (1971) (Harlan, J., writing for the majority with Black, J., joining Blackmun, J., dissenting) (upholding the right to wear a "fuck the draft" jacket in the halls of a public court). But in yet other instances, Black's absolutism triumphed. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 713 (1971) (per curiam) (denying government's request for a prior restraint against newspapers seeking to publish classified materials regarding the Vietnam War); *id.* at 714–15 (Black, J., concurring); *id.* at 752 (Harlan, J., dissenting).

[245] *See* United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring).

[246] STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 373 (2008). Professor Feldman adds:

Looking back seventy years after the case came down, what have we learned from Justice Frank Murphy's constitutional handiwork in *Chaplinsky v. New Hampshire*? What lessons does it teach us in our modern First Amendment era governed, for now, by the rule and reason of a majority of the Roberts Court? There are, of course, many lessons, but here are a few I believe to be worthy of special consideration.

First, just as *Chaplinsky* dismissed the absolutism of runaway liberality, it ushered in its own brand of absolutism, an absolutism of *categorical denial*. That is, *Chaplinsky*, at least at its outset, was a one-way form of absolutism that automatically ratcheted downwards to deny free speech rights rather than upwards to affirm them. This was a theory devoid of nuance. To change the metaphor, it performed its jurisprudential operations with a saw rather than with a scalpel.

Second, if there was a historically demonstrable basis for *Chaplinsky's* categorical exceptions to the First Amendment, reliable evidence of such a record was never fully tendered. For that matter, are we even sure of the jurisprudential *methodology* that would be invoked to identify such exceptions? For example, where do we look to for historical evidence? Do we look to:

- The text of the First Amendment, confined as it is to "Congress"?[247]

> What, for instance, qualifies as an interest (and thus becomes part of the balancing calculus)? What weight should be accorded to different interests? How should different kinds of interests be weighed or compared? How, for example, should one weigh an interest in economic prosperity against an interest in speaking freely? They are the proverbial apples and oranges . . . . Constitutional issues often "demand the appraisal and balancing of human values which there are no scales to weigh," [Justice Learned] Hand observed. "Who can say whether the contributions of one group may not justify allowing it a preference? How far should the capable, the shrewd or the strong be allowed to exploit their powers?" As Hand elucidated, the problem "does not come from ignorance, but from the absence of any standard, for values are incommensurable." Even more important, . . . if legislatures enacted laws in response to competing interests, and the Court resolved disputes by balancing countervailing interests, then what [would] distinguish[] legislative [preferences] from judicial decision making?

Id. (quoting Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 155, 161 (Irving Dillard ed., 3d ed. 1960)).

[247] Ronald K.L. Collins, *The Speech & Press Clauses of the First Amendment*, 29 DEL. LAW. 8, (Winter, 2011–2012).

- The records of the debates on the Amendment?[248]
- The evidence in the state ratifying conventions?[249]
- The evidence in contemporaneously published newspapers and elsewhere?[250]
- The law as found in criminal laws and in the common law of the states at the time near ratification?[251]
- The evidence set out in private correspondence and diaries?[252]
- The record of what appears in treaties from the time?,[253] or
- The record gleaned from the actual *practice* of the press and the people in exercising free speech rights?[254]

How much determinative weight do we give to such materials? And what if the early historical records[255] are largely barren or vague so far as a purported historical exception is concerned?[256]

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[248] *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 83–92 (Neil H. Cogan ed., 1997).

[249] *Id*. at 97–101.

[250] *Id.* at 101–15.

[251] *Id*. at 119–28.

[252] *Id.* at 115–19.

[253] *Id.* at 119–28.

[254] *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 147 (1985) ("My original interest law with law and theory; I had paid little attention to press practices.").

[255] To be sure, there is an originalist flavor to the *Chaplinsky* exceptions, though nowhere did the Court venture to substantiate its historical assumptions. In a recent essay decisively critical of originalism, Judge Richard Posner argued: "The decisive objection to the quest for original meaning, even when the quest is conducted in good faith, is that judicial historiography rarely dispels ambiguity. Judges are not competent historians. Even real historiography is frequently indeterminate, as real historians acknowledge." Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18, 19.

[256] Take obscenity, for example. In the nation's early years, there were no federal statutes and but a few state ones. *See* Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107, 116–17 (1994) (providing descriptions of Massachusetts's obscenity statute and the blasphemy statutes in Connecticut and Vermont). As for the common law, see Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 91–92, 102 (Pa. 1815), which refers to certain common law doctrines to uphold a conviction for showing an obscene drawing done for profit, and DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 193 (1997), which notes that the early common law treated obscenity as a type of libel. As Professor Geoffrey Stone has observed:

> The Supreme Court's claim in *Roth* that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" was misleading, at best. Indeed, the most striking fact about that era was the *absence* of any laws regulating such material. What the Court did in *Roth* was to extrapolate from regulations of libel, blasphemy, and profanity to regulations of obscenity. It was that extrapolation that required the Court's subtle use of the word "implicit." But the real lesson "implicit" in the origins of the First Amendment is that at the time the First Amendment was enacted obscenity was treated completely differently from libel,

Third, *Chaplinsky*'s five enumerated exceptions might be seen as under-inclusive when measured against *Alvarez's* nine exceptions, which in turn seem grossly under-inclusive when considered against the forty-three exceptions listed above. This tells us something about the enterprise of absolute exceptions—that is, their currency as a jurisprudential theory depends on a specified, *limited* number of exceptions. When you have some forty-three exceptions to a rule, the core of protected speech constricts considerably. With that many exceptions, is it even reasonable to argue that there is a *rule* in the first place?[257] In such a world, might it not make more sense

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blasphemy, and profanity.

Geoffrey R. Stone, *Sex, Violence, and the First Amendment,* 74 U. CHI. L. REV. 1857, 1863 (2007) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (footnote omitted). The offense "does not appear to have been clearly established there until the enactment of Lord [Chief Justice John] Campbell's Act of 1857." THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 468 (1970). *See also* JAMES C. N. PAUL & MURRAY L. SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 9–20 (1961) (noting development of the law of obscenity in America). As Professors Paul and Schwartz noted, prior to 1842 when Congress enacted the Tariff Act which regulated obscene prints or pictures brought into the country, there was some common law authority for regulation in this area:

> [There were] a few cases and some very general pronouncements in the leading texts . . . to the effect that public exhibition or sale of obscene things, including books, was criminal even in the absence of a statute. But in the actual cases [that] had arisen, the courts seemed more concerned with the scandalous behavior of the particular individuals who had been indicted than with the general repression of a [category of expression].

Id. at 11–12. In 1842, a provision was inserted into the Tariff Act to deal with the "problem" of the French postcard trade. *See id*. at 12. The law authorized customs officers to seize imported prints and pictures that were "obscene or immoral" and thereafter to go to court to request their destruction. *Id*. Later, in 1857, an amendment was added to "more effectually accomplish the [p]urposes for which the [p]rovision was enacted." Act of Mar. 2, 1857, ch. 270, 34 Stat. 168, 168 (1857). Under the amended law obscene "images" and "obscene articles" were added to the censorial list. *Id*. Hence, to the best of my knowledge the first *major* development in the law of obscenity occurred abroad, in England. What Lord Chief Justice Alexander Cockburn wrote in R. v. Hicklin, [1868] L. R. 3 Q. B. 360, 360 (Eng.), would have a profound effect on American law for scores and scores of years thereafter. In the United States, it was more than a half-century after the First Amendment became law that anything that might be labeled an obscenity law (loosely defined) found its way into federal law. PAUL & SCHWARTZ, *supra*, at 11–12. Then, in 1865, Congress enacted a new law to protect the military amidst reports that obscene print and photographic items were being mailed to soldiers. *Id.* at 17–18. The crudely crafted and confusing law was supposed to prohibit the distribution of obscene books and pictures in the U.S. mails. *Id*. "Although there was no clear consensus in 1792 that obscenity was not protected by the First Amendment, obscenity has in fact been regulated by every state in the nation since Anthony Comstock launched his anti-obscenity campaign in the 1860s." Stone, *supra*, at 1865.

[257] In order to deal with the problem of protecting various kinds of intentionally false speech, Professors Volokh and Weinstein have noted:

> Another approach would be to hold that, though knowingly false statements of fact are generally constitutionally protected, there are many narrow exceptions to this rule: one for defamation, one for per-jury, one for fraudulent solicitation of money, one for the false light tort, one for intentional infliction of emotional distress through knowing falsehoods,

to view the rule as the exception and vice-versa? Perhaps that explains why the Court has been deliberately modest in listing the number of exceptions it concedes at any one time.[258] Or as Justice Kennedy put it in 1991: The list consists of only "a few legal categories."[259] Justice Scalia made precisely the same point a year later when he proclaimed that the list of exceptions pertains only to "a few limited areas."[260] In other words, the speech-protective regime of the Roberts Court's interpretation of *Chaplinsky requires* that the number of recognized exceptions to the First Amendment

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> one for the knowing use of deceptive party names in campaigns, and so on.
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> This, though, would make it impossible for this Court to say, at it has before, that the exceptions to the general ban on content-based restrictions apply only to "a few limited areas." The list of recognized First Amendment exceptions would grow from a handful—incitement, obscenity, threats, speech closely linked to conduct, fighting words, and false statements of fact—to more than fifteen . . . .
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> And this growth in the number of exceptions will likely stimulate calls for more exceptions, including ones not limited to false statements of fact. If more than fifteen categories of speech are excluded from First Amendment protection, why not more—perhaps "hate speech" or speech depicting violence or the like?

Volokh & Weinstein Brief, *supra* note 49, at 13–14 (citations omitted). Picking up on this very idea, Professor Richard Delgado once called on the Court to expand its existing list of exceptions to the First Amendment:

> [O]ver the past century the courts have carved out or tolerated dozens of "exceptions" to free speech. These exceptions include: speech used to form a criminal conspiracy or an ordinary contract; speech that disseminates an official secret; speech that defames or libels someone; speech that is obscene; speech that creates a hostile workplace; speech that violates a trademark or plagiarizes another's words; speech that creates an immediately harmful impact or is tantamount to shouting fire in a crowded theatre; "patently offensive" speech directed at captive audiences or broadcast on the airwaves; speech that constitutes "fighting words"; speech that disrespects a judge, teacher, military officer, or other authority figure; speech used to defraud a consumer; words used to fix prices; words ("stick 'em up—hand over the money") used to communicate a criminal threat; and untruthful or irrelevant speech given under oath or during a trial.
>
> Much speech, then, is unprotected. The issues are whether the social interest in reining in racially offensive speech is as great as that which gives rise to these "exceptional" categories, and whether the use of racially offensive language has speech value.

Id. at 14–15 (quoting Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 377–78 (1991)) (other citations omitted).

[258] To much the same effect, Professors Volokh and Weinstein have noted that:

> [T]he creation of a large array of free speech exceptions ought to be avoided. Having a dozen exceptions for subcategories of knowingly false statements may seem more speech-protective than having a general exception for all knowingly false statements. But such a proliferation of exceptions may ultimately prove to be less speech-protective, because it may open the door to more exceptions that will not be limited to knowing falsehoods.

Volokh & Weinstein Brief, *supra* note 49, at 17.

[259] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment).

[260] R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

be reined in and that the quantity be kept small and manageable.[261]

Fourth, as the doctrinal history of *Chaplinsky*'s exceptions make clear, they are not entirely categorical. Thus, libel is not *entirely* excluded from the domain of protected speech as the ruling in *New York Times Company v. Sullivan*[262] makes clear. That is, it is more accurate to label the exceptions as a "limited categorical approach."[263] In other words, the stated exceptions are themselves subject to exceptions—they are subject to being reined in as circumstances warrant. Moreover, it is well to bear in mind what Justice Scalia has said on this score in his opinion for the Court in *R.A.V. v. City of St. Paul*:

> Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government 'may regulate [them] freely." That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.[264]

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[261] Here again, it is useful to consider what Professors Volokh and Weinstein have pointed out in this regard:

> But as the exceptions become more plentiful, they may begin to seem like they swallow the rule. As Justice Scalia noted in the Fourth Amendment context, once a rule (there, the warrant requirement) "become[s] so riddled with exceptions that it [is] basically unrecognizable," it is easy to see new exceptions not "as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years," and to conclude that the rule needs to be jettisoned altogether.

Volokh & Weinstein Brief, *supra* note 49, at 17 (quoting California v. Acevedo, 500 U.S. 565, 582, 583 (1991) (Scalia, J., concurring in the judgment)).

[262] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283, 292 (1964). Justice Scalia conceded as much in his *R.A.V.* opinion: "Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, but a limited categorical approach has remained an important part of our First Amendment jurisprudence." *R.A.V.*, 505 U.S. at 383 (citations omitted).

[263] *See R.A.V.*, 505 U.S. at 383.

[264] *Id.* at 384 (footnote omitted) (citation omitted). But consider what Justice Scalia said in a later case:

> The First Amendment prohibits laws "abridging the freedom of speech," which, "'as a general matter . . . means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" But the Amendment has no application when what is restricted is not protected speech.

This is yet more evidence that *Chaplinsky*'s exemptions are not as categorical as they may have first appeared.

Fifth, as the majority opinions in *Stevens* and *Brown* and the plurality opinion in *Alvarez* reveal, *Chaplinsky*'s exceptions can be read to ratchet up free speech freedom by strongly protecting speech (or at least certain kinds) outside of the proscribed realm of unprotected speech.[265] This kind of reverse psychology has produced a new kind of First Amendment absolutism.

Sixth, the Roberts Court seems to invoke *Chaplinsky* analysis only in those situations in which it is inclined to sustain a rights claim. Even so, the Roberts Court has both sustained[266] and denied[267] free speech claims in situations in which it has ignored any *Chaplinsky*-type analysis. To be sure, how the Court approaches a case is shaped in some part by how that case is briefed; and the lawyers in *Stevens*,[268] *Snyder*,[269] *Brown*,[270] and *Alvarez*[271] relied on a *Chaplinsky*-type analysis. That said, the Court is not obligated to adhere firmly to that kind of analysis; the Justices can accept, reject, or even ignore it.

Seventh, it is within the realm of reasonable possibility that the Court might in the future take steps to rein in its liberal application of *Chaplinsky*. If so, it might do so in at least three ways:

(i) it might simply ignore any *Chaplinsky*-like analysis altogether;
(ii) it might recognize a "new" historical exception(s); or

Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347 (2011) (alteration in original) (citations omitted).

[265] *See* United States v. Alvarez, 132 S. Ct. 2537, 2547, 2548, 2551 (2012) (Kennedy, J., plurality opinion); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2741–42 (2011); United States v. Stevens, 130 S. Ct. 1577, 1586, 1592 (2010).

[266] *See, e.g.*, Knox v. Serv. Emp. Int'l Union, Local 1000, 132 S. Ct. 2277, 2295–96 (2012).

[267] *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730, 2731 (2010).

[268] Brief for the Respondent, *supra* note 116, at 16–17 (citing *R.A.V.*, 505 U.S. at 383).

[269] *See, e.g.*, Brief for Respondents, *supra* note 159, at 20–33 (discussing post-*Chaplinsky* "categorical" caselaw).

[270] *See, e.g.*, Brief of Respondents at 19, *Brown*, 131 S. Ct. 2729 (No. 08-1448) (citing *Stevens*, 130 S. Ct. at 1584); Brief of Amicus Curiae Comic Book Legal Defense Fund in Support of Respondents, *supra* note 193, at 31–36. Robert Corn-Revere was counsel of record for Amicus in this case and Ronald G. London was with him on the brief. *Id.* at 1.

[271] *See, e.g.*, Brief of Amici Curiae the Reporters Committee for Freedom of the Press and Twenty-Three News Media Organizations in Support of Respondent at 12–19, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11-210). Robert Corn-Revere was counsel of record for Amici in the case and Lucy A. Dalglish and Ronald G. London were listed on the brief, among others. *Id.* at 1.

(iii) it might invoke the second tenet of *Chaplinsky*'s dictum and decline to sustain a free expression claim because the speech in question is not an "essential part of any exposition of ideas"[272] and/or because the expression at issue is of "slight social value as a step to truth."[273]

And finally, there is the take away point to be gleaned from Chief Judge Kozinski's opinion in *Alvarez*. That is, is not his critique of absolutism in *denying* free speech rights likewise applicable to a kind of absolutism in *affirming* free speech rights? After all, is not the real problem *categorical reasoning*? Floyd Abrams, the First Amendment lawyer par excellence of our times,[274] spoke to this very point in a 1988 speech he presented at Harvard Law School:

> Absolutism sounds dumb, sounds blunt instead of narrow, sounds as if one is insistent on making so broad a statement of law that it cannot possibly be correct. And, of course, any statement that one really means to be absolutist in character is only defensible if there is quite literally, no hypothetical set of facts—none at all—that would lead one to retreat from absolutist principles . . . . A First Amendment absolutist must be prepared to accept the potential consequences of his or her absolutism. If there is an exception that one grants, [it] overcomes the claims of absolutism, [and then] the absolutism falls before its weight.[275]

Even so, Mr. Abrams did not leave the idea of First Amendment absolutism out in the cold; thus, he did not relegate it to a fanciful idea never to be allowed entry into the house of the law:

> All that being said, it says something about the power of the First Amendment that we not only have a good body of principles in that area that may fairly (if uncomfortably) be described as absolutist—but a good body more that deny their absolutist quality but are so near absolutist in their nature that, in practical effect, it is as if they were absolutist . . . .

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

[273] *Id.*

[274] *See, e.g.*, David Segal, *A Matter of Opinion?*, N.Y. TIMES, July 19, 2009, at 1 (Sunday Bus. Sect.).

[275] Floyd Abrams, First Amendment Near-Absolutism, at 8–9 (Mar. 2, 1988) (unpublished remarks, on file with the author). The remarks will be reprinted in FLOYD ABRAMS, FRIEND OF THE COURT: ON THE FRONT LINES WITH THE FIRST AMENDMENT (forthcoming 2013).

> Are there really any absolutist First Amendment rights? Has the Supreme Court really gone so far as to say that, in any area at all, the "*no law*" language of the First Amendment quixotically means no law? The surprising answer is that now and then, at least, "no law" means just that.[276]

In both the law Mr. Abrams has long argued for,[277] and in a certain line of Roberts Court cases we have seen examples of what I have termed the new absolutism.

A FEW TENTATIVE CONCLUSIONS

If the Roberts Court's new absolutism is a cause for elation in some First Amendment quarters, then its rulings on student speech,[278] government employee speech,[279] and prisoner speech,[280]

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[276] *Id.*

[277] *See* COLLINS, *supra* note 26.

[278] Morse v. Frederick, 551 U.S. 393, 410 (2007).

> It is difficult to read *Morse* and see the Roberts Court as protective of free speech. The banner at issue in this case was silly and incoherent. There was not the slightest evidence that it caused any harm; there was no claim that it was disruptive and certainly no evidence that it increased the likelihood of drug use. But, the conservative majority still ruled against speech and in favor of the government.

Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 728 (2011) (footnote omitted).

[279] Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).

> *Garcetti* is . . . an important limit on First Amendment protections for speech by government employees; it is a categorical exception from constitutional protection for speech while on the job and in the scope of the employee's duties. The case's premise that the First Amendment protects only speech "as citizens" has no foundation in other case law. For example, in *Citizens United v. Federal Election Commission*, the Court protected the speech of corporations even though they, of course, are not citizens. The explicit premise of *Citizens United* is that more speech is better whatever the source; the effect of *Garcetti v. Ceballos* is that there will be significantly less speech. Moreover, government employees do not lose their citizenship when they walk into the government office building.

Chemerinsky, *supra* note 278, at 726 (footnotes omitted).

[280] Beard v. Banks, 548 U.S. 521, 524–25, 536 (2006). Commenting on the case, Professor Erwin Chemerinsky correctly observed:

> The Court's deference to the government was stunning. This is a regulation that denies prisoners access to all newspapers, magazines, and even family photographs. It is hard to imagine a more extensive restriction of First Amendment rights. There was no evidence that this actually improves prisoner behavior, and in fact, the Court said that none was needed. The government's assertion of a benefit was sufficient to justify the restriction on speech.

Chemerinsky, *supra* note 278, at 728 (footnotes omitted).

along with its anti-terrorism material support ruling[281] must be cause for discontent. As with so many other things in life and law, even those in the First Amendment community are far from attaining free speech nirvana. So what do we know about the Roberts Court's free speech jurisprudence at this pinpoint in time? Generally speaking, here are a few tentative conclusions:

First, Chief Justice John Roberts is at the helm of this ship of the Court's First Amendment jurisprudence. His number of majority opinions far exceeds those of all others on the Court, including Justice Anthony Kennedy.[282] Roberts wrote the majority opinions in *Morse. v. Frederick*[283] and *Holder v. Humanitarian Law Project*,[284] two important First Amendment cases in which the free speech claim was denied. But then again, he also wrote the majority opinions in *United States v. Stevens*[285] and *Snyder v. Phelps*,[286] in which the Court boldly sustained the free speech rights at stake in those cases.

Second, Justice Anthony Kennedy is also a real force in this area of law; he authored the majority opinions in cases such as *Citizens United v. Federal Election Commission*[287] and *Sorrell v. IMS Health*

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[281] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730, 2731 (2010). In *Holder*, the "restriction on speech was allowed even without any evidence that the speech would have the slightest effect on increasing the likelihood of terrorist activity. The deference that the Court gave to the government was tremendous and the restrictions it placed on speech were great." Chemerinsky, *supra* note 278, at 730 (footnote omitted).

[282] See *infra* Appendix.

[283] *Morse*, 551 U.S. at 395. Kenneth Starr, a former special prosecutor and then dean of Pepperdine Law School and now president of Baylor University, *Ex-Prosecutor Starr Takes Helm at Baylor U.*, CHI. TRIB., Feb. 16, 2010, at 13, represented the Petitioner school principal. *Id.* at 395.

[284] *Holder,* 130 S. Ct. at 2712.

[285] United States v. Stevens, 130 S. Ct. 1577, 1582 (2010).

[286] Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011).

[287] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 886 (2010). As Jeffrey Toobin tells it, Chief Justice Roberts had originally assigned the *Citizens United* majority opinion to himself and had planned to decide the case on narrow statutory grounds. JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 167–68 (2012). But Justice Kennedy, aided by Justices Scalia, Thomas and Alito, wanted to reach the broader First Amendment question and thereafter declare the McCain-Feingold campaign finance law unconstitutional. *See id.*; *Citizens United*, 130 S. Ct. at 886. It was at that point that Roberts purportedly yielded to Kennedy, who wrote the majority opinion after the case was reargued per the Chief Justice's suggestion. *See* TOOBIN, *supra*, at 168; Thomas Goldstein, *Jeff Toobin on Citizens United (Slightly Expanded)*, SCOTUSBLOG (May 14, 2012, 9:30 PM), http://www.scotusblog.com/2012/05/jeff-toobin-on-citizens-united ("[T]he Chief Justice lost his majority to Kennedy's broader constitutional opinion. That happens. While Toobin calls the draft Kennedy opinion a 'majority,' he does not report that the entire majority switched to Kennedy's opinion. It appears that Kennedy may have had only a plurality. The conservatives

Inc.,[288] and the plurality opinion in *United States v. Alvarez*.[289] Though for different reasons, these are all significant opinions that could have an important and long impact on the development of free speech jurisprudence. More broadly speaking, in the opinions in which he wrote a majority or a plurality opinion, Kennedy voted to *affirm* First Amendment free expression rights claims in three of five such cases.[290]

Third, Justice Antonin Scalia authored four of the Court's eight opinions in First Amendment free expression cases where the judgment was unanimous[291] or near-unanimous.[292] This tells us that Chief Justice Roberts is more likely to assign such an opinion to Justice Scalia than to any of his other colleagues on the Court. But when the vote is closer, Justice Scalia is not the one likely to be selected to write for the Court.

Fourth, Justice Clarence Thomas has a mixed record on free expression issues. During his tenure while serving on the Roberts Court, for example, he was a near-absolutist when it came to deregulating elections[293] and protecting commercial speech,[294] but withheld First Amendment protection in cases involving bans or

have repeatedly divided on how quickly to move the law to the right, and the Chief Justice has been one to favor moving more slowly.").

[288] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011).

[289] United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012).

[290] *See* Garcetti v. Ceballos, 547 U.S. 410, 412, 426 (2006) (holding in a 5–4 decision that freedom of expression does not shield employees in their official duties); Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2491, 2501 (2011) (vacating in an 8–1 decision, the Third Circuit's affirmation of an employee's claim under the petition clause of the First Amendment); *Citizens United*, 130 S. Ct. at 886 (sustaining claim in a 5–4 decision); *Sorrell*, 131 S. Ct. at 2672 (sustaining claim in a 6–3 decision); *Alvarez*, 132 S. Ct. at 2542, 2551 (holding in a 6–3 plurality that lying about war time medals received is protected speech).

[291] *See* Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2346 (2011); Pleasant Grove City v. Summum, 555 U.S. 460, 463 (2009); N.Y. State Bd. of Elections v. Torres, 552 U.S. 196, 197 (2008); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 180 (2007).

[292] *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732 (2011); United States v. Williams, 553 U.S. 285, 287 (2008).

[293] *See Citizens United*, 130 S. Ct. at 886 (joining Justice Scalia's concurrence in part); Davis v. Fed. Election Comm'n, 554 U.S. 724, 727 (2008) (joining the majority opinion); Wis. Right to Life, Inc. v. Fed. Election Comm'n, 546 U.S. 410, 410 (2007) (per curium); Randall v. Sorrell, 548 U.S. 230, 265 (2006) (joining in a concurring opinion with Justice Scalia). *But see* Wash. State Grange v. Wash. State Rep. Party, 552 U.S. 442, 444 (2008) (authoring the majority opinion); *N.Y. State Bd. of Elections*, 552 U.S. at 197 (joining the majority opinion).

[294] *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2658–59 (2011) (joining the majority opinion); s*ee also* 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484, 526 (1996) (Thomas, J., concurring in the judgment) ("[A]ll attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.").

limits on video games,[295] prisoner speech,[296] government employee speech,[297] student expression,[298] speech related matters involving public employee unions,[299] and purported material support for terrorists.[300] Hence, in a few select categories of cases, Justice Thomas votes like an absolutist, though in a good number of other free speech areas he is a sure vote to deny many free expression claims.

Fifth, when Justice Stephen Breyer has been assigned to write a lead opinion for the Roberts Court, it has typically been in cases where the First Amendment claim has been denied.[301] Otherwise, he often finds himself in disagreement with the "conservative" bloc. For example, he dissented in many of the Roberts Court campaign finance cases.[302] So, too, he broke company with the Court's conservative wing in employee speech[303] and student speech[304] cases and took strong exception to the majority opinions in *Holder v. Humanitarian Law Project*[305] and *Sorrell v. IMS Health Inc.*[306] On

[295] *Brown*, 131 S. Ct. at 2751 (Thomas, J., dissenting). A significant portion of Justice Thomas's dissent, which no other justice joined, focused on the argument that the First Amendment did not apply to minors. According to Justice Thomas, the drafters of the Constitution and the Bill of Rights "could not possibly have understood 'the freedom of speech' to include an unqualified right to speak to minors." *Id.* at 2759. Thus, to Justice Thomas, the California statute forbidding the sale of violent video games to minors could not possibly be unconstitutional, as it targeted a group that the Framers never intended the First Amendment to protect. *Id.*

[296] *See* Beard v. Banks, 548 U.S. 521, 524 (2006) (concurring in the judgment).

[297] *See* Garcetti v. Ceballos, 547 U.S. 410, 412 (2006) (joining the majority opinion).

[298] *See* Morse v. Frederick, 551 U.S. 393, 395 (2007) (joining the majority opinion).

[299] *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 354 (2009) (joining the majority opinion).

[300] *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712 (2010) (joining the majority opinion).

[301] *See* Locke v. Karass, 555 U.S. 207, 209–10, 221 (2009) (authoring the unanimous opinion denying a claim); *Beard*, 548 U.S. at 524, 536 (Breyer, J., plurality opinion) (authoring the plurality opinion denying a claim). *But see* Randall v. Sorrell, 548 U.S 230, 236, 262 (2006) (Breyer, J., plurality opinion) (authoring the plurality opinion sustaining a claim).

[302] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2829 (2011) (Kagan, J., dissenting) (joining the dissenting opinion); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting) (joining the dissenting opinion); Davis v. Fed. Election Comm'n., 554 U.S. 724, 749 (2008) (Stevens, J., dissenting) (joining the dissenting opinion), Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 504 (2007) (Souter, J., dissenting) (joining the dissenting opinion). *But see Randall*, 548 U.S. at 236 (Breyer, J., plurality opinion) (authoring the plurality opinion with which Justices Roberts and Alito joined in part).

[303] Garcetti v. Ceballos, 547 U.S. 410, 444 (2006) (Breyer, J., dissenting).

[304] Morse v. Frederick, 551 U.S. 393, 425 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).

[305] *Holder*, 130 S. Ct. at 2731 (Breyer, J., dissenting).

[306] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2673 (2011) (Breyer, J., dissenting).

other occasions, however, Breyer broke ranks with Justices Ginsburg, Sotomayor, and Kagan, and aligned himself with Justice Thomas in registering a dissent in *Brown v. Entertainment Merchants Association*.[307] In *Knox v. Service Employees International Union*,[308] Breyer declined to join Justices Ginsburg and Sotomayor in concurring in the judgment of the Court. And in *United States v. Alvarez*,[309] he concurred by way of a separate opinion (joined by Justice Kagan) that rejected the plurality's near-absolutist approach to deciding the merits of the case. Given all of the above, it seems that Justice Breyer is typically quite restrained in his approach to free expression issues and looks more to context and balancing than to any rigid or formulaic method of decision-making.

Sixth, those least likely to write for the Court in a First Amendment free expression cases are the *women* members of the Court: Justices Elena Kagan (zero opinions),[310] Ruth Bader Ginsburg (one opinion),[311] and Sonya Sotomayor (one opinion).[312] And when they do write, it is where there is a wide-vote margin in cases *denying* a rights claim.[313] Moreover, the *total* number of opinions (majority and otherwise) authored by the Court's female Justices is eight.[314] While Justice Sotomayor did not come onto the Court until 2009[315] and Justice Kagan did not arrive until 2010,[316]

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[307] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2761 (2011) (Breyer, J., dissenting). Justice Thomas wrote his own dissent with which no one joined. *Id.* at 2751 (Thomas, J., dissenting).

[308] Knox v. Serv. Emp. Int'l Union, Local 1000 132 S. Ct. 2277, 2296 (2012) (Sotomayor, J., concurring) (joined by Justice Ginsburg); *id.* at 2299 (Breyer, J., dissenting). Justice Kagan joined in Justice Breyer's dissent. *Id.*

[309] United States v. Alvarez, 132 S. Ct. 2537, 2551–56 (2012) (Breyer, J., concurring in the judgment).

[310] *Cf.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. at 2806, 2829 (2011) (Kagan, J., dissenting); s*ee infra* Appendix. Justices Sotomayor, Ginsburg, and Breyer joined Justice Kagan's dissent. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2829.

[311] Golan v. Holder, 132 S. Ct. 873, 877, 878 (2012) (denying a claim by a 6–2 vote); *see infra* Appendix.

[312] Milavetz, Gallop & Milavetz v. United States, 130 S. Ct. 1324, 1329 (2010) (unanimously denying a claim); *see infra* Appendix.

[313] *See, e.g.*, *Milavetz, Gallop & Milavetz*, 130 S. Ct. at 1329.

[314] *See infra* Appendix.

[315] The Court has decided fifteen First Amendment cases since Justice Sotomayor took her seat. Charlie Savage, *Senate Approves Sotomayor to Supreme Court*, N.Y. TIMES, Aug. 7, 2009, at A1 (noting that Sotomayor was confirmed on August 6, 2009); *see infra* Appendix.

[316] The Court has decided ten First Amendment cases since Justice Kagan took her seat. Carl Hulse, *Senate Confirms Kagan in Partisan Vote*, N.Y. TIMES, Aug. 6, 2010, at A1 (noting that Kagan was confirmed on August 5, 2010); *see infra* Appendix.

that number pales in comparison to thirty-eight such opinions authored by their male counterparts during Justice Sotomayor's tenure,[317] and twenty-three during Justice Kagan's tenure.[318] Translated: When it comes to opinions in First Amendment free expression cases, this domain is ruled largely by the men.

Seventh, the Court has divided along ideological lines ("conservative" vs. "liberal") in all of the Court's 5–4 free expression opinions.[319] While labels are often misleading, where the Court is badly divided, we will typically see Roberts, Kennedy, Scalia, Thomas, and Alito in one camp and Ginsburg, Breyer, Sotomayor and Kagan in another.

Eighth, in more than half of the cases (53%) where the Court *denied* a First Amendment free expression claim, the vote was unanimous or near unanimous.[320] In only two of those nine cases did the Court vote to fully *affirm* the lower court.[321] This tells us something about why the Court takes cases in the first instance. That is, there is a certain corrective mindset at work here to rein in what is seen by all or most of the Court's members as excessive deference to First Amendment claims.

Ninth, forty some years ago, the Supreme Court aligned the free speech liberty principle with the equality principle. Justice Thurgood Marshall's opinion for a unanimous Court in *Police*

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[317] *See infra* Appendix.

[318] *See infra* note 343 (counting the number of opinions written by male authors from Justice Kagan's first opinion concerning First Amendment free speech in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), resulting in twenty-three total opinions).

[319] *See* Ariz. Free Enter. Club's Freedom Club v. Bennett, 131 S. Ct. 2806, 2829 (2011) (Justices Kagan, Ginsburg, Breyer, and Sotomayor in dissent); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 929 (2010) (Justices Stevens, Ginsburg, Breyer, and Sotomayor in dissent); Davis v. Fed. Election Comm'n, 554 U.S. 724, 749 (2008) (Justices Stevens, Souter, Ginsburg, and Breyer in dissent); Morse v. Frederick, 551 U.S. 393, 425, 433 (2007) (Justices Stevens, Souter, Ginsburg in dissent, and Breyer in dissent in part); Garcetti v. Ceballos, 547 U.S. 410, 428 (2006) (Justices Stevens, Souter, Ginsburg, and Breyer in dissent).

[320] *See* Reichle v. Howards, 132 S. Ct. 2088, 2090, 2097 (2012) (reversed and remanded); Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2491, 2501 (2011) (vacated and remanded); Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2346, 2352 (2011) (reversed and remanded); Doe v. Reed, 130 S. Ct. 2811, 2814, 2821 (2010) (affirmed); Milavetz, Gallop & Milavetz, P.A., v. United States, 130 S. Ct. 1324, 1329, 1341 (2010) (affirmed in part, reversed in part, and remanded); Pleasant Grove City v. Summum, 555 U.S. 460, 463, 481 (2009) (reversed lower court); Locke v. Karass, 555 U.S. 207, 209, 221 (2009) (affirmed lower court); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 179, 191–92 (2007) (vacated and remanded); Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 51, 70 (2006) (reversed and remanded).

[321] *Doe*, 130 S. Ct. at 2821, *aff'g* 586 F.3d 671 (9th Cir. 2009); *Locke*, 555 U.S. at 221, *aff'g* 498 F.3d 49 (1st Cir. 2007).

Department of the City of Chicago v. Mosley[322] is illustrative of this point. Echoing Alexander Meiklejohn, Justice Marshall stated: "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."[323] That idea took on added traction when Kenneth Karst published his groundbreaking article, *Equality as a Central Principle of the First Amendment*,[324] wherein he championed the "principle of equal liberty of expression."[325] And where such equality is the touchstone, the idea of leveling in the name of egalitarian fairness is buttressed. That said, whatever the merit and reach of the equality principle in First Amendment jurisprudence, that principle came to a halt in the 5–4 opinion authored by Chief Justice Roberts in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[326] There, a divided Court struck down a state matching funds law that provided additional funds to a publicly funded candidate when expenditures by a privately financed one (and independent groups) exceeded the funding initially allotted to the publicly financed candidate.[327] In one sense, the case seemed decided before the ruling came down. I refer to the rhetorical question the Chief Justice posed during oral arguments in the case: "I checked the Citizens' Clean Elections Commission website this morning," he began, "and it says that this [Arizona Citizens Clean Elections Act] was passed to, quote, 'level the playing field' when it comes to running for office. Why isn't that clear evidence that it's unconstitutional?"[328] In striking down the

[322] Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92, 92 (1972).

[323] *Id.* at 96 (footnote omitted) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

[324] Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (explaining that re-regulation of speech based on content is constitutionally suspect). *But cf.* Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 116 n.95 (2007) ("Not long [after the publication of Karst's Equality article], Geoffrey Stone offered a soft-spoken correction. He pointed out that a number of forms of content regulation (prominently including regulations of subject matter) should satisfy First Amendment scrutiny; the most serious constitutional concern is raised by viewpoint discrimination.").

[325] Geoffrey R. Stone, *Kenneth Karst's* Equality as a Central Principle in the First Amendment, 75 U. CHI. L. REV. 37, 37 (2008).

[326] Ariz. Free Enter. Club's Freedom PAC Club v. Bennett, 131 S. Ct. 2806, 2813 (2011).

[327] *Id.* at 2813, 2828–29.

[328] Transcript of Oral Argument at 48, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (No. 10-238), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-238.pdf. For additional commentary, see GARRETT EPPS, WRONG AND DANGEROUS: TEN RIGHT-WING MYTHS ABOUT OUR CONSTITUTION 69–82 (2012).

Arizona election leveling law, the Chief Justice declared that "we have invalidated government-imposed restrictions on campaign expenditures, restraints on independent expenditures applied to express advocacy groups, limits on uncoordinated political party expenditures, and regulations barring unions, nonprofit and other associations, and corporations from making independent expenditures for electioneering communication."[329] In short, the leveling principle has no place in the First Amendment jurisprudence of the Roberts Court. In fact, that principle is the very target of much of the Court's decisional law in this area.

And finally, there is the immense gulf between the Roberts Court's generosity in *Citizens United v. Federal Election Commission,*[330] and its niggardliness in *Holder v. Humanitarian Law Project*. In the former, it eschewed judicial restraint by skirting the doctrines of *stare decisis*[331] and constitutional avoidance[332] in order to fashion a new and hefty dollop of First

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[329] *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2817 (citations omitted).

[330] As of this writing, the Court is considering yet another First Amendment case in this area. *See* Danielczyk v. United States, docket # 12-579 (Whether the ban on campaign contributions by corporations in the Federal Election Campaign Act, 2 U.S.C. §441b, violates the First Amendment; and (2) whether restrictions or bans on the right to make campaign contributions should be reviewed under strict scrutiny, as other restrictions on political expression are, or instead under a less protective standard).

[331] Justice John Paul Stevens made the point his way in his *Citizens United* dissent:

> The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." . . . No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.

Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 938 (2010) (Stevens, J., dissenting) (footnote and citations omitted).

[332] Here again, Justice Stevens took strong issue with his colleagues in the majority in *Citizens United*:

> Consider just three of the narrower grounds of decision that the majority has bypassed. First, the Court could have ruled, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an "electioneering communication" under §203 of BCRA, 2 U.S.C. §441b. . . .
>
> Second, the Court could have expanded the *MCFL* exemption to cover § 501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations. . . .
>
> Finally, let us not forget Citizens United's as-applied constitutional challenge. Precisely because Citizens United looks so much like the *MCFL* organizations we have exempted from regulation, while a feature-length video-on-demand film looks so unlike the types of electoral advocacy Congress has found deserving of regulation, this challenge is a substantial one. As the appellant's own arguments show, the Court could have easily

Amendment protection. Even if one agrees with the substantive result in the case, it is hard to defend the process by which the majority bulldozed its way to the outcome it desired. In the *Holder* case, by stark contrast, the majority all-too-conveniently dispensed with a statutory resolution of the case[333] in order to announce a meager and obscure level of First Amendment "protection"[334] that, in practice, was audaciously deferential to the mantra of "national security"[335] however illegitimately invoked. If *Citizens United* signifies the high water mark in First Amendment protection, then *Holder* is the barren wasteland floor. If the former is an example of

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limited the breadth of its constitutional holding had it declined to adopt the novel notion that speakers and speech acts must always be treated identically—and always spared expenditures restrictions—in the political realm. Yet the Court nonetheless turns its back on the as-applied review process that has been a staple of campaign finance litigation since *Buckley v. Valeo*.

Id. at 937–38 (citations omitted).

[333] In keeping with the doctrine of constitutional avoidance, Justice Breyer made a sensible point in his *Holder* dissent:

> I believe that a construction that would avoid the constitutional problem is "fairly possible." In particular, I would read the statute as criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions. Under this reading, the Government would have to show, at a minimum, that such defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims.

Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2740 (2010) (Breyer, J., dissenting).

[334] In this case involving political expression and content discrimination, the *Holder* majority held that the Court "must [apply] a more demanding standard" than the one which was described in *United States v. O'Brien*." *Id.* at 2723 (majority opinion) (alteration in original) (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989)). But exactly how demanding? Given how the majority ultimately resolved the case and its great deference to Congress and the Executive, it seems that its new test, at least as applied, was actually *less* protective than the one announced in *O'Brien*.

[335] With all due respect to Chief Justice Roberts, who is often a strong defender of First Amendment freedoms, the following pronouncement by him seems perplexing, contradictory, or perhaps both:

> Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals." *But when it comes to collecting evidence and drawing factual inferences in this area, "the lack of competence on the part of the courts is marked," and respect for the Government's conclusions is appropriate*.

Holder, 130 S. Ct. at 2727 (emphasis added) (citations omitted). Diminishing the domain of the First Amendment even further, the Chief Justice later emphasized: "In this area perhaps more than any other, the Legislature's superior capacity for weighing competing interests means that 'we must be particularly careful not to substitute our judgment of what is desirable for that of Congress.'" *Id.* at 2728 (quoting Rostker v. Goldberg, 453 U.S. 57, 68 (1981)). In light of such statements, what *meaningful* degree, if any, of First Amendment protection survives?

judicial sensitivity to First Amendment values, then the latter is an example of judicial indifference to those values. *Citizens United* and *Holder* thus offer a bewildering picture of the Roberts Court—a portrait of a Janus-faced majority with one set of eyes sharp and the other sightless.

To step back and alter the metaphor, all of the just-mentioned observations are, of course, but pieces of an unfinished mosaic of the Roberts Courts and its free speech jurisprudence.[336] To be sure, more work needs to be done and more information compiled and analyzed. A pattern does, however, seem to be developing in which a majority will likely sustain First Amendment claims in cases involving campaign financing,[337] commercial speech,[338] and in many content-discrimination cases.[339] Beyond that, as Dean Erwin Chemerinsky has argued, the Roberts Court is hardly a full-fledged friend of the First Amendment.[340] Moreover, we have yet to see how

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[336] All in all, some have been understandably critical of the current Court's First Amendment free expression jurisprudence: "Some Roberts Court decisions have been protective of speech, such as the rulings in *Snyder v. Phelps* and *Brown v. Entertainment Merchants Ass'n*. But a look at the overall pattern of Roberts Court rulings on speech yields a clear and disturbing conclusion: it is not a free speech Court." Chemerinsky, *supra* note 278, at 734. By contrast, "[o]ne area where the Roberts Court has uniformly ruled in favor of free speech claims is in challenges to campaign finance laws. There have been several such cases in the first six terms of the Roberts Court, and all have struck down the challenged laws." *Id.* at 732.

[337] *See Citizens United*, 130 S. Ct. at 913. To be fair, Chief Justice Roberts and Justice Alito have shown some restraint in this area. In this regard, consider the following: "In a major new ruling on money in politics, almost certainly headed for the Supreme Court, a three-judge U.S. District Court in Washington on Friday rejected a Republican Party challenge to the federal law that limits so-called 'soft money' donations to political parties." Lyle Denniston, "*Soft Money" Donation Ban Upheld*, SCOTUSBLOG (Mar. 26, 2010, 1:03 PM), http://www.scotusblog.com/2010/03/soft-money-donation-ban-upheld. "The District Court ruled that the GOP challenge was not aided by the Supreme Court's Jan. 21 ruling in *Citizens United v. Federal Election Commission*, expanding constitutional protection for some forms of campaign spending by non-party groups." *Id.* As it turned out, the Court summarily affirmed the lower court. Republican Nat'l Comm. v. Fed. Election Comm'n., 130 S. Ct. 3544, 3544 (2010) (affirming with Justice Scalia, Justice Kennedy, and Justice Thomas noting probable jurisdiction and urging that the case be set for oral argument). Theodore Olson was the attorney for the Republican National Committee. Brief for Appellants Opposing Motions to Dismiss or Affirm, Republican Nat'l Comm. v. Fed. Election Comm'n., 130 S. Ct. 3544 (2010) (No. 09-1287), 2010 WL 2300561.

[338] *See* PIETY, *supra* note 59, at 3 (critiquing First Amendment rights of corporations); David Kairys, *The Contradictory Messages of Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, 2013 U. ILL. L. REV. 101 (2013) (arguing that there are stark differences between the Court's treatment of modes of speech available to people of ordinary means, and modes available to corporations and the wealthy).

[339] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012).

[340] *See* Chemerinsky, *supra* note 278, at 734. Ms. Millett and others have also noted that:

> [W]arning signs are up: there are limits to how far the Roberts Court appears willing to go. The more closely integrated speech is with proscribable conduct, as in *Humanitarian*

it might rule on other matters, such as the intersection between the First Amendment and conditions of receipt of federal money.[341]

Mindful of what has been charted out in this Foreword and yet other considerations, it remains to be seen whether behind the curtain of the new absolutism there is a brand of libertarianism, not of the kind that elevates the rights of the powerful over the powerless,[342] but rather of the kind that lifts the level of liberty for all, rich and poor, corporate and non-corporate, and religious and radical types alike. Meanwhile, the old words of the late Harold Laski merit repetition, if only to remind all of us of something basic about our system of freedom of expression:

> We ought not to accept the easy gospel that liberty must prove that it is not licence. We ought rather to be critical of every proposal that asks for a surrender of liberty. Its enemies, we must remember, never admit that they are concerned to attack it; they always base defense of their purpose on other grounds. But I could not, for myself, serve principles which claimed to be just if their result was to make the temple of freedom a prison for the impulses of men.[343]

As the attentive reader will surely discern, there is a measure of

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Law Project, *Williams*, and *Milavetz*, the more likely the Court is to tolerate restrictions and, critically, to defer to governmental judgments in the course of applying constitutional scrutiny. In addition, the Court seems far more receptive to disclosure requirements imposed by law (*Citizens United*, *Reed*); although that arguably can be attributed to the countervailing public speech interest in obtaining information bearing on matters of public interest such as legislative referenda and electioneering speech.

Millett et al., *supra* note 113, at 42.

[341] *See* Alliance for Open Society Int'l, Inc. v. Agency for Int'l Dev., 651 F.3d 218, 231 (2d Cir. 2011) (citing Rust v. Sullivan, 500 U.S. 173, 203 (1991); FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550–51 (1983)). A divided panel of the court of appeals held that Section 7631(f) of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 "likely violates the First Amendment by impermissibly compelling [respondents] to espouse the government's viewpoint on prostitution." *Alliance for Open Society Int'l Inc.*, 651 F.3d at 223, 230. According to the panel, section 7631(f) "falls well beyond . . . permissible funding conditions," because it "does not merely restrict recipients from engaging in certain expression . . . but pushes considerably further and mandates that recipients affirmatively *say* something." *Id.* at 234. The case is now before the Supreme Court for oral argument. Agency for Int'l Dev. v. Alliance for Open Society Int'l, 2013 WL 135533 (Jan. 11, 2013) (granting certiorari).

[342] *See* PIETY, *supra* note 59, at 9 (discussing Nike's situation).

[343] HAROLD J. LASKI, LIBERTY IN THE MODERN STATE 158 (Penguin Books 1937) (1930) (British spelling in quoted matter).

irony here.[344] Even so, the liberty vouchsafed by the new absolutism might well live in general harmony with that championed by Professor Laski, if only the Court and our country allow for it. Strange as that may seem, it is, I submit, a goal worthy of free men and women.

[344] *See* ISAAC KRAMNICK & BARRY SHEERMAN, HAROLD LASKI: A LIFE ON THE LEFT 153–55, 301, 303 (1993) (noting, among other things, that Laski was a Labour Party activist and a member of its national executive committee and a noted figure in the Socialist League).

APPENDIX[345]

FREE SPEECH FIRST AMENDMENT CASES DECIDED BY THE ROBERTS COURT[346]

- ○ [6–2: Plurality, SB]: Beard v. Banks, 548 U.S. 521 (2006)[347]
- ○ [9–0, AS]: Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007)[348]
- ✓ [5–4: In parts, SA]: Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008)
- ✓ [5–4, JR]: Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007)[349]
- ○ [5–4, AK]: Garcetti v. Ceballos, 547 U.S. 410 (2006)
- ○ [5–4: In parts, JR]: Morse v. Frederick, 551 U.S. 393 (2007)
- ✓ [9–0, AS]: N.Y. State Bd. of Elections v. Torres, 552 U.S. 196 (2008)
- ○ [9–0, SA]: Pleasant Grove City v. Summum, 555 U.S. 460 (2009)
- ✓ [6–3: Plurality, SB]: Randall v. Sorrell, 548 U.S. 230 (2006)
- ○ [8–0, JR]: Rumsfeld v. Forum for Academic & Inst. Rights Inc., 547 U.S. 47 (2006)[350]
- ○ [7–2, AS]: United States v. Williams, 553 U.S. 285 (2008)
- ○ [7–2, CT]: Wash. State Grange v. Wash. State Rep. Party, 552 U.S. 442 (2008)

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[345] Key:
✓ = sustains First Amendment claim;
○ = denies First Amendment claim.
The bracketed references refer to the vote in the case. The initials refer to the member of the Court who wrote the lead opinion, either by way of a majority or plurality opinion.

[346] As indicated by the Appendix's title, free speech cases decided on non-First Amendment grounds are not included in this list. *See e.g.*, Dayton v. Hanson, 550 U.S. 511, 515 (2007) (speech and debate clause case); FCC v. Fox Television Stations, Inc. 556 U.S. 502, 529 (2009) (holding that because the FCC failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the Commission's standards as applied to said broadcasts were unconstitutionally vague).

[347] Justice Alito took no part in the consideration or decision of this case. Beard v. Banks, 548 U.S. 521, 523 (2006).

[348] This case was consolidated with *Washington v. Washington Education Association*. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 177 (2007).

[349] This case was consolidated with *McCain v. Wisconsin Right to Life, Inc.* Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 449 (2007).

[350] Justice Alito took no part in the consideration or decision of this case. Rumsfeld v. Forum for Academic & Inst. Rights Inc., 547 U.S. 47, 70 (2006).

- ○ [6–3, JR]: Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009)
- ○ [9–0, SB]: Locke v. Karass, 555 U.S. 207 (2009)
- ○ [6–3, JR]: Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010)
- ✓ [8–1, JR]: United States v. Stevens, 130 S. Ct. 1577 (2010)
- ○ [9–0, SS]: Milavetz, Gallop & Milavetz, P.A., v. United States, 130 S. Ct. 1324 (2010)
- ✓ [5–4, AK]: Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010)
- ○ [8–1, JR]: Doe v. Reed, 130 S. Ct. 2811 (2010)
- ✓ [6–3, AK]: Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011)
- ✓ [7–2, AS]: Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011)
- ✓ [8–1, JR]: Snyder v. Phelps, 131 S. Ct. 1207 (2011)
- ○ [8–1, AK]: Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011)
- ○ [9–0, AS]: Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011)
- ✓ [5–4, JR]: Ariz. Free Enter. Club PAC v. Bennett, 131 S. Ct. 2806 (2011)
- ○ [8–0, CT]: Reichle v. Howards, 132 S. Ct. 2088 (2012)[351]
- ○ [6–2, RBG]: Golan v. Holder, 132 S. Ct. 873 (2012)[352]
- ✓ [7–2, SA]: Knox v. Serv. Emp. Int'l Union, Local 1000 132 S. Ct. 2277 (2012)
- ✓ [6–3: Plurality, AK]: United States v. Alvarez, 132 S. Ct. 2537 (2012)

Total # of Cases	**29**
First Amendment Claims Sustained	12
First Amendment Claims Denied	17
Unanimous Judgments	8[353]
Unanimous or Near-Unanimous in Cases Denying First Amendment Claims	9[354]
5–4 Judgments	6

[351] Justice Kagan took no part in the consideration or decision of this case. Reichle v. Howards, 132 S. Ct. 2088, 2097 (2012).

[352] Justice Kagan took no part in the consideration or decision of this case. Golan v. Holder, 132 S. Ct. 873, 894 (2012).

[353] Seven of these eight cases deny First Amendment claims.

[354] Two of these nine cases were decided 8–1.

Author of Majority/Plurality Opinions	
Roberts	9
Kennedy	5
Scalia	5
Breyer	3
Alito	3[355]
Thomas	2
Ginsburg	1
Sotomayor	1
Kagan	0

First Amendment Opinions authored by Female Justices	
Majority Opinions	
Ginsburg	1[356]
Sotomayor	1[357]
Separate Opinions	
Ginsburg	3[358]
Sotomayor	2[359]
Kagan	1[360]

Total number of opinions (majority & otherwise) by Female Justices: 8[361]

Number of Opinions by Male Justices: 38[362]

[355] Here, note that Justice Alito participated in twenty-seven of the twenty-nine cases listed above.

[356] Golan v. Holder, 132 S. Ct. 873 (2012).

[357] Milavetz, Gallop & Milavetz P.A., v. United States, 130 S. Ct. 1324 (2010).

[358] Reichle v. Howards, 132 S. Ct. 2088 (2012) (Ginsburg, J., concurring); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008) (Ginsburg, J., concurring in part and dissenting in part); Beard v. Banks, 548 U.S. 521 (2006) (Ginsburg, J., dissenting).

[359] Knox v. Serv. Emp. Int'l Union, Local 1000 132 S. Ct. 2277 (2012) (Sotomayor, J., concurring); Doe v. Reed, 130 S. Ct. 2811 (2010) (Sotomayor, J., concurring).

[360] Ariz. Free Enter. Club v. Bennett, 131 S. Ct. 2806 (2011) (Kagan, J., dissenting).

[361] *See supra* notes 355–59.

[362] The number on the left indicates the number of opinions, either majority or otherwise:

2 Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (Justice Roberts writing for the majority; Justice Breyer writing in dissent).

2 United States v. Stevens, 130 S. Ct. 1577 (2010) (Justice Roberts writing for the majority; Justice Alito writing in dissent).

5 Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (Justice Kennedy writing for the majority; Justice Roberts writing in concurrence; Justice Scalia writing in concurrence; Justice Stevens writing to concur in part and dissent in part; Justice Thomas writing to concur in part and dissent in part).

6 Doe v. Reed, 130 S. Ct. 2811 (2010) (Justice Roberts writing for the majority; Justice Stevens writing to concur in part and concur in the judgment; Justice Scalia writing in concurrence of the judgment; Justice Breyer writing in concurrence; Justice Alito writing in concurrence; Justice Thomas writing in dissent).

2 Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (Justice Kennedy writing for the majority; Justice Breyer writing in dissent).

4 Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (Justice Scalia writing for the majority; Justice Alito writing in concurrence of the judgment; Justice Breyer writing in dissent; Justice Thomas writing in dissent).

3 Snyder v. Phelps, 131 S. Ct. 1207 (2011) (Justice Roberts writing for the majority; Justice Breyer writing in concurrence; Justice Alito writing in dissent).

3 Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (Justice Kennedy writing for the majority; Justice Thomas writing in concurrence of the judgment; Justice Scalia writing to concur in part and dissent in part).

3 Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011) (Justice Scalia writing for the majority; Justice Kennedy writing in concurrence; Justice Alito writing in concurrence).

1 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (Justice Roberts writing for the majority).

1 Reichle v. Howards, 132 S. Ct. 2088 (2012) (Justice Thomas writing for the majority)

1 Golan v. Holder, 132 S. Ct. 873 (2012) (Justice Breyer writing in dissent).

2 Knox v. Serv. Emp. Int'l Union, Local 1000 132 S. Ct. 2277 (2012) (Justice Alito writing for the majority; Justice Breyer writing in dissent).

3 United States v. Alvarez, 132 S. Ct. 2537 (2012) (Justice Kennedy writing for the plurality; Justice Breyer writing in concurrence of the judgment; Justice Alito writing in dissent).