

THE RISE AND REACH OF ‘THE DOCTRINE OF CATEGORICAL EXCLUSION’
How the Supreme Court Should More Clearly Define Speech Placed in the ‘First Amendment
Free Zone’ from *Chaplinsky* to *Elonis*

BY

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ABSTRACT

Chapter 1 introduces the “Doctrine of Categorical Exclusion” which to date has been loosely but persistently articulated by the Supreme Court (without use of the phrase itself). At its core, the Doctrine is a set of rules to identify and analyze certain categories of expression that fall outside the “Freedom of Speech” protected by the First Amendment.

Chapters 2 and 3 trace various disjointed roots of the unarticulated doctrine from the mists of history up until the Supreme Court’s first attempt to coalesce and synthesize disparate rulings into what had the appearance of a single doctrine, the landmark 1942 case *Chaplinsky v. New Hampshire*.

Chapters 4 through 7 trace the development of the doctrine, while still unnamed, from *Chaplinsky* in 1942 to the verge of the Supreme Court’s next attempt, in 2010, at synthesizing the doctrine into a coherent and comprehensive articulation. That 68-year period witnessed the evolution of the excluded categories articulated in *Chaplinsky*, the rise and fall of an additional category, the enduring recognition of more categories, the rejection of others, and methods developed by the Supreme Court to control the categorical boundaries. Thus, Chapters 4 through 7 travel the jurisprudential path from *Chaplinsky* to the verge of *United States v. Stevens*.

Chapters 8 and 9 consider the two modern, somewhat comprehensive attempts by the Supreme Court to synthesize the various rules and holdings into a single, coherent doctrine: *United States v. Stevens* (2010) and *United States v. Alvarez* (2012).

Chapter 10 features a proposal for a simplified, coherent approach to the modern Doctrine of Categorical Exclusion—determining what speech falls in the “First Amendment Free Zone” that is outside the freedom of speech protected by the Constitution. The chapter

explains how a simplified approach would promote Speech Clause values and bring greater order and predictability to this aspect of the First Amendment.

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Whatever contribution this dissertation may make to understanding the Speech Clause of the First Amendment is attributable to the generous help and encouragement of the people above. Whatever shortcomings it contains, in form or substance, are purely my own.

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“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

--The First Amendment
U.S. Constitution (1791)

“[The First] [A]mendment, then, we may take it for granted, does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the *freedom* of speech. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is.”

--*Gertz v. Robert Welch, Inc.*
U.S. Supreme Court (1974)

“The claim is not just that Congress may regulate [certain categories of speech] subject to the First Amendment, but that these [categories] are outside the reach of that Amendment altogether—that they fall into a ‘First Amendment Free Zone.’”

--*United States v. Stevens*
U.S. Supreme Court (2010)

INTRODUCTION

The First Amendment to United States Constitution commands that “Congress shall make no law . . . abridging the freedom of speech”¹ Since the 1920s, that constitutional limitation on the power of the federal government to restrict speech has been applied through the Fourteenth Amendment to restrain the states as well.²

Despite their linguistic simplicity, those ten words have filled American constitutional history with dynamic conflict about their scope, their meaning, and their application to real-world cases and controversies. This dissertation focuses on one cluster of the many rules—a particular doctrine—that has guided the Supreme Court in interpreting and applying the Speech Clause throughout American history. This doctrine has wide-ranging roots as ancient as pre-Revolution English law and as recent as *Elonis v. United States*,³ decided June 1, 2015. It is applied as a threshold matter—either explicitly or implicitly—in *every* case arising under the Speech Clause to determine “whether a speech act is covered at all by the First Amendment”⁴ or whether instead the speech at issue falls within a type of “category”⁵ that is excluded from First Amendment protection. But despite this doctrine’s omnipresence, the Supreme Court itself has never given it a specific name, although the Court has colorfully described unprotected speech

¹ U.S. CONST. amend. I.

² U.S. CONST. amend. XIV. *See also* *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the Speech Clause of the First Amendment to apply to the states through the Due Process Clause of the Fourteenth Amendment, *part. rev’g* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which had held the Bill of Rights did not apply to the states); *Douglas v. City of Jeannette*, 319 U.S. 157, 162 (1943). The incorporation of the Speech Clause to apply to the states is now settled law.

³ *Elonis v. United States*, 135 S. Ct. 2001 (2015).

⁴ Joseph Blocher, *Categoricalism and Balancing In First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 387 (2009).

⁵ The Supreme Court first used the phrase “classes of speech,” the predecessor to the modern term “categories,” in describing types or groupings of speech unprotected by the First Amendment in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

that is excluded from the “freedom of speech” protected by the Constitution as existing in a “First Amendment Free Zone.”⁶

Claiming naming rights, this dissertation proposes that the Supreme Court should hone and formalize its approach to identifying speech that falls outside the protection of the Speech Clause, christening it “The Doctrine of Categorical Exclusion.”⁷ Certainty and predictability in the scope of the First Amendment’s protections tend to protect Free Speech values by giving clear notice of the boundaries of the constitutional protection and thereby limiting self-censorship and “chilling” effects.⁸ Thus, both jurisprudential and broader free-speech interests

⁶ *United States v. Stevens*, 559 U.S. 460, 469 (2010). Chief Justice Roberts borrowed this phrase from *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). In *Jews for Jesus*, Justice Sandra Day O’Connor had used the phrase to refer literally to a physical space—an airport—as asserted to be a “First Amendment Free Zone.” In *Stevens*, however, Chief Justice Roberts morphed the phrase into a reference to a conceptual space, not a physical location, and used it to describe speech that falls outside the *freedom* of speech protected by the First Amendment.

⁷ The use of these three terms together—“doctrine,” “categorical,” and “exclusion”—to describe the jurisprudence in this area of First Amendment interpretation is the core contribution of this dissertation to the academic literature. Admittedly, the Supreme Court itself never has associated all three terms for these purposes. Justices have referenced expression that falls outside the freedom of speech protected by the First Amendment as “excluded” from constitutional protection. *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976) (referencing precedent that “has operated to exclude commercial speech from the protection afforded by the First Amendment to other types of communication”); *United States v. Williams*, 553 U.S. 285, 297 (2008) (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”). They also have referred to the “categorical” nature of this exclusion, although the term most commonly used in this context in conjunction with “categorical” is “approach.” *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 400 (1992) (“This categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need. . . . The categorical approach is a firmly entrenched part of our First Amendment jurisprudence.”). The Supreme Court never has referred to the categorical approach to identifying speech that falls outside First Amendment protection as a “doctrine,” but as this dissertation argues, it should. “Doctrine” is defined generally as “a principle, esp. a legal principle, that is widely adhered to.” *BLACK’S LAW DICTIONARY* 496 (7th ed. 1999). As the Supreme Court has explained in a different context, a “doctrine” is a “set of rules for determining when past precedent should be applied to a case before the court.” *Am. Trucking Ass’ns, Inc. v. Smith*, 496 U.S. 167, 196 (1990). As this dissertation describes, the Supreme Court’s approach to determining what categories of speech fall outside the protection of the First Amendment has developed to the point it constitutes “a legal principle that is widely adhered to” and is properly characterized as “a set of rules for determining when past precedent should be applied to a case before the Court.” Thus, the Supreme Court should formalize its approach within the proposed name “Doctrine of Categorical Exclusion,” which accurately describes the jurisprudence.

⁸ *See, e.g.*, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring) (noting “that First Amendment values generally are well served by categorizing speech protection according to respective characters of the expression, its context, and the restriction at issue”).

would be advanced by the Supreme Court defining and articulating the categories of unprotected speech more concisely, consistently, and clearly.

The Speech Clause Requires a Two-Step Analysis

To minimize confusion, this discussion must begin by acknowledging the confused state of the nomenclature. The Supreme Court's jurisprudence often describes as "categories" various groupings of speech for purposes of guiding which judicially created rule applies to which type, or "category," of speech. For example, the Court frequently has explained that speech categorized as "political" enjoys the highest level of protection from the Speech Clause, while speech categorized as "commercial" may enjoy a lesser protection, and still other types of "low value" speech may enjoy no protection at all and thus be considered "excluded" from the First Amendment altogether. Similarly, the Supreme Court has grouped speech into distinct categories for the purpose of applying different First Amendment rules based who is doing the speaking or the place where the speaking is being done, and the Court has developed different doctrinal approaches to speech categorized as "speech acts" or "expressive conduct" as opposed to "pure speech." All of these are examples of the Supreme Court placing speech in "categories" for the purpose of applying rules to determine whether a government regulation of the speech in question can survive First Amendment scrutiny.

The Supreme Court's use of the word "category" and its variants, however, has been less than precise in its various Speech Clause applications, and that imprecision in language tends to muddy the understanding of the jurisprudence. For example, the Supreme Court has referred to its "categorical approach" to describe its broad overall use of categories of speech to analyze

Speech Clause cases⁹ but also has used the identical term to narrowly describe only those categories that are *excluded* from First Amendment protection.¹⁰ The Supreme Court has even used the same phrase to describe the concept that certain speech may be of such overwhelming value that the “categorical approach” requires, without further analysis, that such speech *always* be protected from certain types of government regulation, such as criminal prosecution.¹¹ Thus, the Supreme Court has used the phrase “categorical approach” to describe the concept that certain speech is *always* protected, the concept that certain speech is *never* protected, and the concept that certain speech is *sometimes* protected, an inexact deployment of the phrase that understandably may leave the student of Supreme Court jurisprudence perplexed. The Supreme Court itself has from time to time adopted this confusion through its inapt interchangeable use of similar terms.¹²

The imprecise use of “category” and its variants obscures an important *conceptual* distinction within the jurisprudence. Most of the time, when the Court (or any individual Justice) describes a “category” of speech, the purpose of doing so is to assist in explaining what First Amendment rule must be applied to the government regulation burdening that speech—is it

⁹ See, e.g., *id.* at 775 (acknowledging “[t]he value of the categorical approach generally to First Amendment security”).

¹⁰ See, e.g., *R.A.V.*, 505 U.S. at 383 (“[A] limited categorical approach has remained an important part of our First Amendment jurisprudence.”); *id.* at 417 (Stevens, J., concurring) (“Fifty years ago, the Court articulated a categorical approach to First Amendment jurisprudence” in reference to *Chaplinsky*).

¹¹ See *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (“Landmark urges as the dispositive answer to the question presented that truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanctions by the First Amendment. . . . We find it unnecessary to adopt this categorical approach to resolve the issue before us.”).

¹² See, e.g., *Morse v. Frederick*, 551 U.S. 393, 446 (2007) (Stevens, J., dissenting) (“Our First Amendment jurisprudence has identified some categories of expression that are less deserving of protection than others—fighting words, obscenity, and commercial speech, to name a few.”). This passage from *Morse* effectively illustrates the confused state of the doctrine and the tendency to intermingle the various meanings of the term “category” by mixing categories that are excluded from First Amendment protection—like fighting words and obscenity—with those that are protected in some manner by the First Amendment—like commercial speech); see also generally *R.A.V.*, 505 U.S. 377 (acknowledging existence of “categorical approach” in reference the post-*Chaplinsky* cases but paradoxically concluding even categorically excluded speech is not “invisible to the Constitution”).

subject to strict scrutiny? Intermediate scrutiny? Mere rational basis?¹³ As a practical matter, the test applied under the First Amendment often determines the outcome of the case, and the category into which the Court places the speech at issue determines which test applies.

However, while rarely expressly acknowledged by the Supreme Court, every Speech Clause case necessarily involves a two-step analysis: There exist both a threshold question and a tertiary question that must be answered.¹⁴ Before a court can reach the question of what First Amendment test applies, the court must determine whether the Speech Clause of the First Amendment is applicable to the speech in the case or controversy before it.¹⁵ Thus, the threshold question in *every* Speech Clause case necessarily is whether the First Amendment applies *at all* to the speech at issue. If it does not, then the court's role under the First Amendment in reviewing the government regulation at issue is at an end; if it does, then the court must address the tertiary question of *how* the Speech Clause applies to the regulation and speech at issue in the particular case. Most of the time, the threshold question is not expressly addressed by the

¹³ An example of the Supreme Court using the term “category” to describe a method of analysis within the First Amendment is Justice Breyer’s dissent in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2685 (2011) (Breyer, J., dissenting) (referencing “important First Amendment categories—‘content-based,’ ‘speaker-based,’ and ‘neutral’”).

¹⁴ On occasion, the Supreme Court in other Speech Clause contexts has explicitly recognized this two-step nature of the analysis. For example, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984), the Court explained that in expressive conduct cases it is necessary for a person challenging “assertedly expressive conduct to demonstrate that the First Amendment even applies.” Similarly, in *Cornelius v. NAACP*, 473 U.S. 788, 797 (1985), the Court concluded that to assess whether government restrictions on charitable fundraising in the government workplace “we must first decide whether the solicitation in the context of the [particular fundraising methods] is speech protected by the First Amendment, for, if it is not, we need go no further.”

¹⁵ In the context of categorical exclusion, Chief Justice Burger acknowledged the necessity of this two-step analysis in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 561-62 (1981) (Burger, C.J., dissenting) (“But to say the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*. The plurality confuses the Amendment’s coverage with the scope of its protection.”). For a crisp example of a lower court articulating an analytical framework for all First Amendment speech cases that incorporates a threshold assessment of whether the Doctrine of Categorical Exclusion applies, see *Brayshaw v. City of Tallahassee*, 709 F. Supp. 2d 1244, 1248 (N.D. Fla. 2010) (“The First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment, prohibits Congress and the States from ‘abridging the freedom of speech.’ A challenge to a statute on First Amendment grounds *requires that I first consider whether the speech or conduct is protected by the United States Constitution*. If the answer is affirmative, I then consider whether the statute is unconstitutional on its face. There are few categories of speech that are not protected by the First Amendment.”(citations omitted) (emphasis added)).

litigants or by the court because it is implicitly answered in the affirmative by all involved¹⁶—regulations of political speech, for example, are universally accepted to be subject to Speech Clause protection. Thus, in litigating political-speech cases it is unnecessary to expressly analyze the threshold question to establish that the Speech Clause applies to the government regulation of speech that is in dispute; the legal dispute in political-speech cases is *always* about the tertiary question of what First Amendment rule applies and how that rule applies to the speech at issue. But in a minority of free-speech cases—a relatively small subset of the entire universe of Speech Clause cases decided by the Supreme Court—the threshold question of whether the Speech Clause applies *at all* to the speech at issue is, itself, the core issue in dispute in the case.

The confusion spawned by imprecision is important because the two questions are different in nature; thus, a failure to distinguish between them analytically is a material shortcoming of both the jurisprudence and much of the academic literature. The threshold question is binary in nature—either the Speech Clause applies to the speech at issue or it does not.¹⁷ The tertiary question, however, is open-ended, or “variable,” in nature. There exist

¹⁶ In this sense, this threshold question of whether the Speech Clause applies *at all* in any given case is analogous to subject matter jurisdiction—it is a threshold issue that must be satisfied in every case, but typically it is not in dispute. Only when there is a basis for disputing its presence might the threshold question of whether the speech at issue falls within Speech Clause protection, like the threshold issue of whether the court has jurisdiction to decide the subject matter in dispute in the case, become the subject of the litigation. Indeed, the analogy between the question of the Speech Clause applicability and subject matter jurisdiction is a close one—it is reasonable to think of the question of the Speech Clause’s application (or non-application) to the speech at issue in the case as a determination whether there is any federal question in dispute in the case; if the speech at issue is outside the protection of the Speech Clause of the First Amendment, then in a sense there is no federal constitutional question to be decided by the court.

¹⁷ For a contrary view, however, see *R.A.V.*, 505 U.S. at 383-84 (“We have sometimes said that these [excluded] categories of expression are “not within the area of constitutionally protected speech.” Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity “as not being speech at all.” What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”).

dozens, perhaps scores, perhaps hundreds of judicially made rules for applying the First Amendment to constrain government regulations of different types and circumstances of speech.

Thus, the threshold question requires a fundamentally different sort of analysis than the tertiary question. The binary nature of the threshold question (Does the Speech Clause apply, yes or no?) is conceptually and analytically different from the open-ended nature of the tertiary question (If the Speech Clause does apply, then *how* does it apply to this particular speech at issue?). The important difference has been described as follows:

Binary predictions and exposures are about well defined discrete events, with yes/no types of answers, such as whether a person will win the election, a single individual will die, or a team will win a contest. We call them binary because the outcome is either 0 (the event does not take place) or 1 (the event took place). . . . For instance, we cannot have five hundred people winning a presidential election. Or a single candidate running for an election has two exhaustive outcomes: win or lose. . . . [By contrast,] ‘variable’ predictions and exposures, also known as natural random variables, correspond to situations in which the payoff is continuous and can take several values.¹⁸

To illustrate the difference and its significance, consider a typical school examination. The binary questions are true-false; the variable questions require short answers or perhaps even essays. The student who answers true-false questions with lengthy and elaborate essays, or who responds to essay questions simply with “true” or “false,” would score poorly. Thus is the need to distinguish binary questions from variable questions. The fundamental difference not only stands to reason but also is mathematically demonstrable: “The binaries are mathematically tractable, while the variable are much less so.”¹⁹

¹⁸ Nassim N. Taleb & Philip E. Tetlock, *On the Difference between Binary Prediction and True Exposure With Implications For Forecasting Tournaments and Decision Making Research*, 1 (Nov. 27, 2013) (unpublished paper), available at https://www.stat.berkeley.edu/~aldous/157/Papers/taleb_tetlock.pdf. In this brief paper, two statisticians explain in terms even a math-deficient lawyer can understand the common tendency to confuse the binary question with the variable question and the need to keep them separate for analytical purposes. Of course, for the statisticians, the “analytical purpose” is a mathematical one, but the same reasoning applies with equal force to the need to keep these dissimilar questions separate for the “analytical purpose” of logical and legal analysis.

¹⁹ *Id.*

Unfortunately, the Supreme Court generally has not expressly drawn that conceptual distinction between analysis of the binary threshold question in free speech cases (does the Speech Clause apply *at all* in this case?) and analysis of the open-ended, or “variable,” tertiary question that is the subject of most free speech cases (*how* does the Speech Clause apply to the speech at issue in this case?). The Court certainly is not alone in improperly intertwining the analysis of binary questions with that of open-ended, or “variable,” questions:

[B]ecause of the human tendency to engage in attribute substitution when confronted by difficult questions, decision-makers and researchers often confuse the variable for the binary. . . . The nub of the conceptual confusion is that although predictions and payoffs are completely separate mathematically, both the general public and researchers are under constant attribute-substitution temptation of using answers to binary questions as substitutes for exposure to standard risks.²⁰

This failure to expressly distinguish the two concepts is reflected in the Court’s imprecise (and therefore sometimes confusing) use of language, particularly the term “category” and its variants, in Speech Clause cases. The mashing together of what must by their nature be separate analyses of the two questions presented in Speech Clause cases is a phenomenon hardly unique to the Court. As discussed immediately below, the scholarly literature also is replete with discussion of the “categorical approach” generally and often has not distinguished the use of the word “category” and its variants to describe the binary threshold analysis from its use to describe the tertiary open-ended, or variable, analysis.

Thus, improved linguistic precision would contribute greatly to both the jurisprudence and the scholarship of the Speech Clause. To borrow a phrase, this is an area of the law that would be advanced if the Supreme Court would say what it means and mean what it says. By separating the language describing judicial analysis of the binary threshold question from that describing the variable tertiary question, it is likely more-precise reasoning would follow the

²⁰ *Id.* at 1, 3.

more-precise words. The linguistic and conceptual differences between the two questions inherent in all Speech Clause cases would tend to become clearer and more precise, and thus the clarity and certainty of the law would be improved. Coining and employing the phrase “Doctrine of Categorical Exclusion” to describe the rules and analyses related to the binary threshold question in Speech Clause cases, as this dissertation advocates, would advance that worthy purpose.

Categoricalism v. Balancing

In modern jurisprudence, the Supreme Court has developed two broad approaches to interpretation of the First Amendment’s command: The balancing approach and the categorical approach.²¹ As one scholar described the history of the two:

Decades ago, Justices [Hugo] Black and [Felix] Frankfurter waged a . . . battle in the First Amendment context, and the echoes of their struggle continue to reverberate in free speech doctrine. . . . Justice Frankfurter and the First Amendment balancers won most of their battles. As a result, modern First Amendment doctrine is a patchwork of categorical and balancing tests, with a tendency toward the latter.²²

It has been argued persuasively that the fundamental difference between the approach of the balancers and that of the categoricalists is the distinction between viewing the law as an exercise in applying *standards* versus applying *rules*. The First Amendment balancers prefer standards to be applied case-by-case; the categoricalists tend toward rules that are developed before any particular case or controversy presents itself.²³ As one scholar has framed the distinction:

²¹ In this context, the term “categorical approach” references generally the use of categories to assist in Speech Clause analysis and tends to include both the categorical approach of determining whether speech falls within the First Amendment and the categorical approach of determining what First Amendment rules applies to any particular speech. As discussed above, however, the use of the term and its variants is imprecise and sometimes is used interchangeably for different and distinct purposes.

²² Blocher, *supra* note 4, at 375-76.

²³ See generally Thomas A. Balmer & Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 ALB. L. REV. 2027 (2012/2013); David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking*

The Justices of rules are skeptical about reasoned elaboration and suspect that standards will enable the Court to translate raw subjective value preferences into law. The Justices of standards are skeptical about the capacity of rules to constrain value choice and believe that custom and shared understandings can adequately constrain judicial deliberation in a regime of standards.²⁴

In modern context, the struggle between the balancers and the categoricalists continues. The standards-based approach of the Great Balancer, Justice Frankfurter, has been taken up by Justice Stephen Breyer, who tends to reject “strict categorical analysis” because he interprets precedent to mean “[u]ltimately the Court has had to determine whether the [challenged] statute works speech-related harm that is out of proportion to its justifications.”²⁵ The rules-based approach of the Great Categoricalist, Justice Black,²⁶ lives on in Justice Anthony Kennedy²⁷ who argues that “[t]he vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.”²⁸

The difference between the balancing approach and the categorical approach has been aptly described:

Generally, balancing approaches set the individual’s interest in asserting a right against the government’s interest in regulating it, attach whatever weights are appropriate for the context, and determine which is weightier. In contrast,

Glass of the First Amendment, 44 HASTINGS L.J. 829 (1992-1993); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

²⁴ Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 27 (1992).

²⁵ *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring in the judgment).

²⁶ *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (Justice Black’s view of the Speech Clause famously described as “no law means no law.”). Justice Black often is described as the First Amendment “absolutist,” but absolutism and categoricalism are opposite sides of the same coin; thus, Justice Black could remain resolute that all speech was protected by the First Amendment by simultaneously viewing certain speech or expressive conduct as categorically *excluded* from First Amendment protection. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting, joined by Black, J.). To be an absolutist without categorically excluding some types of speech from First Amendment protection would necessarily result in the upholding of *every* asserted claim that the First Amendment should be applied to bar government regulation without resort to any discretion or judgment, thereby rendering the act of judging a nullity. Thus, this dissertation recognizes and discusses only two approaches to interpreting and applying the Speech Clause of the First Amendment, balancing and categoricalism, even though some would describe the existence of three approaches: balancing, categoricalism, and absolutism. *See, e.g.*, Irene Segal Ayers, *Categorical Approach to Free Speech*, at <http://usciviliberties.org/themes/3309-categorical-approach-to-free-speech.html>.

²⁷ And, of course, in Justice Antonin Scalia.

²⁸ *Alvarez*, 132 S. Ct. at 2544.

categoricalism prohibits this kind of weighing of interests in the individual case and asks only whether the case falls inside certain predetermined, outcome-determinative lines. Balancing therefore tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation, whereas categorization binds a decisionmaker to respond in a determinative way to the presence of delimited triggering facts.²⁹

To be sure, in actual jurisprudence this academic and intellectual distinction may prove a distinction without a difference. In practice, the difference between the two approaches may be reduced to little more than a matter of timing as to *when* the balancing is conducted: “When categorical formulas operate, all the important work in litigation is done *at the outset*. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government’s justification for the infringement.”³⁰

Like all approaches to interpreting and applying the Speech Clause of the First Amendment, the categorical approach has benefits and drawbacks. On the one hand:

In addition to being seen as more protective generally of free speech rights, the categorical approach is praised by its proponents for being protective of those speech rights most in danger: the rights of unpopular or distasteful speakers. The categorical approach is commended for providing principled, objective guidance to courts, for helping judges take a pro-speech stand against the popular will, and for providing speakers with notice and fair warning about when governments can restrict speech. The categorical approach is also praised for bolstering the images of courts as dispensers of fair and equal treatment and for making judges less vulnerable to charges of legislating from the bench.³¹

On the other hand:

Opponents of categorical approaches, however, question the claimed objectivity of free-speech categories. What seem to be fixed, consistent categories can often be manipulated to produce the desired outcome in the case. Thus, liberal judges are more likely to classify as ‘content-based’ laws regulating sexual expression,

²⁹ Blocher, *supra* note 4, at 381 (internal quotation marks omitted).

³⁰ Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293-94 (1992) (emphasis added).

³¹ Irene Segal Ayers, *Categorical Approach to Free Speech*, <http://uscivilliberties.org/themes/3309-categorical-approach-to-free-speech.html>.

whereas conservative judges will often classify the same laws as ‘content-neutral;’ conversely, liberal judges are more likely to categorize laws regulating abortion protesters as ‘content-neutral,’ whereas conservatives assign them to the ‘content-based’ category of speech restrictions. Critics of the categorical approach charge that it is mere labeling, that it is mechanical and formulaic, and that it is not adaptable to a changing world and new technologies. Critics further complain that categories mask the real but unarticulated assessments of facts and policies that occur whenever judges decide speech cases. To the extent such ‘silent’ covert judging happens, the development of constitutional jurisprudence suffers.³²

Whatever the scholars may argue as benefits or drawbacks of each approach, there is no doubt that the Supreme Court continues to rely heavily upon the categorical approach in interpreting and applying the Speech Clause of the First Amendment. While it may be “tempting to characterize all categories of unprotected speech as mere relics of a less enlightened day,”³³ that is not a temptation to which the Supreme Court has succumbed. Nor should it.

As discussed above, categories are employed by the Supreme Court for various and distinct purposes throughout its First Amendment jurisprudence. One author has gone so far as to categorize the categories—arguing that in applying the First Amendment, courts use categories for any of three purposes: “Categorization as Coverage,” “Categorization as Classification (Subcategorization),” and “Categorization as Protection.”³⁴ Another scholar has explained the diversity of First Amendment uses of categorical analysis:

Normally, when people speak about the categorical approach, they are referring to the rules that give lesser protection to certain content based on its supposed lack of value. There are also sets of categories relating to disfavored speaker (e.g.,

³² *Id.*

³³ Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 931 (2009).

³⁴ This framework is proposed by Blocher, *supra* note 4, at 387-93. He credits its development to Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). Blocher’s proposed “Categorization as Coverage” addresses, *inter alia*, whether a particular type of speech receives *any* protection from the First Amendment and therefore comes closest to the focus of this dissertation. Blocher’s other two groupings—“Categorization as Classification (Subcategorization)” and “Categorization as Protection” relate to speech that falls within the First Amendment’s scope, not without it.

students, prisoners, soldiers, state employees) or settings (classrooms, employer communication systems, military bases).³⁵

Although “[c]ontemporary First Amendment opinions . . . are loaded with the rhetoric of balancing,”³⁶ it remains true that “various forms of categoricalism . . . apply throughout First Amendment doctrine, often *in tandem* with balancing.”³⁷ The result is that modern “First Amendment doctrine combines both approaches [balancing and categoricalism], but in different proportions within different categories of speech.”³⁸ As one scholar has put it, this combined approach stands the test of reason because “categories may be rationalized as merely the precipitate of earlier balancing that always happens to come out the same way”³⁹

For example, there exist certain rules that apply to speech categorized as “political”⁴⁰ but different rules govern if the speech falls within the “commercial” category.⁴¹ Certain rules govern regulation of speech by schoolchildren in a school setting⁴² and others apply to speech by public employees in a public work setting.⁴³ There are rules for speech categorized as expressive conduct.⁴⁴ Certain rules apply when the government seeks to restrict defamatory statements directed to public officials,⁴⁵ and different rules govern for those directed at private persons.⁴⁶ In the defamation context, the Supreme Court also distinguishes between the rules applicable for speech on matters of public concern and those of private concern.⁴⁷ There are rules that apply if the speech is “false,” but it matters materially whether the false speech is political (fully

³⁵ Farber, *supra* note 32, at 928.

³⁶ Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 779 (2001).

³⁷ Blocher, *supra* note 4, at 386 (emphasis added).

³⁸ Farber, *supra* note 32, at 919.

³⁹ Sullivan, *supra* note 29, at 295 n.6.

⁴⁰ See generally *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴¹ See generally *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

⁴² See generally *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

⁴³ See generally *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

⁴⁴ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

⁴⁵ See generally *Sullivan*, 376 U.S. 254.

⁴⁶ See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴⁷ See generally *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

protected),⁴⁸ commercial (somewhat protected),⁴⁹ fraudulent (unprotected),⁵⁰ given under oath in a government proceeding (unprotected),⁵¹ or merely designed to puff oneself up (protected).⁵²

The application of all these rules is interwoven within the categorical approach to the First Amendment—which rule applies is determined by which category a particular form of speech is placed into. “The result is a complex tapestry of rules regarding speech restriction.”⁵³

This dissertation focuses on the evolution and development of one specific *type* of category: Those categories of speech that are *excluded* from First Amendment protection. This is the type of category Justice Byron White was describing when he wrote:

“No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. . . . All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then, we may take it for granted, does not forbid the abridging of *speech*. But, at the same time, it does forbid the abridging of the *freedom* of speech. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is.”⁵⁴

As discussed above, this type of categorization relates to the threshold question in the inherent two-step Speech Clause analysis. Thus, categorical *exclusion*, as opposed to other categorical analysis, addresses a question that is fundamentally different in nature—binary, not variable—than the wide range of questions addressed by other uses of categorization in Speech Clause

⁴⁸ See generally *Sullivan*, 376 U.S. at 270 (acknowledging “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); see also *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (the First Amendment has its “fullest and most urgent application precisely to the conduct of campaigns for political office.”).

⁴⁹ See generally *Central Hudson*, 447 U.S. 557.

⁵⁰ See generally *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003).

⁵¹ *United States v. Dunnigan*, 507 U.S. 87, 97 (1993) (“[W]e have said that the constitutionality of perjury statutes is unquestioned.”).

⁵² See generally *Alvarez*, 132 S. Ct. 2537.

⁵³ Farber, *supra* note 32, at 928.

⁵⁴ *Gertz*, 418 U.S. at 382 (White, J., dissenting) (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 21 (Oxford Univ. Press 1965)) (emphasis added).

jurisprudence. The concept is demonstrated visually in Figure 1. If one thinks of the universe of “speech” as a circle and the “freedom of speech” protected by the First Amendment as a subset of that circle, then this dissertation focuses on the “First Amendment Free Zone” containing whatever speech lies in between the two. The categories of speech excluded from the First Amendment are a method of describing the speech that falls outside the protected freedom of speech and therefore lie within the “First Amendment Free Zone.” As shown in Figure 1, the categories of speech excluded from First Amendment protection are represented by the area that is within the outer “circle” of *speech* but outside the inner “circle” of protected *freedom of speech*.

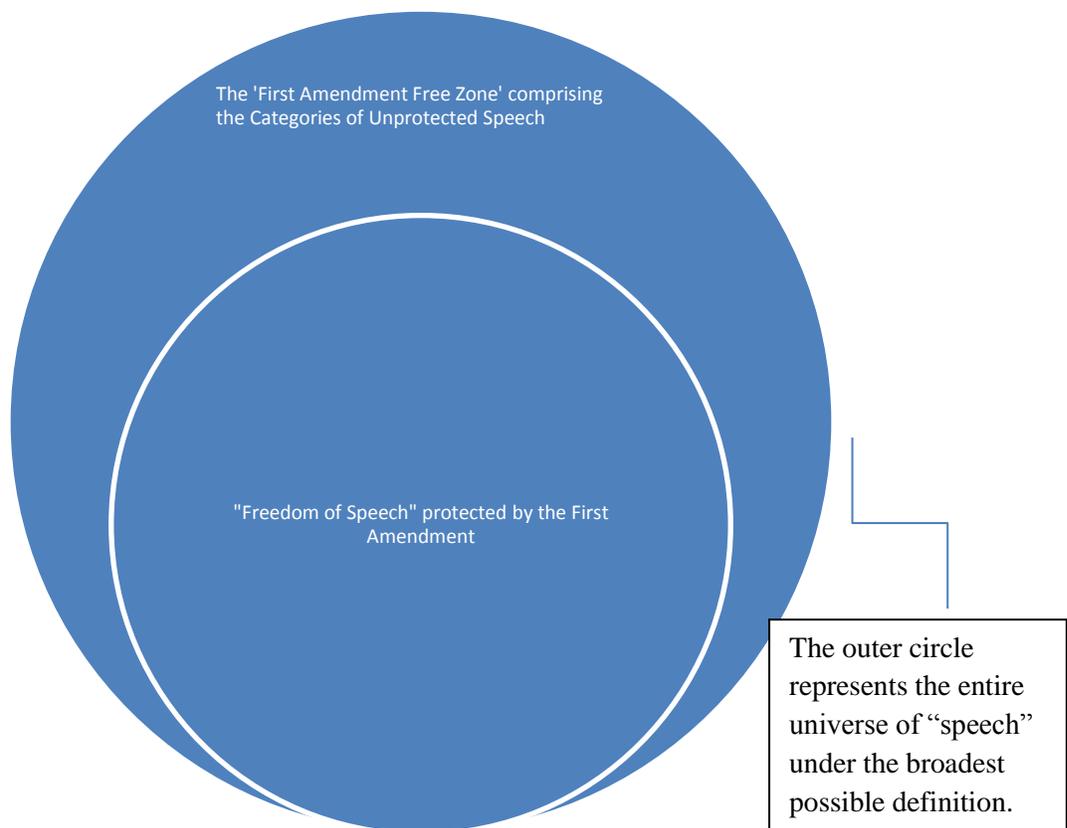


Figure 1: Conceptual relationship between constitutionally protected "Freedom of Speech" and the unprotected categories of speech in the "First Amendment Free Zone"

Throughout the history of the Republic, courts have struggled with defining what speech lies in this “First Amendment Free Zone.” But the judicial approach has been largely *ad hoc*, ill structured, imprecise and dissatisfyingly erratic. The fundamental question underlying the Supreme Court’s categorical exclusion of speech from the First Amendment, therefore, really comes down to this: What speech lies in the “First Amendment Free Zone” that is outside the “freedom of speech” protected by the Constitution, and how do we know the answer to that question?

* * *

With that framework for analysis now established, attention now turns to Chapter 1: The Doctrine of Categorical Exclusion.

CHAPTER 1: The Doctrine of Categorical Exclusion

It long has been accepted in the law and in the society at large that certain types of speech or utterances, such as “falsely shouting fire in a theatre and causing a panic,” do not enjoy the protection of the First Amendment.⁵⁵ But to place that general notion, which has escaped the confines of the law and of the academy and made its way into common parlance, within the Supreme Court’s jurisprudence involving the Speech Clause, it is critical to understand this distinction: The Supreme Court employs categories of speech throughout its First Amendment jurisprudence, but the fact that particular speech has been judicially placed in a “category” does not necessarily mean it is been placed in a category that is wholly *excluded* from First Amendment protection. Thus, as discussed above in the Introduction, the overall categorical *approach* to applying the Speech Clause includes *both* the use of certain categories for analyzing speech *within* the First Amendment—political speech, commercial speech, student speech, expressive conduct, etc.—and the use of certain categories to describe speech wholly *outside* the freedom of speech protected by the First Amendment. The overall categorical approach includes, but is not limited to, the subset of excluded categories.

This dissertation focuses *only* on the subset—those categories of speech that are *outside* the protection of the First Amendment, referenced herein interchangeably as the “excluded categories” or the “unprotected categories” or, occasionally, as “what lies in the First Amendment Free Zone that is outside the freedom of speech protected by the Constitution,” an allusion to the visual representations of the concept in Figures 1 through 6 in this dissertation. These excluded categories exist to inform the threshold, binary question present in all Speech Clause cases: Does the Speech Clause apply *at all* to the speech in dispute? This dissertation

⁵⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1919). This famous phrase by Justice Holmes has made its way well beyond the world of jurisprudence and into the popular jargon of the United States.

will consider the nature of these excluded categories, the characteristics or tests the Supreme Court applies to determine or describe their existence, the names or labels the Supreme Court has attached to each of them, and related issues such as the Supreme Court’s approach to applying them in specific cases or controversies. Taken together, the collection of these various analyses and considerations involved in the Supreme Court’s determination that certain categories of speech may be proscribed by the government without offending the First Amendment are the Doctrine of Categorical Exclusion—a doctrine that the Supreme Court long has applied, in practice though not in name, to conclude that certain types of speech or expression are *excluded from the protection of the First Amendment*.

To be sure, the Supreme Court itself has never invoked the phrase “Doctrine of Categorical Exclusion,” although since *Chaplinsky v. New Hampshire*⁵⁶ it has acknowledged that several “classes” or “categories” of speech may constitutionally be proscribed.⁵⁷ *Chaplinsky* was the Supreme Court’s first attempt to articulate expressly and in what appears to be an intended comprehensive manner the collection of categories of unprotected speech previously identified by the Court. In the sense that the *Chaplinsky* Court synthesized into a single recitation various types of speech previously held to be constitutionally unprotected, it is the founding case for the modern *Doctrine* of Categorical Exclusion—although it used no such terminology, and the underlying concept of exclusion by far predates it.

⁵⁶ 315 U.S. 568 (1942).

⁵⁷ *Chaplinsky* does appear to be the first case in which the Supreme Court expressly stated that it was articulating “classes,” or categories, of speech that are outside the protection of the First Amendment. However, several of the categories the Supreme Court identified in *Chaplinsky* had previously been discussed in a similar context by the Supreme Court, albeit without describing them as part of a “categorical” framework. *See, e.g.,* *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not protect a man from an injunction against uttering words that may have all the effect of force.” (citations, internal quotation marks, and footnotes omitted)); *see generally infra* Chapter 2.

Part A: The “First Amendment Free Zone”

Since *Chaplinsky*, the Supreme Court has been less than entirely consistent in how it characterizes speech that falls into an excluded category. For example, it has famously stated that the “prevention and punishment” of such speech has “never been thought to raise any Constitutional problem,”⁵⁸ a theme constantly repeated in the case law, and it has said the “protection of the First Amendment does not extend”⁵⁹ to these excluded categories. The Supreme Court has expressed that same concept in various shorthand, calling the excluded categories “unprotected,”⁶⁰ “fully outside the protection of the First Amendment,”⁶¹ “not within the area of constitutionally protected speech,”⁶² “proscribable,”⁶³ “outside the scope of Constitutional protection,”⁶⁴ “categorically excluded from First Amendment protection,”⁶⁵ “categories of expression where content-based regulation is permissible,”⁶⁶ “falling outside the First Amendment’s protective shield,”⁶⁷ and even a “First Amendment Free Zone.”⁶⁸ But as a point of caution, the Supreme Court paradoxically also has made clear that even speech within an excluded category is not “entirely invisible to the Constitution.”⁶⁹

⁵⁸ *Chaplinsky*, 315 U.S. at 571-72.

⁵⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989)).

⁶⁰ *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002) (discussing whether “virtual child pornography should be regarded as an additional category of unprotected speech.”).

⁶¹ *United States v. Stevens*, 559 U.S. 460, 471 (2010) (“When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.”).

⁶² *R.A.V.*, 505 U.S. at 383 (citing *Roth v. United States*, 354 U.S. 476, 483 (1957); *see also Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)).

⁶³ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011) (categories without constitutional protection are part of a “long . . . tradition of proscription”); *R.A.V.*, 505 U.S. at 383-84 (referencing the “constitutionally proscribable content” of certain types of speech and these categories’ “distinctively proscribable content”).

⁶⁴ *Konigsberg v. State Bar*, 366 U.S. 36, 50 (1961).

⁶⁵ *United States v. Williams*, 553 U.S. 285, 297 (2008).

⁶⁶ *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012).

⁶⁷ *Id.* at 2561 (Alito, J., dissenting).

⁶⁸ *Stevens*, 559 U.S. at 469 (quoting *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)).

⁶⁹ *R.A.V.*, 505 U.S. at 383-84 (obscenity, defamation and similar categories are “not . . . categories of speech entirely invisible to the Constitution”).

While scholarly critics have argued that this Doctrine of Categorical Exclusion “risks ossification”⁷⁰ and should be abandoned in favor of a more overtly balancing approach, that most certainly has *not* been the view of the Supreme Court. To the contrary, the Supreme Court in recent years has reinvigorated the Doctrine of Categorical Exclusion, invoking it, to varying extents, to resolve at least five major First Amendment cases in the past five years. The stage for this modern resurgence of the Doctrine was set in January 2010 when the Supreme Court—under the leadership of Chief Justice John Roberts—opened a new era of reinvigorated application of traditional free speech principles in its jurisprudence. That month, reversing precedent⁷¹ and striking down a statutory prohibition on certain campaign contributions in order, *inter alia*, to preserve the Free Speech rights of corporations, the Court declared in the sort of bold language it often deploys in asserting fundamental free-speech principles:

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.⁷²

While the jury is still out on the Roberts Court’s First Amendment legacy—and even, perhaps, on its overall direction—there is little doubt the Roberts Court has developed a reputation for attention to, spirited discussion of, and general support for, free-speech freedoms.⁷³

So the natural question to accompany this modern First Amendment resurgence on the Supreme Court would be this: Would this age of renewed vigor by the Roberts Court in enforcing constitutional limits on government’s power to restrict speech mark the end of the Doctrine of Categorical Exclusion? After all, if the Supreme Court’s trend favors *limiting*

⁷⁰ *The Supreme Court 2011 Term—Leading Cases*, 126 HARV. L. REV. 176, 203 (2012).

⁷¹ *Citizens United v. FEC*, 558 U.S. 310 (2010), overruled *Austin v. Michigan*, 494 U.S. 652 (1990).

⁷² *Citizens United*, 558 U.S. at 356.

⁷³ See generally Robert L. Kerr, *Can Postmodernist Analysis Better Explain the First Amendment Jurisprudence of the Roberts Court?*, 4 U. BALT. J. MEDIA L. & ETHICS 1, 1-35 (2014).

government's power to restrict speech, then a doctrine that does just the *opposite*—by placing certain government restrictions on speech *outside* the reach of the Constitution and, therefore, within the controlling power of government and outside judicial review—would seem counterintuitive, even archaic. It stands to reason that “[f]rom the point of view of those who seek to maximize the protection of speech, the recognition of any categories of disfavored speech is unsettling.”⁷⁴

But any rumors of the Doctrine's demise, to paraphrase Mark Twain, were vastly exaggerated. Just as Justice Black—the First Amendment absolutist—was quick to invoke the Doctrine of Categorical Exclusion,⁷⁵ so the modern Roberts Court has *reinvigorated* the Doctrine alongside its growing reputation as a pro-Free Speech Court. For the Roberts Court as for Justice Black, the need for a vigorous Doctrine of Categorical Exclusion is the same: As courts move in the direction of First Amendment absolutism, it becomes increasingly necessary for them to define various expressions as excluded speech, “unprotected speech,” or “not speech” in order to maintain *any* capacity for predictability.⁷⁶ The Doctrine functions as a sort of jurisprudential safety valve. Without the Doctrine of Categorical Exclusion, an absolutist approach by the Supreme Court would inevitably lead to the absurd result that everything *defined* as speech must be constitutionally protected and everything *claimed* to be speech must be so defined. Thus, there would be no incentive to avoid case-by-case litigation challenging *every* government regulation that proscribes, regulates or burdens in any way anything claimed to be speech. Every utterance or expression would be presumed protected by the Constitution, and

⁷⁴ Farber, *supra* note 32, at 931.

⁷⁵ Blocher, *supra* note 4, at 387-88; *see also id.* at 384 n. 23 (collecting cases in which Justice Black concluded a categorical exclusion applied to sustain government regulation of contested speech).

⁷⁶ *See generally* R. George Wright, *What Counts as “Speech” in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1218 (2010) (“If freedom of speech has particular purposes and goals, the idea of speech must have some bounds and limits. Speech for First Amendment purposes cannot include everything. One can be a free speech absolutist, certainly, only if not everything counts as speech.”).

only after a fact-specific determination might courts uphold a regulation. There would be no predictive capacity in First Amendment speech law—only case-by-case adjudication. This is no speculative concern: It occurred between *Roth v. United States* in 1957 and *Miller v. California* in 1973 as the Supreme Court struggled to define obscenity, summarily reversing without explanation 31 lower court decisions⁷⁷ on the subject during the intervening sixteen years. That practice led an exasperated Chief Justice Warren Burger to declare the Supreme Court had assumed “the role of a supreme and unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before it. . . . That is not one of the purposes for which this Court was established.”⁷⁸ Indeed, it is not—and applying the Doctrine of Categorical Exclusion is one method the modern Supreme Court uses to avoid replicating that undesirable experience elsewhere in its Speech Clause jurisprudence.

Therefore, it should not be surprising that the Doctrine of Categorical Exclusion has found perhaps more interest, more favor and more clarity in articulation on the Supreme Court since 2010 than ever before in First Amendment jurisprudence. In the past five years, the Supreme Court has relied upon the Doctrine in deciding no fewer than five cases. In 2010, it decided videos showing cruelty and abuse of animals were not categorically unprotected;⁷⁹ in 2011, it held neither were violent video games⁸⁰ or grotesque picketings of military funerals.⁸¹ By 2012, the Supreme Court was applying categorical analysis to conclude liars who falsely claim military honors could not be punished by the government.⁸² In 2015, the Court resolved through statutory construction a dispute about the government’s power to prosecute Internet-

⁷⁷ *Miller v. California*, 413 U.S. 15, 22 n.3 (1973).

⁷⁸ *Walker v. Ohio*, 398 U.S. 434 (1970) (per curiam) (Burger, C.J., dissenting).

⁷⁹ *See United States v. Stevens*, 559 U.S. 460 (2010).

⁸⁰ *See Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011).

⁸¹ *See Snyder v. Phelps*, 562 U.S. 443 (2011).

⁸² *See United States v. Alvarez*, 132 S. Ct. 2537 (2012).

based threats but two Justices would have reached the constitutional question of whether the threats involved were “true threats” unprotected by the First Amendment.⁸³

The concentration of cases since 2010 articulating, elaborating upon and applying the Doctrine of Categorical Exclusion is unprecedented in the Supreme Court’s history. Far from “ossification,” the Doctrine of Categorical Exclusion is undergoing unprecedented clarification, application and acceptance at the modern Supreme Court. In *United States v. Alvarez*,⁸⁴ for example, seven of the nine Justices—spanning the philosophical spectrum from Justices Samuel Alito and Clarence Thomas to Justices Sonia Sotomayor and Ruth Bader Ginsburg—applied the Doctrine of Categorical Exclusion in reaching their respective plurality and dissenting results.

Thus, the timing is appropriate for the Supreme Court to formalize its jurisprudence into a synthesized Doctrine of Categorical Exclusion and to define and articulate the categories of unprotected speech more concisely, consistently, and clearly. As the Supreme Court comes to rely more frequently on application of the Doctrine, further clarity is desirable to address the recurring and unavoidable fundamental question: What speech lies in the “First Amendment Free Zone” that is outside the “freedom of speech” protected by the Constitution, and how do we know the answer to that question?

⁸³ See *Elonis v. United States*, 135 S. Ct. 2001 (2015). The separate concurrence of Justice Alito and dissent of Justice Thomas each invoked the Doctrine of Categorical Exclusion, although of course not by name. Interestingly, but not squarely pertinent here, in the October 2014 term, the Supreme Court also took the unusual step of upholding a government regulation on speech by *applying* the First Amendment but concluding strict scrutiny had been satisfied. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

⁸⁴ 132 S. Ct. 2537 (2012).

Part B: Common Characteristics of the Excluded Categories

A categorical approach to excluding speech from the protection of the First Amendment necessarily begs the question: What is the basis upon which a category of speech comes to be recognized by the Supreme Court as an *excluded* category? Put another way, the essential question becomes: What are the common characteristics of speech within the various excluded categories?

To be sure, there is no single test the Supreme Court applies to determine whether a category of speech should be excluded from the First Amendment. From an intellectual standpoint, the absence of such a test stands to reason:

By and large, the Court has been reluctant to recognize new categories of unprotected speech. This reluctance makes sense. If the rules governing unprotected speech were readily malleable, they would in effect operate as standards and fail to provide clear guidance to future cases or clear guidance to speakers and state authorities.⁸⁵

The Supreme Court recently rejected in sharp terms the Government's invitation to establish a "simple balancing test" to determine whether a category of speech should be excluded from the First Amendment, characterizing that "free-floating test" as "startling and dangerous."⁸⁶

Rather than devising a test that can be applied to determine whether a category of speech should be designated as unprotected, the Supreme Court since *Chaplinsky* has from time to time articulated characteristics of the unprotected categories. The Supreme Court itself has acknowledged as much:

[T]his Court has often *described* historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and

⁸⁵ Farber, *supra* note 32, at 924.

⁸⁶ *Stevens*, 559 U.S. at 470. The actual test proposed by the Government to determine whether a category should be recognized as unprotected was: "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." *Id.*

morality. . . . [W]e noted that within these categories of unprotected speech, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required, because the balance of competing interests is clearly struck. . . .

But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an *ad hoc* calculus of costs and benefits tilts in a statute’s favor.⁸⁷

Even in the absence of “a freewheeling authority to declare new categories of speech outside the scope of the First Amendment,”⁸⁸ it is possible to identify common characteristics shared by the excluded categories—i.e., those “descriptive” characteristics the Supreme Court referenced in the excerpt above. There are four of those descriptive characteristics that tend to describe speech to which the Supreme Court has applied the Doctrine of Categorical Exclusion.

First, there must exist a historical practice of excluding the speech from First Amendment protection. This speech is proscribable because, as the *Chaplinsky* Court termed it, “[its] prevention and punishment . . . has *never* been thought to raise any Constitutional problem.”⁸⁹ The Supreme Court has variously referenced this concept as a “long . . . tradition of proscription,”⁹⁰ “long-established . . . proscriptions,”⁹¹ or “historically unprotected.”⁹² The existence of such historical practice must be established by “persuasive evidence.”⁹³

In applying the Doctrine of Categorical Exclusion, the Supreme Court seeks to recognize unprotected categories of speech that have previously existed in the law rather than creating such categories by judicial action on a case-by-case basis.⁹⁴ One might analogize the Supreme Court’s

⁸⁷ *Id.* at 470-71 (citations and internal quotation marks omitted).

⁸⁸ *Id.* at 472.

⁸⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (emphasis added).

⁹⁰ *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. at 2729, 2734 (2011).

⁹¹ *United States v. Williams*, 553 U.S. 285, 298 (2008).

⁹² *Stevens*, 559 U.S. at 472.

⁹³ *Entm’t Merchants Ass’n*, 131 S. Ct. at 2734.

⁹⁴ *Consider, e.g., Stevens*, 559 U.S. at 472 (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”).

self-identified role in this regard as similar to that of a paleontologist who cannot *create* new species of dinosaurs but who may, from time to time, *discover* new evidence of some long-ago species not previously identified. Thus, “it cannot be said with certainty that the [already discovered excluded categories] are or will remain the only ones that are without First Amendment protection”⁹⁵

There are three ways in which the Supreme Court has satisfied itself that an excluded category of speech satisfies this requirement for historical practice:

Original meaning: Like originalism generally, reliance upon original meaning to demonstrate a historical practice of exclusion involves looking to whether the Founding Generation considered a particular category of speech protected or whether the Constitution “never”⁹⁶ barred its “prevention and punishment.”⁹⁷ While “conditions in 1791 ‘do not arbitrarily fix the division between lawful and unlawful speech for all time,’”⁹⁸ the presence at the Founding of a practice of proscription is strong evidence that a category of speech may yet be classified today as proscribable. “Throughout its history this [Supreme] Court has consistently recognized . . . ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk.”⁹⁹ Perhaps the best articulation of the textual basis for this approach is from Justice Thomas’s dissent in *Brown v. Entertainment Merchants Association* (“*EMA*”),¹⁰⁰ the violent video games case: “As originally understood, the First Amendment’s protection against laws ‘abridging the freedom of speech’ did not extend to *all* speech.”¹⁰¹ Justice Thomas

⁹⁵ *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment).

⁹⁶ *Chaplinsky*, 315 U.S. at 572.

⁹⁷ *Id.*

⁹⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,382 (1974) (White, J., dissenting) (quoting ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 14 (Harvard Univ. Press 1954)).

⁹⁹ *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49-50 (1961) (emphasis added).

¹⁰⁰ 131 S. Ct. 2729, 2751-61 (2011) (Thomas, J., dissenting).

¹⁰¹ *Id.* at 2751 .

noted that the “freedom of speech” referenced in the First Amendment was not considered by the Founding Generation to be so broad as to include all utterances. “Laws regulating such [unprotected] speech do not ‘abridg[e] the freedom of speech’ because such speech is understood to fall outside ‘the freedom of speech.’”¹⁰² Thus, if the authors of the First Amendment considered particular categories of speech to be without constitutional protection, those categories must be speech falling outside the “freedom” they referenced in the First Amendment and therefore remain subject to government proscription.

Longstanding practice: In some applications, the Supreme Court has found the requisite historical practice of exclusion is satisfied by a showing of a “traditional categorical exception[.]”¹⁰³ even without proof that the tradition reaches back to 1791. In effect, the Supreme Court has found that a practice of exclusion may be *historical enough* if evidence shows a “long . . . tradition of proscription”¹⁰⁴ that nevertheless falls short of dating to the Founding Generation. What such longstanding traditions that fall short of the Founding Generation lack in duration, however, the Supreme Court may insist be made up in proof of widespread acceptance.¹⁰⁵ Exclusion of speech justified in this manner rests on the identification of a “historic and traditional categor[y] *long familiar to the bar.*”¹⁰⁶

¹⁰² *Id.* at 2752.

¹⁰³ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

¹⁰⁴ *EMA*, 131 S. Ct. at 2734.

¹⁰⁵ *See, e.g., New York v. Ferber*, 458 U.S. 747, 758 (1982). The *Ferber* Court justified categorical exclusion of child pornography from First Amendment protection because, *inter alia*, “virtually all of the States and the United States” have banned it and “[t]he legislative judgment, as well as the judgment found in the relevant literature, is that” child pornography is harmful to the health of children. *Id.* Thus, the Court looked not only to the *political* consensus but also the confirming *academic* consensus in its analysis.

¹⁰⁶ *Simon & Schuster*, 502 U.S. at 127 (Kennedy, J., concurring in the judgment) (emphasis added).

Tort law yields examples of “statements that were neither illegal nor tortious at the time of the [First] Amendment’s adoption” but that nonetheless fal[l] outside the First Amendment’s protective shield.”¹⁰⁷ As Justice Alito has noted:

The right to freedom of speech has been held to permit recovery for the intentional infliction of emotional distress by means of a false statement, even though that tort did not enter our law until the late 19th century. [In addition,] . . . the Court concluded that the free speech right allows recovery for the even more modern tort of false-light invasion of privacy.¹⁰⁸

It also “has long been assumed that the First Amendment is not offended by prominent criminal statutes with no close common-law analog”¹⁰⁹—statutes that, therefore, could not have been contemplated by the Founding Generation.

Piggybacking: In a few circumstances, the Supreme Court has satisfied its requirement to show a historical practice of exclusion by closely tying a category of excluded speech to a *separate* category that otherwise satisfies the requirement. In practice, this is essentially an exercise in “adjust[ing] the boundaries of an existing category of unprotected speech” to accommodate a new circumstance.¹¹⁰ In other words, if the Supreme Court cannot demonstrate a sufficient tradition of proscription for a newly excluded category itself, it may essentially conclude that the category is merely *piggybacking* on another “related and overlapping [excluded] category”¹¹¹ whose historical roots already are established.

The clearest example of this approach is the Supreme Court’s handling of child pornography. Unable to show a tradition of proscription of visual depictions of child pornography that only “[i]n recent years” had developed into a “serious national problem,”¹¹² the

¹⁰⁷ *Alvarez*, 132 S. Ct. at 2561 (Alito, J., dissenting).

¹⁰⁸ *Id.* (citations omitted).

¹⁰⁹ *Id.* 2561-62 (collecting examples).

¹¹⁰ *EMA*, 131 S. Ct. at 2735.

¹¹¹ *Williams*, 553 U.S. at 288.

¹¹² *Ferber*, 458 U.S. at 749.

Supreme Court instead emphasized how the characteristics of this new category of speech were consistent with other proscribable categories. In *New York v. Ferber*,¹¹³ the Court emphasized the similarities between “child pornography” and proscribable “obscenity.”¹¹⁴ The Court in *United States v. Williams*¹¹⁵ later further emphasized that visual depictions of child pornography are “contraband” that can be banned under the established principle that “[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection.”¹¹⁶

Second, speech in a proscribable category inflicts harm. The *Chaplinsky* Court introduced this characteristic as meaning words that “by their very utterance inflict injury.”¹¹⁷ Characterized broadly, the government’s legitimate interest in preventing the infliction of “harm,” or of “evil,”¹¹⁸ is a common attribute of every excluded category. For example, child pornography harms children; defamation harms the person whose reputation is defiled; obscenity harms morality in society generally; speech integrated with criminal conduct facilitates the harmful criminal act; and incitement causes harmful riots. Indeed, one scholar has argued for a more expressly harm-based assessment of excluded categories:

The Court could evaluate whether a category of speech works sufficiently substantial harm to be regulated in light of several factors: (1) whether the speech has a materially—for example, physically or financially—negative impact on an individual or group; (2) whether the speech causes or is very likely to cause psychological or emotional distress or damage to an individual or group; (3) whether the speech is intimately tied to some other form of harm that is already within the government’s power to prevent; and (4) whether the group with which the speech is concerned . . . warrants special protection due to some special vulnerability.

¹¹³ 458 U.S. 747 (1982).

¹¹⁴ See generally *id.*

¹¹⁵ 553 U.S. 285 (2008).

¹¹⁶ *Id.* at 297 (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

¹¹⁷ *Chaplinsky*, 315 U.S. at 572.

¹¹⁸ See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (speech may be restricted when it “create[s] a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent”).

These factors attempt to capture the various permutations of ‘harm’ that exist within the law, and particularly within First Amendment doctrine.¹¹⁹

This, of course, stands to reason—what would be the constitutional justification for permitting government to proscribe harmless utterances?¹²⁰ The Supreme Court inevitably takes into account the “legally cognizable harm associated with”¹²¹ speech when it applies the Doctrine of Categorical Exclusion. For example, visual depictions of child pornography may be proscribed because “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”¹²² But, presumably because the ultimate responsibility for protecting First Amendment values is a judicial task, the Supreme Court has been willing to *consider* legislative or academic findings related to the harm caused by specific speech¹²³ but has specifically reserved to itself the final assessment of whether “certain speech is too harmful to be tolerated.”¹²⁴

Third, speech in an excluded category is deemed to be of relatively low value. The principle has been consistent since *Chaplinsky*’s formulation 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.”¹²⁵ Only speech of “trifling”¹²⁶ value may properly be eligible for inclusion in an excluded category. There has remained a strong sentiment on the Supreme Court—even if not always in the majority—that *any* prohibition that may be applied to *any* speech that in itself has

¹¹⁹ *The Supreme Court 2011 Term—Leading Cases*, 126 HARV. L. REV. 176, 203-04 (2012).

¹²⁰ *See, e.g., Alvarez*, 132 S. Ct. at 2546 (false statements that cause no harm but serve merely to “puff up” the speaker are constitutionally protected).

¹²¹ *Id.* at 2545.

¹²² *Ferber*, 458 U.S. at 757.

¹²³ *See, for example*, the extensive discussion in *Ferber* of the harm caused to children by the making of child pornography. *Id.* at 758-58 nn. 9 & 10.

¹²⁴ *EMA*, 131 S. Ct. at 2734.

¹²⁵ *Chaplinsky*, 315 U.S. at 572.

¹²⁶ *Stevens*, 559 U.S. at 487 (Alito, J., dissenting).

“serious literary, artistic, scientific, or medical value[] would violate the First Amendment” because *any* such burden on speech is “by definition, simply not ‘*de minimis*.’”¹²⁷ Not all low value speech is unprotected, but all unprotected speech is deemed to be of low value.

Fourth, the excluded category itself must be, as *Chaplinsky* put it, a “well-defined and narrowly limited class[] of speech.”¹²⁸ Those principles have remained constant in the Doctrine of Categorical Exclusion as the Supreme Court has continued to insist that “a *limited* categorical approach has remained an important part of our First Amendment jurisprudence”¹²⁹ and that laws proscribing categorically excluded speech must “sufficiently describe[] a category of material.”¹³⁰ In applying the Doctrine, the Supreme Court continues to make clear that “[o]ur task is only to say whether or not such works constitute a ‘well-defined and narrowly limited class[] of speech. . . .’”¹³¹ In modern application, the Doctrine of Categorical Exclusion has come to include a variety of tools, discussed in Chapter 7, *infra*, the Supreme Court uses to ensure the categories remain “well-defined and narrowly limited.”

* * *

Each of the four characteristics above is a necessary, but by itself not a sufficient, condition indicating the existence of an excluded category. A historical practice of exclusion is necessary, but evidence of historical practice alone cannot indicate the modern presence of an excluded category. If it could, blasphemy still would be punishable by the government, as it was for the Founding Generation, and so would profanity, which was recognized as proscribable until as recently as 1942.¹³² Moreover, if a mere showing of historical practice sufficed to justify

¹²⁷ *Ferber*, 458 U.S. at 776 (Brennan, J., concurring in the judgment).

¹²⁸ *Chaplinsky*, 315 U.S. at 571.

¹²⁹ *R.A.V.*, 505 U.S. at 383 (emphasis added).

¹³⁰ *Ferber*, 458 U.S. at 765.

¹³¹ *EMA*, 131 S. Ct. at 2741.

¹³² “The profane” is one of the proscribable categories articulated in *Chaplinsky*, 315 U.S. at 572.

exclusion, Justice Alito’s persuasive demonstration that George Washington’s army punished lies about military honors would have saved the Stolen Valor Act,¹³³ and Justice Thomas’s showing that the Founding Generation customarily banned adults from communicating directly with other people’s children would have preserved California’s regulation of violent video games.¹³⁴ But neither did.

Nor is a mere showing of harm caused by speech or a demonstration of an utterance’s low value sufficient to justify its categorical exclusion. The concepts of harm inflicted and value conveyed are, in fact, opposite sides of the same coin and, in that sense, are the weights on different sides of the same balancing scale. Neither has much analytical meaning except when weighed against the other. “[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.”¹³⁵ Moreover, the conclusion that mere narrowness of a category of speech is plainly insufficient to justify the government banning it needs no further explanation—for example, a category of speech criticizing the President of the United States on matters related to particular taxes might be narrow but clearly would not be proscribable.

Thus, the Doctrine of Categorical Exclusion really is a product of balancing. To be sure, “[t]he 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.”¹³⁶ The Doctrine is not a function of “an *ad hoc* calculus of costs and benefits”;¹³⁷ rather, we might aptly describe it as the product of *systematic* balancing. Within excluded categories, the Supreme Court has explained:

¹³³ See generally *Alvarez*, 132 S. Ct. at 2556-65 (Alito, J., dissenting).

¹³⁴ See generally *EMA*, 131 S. Ct. at 2751-71 (Thomas, J., dissenting).

¹³⁵ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)).

¹³⁶ *Stevens*, 559 U.S. at 470.

¹³⁷ *Id.* at 471.

“‘[T]he evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,’ because ‘the balance of competing interests is clearly struck.’”¹³⁸ As one scholar described it in discussing categorical analysis more generally:

Categoricalism allows a judge to transform some background value into a rule that will govern all subsequent cases inside the category without any further reference to the background principle or value. The creation of the category cuts off future adjudicators from the underlying value and prohibits the reweighing of interests.¹³⁹

Or in the words of another: “[T]he surviving categories [of unprotected speech] may be rationalized as merely the precipitate of earlier balancing that always happens to come out the same way [O]nce the categories are established, further *ad hoc* balancing is cut off”¹⁴⁰

This notion that categories really are the now-predictable result of numerous long-concluded historical acts of balancing—just as fossils are the result of numerous long-dead historical life forms—is consistent with the Supreme Court’s strong and consistent insistence on a showing of historical practice as a precondition for applying the Doctrine of Categorical Exclusion.

Returning to first principles, the Supreme Court has noted:

The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.”¹⁴¹

The excluded categories, therefore, are tools that can assist courts, speakers and practitioners of the law to predict the outcome when government seeks to regulate certain types of speech, not a rigid doctrinal equation that when provided certain input inevitably produces certain output. The

¹³⁸ *Id.* (quoting *Ferber*, 458 U.S. at 763-64).

¹³⁹ Blocher, *supra* note 4, at 382.

¹⁴⁰ Sullivan, *supra* note 29, at 295 n.6.

¹⁴¹ *Stevens*, 559 U.S. at 470 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

Doctrine of Categorical Exclusion operates to promote predictability and certainty but is cautious to maintain an element of flexibility, which is why the Supreme Court has made clear it “need not foreclose the future recognition of . . . additional [excluded] categories to reject . . . [a] highly manipulable balancing test as a means of identifying them.”¹⁴² Thus, excluded categories may be understood, as one scholar has put it, to be “a kind of prepackaged strict scrutiny” or “shortcut applications of strict scrutiny.”¹⁴³

Whether understood as “prepackaged strict scrutiny” or otherwise, there is little doubt that the Doctrine of Categorical Exclusion has advantages for First Amendment values and for practitioners of the law:

The positive function of the categories is clear. Essentially, for some key government interests, the Court has given clear direction about which regulations are acceptable. This provides useful guidance to the government, and more importantly, clear warning to speakers about what they may and may not say. There seems to be a clear gain from avoiding the case-by-case application of the compelling interest test.¹⁴⁴

At the same time, the Doctrine is no panacea. In many ways, it merely substitutes problems of defining the categories for problems of defining the standards. “Categorization is the taxonomist’s style—a job of classification and labeling,”¹⁴⁵ and the insistence on historical practice risks ossification. That is why the Supreme Court has for many years signaled its unwillingness to become tightly bound by a rigid application of categorical analysis.¹⁴⁶ It also is

¹⁴² *Stevens*, 559 U.S. at 472.

¹⁴³ Farber, *supra* note 32, at 919-20.

¹⁴⁴ *Id.* at 932.

¹⁴⁵ Sullivan, *supra* note 29, at 293.

¹⁴⁶ Consider, for example, the Supreme Court’s approach to applying the First Amendment to a Florida law that barred media organizations from publishing the name of a rape victim in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In that case, the Supreme Court declined a rape victim’s invitation to establish “a categorical rule that publication of the name of a rape victim never enjoys constitutional protection.” *Id.* at 531-32. At the same time, while ruling in this case in favor of the newspaper that published the rape victim’s name in violation of a Florida statute and of the newspaper’s own internal policy, the Supreme Court was careful to “not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary” as to be allowed within the limits of the First Amendment. *Id.* at 537. Thus, the overall teaching of *Florida Star* is that the Supreme Court has carefully worked to preserve its flexibility in balancing competing constitutional

why the Supreme Court has acknowledged that the various excluded categories are often “related and overlapping.”¹⁴⁷

To illustrate that point in practice, this chapter closes with consideration of how the Supreme Court has applied the Doctrine of Categorical Exclusion to recognize or establish a new excluded category for visual depictions of child pornography. If the Supreme Court’s objective was to sustain laws regulating pornographic images created with real children, it could have done so in any one of at least three ways:

First, the Supreme Court could have identified child pornography as a new, separate category of unprotected speech. This is what the Supreme Court *stated* that it did in the line of child pornography cases,¹⁴⁸ although, as shown in Chapter 6, Part C, it is doubtful that is *in fact* what it did.

The problem with this approach is that it is inconsistent with the Supreme Court’s insistence that it merely identifies pre-existing categories of speech that have always been outside the First Amendment and then articulates them. Because the technology to take photographs of actual pornographic acts involving children did not exist for more than a few decades prior to *Chaplinsky*—and the technology certainly was not at all widespread prior to *Chaplinsky*—it is not plausible to assert that there was a longstanding, pre-existing consensus that these sorts of visual depictions of pornographic acts involving real children were among the

interests, in this case free speech rights versus privacy rights both of which are “plainly rooted in the traditions and significant concerns of our society,” *id.* at 533 (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975)), and thus has been cautious in applying categorical analysis: “Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily.” *Id.* at 532.

¹⁴⁷ *Williams*, 553 U.S. 285, 288.

¹⁴⁸ *Ferber*, 458 U.S. at 765-66.

“well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”¹⁴⁹

Second, the Supreme Court could have treated visual depictions of child pornography as a derivative of, or subcategory of, obscenity. On its face, this approach would appear to have made sense and, in a historical context, it would seem to be consistent with the *Chaplinsky* Court’s articulation of the “lewd and obscene” as a category of speech outside the scope of First Amendment protection. From a simple common-sense standpoint, it is reasonable to believe that most people—including most judges—would instinctive consider pornographic visual depictions of children to be “lewd and obscene.”

The problem with this approach from a jurisprudential standpoint is that by the time the Supreme Court first confronted it in 1982,¹⁵⁰ almost a decade had passed since the Court had put behind it the decades of struggle with defining “obscenity.” Having finally settled on a definition of obscenity in 1973,¹⁵¹ after decades of wrangling, it is understandable that the Supreme Court would be loath to identify as “obscene” any material that falls outside the hard-fought *Miller* definition of obscenity.¹⁵² To have done so would have been to invite more years of uncertainty and litigation to define the limits on any newly recognized subcategory of obscenity outside the *Miller* test. Therefore, although it appears obvious that depictions of child pornography are “lewd and obscene,” the Supreme Court could not define them as such without reopening the decades-long struggle to define obscenity that was finally put to rest in *Miller*—and the Supreme Court was, understandably, unwilling to do that.

¹⁴⁹ *Chaplinsky*, 315 U.S. at 571-72.

¹⁵⁰ See generally *Ferber*, 458 U.S. 747.

¹⁵¹ See generally *Miller v. California*, 413 U.S. 15 (1973).

¹⁵² *Ferber*, 458 U.S. at 761 (“It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.” (citation omitted)).

Third, the Supreme Court could have treated visual depictions of child pornography as a subcategory of the proscribable category of speech integral to criminal conduct. The problems with this approach are two-fold: First, the *Chaplinsky* Court did not identify “speech integral to criminal conduct” as one of the excluded categories, so taking this approach would inevitably result in some amount of mental gymnastics.¹⁵³ Second, the first time the Supreme Court grappled with how to handle regulation of visual depictions of child pornography it expressly referred to child pornography as a “category” of unprotected speech, implying that it is a freestanding category all its own.¹⁵⁴

Notwithstanding those analytical challenges, however, the Supreme Court seems to have settled on a framework that does, indeed, treat visual depictions of child pornography as an outgrowth of the Court’s jurisprudence related to the proscribable category of speech integral to criminal conduct. This firming up of the Supreme Court’s approach became clearer in the *Free Speech Coalition*¹⁵⁵ case, where the Court drew a clear line between depictions of *actual* acts of child pornography, which are outside the protection of the First Amendment, and *virtual* depictions that do not record actual acts, which receive First Amendment protection. By the time the Supreme Court reached its third case regarding the regulation of visual depictions of child pornography, its view that this area of jurisprudence was an outgrowth of the category of speech integral to criminal conduct was sufficiently well-established that Justice Antonin Scalia was able to write dismissively that “[o]ne would think that this principle resolves the present case The Eleventh Circuit, however, believed that the exclusion of First Amendment protection extended only to commercial offers to provide or receive contraband This mistakes the

¹⁵³ This category of speech integral to criminal conduct was first identified in 1949 by *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

¹⁵⁴ *Ferber*, 458 U.S. at 765.

¹⁵⁵ See generally *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, (2002).

rationale for the categorical exclusion”¹⁵⁶—as if this were well-settled law that should have been clear to the litigants without the need to so much as file a case.

* * *

It is apparent that, in wrestling with the determination of what speech lies outside the constitutionally protected “freedom of speech,” the modern Supreme Court’s jurisprudence has developed identifiable characteristics, themes and attributes common to all the categories of unprotected speech. But the Court’s need to answer the fundamental question—what speech lies in the “First Amendment Free Zone” that is outside the “freedom of speech” protected by the Constitution, and how do we know the answer to that question—by far predates the Supreme Court’s modern era. Thus, Chapter 2 turns to the next task: Tracing the path of jurisprudence that led by 1942 to *Chaplinsky v. New Hampshire*.

¹⁵⁶ *Williams*, 553 U.S. at 297-98 (citations, footnotes, and emphasis omitted).

CHAPTER 2: All Roads Lead to *Chaplinsky*: Early allusions to categorical exclusion

Even before 1942 when it first attempted in *Chaplinsky* a comprehensive expression of the unprotected categories of speech that fall outside the First Amendment, the Supreme Court long had recognized some of those categories in an *ad hoc* manner. This fact is consistent with the Supreme Court's oft-articulated view that it does not create categories of unprotected speech out of whole cloth but rather from time to time discovers those categories that long have existed and have been recognized by the law. Of course, an alternative plausible explanation for *Chaplinsky* is that "[t]he idea that the low-value categories of speech have always existed, and always existed beyond the scope of constitutional concern, is a historical myth or what we might call an 'invented tradition.'"¹⁵⁷

Regardless of whether *Chaplinsky* brashly created doctrine from whole cloth or merely synthesized earlier doctrine into a coherent whole, the fact remains that from the early days of the Republic, American courts were recognizing that constitutional protections for speech and for the press did not serve to shield all types of speech from legal or penal consequences. The examples below in this section are intended to illustrate the general principles involved, not to provide an exhaustive analysis of the relevant pre-*Chaplinsky* jurisprudence.

Defamation

Defamation, and its components libel and slander, may be the oldest surviving category of speech long considered unprotected. In Western civilization, since Moses brought the tablets down from Mount Sinai millennia ago, the Ninth Commandment has directed: "Thou shalt not

¹⁵⁷ Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV 2166, 2168 (2015). Despite arguing that the concept of categorical exclusion of speech from First Amendment protection was a fabrication of the New Deal Court and that the oft-repeated assertion that unprotected speech has deep historical roots "extend[ing] back to the ratification of the First Amendment" is a "myth," Lakier acknowledges that the concept of categorical exclusion is today "widely accepted." *Id.* at 2168.

bear false witness against thy neighbor.”¹⁵⁸ A similar prohibition is found in almost every society because “[t]o originate or disseminate lies told about one’s neighbor is fundamentally an *antisocial* act, since it strikes at the heart of the social compact by undermining trust and cooperation.”¹⁵⁹ By the early seventeenth century, it was widely accepted in England that defamation was a societal evil worthy of proscription. As William Shakespeare wrote in *Othello*:

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash;
‘Tis something, nothing;
‘Twas mine, ‘tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.¹⁶⁰

Prohibitions on slander date at least to the early Anglo-Saxon kings, who proscribed it “not only to remedy the dishonor and personal insult it caused, but to preserve the peace by eliminating personal vendettas.”¹⁶¹ After the invention of the printing press, a separate doctrine prohibiting libel arose and, because the permanency of the printed word risked greater ongoing harm to reputation caused by wide dissemination and re-reading than did fleeting verbal slander, libel was both easier to prove and more likely to result in an award of damages.¹⁶²

The modern American common law that applies to government action seeking to punish defamatory speech is voluminous, but the basic principle has roots stretching back to the English law and incorporated into American law early in our Republic. As early as 1788, for example, the Supreme Court of Pennsylvania had occasion to consider whether the newly codified

¹⁵⁸ *Exodus* 20:16 (King James).

¹⁵⁹ *Libel, Slander, and Freedom of Speech*, The Center for First Amendment Studies (California State University-Long Beach) (white paper), available at <http://www.firstamendmentstudies.org/wp/pdf/libel.pdf>.

¹⁶⁰ *Id.* (quoting WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3).

¹⁶¹ *Id.*

¹⁶² *Id.* (see generally section on “English Common Law History”).

protections for speech and for the press in the Constitution of the Commonwealth of Pennsylvania precluded the arrest for contempt of a printer and publisher for commentary that impugned the integrity of the court itself. The court concluded they did not.¹⁶³

Eleazer Oswald was the printer and publisher of the *Independent Gazetteer*. In that capacity, he was engaged in the passionate debate of the day regarding the new federal Constitution. He printed in his newspapers several anonymous articles criticizing the character of a schoolmaster named Andrew Browne, and Browne sued for libel. The court imposed a requirement of bail over the objection of Oswald, and soon thereafter Oswald published in his newspaper under his own name an article criticizing the court's handling of the case and asserting that the court was under the influence of Oswald's political enemies with whom he had clashed regarding the new federal Constitution.¹⁶⁴ Oswald unsuccessfully demanded a jury trial because "former prejudices should be found to operate against me on the bench."¹⁶⁵

In its decision, the Pennsylvania Supreme Court recognized that the Pennsylvania Constitution affords citizens greater protection for speech and the press than did the law of England and that, as that protection is to be applied in principle to the case before it, "[h]ere the press is laid open to the inspection of every citizen, who wishes to examine the proceedings of

¹⁶³ *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 328 (Pa. 1788) (ordering the publisher to pay a fine, to serve one month in prison, and thereafter to remain imprisoned by the sheriff until the fine and costs were paid).

¹⁶⁴ *Id.* at 319-320 (quoting from Eleazer Oswald's published article that formed the basis for the Pennsylvania Supreme Court's decision as follows: "But until the news had arrived last Thursday, that the ninth state had acceded to the new federal government, I was not called upon; and Mr. Page in the afternoon of that day visited me in due form of law with a writ. Had Mr. Browne pursued me in this line, 'without loss of time,' agreeably to his lawyer's letter, I should not have supposed it extraordinary—but to arrest me the moment the federal intelligence came to hand, indicated that the commencement of this suit was not so much the child of his own fancy, as it has been probably dictated to and urged on him by others, whose sentiments upon the new constitution have not in every respect coincided with mine. In fact, it was my idea, in the first progress of the business, that Mr. Browne was merely the hand-maid of some of my enemies among the federalists; and in this class I must rank, his great patron Doctor Rush (whose brother is a judge of the Supreme Court) I think Mr. Browns' conduct has since confirmed the idea beyond a doubt.").

¹⁶⁵ *Id.* at 320.

the government; of which the judicial authority is certainly to be considered as a branch.”¹⁶⁶

However, the *Oswald* Court also articulated in strong language, worthy of setting forth here at some length, its view that defamatory speech falls outside the protection of the law:

[L]ibelling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeler, it is more dark and base than that of the assassin, or than his who commits a midnight arson. It is true, that I may never discover the wretch who has burned my house, or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeler admit not of this consolation: the injuries which are done to character and reputation seldom can be cured, and the most innocent man may in a moment be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life. To what tribunal can he then resort? How shall he be tried, and by whom shall he be acquitted? It is in vain to object, that those who know him will disregard the slander, since the wide circulation of public prints must render it impracticable to apply the actedote [sic] as far as the poison has been extended. Nor can it be fairly said, that the same opportunity is given to vindicate, which has been employed to desame [sic] him; for many will read the charge, who may never see the answer; and while the object of accusation is publicly pointed at, the malicious and malignant author rests in the dishonorable security of an anonymous signature. Where much has been said, something will be believed; and it is one of the many artifices of the libeler, to give to his charges an aspect of general support, by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free country, and among an enlightened people. Let every honest man make this appeal to his heart and understanding, and the answer must be no!¹⁶⁷

The *Oswald* Court then proceeded to explain that the Constitution’s protection for a free press was satisfied as long as the press (and presumably citizens as well) was free to publish its opinions but society also was allowed to criticize the press’s motives for its publications.¹⁶⁸ The early case *Respublica v. Oswald* established by forceful language the principle that endures,

¹⁶⁶ *Id.* at 322.

¹⁶⁷ *Id.* at 324-25.

¹⁶⁸ *Id.* at 325 (“The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. The latter description, it is impossible that any good government should afford protection and impunity.”).

albeit in sharply limited form, to this day: Defamatory speech lies outside the protection of the law of free speech.

Separated, as they were, by only three years, both *Respublica v. Oswald* and the federal Bill of Rights were products of the same era. In codifying the five freedoms in the First Amendment, the Framers understood that those rights would sometimes be in tension with each other. Allowing proscription of defamatory speech long has been viewed as an important doctrinal tool to manage the tension between the First Amendment's Freedom of Speech and its Freedom to Assemble:

The essence of a defamatory statement is that it is understood, or capable of being understood, as lowering the reputation of the person about whom the statement is made. Reputation, as it is used in this area of the law, means the estimation of a person's character or worth in the eyes of the community. If third persons tend to dissociate themselves from the person about whom the statement is made, then that person has been defamed. We find here very real tension between freedom of association, or assembly, and freedom of speech: one can actually impinge negatively on the other. For example, if neighbors refuse to associate or come into contact with Mr. Jones because it has been rumored that he was HIV positive, Mr. Jones' freedom of association has been infringed upon unless he can vindicate himself in some sort of forum. The law court, as the social institution designed to test and find the truth, is obviously the vehicle for such vindication. The law has fashioned the civil action of defamation as a means of drawing the balancing line between the freedom to speak and the freedom to associate.¹⁶⁹

Permitting government proscription of defamatory speech, therefore, has deep historical roots in American law.

Incitement

A second category of low-value speech that has deep historical roots was highlighted in a famous United States Supreme Court case deciding whether a person who distributes information

¹⁶⁹ *Libel, Slander, and Freedom of Speech*, *supra* note 154 (see generally section "The Nature of Defamation").

encouraging disobedience to the World War I draft could be punished by the government. The answer in *Schenck v. United States* was ‘yes.’¹⁷⁰

Charles T. Schenck was a general secretary of the Socialist Party, which had been meeting in Pennsylvania and developing actions to express its opposition to World War I in general and the draft in particular. The evidence presented at trial showed that Mr. Schenck had printed about 15,000 leaflets and personally mailed them to persons who had received notices that they would be drafted.¹⁷¹ After reviewing the content of the leaflets, the Court concluded: “Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.”¹⁷² The government charged Mr. Schenck with violating the Espionage Act by obstructing military recruitment and enlistment during wartime and with related violations for misuse of the mail system.

Mr. Schenck’s defense asserted that his conduct was merely a form of expressing his opposition to the war and that this expression was protected by the First Amendment. The Supreme Court disagreed. In its opinion written by Justice Oliver Wendell Holmes, the Supreme Court held that “[t]he question in every case is whether the words used are used in such

¹⁷⁰ 249 U.S. 47 (1919).

¹⁷¹ *Id.* at 50-51. The Supreme Court described the content of the leaflets as follows: “The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few. It said, ‘Do not submit to intimidation,’ but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed ‘Assert Your Rights.’ It stated reasons for alleging that any one violated the Constitution when he refused to recognize ‘your right to assert your opposition to the draft,’ and went on, ‘If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.’ It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, etc., etc., winding up, ‘You must do your share to maintain, support and uphold the rights of the people of this country.’”

¹⁷² *Id.* at 51.

circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”¹⁷³ Because Mr. Schenck’s actions were taken during wartime,¹⁷⁴ the Supreme Court reasoned, they were clearly intended, and were likely, to disrupt the war effort by causing recipients of the leaflet to not cooperate with the draft. The timing of Mr. Schenck’s expression, and its likely effect on conduct that would itself violate the law, were the determining factors for the Supreme Court.¹⁷⁵ Justice Holmes then illustrated the Supreme Court’s reasoning with a single, colorful phrase that has obtained a position of lore not only in American law but in popular culture as well: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”¹⁷⁶ The notion that “falsely shouting fire in a theatre and causing a panic” enjoys no constitutional protection is widely accepted. While the Supreme Court continues to wrestle with application of that principle to various factual situations, the longstanding principle that speech that incites violence or lawlessness is unprotected is fully integrated into the law.

Profanity

The notion that profane speech enjoys no protection from the Constitution has deep roots in American tradition. As far back as 1692, the provincial legislature in Massachusetts, in

¹⁷³ *Id.* at 52.

¹⁷⁴ Invoking the war powers frequently results in the Supreme Court affording greater deference to the government in its actions than otherwise would be the case. *See, e.g.,* *Near v. Minnesota*, 283 U.S. 697 (1931) (government may have power to prevent or punish publication of the sailing dates of transports or the number and location of troops); *Korematsu v. United States*, 323 U.S. 214 (1945) (upholding internment of Japanese Americans during World War II); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding USA Patriot Act prohibition on providing material support to terrorist organizations). *But see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1942) (finding unconstitutional President Truman’s attempt to seize steel production through invoking the President’s war powers); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (finding military commissions an unlawful method of trying Guantanamo detainees).

¹⁷⁵ *Schenck*, 249 U.S. at 52 (citing *Aikens v. Wisconsin*, 195 U.S. 194, 205, 206 (1904)). Indeed, the Court expressly noted: “We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.” *Id.*

¹⁷⁶ *Id.* at 52.

revising the colonial laws, included provisions rendering unlawful “profane swearing.”¹⁷⁷ The nineteenth century jurisprudence of the various states is full of cases applying prohibitions on profanity to various factual circumstances and, in general, the courts were more concerned with the completeness of the pleadings and similar procedural matters than they were with whether constitutional protections for free speech barred or limited such prosecutions at all. Two cases are illustrative of the wide acceptance of prosecutions for profanity in early American jurisprudence.

In 1809, the North Carolina Supreme Court had occasion to decide whether profane swearing itself could be charged as an offense or whether only the result of such profane swearing—namely, the disturbance of those who hear it—could be charged. Defendant Kirby “swore several oaths in the court-yard during the sitting of the Court, to the great disturbance and common nuisance of the citizens necessarily attending said Court.”¹⁷⁸ The one-page opinion lacked analysis but simply concluded that when profane swearing is charged as a nuisance, it may be prosecuted as a nuisance.¹⁷⁹ From the vantage point of twenty-first century America, this once-widespread approach of separating the punishment of the *utterance* of profane speech from the punishment of the offense caused to others who *hear* the profanity appears little more than a distinction without a difference.

A second typical case from the early era is more explicit in articulating the religious basis for allowing the punishment of profane speech, which frequently was intertwined with blasphemy and with a government interest in policing the public morals or protecting

¹⁷⁷ *Hill v. Wells*, 23 Mass. (6 Pick.) 104, 107-08 (1828) (citing Prov. St. 4 W. & M., c. 6 (Anc. Chart. & c. 239)).

¹⁷⁸ *State v. Kirby*, 5 N.C. (1 Mur.) 254 (1809).

¹⁷⁹ *Id.* at 254-55 (“We are of the opinion, that although profane swearing, of itself, and independent of the disturbance and injury which it may produce to those who hear it, may not form the subject of an indictment, but is cognizable before a justice of the peace, under the act of 1741, ch. 14: Yet wherever the bill charges the swearing as a nuisance, and there is evidence to satisfy a Jury that it has produced this effect, we can discover no reason why the offence should not be indictable.”).

Christianity. The Supreme Court of New York in 1811 affirmed the prosecution and conviction of Defendant Ruggles for stating: “Jesus Christ was a bastard, and his mother must be a whore.”¹⁸⁰ On appeal, the Defendant squarely presented the issue of constitutional protection for profanity when he argued that although he could have been prosecuted for his utterance in England, where Christianity was the official state religion, he could not be so prosecuted in New York because the state’s Constitution and laws did not adopt Christianity as an official state religion.¹⁸¹ The New York Supreme Court rejected his argument.

Instead, after recounting at some length the deep historical roots of blasphemy prosecutions, profanity prosecutions, and similar government regulation of speech in England,¹⁸² the New York court favorably commented on that English heritage because “[w]e stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue, which

¹⁸⁰ *People v. Ruggles*, 8 Johns. 290 (N.Y. Sup. Ct. 1811).

¹⁸¹ *Id.* at 291 (“[Defense counsel], for the prisoner, now contended, that the offence charged in the indictment was not punishable by the law of this state, though, he admitted, it was punishable by the common law of England, where christianity makes part of the law of the land, on account of its connection with the established church. In England, apostacy, heresy, reviling the ordinances of the established church, and nonconformity, are made punishable by statute. But from the preamble, and the provisions of the constitution of this state, and the silence of the legislature, it was to be inferred that Christianity did not make a part of the common law of this state. There are no statutes concerning religion, except those relative to the Sabbath, and to suppress immorality. The constitution allows a free toleration to all religions and all kinds of worship. The exception as to licentiousness, refers to conduct, not opinions.”).

¹⁸² *Id.* at 293-94 (“Such words, uttered with such a disposition, were an offence at common law. In *Taylor’s* case, the defendant was convicted upon information of speaking similar words, and the court of *K.B.* said, that Christianity was parcel of the law, and to cast contumelious reproaches upon it, tended to weaken the foundation of moral obligation, and the efficacy of oaths. And in the case of *Rex v. Woolston*, on a like conviction, the court said they would not suffer it to be debated whether defaming Christianity in general was not an offence at common law, for that whatever strikes at the root of christianity, tends manifestly to the dissolution of civil government. But the court were careful to say, that they did not intend to include disputes between learned men upon particular controverted points. The same doctrine was laid down in the late case of *The King v. Williams*, for the publication of *Paine’s “Age of Reason,”* which was tried before Lord *Kenyon*, in *July, 1797*. The authorities show that blasphemy against God, and the contumelious reproaches and profane ridicule of Christ of the Holy Scriptures, (which are equally treated as blasphemy,) are offences punishable at common law, whether uttered by words or writings. The consequences may be less extensively pernicious in the one case than in the other, but in both instances the reviling is still an offence, because it tends to corrupt the morals of the people, and to destroy good order. Such offences have always been considered independent of any religious establishment or the rights of the church. They are treated as affecting the essential interests of civil society.” (citations omitted)).

help to bind society together.”¹⁸³ The court then proceeded to articulate the connection between protection of religion and regulation by the government of profane speech:

Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinction between things sacred and profane; for, to use the words of one of the greatest oracles of human wisdom, “profane scoffing doth by little and little deface the reverence for religion;” and who adds, in another place, “two principal causes have I ever known of atheism—curious controversies and profane scoffing.”¹⁸⁴

After these lengthy recitations, the New York court addressed the heart of the issue and found that the Constitution¹⁸⁵ did not bar a prosecution for profane speech:

Though the constitution has discarded religious establishments, it does not forbid judicial cognizance of those offences against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation, and weaken the security of the social ties.¹⁸⁶

While the language, the religious context, and the unabashed sectarian nature¹⁸⁷ of the *Ruggles* decision seems terribly foreign from the vantage point of twenty-first century America, the opinion reflects the deep historical roots of excluding profane speech from the protection of the Constitution’s free speech guarantees. Although modern case law has moved away from profanity *per se* as an excluded category, the basic principles permitting its punishment had not changed over the many years and it is, therefore, not surprising that the *Chaplinsky* Court in 1942

¹⁸³ *Id.* at 294 (quoting *Lord Bacon’s Works*, vol. 2, 291, 503).

¹⁸⁴ *Id.*

¹⁸⁵ The court was applying only the New York Constitution because this case predates the Fourteenth Amendment’s application of First Amendment free-speech protection to the states. The historical principle of profane speech falling outside the protection of constitutional guarantees, however, is the same.

¹⁸⁶ *Id.* at 295.

¹⁸⁷ *Id.* Consider, for example, this excerpt from the court: “Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet or of the grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those impostors.” *Id.*

identified profanity as a category of speech historically considered to be outside the protection of the First Amendment.

Blasphemy

Historically, laws prohibiting profanity were closely akin to, and intertwined with, laws prohibiting blasphemy. Early American case law is replete with blasphemy prosecutions, and throughout the nineteenth century and into the twentieth century statutes proscribing blasphemous speech routinely were upheld by American courts.

A typical example was the case of Thomas Jefferson Chandler, whose conviction for violating Delaware's blasphemy statute was affirmed in 1837. Mr. Chandler had publicly declared that "the virgin Mary was a whore, and Jesus Christ was a bastard" and was convicted by a jury. The Delaware appellate court, using language that foreshadowed the reasoning of modern-day incitement, upheld the anti-blasphemy statute because blasphemy "is a gross offence against society on account of its tendency to disturb the public peace."¹⁸⁸ Similarly illustrative was the case of Abner Kneeland, the editor and publisher of the Boston Investigator newspaper, who in 1833 had published an article regarding "Universalists" that was found to be a "denial of God, his creation government, or final judging of the world, made willfully, that is, with the intent and purpose to calumniate and disparage him and impair and destroy the reverence due to him" in violation of the Massachusetts blasphemy statute.¹⁸⁹ Even while affirming the blasphemy conviction, the Massachusetts court invoked language foreshadowing modern Speech Clause jurisprudence:

The statute is not intended to prohibit the fullest inquiry and freest discussion for all honest and fair purposes, one of which is the discovery of truth; nor to prevent the simple and sincere avowal of disbelief in the existence and attributes of a supreme, intelligent

¹⁸⁸ See *State v. Chandler*, 2 Del. (2 Harr.) 553, 553 (Ct. of Gen. Sess. of the Peace and Jail Delivery Of Del. 1837).

¹⁸⁹ See *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206 (1838).

being, upon suitable and proper occasions; nor to prevent or restrain the formation of any religious opinions or the profession of any religious sentiments whatever; but it is intended to punish a denial of God, made with a bad intent, and in a manner calculated to give just offence¹⁹⁰

Thus, the Massachusetts court acknowledged what today would be called First Amendment values even while concluding they were not offended by the blasphemy prosecution of Mr. Kneeland. Likewise, when Abner Updegraph declared in 1821 in Pennsylvania that “the Holy Scriptures were a mere fable: that they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies,” he was subject to prosecution for blasphemy.¹⁹¹ But even at that early date, the Pennsylvania Supreme Court was mindful that the new federal Constitution presented new issues when reviewing blasphemy laws:

Is the act of 1700 [concerning blasphemy] inconsistent with the constitution? A law, enacted a century prior to the adoption of the federal constitution, when religious and civil tyranny were at their height; when the decrees of the church were accompanied by the terror of civil power; when enlightened notions of the rights of man were not so universally diffused, as at this day, when the spirit of the law gives freedom to all, whether Christian, Jew or Mohammedan.

But if the act of 1700 be considered as still in force, do the *expressions and the place and manner of their utterance*, contain an offence within its purview?¹⁹²

Thus, even quite early in the history of the United States, American courts had begun to question whether blasphemy laws could survive scrutiny under the new federal constitution. They also had begun injecting language, such as “place and manner of their utterance,” that would find its way into the modern case law of the First Amendment.

State governments continued bringing successful blasphemy prosecutions into the twentieth century.¹⁹³ The *Chaplinsky* Court, of course, did not mention blasphemy among the

¹⁹⁰ *Id.*

¹⁹¹ See *Updegraph v. Commonwealth*, 11 Serg. & Rawie 394 (Pa. 1824).

¹⁹² *Id.* at 395 (emphasis original).

¹⁹³ For an interesting case, see *State v. Mockus*, 113 A. 39 (Me. 1921) (overruled by *State v. John W.*, 418 A.2d 1097 (Me. 1980)). Mr. Michael X. Mockus delivered a lecture in the town of Rumford, Maine, and by all accounts his

unprotected categories of speech, thus suggesting that by 1942 the prevailing view found the First Amendment to deny government power to punish blasphemous speech. It is notable, however, that despite long ago having been relegated to the sidelines of First Amendment thought, the necessity for American courts to expressly disable state blasphemy laws continued into modern times.¹⁹⁴

Obscenity

While the United States Supreme Court in the middle part of the twentieth century would grapple at length with the definition of ‘obscenity,’ the basic principle that obscene expressive material falls outside the protection of the First Amendment has been largely unchallenged throughout American legal history. Indeed, most of the early cases take as a given that obscene material may be regulated by the government and deal only with contested methods and facts as they arise in individual cases.

A typical illustrative case is *Grimm v. United States* from the late nineteenth century.¹⁹⁵

William Grimm of St. Louis was a photographer who had numerous obscene photographs of “actresses.”¹⁹⁶ He received a solicitation by United States mail inquiring whether he would sell those photographs and, if so, in what quantities and for what price. He responded in the affirmative by return mail and also sent pricing information.¹⁹⁷ Unfortunately for Mr. Grimm, the solicitation was from a postal inspector working undercover to investigate whether Mr.

written presentation was tasteful and appropriate. However, during the lecture, he delivered an extensive verbal aside denouncing God, the Bible, the Virgin Mary, the Holy Trinity and various other aspects of Christianity. While the written presentation was delivered to the townspeople in English, the verbal aside was delivered in Lithuanian. Unfortunately for Mr. Mockus, somebody in the audience spoke his language, resulting in an eight-count indictment and conviction for violating the Maine blasphemy statute).

¹⁹⁴ See, e.g., *John W.*, 418 A.2d 1097 (declaring in 1980 the Maine blasphemy law unconstitutional); *State v. West*, 362 A.2d 602 (Md. Ct. Spec. App. 1970) (declaring Maryland blasphemy law unconstitutional); *Kalman v. Cortes*, 723 F. Supp. 2d 766 (E.D. Penn. 2010) (declaring Pennsylvania blasphemy law unconstitutional).

¹⁹⁵ *Grimm v. United States*, 156 U.S. 604 (1895).

¹⁹⁶ *Id.* at 607.

¹⁹⁷ *Id.*

Grimm was distributing obscene materials through the mail. When Mr. Grimm responded to the inquiry, he was charged with violating a section of federal law that prohibited the sending of such material through the mail.¹⁹⁸ He was convicted and appealed.

As was typical in these pre-twentieth century cases, the United States Supreme Court in *Grimm* was not presented with any First Amendment challenge to the statute regulating the transmitting of obscene material. Rather, the Supreme Court assumed the authority of the government to regulate obscenity and spent its focus in determining the sufficiency of the procedure the government used obtaining and presenting the grand jury's indictment and prosecuting Mr. Grimm. At issue was whether it was necessary for the obscene materials themselves to be included in the indictment itself or at least described in sufficient detail to allow a reviewing court to determine, from the fact of the pleading, whether the materials were in fact obscene. In a reflection of the widespread view at the time that the Constitution was no impediment to the regulation of material deemed obscene, the *Grimm* Court found it sufficient that the materials were *alleged* to have been obscene. “[I]t is held that it is unnecessary to spread the obscene matter in all its filthiness upon the record; it is enough to so far describe it that its obnoxious character may be discerned.”¹⁹⁹

The notion that “obscene” speech falls outside the scope of the First Amendment’s protection has deep roots in American jurisprudence.

¹⁹⁸ *Id.* at 605. At the time, “Section 3893, Rev. St., as amended by section 2 of the act of congress of September 26, 1888, c. 1039 (st Stat. 496), provide[d] that ‘every obscene, lewd, or lascivious book, pamphlet, picture, . . . and every written or printed card, letter, . . . giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, . . . shall, for each and every offence, be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court.’” *Id.*

¹⁹⁹ *Id.* at 608.

Speech As Part of Unlawful Conduct

A final grouping of early cases suggests speech that is an integral part of unlawful conduct also long has been viewed as falling outside the protection of the First Amendment. “The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.”²⁰⁰ Indeed, this notion appears to have been so widely accepted that few early cases expressly articulate the principle; instead, the early cases accept this principled limit on the First Amendment’s scope as a given and refer to it only in passing as if there were no meaningful dispute about its existence. In one oft-cited early case, which no doubt would reach a different result today under modern First Amendment jurisprudence, the Supreme Court held that publication of a newspaper article²⁰¹ construed as “encouraging an actual breach of law”²⁰² by advocating for public nudity and against persons or organizations that objected to a nudist community²⁰³

²⁰⁰ *Aikens v. Wisconsin*, 195 U.S. 194, 206 (1904).

²⁰¹ *Fox v. Washington*, 236 U.S. 273, 276-77 (1915) (describing the newspaper article as follows: “The printed matter in question is an article entitled, ‘The Nude and the Prudes,’ reciting in its earlier part that ‘Home is a community of free spirits, who came out into the woods to escape the polluted atmosphere of priest-ridden, conventional society;’ that ‘one of the liberties enjoyed by the Homeites was the privilege to bathe in evening dress, or with merely the clothes nature gave them, just as they chose;’ but that ‘eventually a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people’s freedom,’ and that they had four persons arrested on the charge of indecent exposure, followed in two cases, it seems, by sentences to imprisonment. ‘And the perpetrators of this vile action wonder why they are being boycotted.’ It goes on: ‘The well-merited indignation of the people has been aroused. Their liberty has been attacked. The first step in the way of subjecting the community to all the persecution of the outside has been taken. If this was let go without resistance the progress of the prudes would be easy.’ It then predicts and encourages the boycott of those who thus interfere with the freedom of Home, concluding: ‘The boycott will be pushed until these invaders will come to see the brutal mistake of their action and so inform the people.’”).

²⁰² *Id.* at 277. The Washington state statute in question read as follows: “Every person who shall willfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor.” *Id.* at 275-76.

²⁰³ *Id.* at 277. The Supreme Court found: “Thus by indirection, but unmistakably, the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; and the jury so found.” *Id.*

lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it cannot be said to infringe the Constitution of the United States.²⁰⁴

Three subsequent cases decided in succession from 1938 through 1940 well-illustrate the Supreme Court's approach to government regulation of speech intertwined with illegal conduct before *Chaplinsky*.

A classic example is the Supreme Court's decision in *Lovell v. City of Griffin*.²⁰⁵ In that case, Alma Lovell was convicted of violating a Griffin, Georgia, city ordinance that prohibited the distribution of literature without a permit.²⁰⁶ She specifically chose not to apply for the permit before distributing a pamphlet and magazine that set forth the gospel of the "Kingdom of Jehovah" because she "regarded herself as sent 'by Jehovah to do His work' and . . . such an application would have been 'an act of disobedience to His commandment.'"²⁰⁷ The Supreme Court held the city ordinance facially unconstitutional in violation of the First Amendment, but did so in part because the ordinance was not limited to regulating the distribution of literature "that is obscene or offensive to public morals or that advocates unlawful conduct."²⁰⁸ This backhanded reference to speech integral to unlawful conduct is the only reference to that concept

²⁰⁴ *Id.* at 277-78.

²⁰⁵ 303 U.S. 444 (1938).

²⁰⁶ *Id.* at 447-48. The ordinance stated: "Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin. 'Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance.'" *See id.* at 447.

²⁰⁷ *Id.* at 448.

²⁰⁸ *Id.* at 451 (emphasis added). While the *Lovell* case sustained a facial First Amendment challenge to the local ordinance, the Supreme Court also implied that an "as applied" challenge would have failed as well because "[t]here is no suggestion that the pamphlet and magazine distributed in the instant case were of that character [i.e., obscene, offensive, or advocating unlawful conduct]." *Id.*

in the opinion, and its grouping without further analysis by the Supreme Court in the same reference with speech that is obscene or offensive to public morals suggests the Court viewed all of those types of speech as constitutionally similar—specifically, outside the protection of the First Amendment.

One year later, the Supreme Court clarified the meaning of *Lovell* when it considered consolidated First Amendment challenges to separate local ordinances governing leafleting in New Jersey, California, Wisconsin and Massachusetts. In that case, *Schneider v. State*,²⁰⁹ the Supreme Court found each of the local ordinances to violate the First Amendment but in doing so clarified that governments do retain their police powers to protect the health, safety and welfare of citizens. In the context of regulating leafleting, the Court offered hypothetical examples of where the constitutional boundary might lie between permissible uses of the police power and the First Amendment’s guarantee of freedom of speech.²¹⁰ Foreshadowing its future test applied under strict scrutiny that would require a government regulation of speech to be the “least restrictive means” to achieve the legitimate government purpose, the *Schneider* Court articulated the concept that a police power regulation that is general in nature but nonetheless burdens speech must be narrowly drawn to survive a First Amendment challenge.²¹¹

²⁰⁹ 308 U.S. 147 (1939).

²¹⁰ *Id.* at 160-61 (1939) (“Municipal authorities, as trustees for the public, have the duty to keep their communities’ streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets.”).

²¹¹ *Id.* at 162 (“The motive of the legislation under attack . . . is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect

Turning its attention specifically to the New Jersey ordinance, which was enacted by the Town of Irvington, the *Schneider* Court noted that it rested on an additional justification not present in the other states' ordinances. Not only was the town motivated by the desire to reduce littering through the discarding of unwanted literature that might be distributed, but the town also expressed a desire to reduce door-to-door solicitations because some such solicitations were fraudulent.

The Supreme Court rejected the particular approach that the Town of Irvington deployed to combat fraud—namely, a licensing scheme in which all door-to-door solicitors were required to obtain approval of the police department before soliciting and, as part of the license application, must provide evidence of 'good character' and obtain government approval of the content of the information he intended to distribute.²¹² But although rejecting the town's particular method of regulation as unconstitutionally burdensome on speech, the Supreme Court recognized that the First Amendment does not bar the government from punishing fraud or other criminal acts that by definition involve speech.²¹³ The line the *Schneider* Court drew was this: The risk of fraud could not be used by a government to justify a prior restraint on speech, but after the fact "[f]rauds may be denounced as offenses and punished by law."²¹⁴ This conceptual approach to punishing fraudulent speech after the fact foreshadowed the Supreme Court's later

consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.").

²¹² *Id.* at 163-64.

²¹³ *Id.* at 164 ("Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden.").

²¹⁴ *Id.*

rejection of prior restraints on publication in most cases and was, in the *Schneider* case, explained as follows:

If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.²¹⁵

Two years after deciding *Lovell*, and one year after *Schneider*, the Supreme Court was more explicit in its discussion of speech that is integral to criminal conduct falling outside the protection of the First Amendment. In *Thornhill v. Alabama*,²¹⁶ the Supreme Court rejected as facially unconstitutional an Alabama statute that was crafted to restrict picketing in front of a business during labor disputes.²¹⁷ Byron Thornhill peacefully walked the picket line in a small group of picketers during a labor dispute with his employer, Brown Wood Preserving Company in Tuscaloosa County, Alabama.²¹⁸ He was arrested and charged with violating § 3448 of the State Code of Alabama, which prohibited loitering and picketing in front of businesses.²¹⁹ As in *Lovell*, the Court's analysis focused on the First Amendment protection that was actually afforded to the conduct in the case before it and only referenced briefly and in passing the notion that the peaceful nature of the defendant's conduct was relevant to its analysis. But whereas in *Lovell* the Supreme Court made only a single, passing reference implying that non-peaceful conduct might not be afforded the same First Amendment protection, the *Thornhill* Court

²¹⁵ *Id.*

²¹⁶ 310 U.S. 88 (1940).

²¹⁷ *Id.* at 91-92 (1940). Section 3448 of the State Code of Alabama of 1923 read as follows: "Loitering or picketing forbidden.—Any person or persons who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firm, corporation, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business." *See id.*

²¹⁸ *Id.* at 91.

²¹⁹ *Id.* at 92-93.

referenced that concept repeatedly, noting as relevant to its decision the picketer's "peaceful manner,"²²⁰ the fact that witnesses "heard no harsh words and saw nothing threatening"²²¹ in the picketing, the fact that the picketer walked "slowly and peacefully"²²² on the sidewalk in front of the business, "the peaceful character of [the picketers'] demeanor,"²²³ and the fact that they picketed "without annoyance or threat of any kind."²²⁴

The *Thornhill* Court then proceeded to articulate an early rule that would tend to distinguish constitutionally protected speech that results in action by the listeners from unprotected speech that is integral to criminal conduct that the state may prohibit. For the *Thornhill* Court, the Constitution protected speech that is "peaceful and truthful" regardless of whether it may stir others to action.²²⁵ While that definition has long since been superseded by more precise definition, the principle expressly articulated by the *Thornhill* Court that the State may regulate certain speech in order to "preserve the peace and to protect the privacy, the lives, and the property of its residents" endures to this day.²²⁶

²²⁰ *Id.* at 94.

²²¹ *Id.* at 94-95.

²²² *Id.* at 98.

²²³ *Id.* at 99.

²²⁴ *Id.* at 100.

²²⁵ *Id.* at 104-05 ("Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truth discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.").

²²⁶ *Id.* at 105 ("The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern." (citation omitted)).

Thus was the state of the common law of speech the government may freely regulate, proscribe or punish prior to 1942. The themes are familiar—defamation, incitement, profanity, obscenity, frauds and other speech intertwined with illegal acts all may be prohibited by government action without violating the freedom of speech protected by the First Amendment. But these ideas were disparate, arising separately and without any apparent doctrinal relationship or affiliation with each other. They tended to be applied *ad hoc* by courts and not as part of a rational constitutional system of defining the limits of governmental power to regulate speech. It was only after a Jehovah's Witness named Walter Chaplinsky cursed in the face of the city marshal of Rochester, New Hampshire, that the United States Supreme Court would have occasion to assemble these various components into a single, coherent (though rudimentary) doctrine.

CHAPTER 3: *Chaplinsky v. New Hampshire*: Four excluded categories in 1942

If Walter Chaplinsky had smiled more and kept his temper in check, the most-cited case in the United States Supreme Court's categorical approach to excluding speech from First Amendment protection might never have arisen.

Mr. Chaplinsky apparently was dedicated to his faith as a Jehovah's Witness. As is common for persons of that faith, Mr. Chaplinsky worked to bear witness by distributing literature that described religious convictions. On a Saturday afternoon, while the citizens of Rochester, New Hampshire, went about their business, Mr. Chaplinsky was in their town distributing his literature and, apparently, offering a bit of verbal commentary along with his handing out of paper. The facts were these:

Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a 'racket'. Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way they encountered Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene.²²⁷

And so it was that Walter Chaplinsky came to have his fateful encounter with Marshal Bowering that day. It occurred when Mr. Chaplinsky and Marshal Bowering met "on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall."²²⁸ Mr. Chaplinsky's exact motive is unknown. Perhaps it was merely in his character to rebel against the authority of the police. Or perhaps he was tired after a long day of interacting with the citizens of Rochester and simply dropped his manners. Maybe something about Marshal

²²⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569-70 (1942).

²²⁸ *Id.* at 569.

Bowering’s mannerisms or demeanor got under Mr. Chaplinsky’s skin, or maybe Mr. Chaplinsky just didn’t think before opening his mouth. But whatever the cause, upon seeing Marshal Bowering for the second time that day, while Mr. Chaplinsky was being escorted to the police station by a traffic cop, Mr. Chaplinsky exclaimed to Marshal Bowering: “‘You are a God damned racketeer’ and ‘a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.’”²²⁹

That plainspoken denunciation—apparently unwisely “said without a disarming smile”²³⁰—set in motion a chain of events that by 1942 would result in the United States Supreme Court doing what it never before had done: Articulating in a succinct summary the unprotected categories of speech that lie outside the freedom of speech protected by the First Amendment.

Mr. Chaplinsky was charged with violating a city ordinance of Rochester that prohibited certain utterances of “derisive or annoying word[s]” in public places.²³¹ Mr. Chaplinsky was convicted after a bench trial in Rochester municipal court and appealed. He received a trial *de novo* before a jury in superior court and was convicted. He appealed, and the New Hampshire Supreme Court affirmed the conviction.²³²

In its opinion, the New Hampshire Supreme Court reached the important conclusion that the language of the New Hampshire code that Mr. Chaplinsky had been convicted of violating was, in fact, more restricted in application than a plain reading might suggest. Although no

²²⁹ *Id.* “Chaplinsky’s version of the affair was slightly different. He testified that when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply Bowering cursed him and told him to come along. [Chaplinsky] admitted that he said the words charged in the complaint with the exception of the name of the Deity.” *Id.* at 570.

²³⁰ *Id.* at 573.

²³¹ *Id.* at 569. Chapter 378, Section 2, of the Public Laws of New Hampshire then stated: “No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.” *See id.*

²³² *Id.* (citing *State v. Chaplinsky*, 18 A.2d 754 (N.H. 1941)).

words in the code itself make clear that it applies solely to utterances that would tend to lead to violence or otherwise disrupt the peace, the New Hampshire Supreme Court essentially read such a requirement into the statute.²³³ The New Hampshire court framed the issue this way:

The defendant admittedly called the Marshal a damned racketeer and Fascist, in exchange, as the defendant says, for the Marshal's calling him a damned bastard. Either appellant, applied directly to the other on the street, would clearly be a breach of the statute. Neither would rise above the level of name-calling. Neither party could expect the other to be persuaded by such language. Neither remark qualifies as peaceful and truthful discussion of matters of public interest. Each invited personal violence and disturbance of the peace, without any observable tendency to enable the by-standers to test the merits of the competitive ideas, if they were ideas. We can see no relationship of such utterances to that freedom of speech which is so acutely desirable if free institutions are to be preserved. Such face-to-face reviling is not remotely necessary in the debate of public questions. It is not argument. It has no persuasive power. Its only power is to inflame, to endanger that calm and useful consideration of public problems which is the protection of free government. Its tendency is to useless and dangerous disorder in which the object of free speech is lost to view.²³⁴

This authoritative interpretation of state law issued by the state's highest court was critical to framing the issue that ultimately was presented to the United States Supreme Court—namely, whether the government may punish speech that provokes violence—because without it, it seems likely that the New Hampshire statute would have been stricken as an impermissibly broad regulation of speech.

²³³ *Id.* at 573 (citing *State v. Brown*, 38 A. 731 (N.H. 1895), and *State v. McConnell*, 47 A. 267 (N.H. 1900)) (“On the authority of its earlier decisions, the state court declared that the statute’s purpose was to preserve the public peace, no words being ‘forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed. It was further said: The word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are ‘fighting words’ when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including ‘classical fighting words’, words in current use less ‘classical’ but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.” (footnotes and internal quotation marks omitted)).

²³⁴ *Chaplinsky*, 18 A.2d at 759-60.

Under the New Hampshire Supreme Court’s rather imprecise yet critical test, Mr. Chaplinsky’s utterances might well have fallen outside the sweep of the state code if only he had uttered them with “a disarming smile,”²³⁵ thereby suggesting a less-strident intent to confront. But history is replete with small decisions, acts or omissions that, like the proverbial ripple upon the ocean, result in a giant wave far away. And so, Walter Chaplinsky’s straight-faced utterance, and the significance that the New Hampshire Supreme Court inferred from his facial expression by noting a “face-to-face reviling” when it applied state law, presented the United States Supreme Court with the opportunity to decide *Chaplinsky v. New Hampshire*, which would become the most-cited case in the jurisprudence of the Supreme Court’s analysis of speech categories excluded from First Amendment protection.²³⁶

In his appeal from the New Hampshire Supreme Court, Mr. Chaplinsky presented the United States Supreme Court with four issues: Whether his conviction violated the constitutional protection for free speech; whether his conviction violated the constitutional protection for freedom of the press; whether his conviction violated the constitutional protection for freedom of worship; and whether his conviction violated the due process clause of the Fourteenth Amendment because the New Hampshire code was so vague that no person could be considered on notice of what conduct would run afoul of it.²³⁷ Remarkably, the Supreme Court disposed of all four issues in an opinion spanning only seven short pages.²³⁸

²³⁵ *Chaplinsky*, 315 U.S. at 573.

²³⁶ Of the Supreme Court cases fairly characterized as predominantly about the Doctrine of Categorical Exclusion, *Chaplinsky* is the most-cited, but in the broader realm of First Amendment jurisprudence other Speech Clause cases far exceed it as a cited precedent. For example, as of July 21, 2015, Westlaw listed 7,862 citing references for *Chaplinsky*, including 1,832 cases that cite it; by comparison, on the same date *New York Times v. Sullivan*, a prominent Speech Clause case that did not predominantly involve categorical exclusion, had 27,023 references including 6,380 cases that cite it. Interestingly, both *Chaplinsky* and *Sullivan* were decided by the Supreme Court on March 9—exactly 22 years apart.

²³⁷ *Chaplinsky*, 315 U.S. at 571.

²³⁸ The Supreme Court flatly rejected Mr. Chaplinsky’s press, worship and general due process claims and focused most of its short opinion on the free-speech claim.

The United States Supreme Court ultimately affirmed Mr. Chaplinsky's conviction, rejecting his free speech claim because the Court was "unable to say that the limited scope of the statute as thus construed [by the New Hampshire Supreme Court] contravenes the constitutional right of free expression."²³⁹ Indeed, the Supreme Court viewed Mr. Chaplinsky's utterances not as speech but as "conduct"²⁴⁰ and as "verbal acts,"²⁴¹ foreshadowing concepts explored in later jurisprudence. "Argument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."²⁴²

Of course, the outcome of the State of New Hampshire's prosecution of Walter Chaplinsky was not, in itself, of tremendous historical significance. Nor was the United States Supreme Court's dalliance with the concept that certain words, at least if uttered without smiling, might not be speech at all but instead were unprotected "conduct" or "verbal acts." Rather, the enduring importance of the Supreme Court's opinion in *Chaplinsky* was a single paragraph in which the Court articulated the constitutional rule it was applying:

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 has 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. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by

²³⁹ *Chaplinsky*, 315 U.S. at 573 ("It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.")

²⁴⁰ *Id.*

²⁴¹ *Id.* at 574.

²⁴² *Id.*

the Constitution, and its punishment as a criminal act would raise no question under that instrument.²⁴³

In that single paragraph lay the first attempt by the Supreme Court at a more-or-less comprehensive collection of the recognized categories of speech that lie outside protection of the First and Fourteenth Amendments. The opinion’s plain language makes clear that the Supreme Court was not attempting an exhaustive listing of every category of unprotected speech—thus, its language that the categories “include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”²⁴⁴ Curiously, the Supreme Court did not account for speech integral to criminal conduct among its articulated categories of unprotected speech even though, as noted earlier, it had considered cases raising that concept only a few years before deciding *Chaplinsky*.²⁴⁵ That single omission would form the basis for the largest expansion of the Doctrine of Categorical Exclusion in the years after *Chaplinsky*—the addition to the *Chaplinsky* list of unprotected categories of an unprotected category of speech integral to unlawful conduct.

Because it established a framework and collected and synthesized recognized categories of unprotected speech into a single exposition, *Chaplinsky* stands as the landmark case that first articulated anything in the nature of a *Doctrine* of Categorical Exclusion, although it used no such term or phrase. This development in the jurisprudence addressing the threshold Speech Clause question—what speech is in the “First Amendment Free Zone” that lies outside the “freedom of speech” protected by the Constitution, and how do we know the answer to that question—*Chaplinsky* allows the following update to the visual depiction of the scope of the Speech Clause:

²⁴³ *Id.* at 571-72 (citations and internal quotation marks omitted).

²⁴⁴ *Id.* at 572 (emphasis added).

²⁴⁵ See, e.g., *Lovell*, 303 U.S. 444; *Schneider*, 308 U.S. 147; and *Thornhill*, 310 U.S. 88.

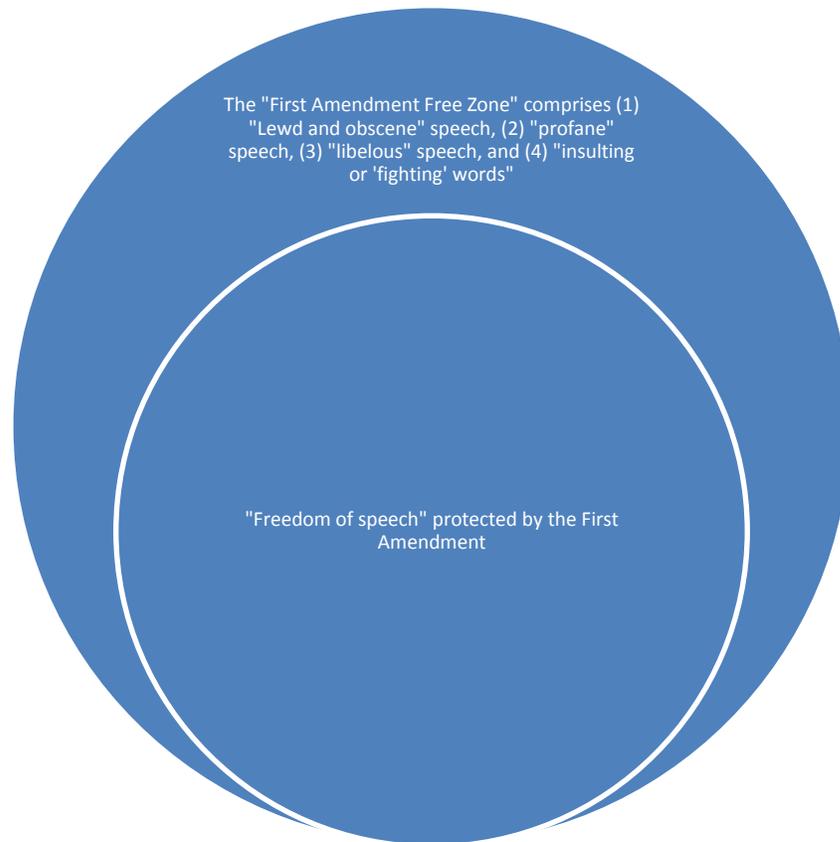


Figure 2: Relationship between the constitutionally protected "Freedom of Speech" and the unprotected "First Amendment Free Zone" after *Chaplinsky v. New Hampshire*²⁴⁶

As the pioneering case in this regard, *Chaplinsky* also begins a jurisprudential dialogue about the scope and nature of the Doctrine. *Chaplinsky* is not without its scholarly critics,²⁴⁷ and the particular categories it recited soon would prove both underinclusive and overinclusive, but its significance for collecting and reciting them is beyond dispute.

Thanks in part to the happenstance of Walter Chaplinsky's unsmiling countenance, the Doctrine of Categorical Exclusion was born.

²⁴⁶ Compare Figure 1, *supra*. From one figure to the next, the outer circle remains a constant, representing the entire universe of speech defined broadly.

²⁴⁷ See generally, e.g., Burton Caine, *The Trouble with "Fighting Words": Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441 (2004).

CHAPTER 4: From *Chaplinsky* to *Stevens*: The evolution of *Chaplinsky*'s four categories

During the almost seven decades between 1942 and 2010, the Supreme Court attempted nothing resembling a comprehensive articulation of the categories of speech excluded from First Amendment protection. To be sure, during that period the Supreme Court from time to time included statements referencing the existence of a collection of unprotected categories. A typical example was included in 1992 in *R.A.V. v. City of St. Paul*:

From 1791 to the present, . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. We have recognized that the freedom of speech referred to by the First Amendment does not include a freedom to disregard these traditional limitations. Our decisions since the 1960s have narrowed the scope of the traditional categorical exceptions for defamation and for obscenity, but a limited categorical approach has remained an important part of our First Amendment jurisprudence.²⁴⁸

But no such *reference* to the framework of categorical analysis appeared, in context of its case, to be intended as a *comprehensive exposition* of that framework. In other words, for sixty-eight years, the Supreme Court made no attempt to update *Chaplinsky*.

The oft-quoted one-paragraph summary in *Chaplinsky*, therefore, remained the only comprehensive articulation of the unprotected categories of speech until the Supreme Court decided *United States v. Stevens*²⁴⁹ in 2010. As will be discussed in Chapter 8, *infra*, *Stevens* in pertinent part may be considered an updating of the *Chaplinsky* doctrine to reflect developments over the sixty-eight years that intervened. Thus, *Chaplinsky* and *Stevens* serve as jurisprudential bookends around a nearly seven-decade period of the Supreme Court's development of its

²⁴⁸ *R.A.V.*, 505 U.S. 377, 382-83 (1992) (citations and internal quotation marks omitted). The *R.A.V.* Court proceeds to discuss, at length, the “fighting words” category in modern application as of 1992.

²⁴⁹ 559 U.S. 460 (2010).

doctrine that identifies, as a threshold matter, whether the speech at issue in a First Amendment case falls within the protected freedom of speech or outside it.

Despite attempting no comprehensive articulation, the Supreme Court during those seven decades was far from silent in developing its jurisprudence relating to categorically excluded speech. To the contrary, this was a period of unprecedented growth and development of First Amendment free-speech law, and a portion of that development included the refinement of the role of the Doctrine of Categorical Exclusion in the context of First Amendment law more broadly. From *Chaplinsky* to *Stevens*, the Supreme Court's various refinements to the Doctrine of Categorical Exclusion generally fell within one of three sorts:

First, the Supreme Court identified and defined *additional* categories of unprotected speech that were not included in the *Chaplinsky* recitation. This phenomenon will be discussed in Chapters 5 and 6, *infra*.

Second, the Supreme Court articulated and applied various rules that operate to *patrol the boundaries* of the categories of unprotected speech. The overall purpose of these rules, discussed in Chapter 7, *infra*, is ensuring that government regulations that properly may apply to categorically unprotected speech do not also improperly apply to other speech that enjoys constitutional protection.

Third, the Supreme Court further *refined* the meaning and definitions of the four categories of unprotected speech articulated in *Chaplinsky*. This chapter will focus on those refinements. It will not, of course, attempt to collect or explain every case relevant to each category during the 68-year period from *Chaplinsky* to *Stevens*—to do so would fill volumes—nor even every relevant theme developed during that time. Rather, each Part A-D below will

identify the major developments in that category and note certain landmark cases critical to understanding the Supreme Court's approach to the evolution of that category.

Part A: The lewd and obscene

In *Chaplinsky*, the Supreme Court stated that “the lewd and obscene” was a category of unprotected speech.²⁵⁰ As early as 1964, however, the Supreme Court had reached the conclusion that “it is only ‘obscenity’ that is excluded from the constitutional protection.”²⁵¹ By the time of *Stevens*, the Supreme Court made no reference to “lewd” speech being unprotected and, instead, mentioned only the exclusion for speech considered “obscene.”²⁵² That narrowed description endures to this day.²⁵³ This facially minor linguistic change reflects two substantial doctrinal developments in the refinement of this unprotected category between 1942 and 2010: First, the definition of “obscene” itself was the subject of extensive consideration and development. Second, the elimination of “lewd” as a descriptor of the category indicates a substantial narrowing of this category.

Subpart I: Defining “obscene”

Perhaps no single area of Speech Clause law received more attention from the United States Supreme Court between *Chaplinsky* and *Stevens* than did efforts to define constitutionally unprotected “obscenity.” Between its first attempt to define obscenity in *Roth v. United States*²⁵⁴ and the more enduring rule articulated in *Miller v. California*,²⁵⁵ the Supreme Court summarily reversed 31 convictions involving “materials that at least five members of the Court, applying their separate tests [for obscenity], found to be protected by the First Amendment,”²⁵⁶ and

²⁵⁰ *Chaplinsky*, 315 U.S. at 572.

²⁵¹ *Jacobellis v. Ohio*, 378 U.S. 184, 188 (1964). *But see* *Ginsberg v. New York*, 390 U.S. 629 (1968) (government may regulate the sale to minors of materials containing nudity that would not be obscene to adults).

²⁵² *Stevens*, 559 U.S. at 468 (listing “obscenity” but not “lewd”).

²⁵³ *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (listing “obscenity” but not “lewd”); *EMA*, 131 S. Ct. at 2733 (same).

²⁵⁴ 354 U.S. 476 (1957).

²⁵⁵ 413 U.S. 15 (1973).

²⁵⁶ *Id.* at 22 n.3.

decided numerous other cases after argument. The Supreme Court was caught in a tension between two competing views of its appropriate role. On the one hand, those advocating for the Supreme Court's continued case-by-case involvement argued:

We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.' The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.²⁵⁷

On the other hand, reviewing individual cases to determine whether the material at issue was constitutionally "obscene" threatened to transform the Supreme Court into "an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us."²⁵⁸ Under this approach, there would be literally no end to the Supreme Court's case-by-case application of the law to individual facts because the Supreme Court's role essentially was reduced to viewing individual material and declaring whether it was obscene without apparent standards that were objectively manageable, a process that led Justice Potter Stewart famously to explain and declare:

[C]riminal laws in this area [regulating obscenity] are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.²⁵⁹

²⁵⁷ *Jacobellis*, 378 U.S. at 187-88 (citations and internal quotation marks omitted).

²⁵⁸ *Miller*, 413 U.S. at 22 n.3.

²⁵⁹ *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring) (emphasis added) (footnote omitted).

This, then, is the essence of what Justice John Marshall Harlan called “the intractable obscenity problem.”²⁶⁰ The modern law of obscenity—the fundamental test to be applied in determining whether material falls outside the First Amendment’s protection—is contained the *Roth-Miller* line of cases.

Roth v. United States (1957):²⁶¹ In this landmark case, the Supreme Court consolidated similar appeals arising from New York and California. The first appeal, *Roth v. United States*, arose out of a federal criminal prosecution in New York City in which a seller of obscene publications was convicted of violating a provision of federal law that barred the mailing of certain obscene materials.²⁶² Samuel Roth operated a business in Manhattan through which he sold various books, photographs and magazines. A federal jury convicted him on four counts of mailing obscene materials in violation of federal law, and the Second Circuit Court of Appeals affirmed the conviction. The second case, *Alberts v. California*, arose from a prosecution in Beverly Hills municipal court. David Alberts, who like Mr. Roth in New York ran a mail-order business selling various adult-oriented books and materials, was charged with a misdemeanor for keeping for sale obscene and indecent books in violation of California law.²⁶³ He was convicted at a bench trial, and the conviction was affirmed on appeal by the California appellate court of

²⁶⁰ *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

²⁶¹ 354 U.S. 476 (1957).

²⁶² *Id.* at 480. The federal statute, 18 U.S.C. § 1461, at the time stated: “Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and [e]very written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly deposits for mailing of delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.”) *Id.* at 479 n.1.

²⁶³ *Id.* at 481. The California statute, Cal. Penal Code Ann. § 311 (1955), at the time stated: “Every person who willfully and lewdly, either: . . . (3) Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or, (4) Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . . is guilty of a misdemeanor.” *Id.* at 479 n.2.

proper jurisdiction. Upon consolidating the two appeals, the Supreme Court noted that “[t]he constitutionality of a criminal obscenity statute is the question in each of these cases”²⁶⁴ and described the question presented in categorical terms:

The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.²⁶⁵

By combining the federal-law case from New York with the state-law case from California, the Supreme Court created a vehicle by which it could make clear that the law governing obscenity applied, through the First Amendment and the Fourteenth Amendment respectively, to states as well as to the federal government.²⁶⁶

The *Roth* Court majority held that “obscenity is not within the area of constitutionally protected speech or press,”²⁶⁷ thereby confirming that portion of the framework articulated in *Chaplinsky*. The *Roth* majority reached its conclusion after an extensive review of colonial and early post-Constitution law in the states demonstrating that at the time the First Amendment was drafted, it could not have been viewed as barring laws that regulated or prohibited obscenity.²⁶⁸ Therefore, “the prevention and punishment of [obscenity has] never been thought to raise any Constitutional problem.”²⁶⁹

Having declared obscenity a category of speech outside the protection of the First Amendment, the *Roth* Court then turned its attention to the ongoing struggle to define, as a

²⁶⁴ *Id.* at 479.

²⁶⁵ *Id.* at 481 (footnote omitted).

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 485.

²⁶⁸ *See id.* at 482-84 & n.10-13 (detailed review of early authorities regarding obscenity); *see also id.* at 483 (“At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection for speech and press.”); *id.* at 484 (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”).

²⁶⁹ *Chaplinsky*, 315 U.S. at 571-72.

matter of constitutional law, precisely what obscenity is. The *Roth* majority acknowledged that “sex and obscenity are not synonymous”²⁷⁰ and made clear that in order to protect First Amendment values and avoid the suppression of protected expression, it was “vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.”²⁷¹ The *Roth* majority then discussed the evolution of the constitutional test to be applied:

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The [early] test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.²⁷²

Thus, the *Roth* majority adopted as its test for determining whether material is obscene: “[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”²⁷³ In his concurrence, Chief Justice Earl Warren noted the difficulty of managing this test and wrote that “[t]he line dividing the salacious or pornographic from literature or science is not straight and unwavering,”²⁷⁴ thus foreshadowing the tortured jurisprudence on this subject that would unfold in decades to come.

²⁷⁰ *Roth*, 354 U.S. at 487.

²⁷¹ *Id.* at 488.

²⁷² *Id.* at 488-89 (citations omitted).

²⁷³ *Id.* at 489.

²⁷⁴ *Id.* at 495 (Warren, C.J., concurring). The Chief Justice further articulated the concern that would trouble the Court in future years as it wrestled with defining obscenity: “That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight States as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the

The *Roth* decision stands for the proposition that obscene speech is categorically unprotected by the First Amendment, a proposition that drew support from a majority of the Supreme Court. But the difficulty in defining precisely what obscenity *is* as a matter of constitutional law would prove far more difficult. The *Roth* Court faced no need to confront that difficulty in applying its announced principle of exclusion to specific material because the obscene nature of the material in the cases combined in *Roth* was undisputed and “[n]o issue is presented in either case concerning the obscenity of the material involved.”²⁷⁵ That was a stroke of good fortune for the *Roth* Court because the test it adopted would prove exceedingly difficult to manage in practice.

***Miller v. California* (1973):**²⁷⁶ For 16 years after handing down the *Roth* decision, the United States Supreme Court wrestled—mightily but unsuccessfully—with applying it. It was well-established that obscene material enjoys no Constitutional protection, but how were courts to determine whether the material disputed in any given case is “obscene?”

The Supreme Court struggled to find a single definition of obscenity that could command a majority of the court.²⁷⁷ This was the unsettled period of time during which the Supreme Court described itself as being “in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.”²⁷⁸ It was during this unsettled time that Justice Stewart, perhaps in frustration, famously declared in his struggle toward a

power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.” *Id.*

²⁷⁵ *Id.* at 481 n.8 (majority opinion).

²⁷⁶ 413 U.S. 15.

²⁷⁷ *See id.* at 22-23 (describing this unsettled period between *Roth* and *Miller*, the *Miller* court wrote: “Apart from the initial formulation in the *Roth* case no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States’ police power. We have seen a variety of views among the members of the Court unmatched in any other course of constitutional adjudication. This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.” (citations and internal quotation marks omitted)).

²⁷⁸ *Id.* at 23 n.3.

definition—“[I] know it when I see it . . .”²⁷⁹—and Justice Harlan described the whole circumstance as “the intractable obscenity problem.”²⁸⁰

This unsettled period ended with the Supreme Court’s 1973 decision in *Miller*. In that case, for the first time since *Roth*, a majority of the Supreme Court agreed on a single test to be used to define the category of “obscenity” that is outside the protection of the First Amendment, the test that remains controlling today. The *Miller* Court understood the importance of its decision:

It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment.²⁸¹

The *Miller* case arose from a criminal prosecution in California in which Marvin Miller was convicted of violating California law²⁸² by mailing to a restaurant in Newport Beach, California, unsolicited sexually explicit brochures advertising for sale various books. The brochures, which were opened by the restaurant owner and his mother, contained various descriptive material, including sexually explicit pictures and drawings.²⁸³ The recipients of the material complained to the police. Mr. Miller was charged, tried, convicted, and he appealed.

²⁷⁹ *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring). To be more precise, Justice Stewart was making the point that he had concluded that the *Roth* exclusion of obscenity from the protection of the First Amendment should be limited to “hard-core pornography,” and it was to that phrase he applied his explanation “[I] know it when I see it . . .”

²⁸⁰ *Interstate Circuit*, 390 U.S. at 704 (Harlan, J., concurring and dissenting).

²⁸¹ *Miller*, 413 U.S. at 29.

²⁸² The applicable California law, Cal. Penal Code §311 and §311.2(a), at the time stated, in pertinent part: “Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . . ‘Obscene’ means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.” *Miller*, 413 U.S. at 18 n.1.

²⁸³ *Id.* at 18.

The Supreme Court vacated the conviction and used the opportunity to “formulate standards more concrete than those in the past.”²⁸⁴

The *Miller* majority settled several important questions about obscenity and the First Amendment. First, it reaffirmed the holding in *Roth* that obscenity is categorically outside the protection of the First Amendment.²⁸⁵ Second, it rejected the Supreme Court’s prior flirtation with requiring prosecutors to affirmatively show that material in question is “utterly without redeeming social value,” a prong in analysis that had arisen during the post-*Roth* period of uncertainty.²⁸⁶ Third and importantly, it established that obscenity is to be determined by applying “contemporary community standards,” which means that the standards will vary from community to community in different parts of the United States.²⁸⁷ Fourth, the *Miller* majority clarified that the definition of “obscene” material was, for First Amendment purposes, limited to material that is sexual in nature:

[W]e now confine the permissible scope of such regulation [of obscenity] to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.²⁸⁸

²⁸⁴ *Id.* at 20.

²⁸⁵ *Id.* at 36.

²⁸⁶ *Id.* at 36-37. A plurality in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), would have required prosecutors to prove material alleged to be obscene was “utterly without redeeming social value.” *Id.* at 418 (plurality opinion); see also *Miller*, 413 U.S. at 22 (“Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was ‘utterly without redeeming social value’—a burden virtually impossible to discharge under our criminal standards of proof.”).

²⁸⁷ *Miller*, 413 U.S. at 32-34 (“It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As this Court made clear . . . , the primary concern with requiring a jury to apply the standard of ‘the average person, applying contemporary community standards’ is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. We hold that the requirement that the jury evaluate the materials with reference to ‘contemporary standards off the State of California’ serves this protective purpose and is constitutionally adequate.” (citations and footnotes omitted)).

²⁸⁸ *Id.* at 24.

Perhaps animated by an understandable desire to calm the confusion in how to handle obscenity cases that had pervaded the federal and state courts since *Roth*, the *Miller* majority then summarized and restated its newly established test for determining “obscenity” in straightforward terms aimed at practitioners:

The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁸⁹

In a practical sense, the effect of *Miller* was to limit the definition of constitutionally unprotected “obscenity” to include only material that is considered “hard core pornography.”²⁹⁰

The test adopted in *Miller* for that purpose remains in use today. But the question then arises: If only “hard core pornography” is constitutionally unprotected “obscenity,” then what is the meaning of the term “lewd” in *Chaplinsky*’s formulation of the category? As the next section explains, material that may be “lewd” but is not “obscene” is subject to constitutional analysis within the First Amendment, not without.

Subpart II: Abandoning “lewd”

The *Chaplinsky* Court described one category of speech lying outside First Amendment protection as “lewd and obscene,”²⁹¹ but by the time of *Stevens* the Supreme Court was describing this same category only as “obscenity.”²⁹² What happened to “lewd”?

²⁸⁹ *Id.* at 24 (citations and internal quotation marks omitted).

²⁹⁰ *Id.* at 27 (“Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed.”).

²⁹¹ *Chaplinsky*, 315 U.S. at 572.

²⁹² *Stevens*, 559 U.S. at 468.

It is notable that the Supreme Court has used a variety of terms to apply to speech that is lewd, including “indecent,” “vulgar,” “or offensive.” It never has been clear whether the Supreme Court has viewed these terms all as describing similar speech that, for constitutional purposes, is interchangeable, or whether a more precise meaning was intended. However, it is clear after *Miller* that speech considered “obscene” is separate and distinct, from a constitutional perspective, from that which is merely indecent, lewd, vulgar or offensive. *Miller* made clear, for example, that “obscene” speech must be sexual in nature, while speech that is lewd, indecent, vulgar or offense may involve other subject matter. Thus, it is not surprising that only five years after deciding *Miller*, the Supreme Court took up the issue of what government regulation may be constitutionally applied to speech that is “indecent but not obscene.”²⁹³ The Court has continued to wrestle with aspects of this distinction.²⁹⁴

Since *Miller*, the Supreme Court’s jurisprudence regarding “indecent” or “lewd” material has evolved to the point that such material is now clearly *not* considered by the Court to be categorically excluded²⁹⁵ but instead is subject to analysis and some degree of protection under the First Amendment. In a line of cases running through *FCC v. Pacifica*, to *Bethel School District v. Fraser*, to *Sable Communications v. FCC*, to *Reno v. ACLU*, the Supreme Court has made clear that “indecent” expression is subject to First Amendment protection—thus, it is not within a category of unprotected speech.²⁹⁶ That distinction was foreshadowed by the pre-*Miller* case *Cohen v. California*.

²⁹³ *FCC v. Pacifica Found.*, 438 U.S. 729, 729 (1978).

²⁹⁴ *See generally* *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (holding that due process requires sufficient notice that broadcasts of “fleeting expletives” or “brief nudity” may be actionable).

²⁹⁵ It is reasonable to speculate that, having finally settled on the *Miller* test, the Court is loath to disturb it. This would explain the Supreme Court’s decision to narrow the category of materials covered by the categorical exclusion of obscenity to fit the test rather than further altering the *Miller* test to fit the facts of post-*Miller* cases.

²⁹⁶ This conclusion applies as a general matter to government regulation of lewd speech. A different conclusion may apply when the government is in a different position, such as acting as a patron or administering grants. *See, e.g.*, *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

Cohen v. California (1971):²⁹⁷ At the height of the War in Vietnam in the spring of 1968, Paul Robert Cohen walked through the Los Angeles County courthouse wearing a jacket bearing the plainly visible words: “Fuck the Draft.”²⁹⁸ He uttered no words and engaged in no misconduct other than wearing the jacket,²⁹⁹ and he later testified that he wore the jacket “as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.”³⁰⁰ He was arrested, prosecuted and convicted of violating a California law that barred disturbing the peace by “offensive conduct.”³⁰¹ His conviction was upheld by the California Court of Appeal, and the California Supreme Court declined review, effectively letting his conviction stand. The United States Supreme Court granted certiorari.³⁰²

In reversing Mr. Cohen’s conviction, the Supreme Court applied categorical analysis³⁰³ to determine, as a threshold matter, whether the message on his jacket fell within the freedom of speech protected by the Speech Clause:

[T]his case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. *This is not, for example, an obscenity case.* Whatever else may be necessary to give rise to the States’ broader power to

²⁹⁷ 403 U.S. 15.

²⁹⁸ *Id.* at 16.

²⁹⁹ *Id.* (“The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.” (quoting record below)).

³⁰⁰ *Id.*

³⁰¹ *Id.* at 16. California Penal Code § 415 read as follows: “Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court.” *Cohen*, 403 U.S. at 16 n.1.

³⁰² *Id.* at 17.

³⁰³ Most of the *Cohen* decision involved analysis of whether the message on Mr. Cohen’s jacket constituted unprotected “fighting words.” That analysis is not pertinent here.

prohibit obscene expression, such expression must be, in some significant way, erotic.³⁰⁴

Thus, the Supreme Court by the time of *Cohen* had begun to distinguish between “obscenity” and other forms of similar expression, a distinction not contained within *Chaplinsky*’s “lewd and obscene” category of unprotected speech. The *Cohen* Court then foreshadowed the rule that would become clear in the cases after *Miller*—that although “obscenity” was constitutionally unprotected, other offensive expressions were not: “It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket.”³⁰⁵

Thus, although Mr. Cohen invoked a “distasteful mode of expression,”³⁰⁶ his words must be analyzed within the First Amendment, not without it. While “obscenity” enjoyed no constitutional protection, it was clear after *Cohen* that other “distasteful” or “offensive” speech, including “vulgarity,” does.

Only two years after deciding *Cohen*, the Supreme Court issued its *Miller* decision. This discussion now continues with a line of post-*Miller* cases that make clear that unlike “obscene” speech, “lewd” speech, however linguistically described, falls within the First Amendment’s protection.

FCC v. Pacifica (1978):³⁰⁷ Comedian George Carlin delivered a monologue titled “Filthy Words” to a live audience in California. The monologue involved Mr. Carlin uttering various formulations of words that he expressly described as “the words you couldn’t say on the public, ah, airwaves, um, the ones you definitely wouldn’t say, ever.”³⁰⁸

³⁰⁴ *Id.* at 19-20 (emphasis added).

³⁰⁵ *Id.* at 20.

³⁰⁶ *Id.* at 21.

³⁰⁷ 438 U.S. 726.

³⁰⁸ *Id.* at 729.

Mr. Carlin's monologue was electronically recorded, and sometime later a radio station in New York rebroadcast the audio of that monologue over the airwaves. A citizen who heard the monologue broadcast over his car radio while riding with his young son sent a letter of complaint to the Federal Communications Commission (FCC) objecting to the content of the broadcast. The FCC, upon investigation, concluded that the broadcast violated the provision of federal law prohibiting the use of "any obscene, indecent, or profane language by means of radio communications."³⁰⁹ The United States Court of Appeals for the District of Columbia Circuit reversed the FCC decision; however, while the three-judge panel voted unanimously to reverse they did so for three separate reasons and wrote three separate opinions.³¹⁰ Thus, the matter was less than clear when it reached the Supreme Court, which granted certiorari to review the case.

The Supreme Court found that Mr. Carlin's monologue did not satisfy the "prurient interest" prong of the *Miller* test for obscenity. Therefore, Mr. Carlin's monologue was not "obscene" within the meaning of *Miller* and could not be excluded from First Amendment protection by categorizing it as such.³¹¹ The *Pacifica* Court distinguished the facts of this case from its prior cases in which the Court had found obscenity and indecency to be essentially the same from a constitutional analysis standpoint.³¹²

The *Pacifica* Court then proceeded to look to the context of the communication in this case as well as to the value of the speech itself. First, the *Pacifica* Court found that the fact the speech in this case was broadcast, rather than communicated in a less-intrusive manner such as by printing, justified additional government regulation even within the First Amendment.³¹³ As

³⁰⁹ *Id.* at 731 (citing 18 U.S.C. § 1464 (1976)).

³¹⁰ *Id.* at 733-34.

³¹¹ *Id.* at 740 ("Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality.").

³¹² *Id.* at 740-41.

³¹³ *Id.* at 741 n.17. The Supreme Court identified "different constitutional limits on Congress' power to regulate" different forms of communication. For example, Congress has less power to regulate use of the mails, based on

the Supreme Court colorfully put this point: “We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.”³¹⁴ Second, the *Pacifica* Court drew upon *Chaplinsky*³¹⁵ and found that the “patently offensive references to excretory and sexual organs and activities” at issue in the *Pacifica* case “surely lie at the periphery of First Amendment concern.”³¹⁶ The Court found significant the fact that the Commission’s order regulating the broadcast of Mr. Carlin’s monologue was aimed at the words used, not at the ideas conveyed.³¹⁷

Having identified these analytical points regarding context and the value of the speech itself, the *Pacifica* Court then wrote that the Constitution does not require an “absolute rule” that speech is either protected or unprotected.³¹⁸ That conclusion allowed the Supreme Court to distinguish between obscenity, as defined by *Miller*, which *is* entirely outside the protection of the First Amendment, and obscenity’s close cousin, indecency, which may be regulated by the government but is “*not* entirely outside the protection of the First Amendment.”³¹⁹

content, than it does to regulate use of the airwaves, based on content. *Id.*; *see also id.* at 748 (reasoning that this distinction based on the method of communication is constitutionally sustainable for two reasons: First, “[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” (citation omitted)); *see also id.* at 749 (Second, “broadcasting is uniquely accessible to children, even those too young to read” and the language at issue in this case “could have enlarged a child’s vocabulary in an instant.”).

³¹⁴ *Id.* at 750-51.

³¹⁵ *Id.* at 746 (“If there were any reason to believe that the Commission’s characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: ‘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.’” (quoting *Chaplinsky*, 315 U.S. at 572) (footnotes omitted)).

³¹⁶ *Id.* at 743.

³¹⁷ *Id.* at 743 n.18 (“A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.”).

³¹⁸ *Id.* at 744.

³¹⁹ *Id.* at 746; *see also id.* at 747 (“[T]he constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of

The *Pacifica* Court began the now-familiar post-*Miller* process of separating the unprotected category of “obscenity” from protected (to some degree) speech that is merely “indecent.” That distinction would become more pronounced in subsequent cases.

Bethel School District No. 403 v. Fraser (1986).³²⁰ Matthew Fraser, a student at a Washington state public school, made a nominating speech before a school assembly of roughly 600 students, many of whom were 14 years old, on behalf of another student seeking election to student government office.³²¹ Throughout his nominating speech, Mr. Fraser referred to his candidate “in terms of an elaborate, graphic, and explicit sexual metaphor.”³²² Mr. Fraser delivered the speech despite having been advised in advance against doing so by at least two teachers, and he subsequently was disciplined by the school administration for violating a school disciplinary rule³²³ and suspended from school for three days. With the support of his father, Mr. Fraser sued the school district claiming his First Amendment rights had been violated. The federal district court found in his favor and awarded him monetary and injunctive relief. The Ninth Circuit Court of Appeals affirmed the district court’s judgment. The Supreme Court granted certiorari.³²⁴

The United States Supreme Court reversed the Court of Appeals and held that school officials constitutionally could punish Mr. Fraser for his speech in this case. The *Fraser* Court’s

speech such as this that both its capacity to offend and its ‘social value’ . . . vary with the circumstances. Words that are commonplace in one setting are shocking in another.” (footnotes and citation omitted)).

³²⁰ 478 U.S. 675.

³²¹ The *Fraser* case is one of many that explore the separate issue of student-speech regulation. It is included in this analysis only to make the general point that, in its approach to the regulation of indecency, the Supreme Court has acknowledged that the audience to which a particular indecent remark is made is relevant in the Court’s analysis; in *Fraser*, for example, the Court specifically noted that the fact the indecent remarks were delivered to a captive audience of schoolchildren was a consideration in the Court’s holding. This dissertation does not delve further into the separate line of cases involving student speech.

³²² *Id.* at 677-78.

³²³ *Id.* at 678. Bethel High School had in place at the time of the speech a disciplinary rule that stated: “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” *Id.*

³²⁴ *Id.* at 679-80.

reasoning, however, relied upon the special circumstances within a public school, not upon a categorical exclusion of Mr. Fraser’s speech from First Amendment protection. Mr. Fraser’s speech was not declared “obscene,” but instead was described by the Court as “lewd, indecent, or offensive.”³²⁵ The *Fraser* Court relied heavily upon the fact that the indecent speech was delivered in a public school³²⁶ and the captive audience subjected to the speech included many children.³²⁷ Applying the First Amendment, the *Fraser* Court held that the school district “acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech”³²⁸ because of “the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”³²⁹ As an interesting part of its rationale, the Supreme Court noted that the rules of both houses of Congress prohibit the use of similar types of language during official debates: “Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?”³³⁰

³²⁵ *Id.* at 683.

³²⁶ *Id.* (“Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the ‘fundamental values necessary to the maintenance of a democratic political system’ disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the schools. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.” (citations and internal quotation marks omitted)).

³²⁷ *Id.* at 684 (“This Court’s First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.”).

³²⁸ *Id.* at 685.

³²⁹ *Id.* at 684.

³³⁰ *Id.* at 681-82 (“In our Nation’s legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of ‘impertinent’ speech during debate and likewise provides that ‘[n]o person is to use indecent language against the proceedings of the House.’ The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order for imputing improper motives to another Senator or for referring offensively to any state. Senators have been censured for abusive language directed at other Senators. Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?” (citations omitted)).

For purposes of this dissertation, the significance of *Fraser* is this: The Supreme Court continued its post-*Miller* approach of separating the constitutionally unprotected “obscene” expression from that which is merely “lewd,” “vulgar,” “indecent,” or “offensive.” While the *Fraser* Court allowed government regulation of the latter sort of speech on the facts of this case, it did so with reasoning applied within the confines of the First Amendment, not without.

Sable Communications v. FCC (1989):³³¹ Having gone to great lengths to emphasize that its holding in *Pacifica* was limited to the facts before it, and having similarly emphasized the unique nature of the school setting that gave rise to the dispute and ultimate holding in *Fraser*, the Supreme Court still was left with the more general issue of what test is to be applied when distinguishing regulation of unprotected obscenity from mere indecency that falls within the First Amendment’s scope. In *Sable*, the Court began the process of clarifying that rule in a broader sense than had its prior cases. While the *Sable* analysis picks up where the categorical approach in *Pacifica* left off, by the end of the *Sable* case the Supreme Court really had concluded that henceforth it would approach indecency cases from the standpoint of a balancing test rather than from the bright-line approach of categorical analysis. Thus, *Sable* is included here for its role in making clear the departure of analyses applicable to categorically excluded “obscenity” on the one hand and constitutionally protected “indecency” and its kin on the other.

The *Sable* case involved federal regulation of dial-a-porn services, through which individuals could place a call to a specified telephone number and, in exchange for a fee, hear various pornographic messages. The case arose when a provider of these services brought an action for declaratory judgment that the federal regulatory statute was unconstitutional and sought an injunction preventing the government from enforcing it. The federal district court upheld the federal statute to the extent that it banned dial-a-porn messages that were obscene but

³³¹ 492 U.S. 115.

found the statute unconstitutional to the extent that it banned dial-a-porn messages that were indecent but not obscene.³³² The Ninth Circuit was bypassed and the matter decided directly by the Supreme Court.

The Supreme Court affirmed the judgment of the district court on both points. The Supreme Court used this opportunity to reaffirm its bright-line rule that obscene material lies outside the protections of the First Amendment and that, therefore, obscene dial-a-porn messages may be banned by Congress.³³³ Turning its attention to the issue of indecent, but not obscene, dial-a-porn messages, the Court inched toward establishing a general rule that would assist it in future cases—and would not be limited only to narrow circumstances³³⁴ or to the facts of an individual case.³³⁵ In *Sable*, the Supreme Court issued the clear holding that “[s]exual expression which is indecent but not obscene is protected by the First Amendment.”³³⁶

That bright-line rule goes beyond the Supreme Court’s previous, narrow holdings in *Pacifica* and *Fraser*. In *Pacifica*, the Court found the material in question to be indecent but still subject to regulation because of the manner in which it was distributed (by daytime broadcast)—a narrow holding. In *Fraser*, the Court found the material in question to be indecent but still subject to regulation because of the place in which it was delivered (a school)—another narrow holding. But in *Sable*, the Court found the material in question to be indecent without those sorts of limiting circumstances, making *Sable* a holding with broader application to future cases.

³³² *Id.* at 117-20.

³³³ *Id.* at 124 (“In contrast to the prohibition on indecent communications, there is no constitutional barrier to the ban on obscene dial-a-porn recordings. We have repeatedly held that the protection of the First Amendment does not extend to obscene speech.”).

³³⁴ Such as the student speech at school assemblies at issue in *Fraser*, 478 U.S. 675.

³³⁵ Such as the Court’s emphatic narrowing of the holding in *Pacifica*, 438 U.S. 726.

³³⁶ *Sable*, 492 U.S. at 126.

The *Sable* Court applied strict scrutiny³³⁷ to determine the validity of the regulation of indecent speech, inquiring whether a compelling government interest served by the regulation,³³⁸ and whether the regulation was narrowly drawn to serve that interest?³³⁹ The *Sable* Court found that a compelling government interest was, indeed, served by the regulation of indecent dial-a-porn messages³⁴⁰ but then found that the regulation was not sufficiently narrowly drawn to survive strict scrutiny because it unnecessarily burdened adults' access to dial-a-porn services in the name of preventing children from accessing the same.³⁴¹ "Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny."³⁴²

Thus, in *Sable* the Supreme Court took a step toward creating a broader rule for considering future challenges to government regulation of indecent material. Unlike obscenity, it was increasingly clear that indecent material would *not* be excluded from First Amendment protection.

Reno v. ACLU (1997).³⁴³ The Supreme Court's move toward invalidating statutes that regulate distribution of indecent, but not obscene, material, as signaled in *Sable*, was furthered in *Reno v. ACLU*. By the time it decided *ACLU* case, the Supreme Court had effectively ended any

³³⁷ *Id.* ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

³³⁸ *Id.* ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.").

³³⁹ *Id.* ("The Government may serve this legitimate interest, but to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." (citations and internal quotation marks omitted)).

³⁴⁰ *Id.* ("[T]he Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages . . .").

³⁴¹ *Id.* at 128 ("[T]he government may not reduce the adult population . . . to . . . only what is fit for children." (citations and internal quotation marks omitted) (ellipsis in original)).

³⁴² *Id.* at 131.

³⁴³ 521 U.S. 844.

attempt to resolve First Amendment disputes regarding indecent material through application of a categorical exclusion.

In *ACLU*, the issue was a facial challenge to the Communications Decency Act (CDA) of 1996. That statute contained two statutory provisions intended to shield minors from “indecent” and “patently offensive” communications on the Internet.³⁴⁴ When the constitutionality of the CDA was challenged soon after its enactment, a special three-judge district court was convened to hear the dispute pursuant to special procedural provisions of the CDA. All three judges held that the statute was facially invalid because it was substantially overbroad, although each of the three wrote a separate opinion emphasizing different aspects of the defects the panel found with the statute.³⁴⁵ Pursuant to a special appellate procedure in the CDA, the Supreme Court agreed to hear the case.

The Supreme Court concluded that the CDA was an unconstitutionally overbroad regulation on free speech. The *ACLU* Court severed from the statute the provisions banning dissemination of “obscene” materials to minors over the Internet and upheld those provisions as consistent with its longstanding conclusion that obscene material is outside of the protection of the First Amendment.³⁴⁶ Except for that narrow provision, however, the Court struck down the balance of the statute.

The *ACLU* Court reaffirmed—in an almost casual manner—the direction signaled by the *Sable* Court of considering indecent material as being subject to First Amendment protection and then applying strict scrutiny to it. After *ACLU*, it was clear that “obscenity” and “indecent” were subject to separate constitutional analyses, and in that sense the *ACLU* Court made clear

³⁴⁴ *Id.* at 849.

³⁴⁵ *Id.* at 861-63.

³⁴⁶ *Id.* at 883.

that the *Chaplinsky* formulation that both “lewd *and* obscene” materials were categorically excluded from First Amendment protection no longer was the view of the Supreme Court.

* * *

The cases above demonstrate the clear separation that has developed between the Supreme Court’s approach to regulation of “obscene” material and its approach to regulation of material that is variously described as “indecent,” “lewd,” “vulgar,” or with similar terms. By the time of *Stevens*, the law was clear: Obscenity lies outside the protection of the First Amendment, and the test for determining whether material is unprotected “obscenity” is set forth in *Miller*. Other material that may be colloquially linked to obscenity, such as material that is indecent, lewd, vulgar, or the like, is not within the categorical exclusion. As such, any regulation of that lewd but non-obscene material will be subject to scrutiny under traditional First Amendment rules, and unless it falls within some sort of “special rules” such as one regulating speech in schools or in public broadcasts, regulation of this sort of lewd but non-obscene material will be subjected to strict scrutiny.

Thus, any Speech Clause case involving obscene speech is resolved at the threshold, binary question: Obscenity is not part of the freedom of speech protected by the First Amendment, and thus a government proscription on obscene speech is constitutionally permissible. By contrast, any case involving non-obscene material that is lewd, vile or of a similar nature may not be disposed of at the threshold question—such non-obscene speech is, as a matter of law, *within* the freedom of speech protected by the Speech Clause—and, therefore, the outcome of such cases turns on application of the open-ended, variable analysis of the second question: *How* does the Speech Clause apply to the government regulation of the speech at

issue? It is apparent *Chaplinsky*'s formulation that the categorical exclusion includes both the "lewd and obscene" is no longer valid.

Part B: The profane

As discussed in Chapter 2, *supra*, the notion that “profane” speech is constitutionally unprotected has long historical roots, but those roots typically are intertwined with concepts of religion and with blasphemy.³⁴⁷ Even by 1942, when the *Chaplinsky* Court described “the profane” as a category of unprotected speech, it is unclear the Court really *meant* it. If profanity truly were an unprotected category in 1942, then the *Chaplinsky* Court readily could have decided that Mr. Chaplinsky’s speech was unprotected because his exclaimed reference to a “God damned racketeer”³⁴⁸ was profane on its face. Why extensively analyze whether Marshal Bowering, or anybody else, might be provoked by Mr. Chaplinsky’s outburst of “fighting words” if the facially profane nature of his words were truly sufficient to permit the government to punish their utterance?

Since recognizing profanity as an unprotected category within the Doctrine of Categorical Exclusion in *Chaplinsky*, the Supreme Court has found no cases to which that category actually applied to save a government regulation. For example, in *Cohen v. California*, the Supreme Court considered whether the expression “Fuck the draft” was constitutionally protected. After disposing of any notion that such profanity might fall within either the unprotected category of obscenity³⁴⁹ or that of fighting words,³⁵⁰ the Supreme Court then stated the issue it was deciding: “It is whether . . . the States, acting as guardians of public morality,

³⁴⁷ See Chapter 2, *supra*; see also generally *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 533-40 (1952) (Appendix collecting seventeenth, eighteenth and nineteenth century definitions of “profane”).

³⁴⁸ *Chaplinsky*, 315 U.S. at 569.

³⁴⁹ *Cohen*, 403 U.S. at 20 (“This is not . . . an obscenity case. Whatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression must be, in some significant way, erotic . . . It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket.” (citation omitted)).

³⁵⁰ *Id.* (“While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’ No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult.” (citation omitted)).

may properly remove this offensive word from the public vocabulary.”³⁵¹ The Supreme Court’s answer: No. The Supreme Court declined to recognize the state’s authority to prohibit the offensive word merely because the idea being expressed could be expressed in a less-offensive manner, saying “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”³⁵² That being so, “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”³⁵³ Rather, the Court held, “we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”³⁵⁴

While the *Cohen* Court never expressly analyzed Mr. Cohen’s expression as “profanity,” it is difficult to imagine a circumstance after *Cohen* in which a person could be punished by the government merely for uttering an “offensive word,” which by definition includes profanity. Soon after deciding *Cohen*, the Supreme Court vacated the judgment below in a New Jersey case involving an individual who had been convicted of disorderly conduct for addressing a public school board meeting while using, as the dissenting Justices obliquely expressed it, “the adjective ‘F05q’ on four occasions, to describe the teachers, the school board, the town and his own country.”³⁵⁵ In that case, a minority of the Supreme Court clung to the view that “the exception to First Amendment protection recognized in *Chaplinsky* . . . extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience,”³⁵⁶ but that was not the majority view. On remand, the Supreme Court of New Jersey

³⁵¹ *Id.* at 22-23.

³⁵² *Id.* at 26.

³⁵³ *Id.* at 25.

³⁵⁴ *Id.*

³⁵⁵ *Rosenfeld v. New Jersey*, 408 U.S. 901, 904 (1972) (Powell, J., dissenting).

³⁵⁶ *Id.* at 905.

struck a middle ground, overturning the conviction but holding the statute “may remain in effect to the extent that it proscribes offensive language which is spoken loudly in a public place and is likely to incite the hearer to an immediate breach of the peace.”³⁵⁷

Any remaining hope for the continued vitality of “profanity” as an unprotected category of speech soon was put to rest in 1973 in another case arising out of protest against the Vietnam War.

Hess v. Indiana (1973):³⁵⁸ One year after deciding *Cohen*, the United States Supreme Court again confronted the constitutionality of a prosecution for use of profanity by a person objecting to the Vietnam War. This time, unlike in *Cohen*, the profane word was actually spoken, not printed on a jacket for others to read.

Gregory Hess was on the campus of the University of Indiana/Bloomington during an anti-war demonstration that involved people gathering in a campus street. The sheriff arrived on the scene and began to clear the street itself, causing people to remove themselves to the sidewalks on either side.³⁵⁹ In response to this, Mr. Hess stated to the crowd in general and to nobody in particular: “We’ll take the fucking street later” or “We’ll take the fucking street again.”³⁶⁰ The sheriff overheard Mr. Hess’s comment and arrested him for disorderly conduct. He was prosecuted in the city court of Bloomington and convicted; he was re-tried de novo in the district court and again convicted. The Indiana Supreme Court upheld the conviction, finding that the defendant’s statement “was intended to incite further lawless action on the part of the

³⁵⁷ *State v. Rosenfeld*, 303 A.2d 889, 893 (N.J. 1973).

³⁵⁸ 414 U.S. 105 (1973) (per curiam).

³⁵⁹ *Id.* at 106.

³⁶⁰ *Id.* at 107 (Testimony indicated that the actual statement was one of these two but did not conclusively determine which it was. From a constitutional standpoint, the difference is immaterial.).

crowd in the vicinity of appellant and was likely to produce such action.”³⁶¹ The United States Supreme Court agreed to hear his appeal.

In a *per curiam* decision, the Supreme Court overturned the conviction because Mr. Hess’s profane speech was protected by the First Amendment. The Supreme Court did not break new ground in this case, but the case is consequential for the almost dismissive manner in which the Supreme Court disposed of any assertion that Mr. Hess’s profanity in the context of this political protest could constitutionally be banned by the State of Indiana. The Supreme Court expressly rejected any notion that Mr. Hess’s speech was obscene or constituted fighting words; consequently, the defendant’s words did not lie outside the protection of the First Amendment.³⁶² The Supreme Court then applied the *Brandenburg* test for incitement to the facts of this case and concluded, contrary to the Indiana Supreme Court, that the defendant’s profanity was not directed at causing any person to engage in “imminent lawless action” and instead “amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess’ speech.”³⁶³

* * *

Chaplinsky itself was the high water mark of the modern Supreme Court’s acknowledgement that “profane” speech may be categorically unprotected. While that was true in the nineteenth century and before, it generally has not been so in the twentieth century or after. In that sense, the fading of “the profane” as an unprotected category effectively illustrates that a history of exclusion is a necessary, but it is not a sufficient, condition for recognition of a modern category of excluded speech. While never expressly rejecting “the profane” as a

³⁶¹ *Id.* at 108 (citing *Hess v. State*, 297 N.E.2d 413, 415 (Ind. 1973)).

³⁶² *Id.* at 107-08. The *Hess* Court offered no analysis of “profanity” as an unprotected category, suggesting that category had by then been abandoned.

³⁶³ *Id.* at 108.

category, the Supreme Court has done so impliedly, holding that a statute applied to punish speech directed at a police officer that “plainly was profane” within the meaning of *Chaplinsky* nonetheless violated the First Amendment.³⁶⁴ Instead, the Supreme Court has quietly abandoned reference to “the profane” as an unprotected category of speech, and in cases testing government power to regulate profane speech has implicitly accepted that the answer to the threshold, binary question whether the Speech Clause applies is “Yes” and proceeded directly to the tertiary, variable question, “How so?” That is why from the time of *Chaplinsky* to the time of *Stevens*, references to “the profane” as a constitutionally unprotected category of speech have vanished from the Supreme Court’s jurisprudence. Nothing resembling “the profane” is included by the Supreme Court as an unprotected category in *any* of the five cases since 2010 that address the Doctrine of Categorical Exclusion.

³⁶⁴ *Lewis v. City of New Orleans*, 415 U.S. 130, 136 (1974) (Blackmun, J., dissenting).

Part C: The libelous

The concepts involved here are not difficult. Defamation is “[t]he act of harming the reputation of another by making a false statement to a third person.”³⁶⁵ Libel is “a defamatory statement expressed in a fixed medium, *esp.* writing but also a picture, sign, or electronic broadcast.”³⁶⁶ Slander is “a defamatory statement expressed in a transitory form, *esp.* speech.”³⁶⁷

The sentiments animating “prevention and punishment”³⁶⁸ of defamation over the years are similarly ancient and nearly universal:

[L]ibelling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeller, it is more dark and base than that of the assassin, or than his who commits a midnight arson. . . . To what tribunal can he then resort?³⁶⁹

It is that last question—“To what tribunal can he then resort?”—that posits the rub. While there is little serious disagreement that defamation is socially undesirable, the question that underlies all First Amendment Speech Clause jurisprudence—“What may the *Government* do about it?”—is most difficult to answer in this context. Thus, the most-litigated, and most-restricted, surviving category from *Chaplinsky* is “the libelous,” or defamation. During the *Chaplinsky* to *Stevens* period, the proliferation of case law-generated rules applicable to various defamatory statements, by various persons, in various contexts or situations, is unsurpassed in First Amendment law. In sum, the general evolution of modern jurisprudence related to libel and defamation has been toward developing rules to answer the tertiary question—*how* does the Speech Clause apply—and toward an implicit affirmative answer to the threshold question—does the Speech Clause apply *at all*?

³⁶⁵ BLACK’S LAW DICTIONARY 427 (7th ed. 1999).

³⁶⁶ *Id.* at 927.

³⁶⁷ *Id.* at 1392-93.

³⁶⁸ *Chaplinsky*, 315 U.S. at 572.

³⁶⁹ *Oswald*, 1 U.S. at 324.

A thorough examination of the modern common law of defamation would, by itself, fill a thick volume and would far exceed what is required or acceptable in the context of this dissertation. But the Supreme Court has succinctly described the bottom line: “Our decisions since the 1960s have narrowed the scope of the traditional categorical exception[] for defamation”³⁷⁰ Notably, the Supreme Court states the excluded category is “narrowed,” not eliminated, and *something* thus remains part of the Doctrine of Categorical Exclusion. Unlike “the profane,” the Supreme Court’s modern articulations of the categories of unprotected speech persist in mentioning “defamation.”³⁷¹ This Part will focus on the basic concepts the Supreme Court has fashioned to accomplish that narrowing of the *excluded category* of defamation (as opposed to the numerous concepts that control the government’s ability to regulate various sorts of defamatory speech *within* the First Amendment). To that end, this Part C will discuss three concepts: “actual malice” in civil defamation (Subpart I), criminal defamation (Subpart II), and an assessment of what, if anything, remains of the excluded category (Subpart III).

³⁷⁰ *R.A.V.*, 505 U.S. at 383.

³⁷¹ *See, e.g., Stevens*, 559 U.S. at 468; *Alvarez*, 132 S. Ct. at 2544.

Subpart I: “Actual malice” in civil defamation

The standard questions of the trade taught to every journalism student are who, what, when, where, why and how?³⁷² How fitting it is, or how ironic, that the Supreme Court has accomplished its narrowing of the traditional excluded category for defamatory speech by a tightening of the answers to those questions. The questions “when and where” the government may regulate defamatory speech remain analyzed *within* the First Amendment, through doctrines that permit time, place and manner restrictions.

The Supreme Court has used the questions “who, what and why” to fashion tests that apply to different sorts of defamatory speech—again, analyzed *within* the First Amendment’s framework. The answer to *who* may have his or her defamatory speech proscribed by the government is reflected in modern doctrines related to public officials or public figures.³⁷³ The answer to *what* speech or *why* speech may be proscribable is reflected in modern doctrines regarding whether the content of speech involves matters of public concern.³⁷⁴

But the contours of what remains of the narrow category of defamatory speech *excluded* from the First Amendment are revealed by the remaining question: “How?” *How* is the defamatory speech delivered? If delivered with “actual malice,” then the speaker cannot seek protection from the First Amendment; but if delivered otherwise, the First Amendment will apply in some fashion.³⁷⁵

³⁷² See, e.g., JAMES G. STOVALL, *JOURNALISM: WHO, WHAT, WHEN, WHERE, WHY AND HOW?* (Pearson 1st ed. 2004).

³⁷³ See generally, e.g., Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y.L. SCH. L. REV. 81 (2005-06).

³⁷⁴ See generally, e.g., Clay Calvert, *Defining “Public Concern” after Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39 (2012).

³⁷⁵ It may also be that speech defaming private individuals and involving matters of purely private concern remains excluded if uttered merely negligently, but that is doubtful. See discussion, *infra*, of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985); and the concluding paragraphs of this Subpart. In any event, if negligent private libels remain unprotected, that circumstance also would be subsumed within the question “How?”

This concept that speech delivered with “actual malice”—indeed, that term itself—has roots in Kansas jurisprudence. In 1904, C. C. Coleman was a candidate seeking reelection as Kansas Attorney General.³⁷⁶ The Topeka State Journal, a newspaper published by Frank P. MacLennan,³⁷⁷ printed an article criticizing Mr. Coleman’s “official conduct in connection with a school fund transaction, making comment upon them and drawing inferences from them.”³⁷⁸ Mr. Coleman filed suit in state court in Topeka, claiming statements in the article were false and libelous. The state trial judge instructed the jury:

“where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office, and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith, and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff, and in such a case the burden is on the plaintiff to show *actual malice* in the publication of the article.”³⁷⁹

The jury in Topeka found for the newspaper defendant, and Mr. Coleman appealed to the Kansas Supreme Court, claiming, *inter alia*, erroneous jury instruction. After extensive discussion of the purposes, history and nature of the law governing defamation, the Kansas Supreme Court affirmed the trial court’s instruction and ruled in favor of the newspaper defendant, and in so doing penned this passage:

In such a case [as a candidate for state attorney general suing a newspaper for publishing false statements about his official activities that the newspaper believed to be true] the occasion gives rise to a privilege qualified to this extent. *Any one claiming to be defamed by the communication must show actual malice, or go remediless. This privilege extends*

³⁷⁶ Notwithstanding this controversy, Mr. Coleman was reelected in 1904 and eventually served as Kansas Attorney General from 1903 to 1907.

³⁷⁷ Mr. MacLennan later would build as his home a mansion atop the bluffs of the Kansas River on the north and west side of Topeka, and his widow upon her death would donate the property, now known as Cedar Crest, for use as the state governor’s residence.

³⁷⁸ *Coleman v. MacLennan*, 98 P. 281, 281 (Kan. 1908).

³⁷⁹ *Coleman*, 98 P. at 281-82, *quoted in Sullivan*, 376 U.S. at 281 (emphasis added). Other early cases used similar linguistic formulations, but they were not cited in *Sullivan*. See, e.g., *Alumbaugh v. State*, 148 S.E. 622 (Ga. Ct. App. 1929) (discussing actions that “maliciously defame” another).

*to a great variety of subjects and includes matters of public concern, public men, and candidates for office.*³⁸⁰

Thus, the Kansas courts as long ago as 1908—in settling a dispute arising from a newspaper’s criticism of a candidate for state attorney general in the 1904 election—articulated what remain the principal boundaries of the excluded category of defamatory speech: The critical distinction between unprotected defamations uttered with “actual malice” and all other defamatory speech that enjoy some degree of constitutional protection. The fundamental reasoning underlying the *Coleman* decision was this: While the Constitution “takes for granted a law of libel” that “places injury to reputation on the same plane with injury to person and property, . . . [i]t is very clear that these words cannot . . . be given unlimited signification and force in all cases. *Where the public welfare is concerned, the individual must frequently endure injury to his reputation without remedy.*”³⁸¹

Almost six decades after the Kansas Supreme Court decided *Coleman*, the United States Supreme Court would draw heavily upon its reasoning and would incorporate into First Amendment law the term “actual malice” in its landmark decision *New York Times v. Sullivan* and, later, *Coleman*’s constitutionally significant concepts of “public men” and “matters of public concern.” This Subpart introduces this category-defining concept through a series of four landmark cases: *New York Times v. Sullivan*, *Curtis Publishing Co. v. Butts*, *Gertz v. Robert Welch, Inc.*, and *Dun & Bradstreet v. Greenmoss Builders, Inc.*³⁸² Reviewing them demonstrates

³⁸⁰ *Coleman*, 98 P. at 285, *quoted in Sullivan*, 376 U.S. at 281-82 (emphasis added). The *Coleman* Court was interpreting only the free speech provisions of the Kansas Constitution because the protections of the First Amendment had not yet been firmly applied to the states by incorporation within the Fourteenth Amendment.

³⁸¹ *Coleman*, 98 P. at 285. Thus, the *Coleman* rule is that libels are categorically excluded from constitutional protection *only* if they do *not* implicate the public welfare, and libels directed at public persons or discussing matters of public concern necessarily *do* implicate the public welfare and therefore must be afforded constitutional protection.

³⁸² Note that each of these four cases arose in the context of the availability of a *civil* remedy for defamatory falsehood. The government’s use of the *criminal* law to punish defamatory speech will be discussed in Subpart II, *infra*.

that while considerable nuance has developed in the modern constitutional law of defamation, the one constant is that defamatory speech uttered with “actual malice” enjoys no protection in any application and thus remains categorically excluded from the First Amendment.

New York Times v. Sullivan (1964):³⁸³ The single most important decision in development of the modern law of defamation came from this dispute arising out of the civil rights struggles of the 1960s. The case arose when a group of civil rights supporters took out a March 29, 1960, full-page advertisement in the *New York Times* criticizing the conduct of various Alabama officials. The Commissioner of Public Affairs in Montgomery, Alabama, Mr. L.B. Sullivan, whose duties included overseeing the city’s police department that had been criticized in the advertisement, filed suit claiming he had been libeled.³⁸⁴ There was no dispute that some of the statements in the advertisement, which had been titled “Heed Their Rising Voices,” were false.³⁸⁵ In the Alabama state trial court, the jury awarded Mr. Sullivan the full amount of damages he claimed—\$500,000, although he “made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel”³⁸⁶—and the Alabama Supreme Court affirmed.³⁸⁷

The United States Supreme Court granted certiorari to decide a single question: “[T]he extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.”³⁸⁸ After disposing of ancillary issues and reviewing the important role First Amendment values had

³⁸³ 376 U.S. 254.

³⁸⁴ *Id.* at 256.

³⁸⁵ *Id.* at 258.

³⁸⁶ *Id.* at 260.

³⁸⁷ *Id.* at 256.

³⁸⁸ *Id.*

played in American government, along with the long history of use of seditious libel laws to suppress criticism of the government, the *Sullivan* Court issued its crucial holding:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.³⁸⁹

Thus, as the *Sullivan* Court succinctly put it: “We hold today that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.”³⁹⁰ There was no dissent from the holding, although some Justices would have gone further than the “actual malice” standard to “completely prohibit”³⁹¹ state regulation of a citizen’s speech criticizing government officials, a privilege that some Justices viewed as “absolute.”³⁹²

The *Sullivan* decision stands for the foundational proposition that defamatory statements about the “official conduct” of a “public official” are constitutionally protected and do not fall within the excluded category of “the libelous,”³⁹³ or defamation—unless uttered with “actual malice.” *Sullivan* is the most dramatic 1960s decision “narrow[ing] the scope of the traditional categorical exception[] for defamation.”³⁹⁴ But it left unanswered important questions about the scope of the post-*Sullivan* category of defamatory speech excluded from constitutional protection: How broad is this concept of “public official,”³⁹⁵ or as the *Coleman* Court had

³⁸⁹ *Id.* at 279-80.

³⁹⁰ *Id.* at 283.

³⁹¹ *Id.* at 293 (Black, J., concurring) (“I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely ‘delimit’ a State’s power to award damages to ‘public officials against critics of their official conduct’ but completely prohibit a State from exercising such a power.”).

³⁹² *Id.* at 298 (Goldberg, J., concurring in the result) (“In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.”).

³⁹³ *Chaplinsky*, 315 U.S. at 572.

³⁹⁴ *R.A.V.*, 505 U.S. at 383 (citations omitted).

³⁹⁵ *Sullivan*, 376 U.S. at 279.

phrased it more broadly decades before, “public men”³⁹⁶ And how broad is this concept of “official conduct,”³⁹⁷ or as the *Coleman* Court had phrased it more broadly, “matters of public concern”³⁹⁸

The remaining cases in this Subpart focus on the Supreme Court’s answers to those two questions to shed light on the overall scope of what remains as the narrowed, excluded category of defamation.³⁹⁹ As will be seen, the answers to those questions assist in analyzing government proscriptions on defamation *within* the First Amendment, but not without it.

Curtis Publishing Co. v. Butts (1967):⁴⁰⁰ As soon as the *Sullivan* Court issued the “new constitutional development”⁴⁰¹ of requiring proof of actual malice before liability for defaming public officials on matters related to their official conduct, the Supreme Court commenced wrestling with how far that limiting principle extended in narrowing the traditional excluded category of defamation. The definition of “public official” had to be clarified⁴⁰² as did the application of the First Amendment to protect commentary on matters of “public interest” even when not involving a public official.⁴⁰³ The natural question became whether the First

³⁹⁶ *Coleman*, 98 P. at 285.

³⁹⁷ *Sullivan*, 376 U.S. at 279.

³⁹⁸ *Coleman*, 98 P. at 285.

³⁹⁹ For conservation of space and to preserve focus, we do not here take up numerous other questions implicit in the *Sullivan* rule, such as what constitutes “reckless” publication. *See, e.g.*, *Amant v. Thompson*, 390 U.S. 727 (1968) (broadcast journalist reading on-air from an affidavit not “reckless” publication).

⁴⁰⁰ 388 U.S. 130.

⁴⁰¹ *Id.* at 148.

⁴⁰² *See Rosenblatt v. Baer*, 383 U.S. 75 (1966) (holding that the supervisor of a New Hampshire county ski recreation area was a “public official” and that a showing of actual malice was required before he could recover damages for libel based upon newspaper columnist’s criticism of his conduct related to such management). The *Rosenblatt* Court laid down a test for determining “how far down into the lower ranks of government employees the ‘public official’ designation would extend for purposes of [the *Sullivan*] rule”: “It is clear, therefore, that the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the [*Sullivan*] malice standards apply.” *Id.* at 85-86.

⁴⁰³ *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967) (“We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times Co. v. Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application

Amendment protected only speakers who directed their defamation at public *officials* or whether similar speech directed at other “public *figures*” also was protected. The answer, as indicated by the *Curtis Publishing* Court, was that both types of defamatory statement—that toward public officials or that toward other public figures—were constitutionally protected.

The decision in *Curtis Publishing* arose from two consolidated cases. One involved defamatory statements falsely accusing the University of Georgia athletic director, Wally Butts, who was employed by a private foundation and not by the state, of rigging a football game with Alabama.⁴⁰⁴ The second involved defamatory statements falsely accusing a retired Army general, Edwin Walker, who during his military career had led federal forces in integrating Central High School in Little Rock, Arkansas, of subsequently leading and encouraging a riot against federal marshals who were escorting James Meredith to integrate through his attendance the University of Mississippi.⁴⁰⁵ The Supreme Court consolidated the two cases “to consider the impact of [*Sullivan*] on libel actions instituted by persons who are not public officials, but who are ‘public figures’ and involved in issues in which the public has a justified and important interest.”⁴⁰⁶

The splintered *Curtis Publishing* Court did not produce a model of clarity on the question of what standard should apply to the speech in question—the plurality fashioned a new rule separate from the *Sullivan* requirement,⁴⁰⁷ while Chief Justice Warren in concurrence would

of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context.”).

⁴⁰⁴ *Curtis Publishing*, 388 U.S. at 135-40.

⁴⁰⁵ *Id.* at 140-42.

⁴⁰⁶ *Id.* at 134.

⁴⁰⁷ *Id.* at 155. The plurality’s proposed rule for application to public figures would have been: “We consider and would hold that a ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct

have applied the “actual malice” standard from *Sullivan*,⁴⁰⁸ Justice Black continued his advocacy for an absolutist reading of the First Amendment to bar *all* libel actions by public officials or public figures,⁴⁰⁹ and Justice William Brennan would have required “actual malice” but was unsure whether it had been shown on the available record.⁴¹⁰

But from the standpoint of the Doctrine of Categorical Exclusion, there was no disagreement among the members of the *Curtis Publishing* Court.⁴¹¹ As the plurality put it, “The modern history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right.”⁴¹² In other words, where is the modern boundary of the category of defamatory speech excluded from First Amendment protection? The *Curtis Publishing* plurality generally accepted the view that:

From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question a rational distinction cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials.⁴¹³

constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” *Id.* That proposed rule did not long endure in the Supreme Court’s jurisprudence.⁴⁰⁸ *Id.* at 163-64 (Warren, C.J., concurring in the result) (“To me, differentiation between ‘public figures’ and ‘public officials’ and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. . . . In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large. Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, ‘public figures,’ like ‘public officials,’ often play an influential role in ordering society. . . . I therefore adhere to the New York Times standard in the case of ‘public figures’ as well as ‘public officials.’”). Though not so in this case, Chief Justice Warren’s view eventually would carry the day.

⁴⁰⁹ *Id.* at 170-72 (Black, J., concurring in result in part and dissenting in part).

⁴¹⁰ *Id.* at 172-74 (Brennan, J., concurring in result in part and dissenting in part).

⁴¹¹ The differences between the plurality and the various concurrences and dissents were on matters not bearing directly upon the modern boundaries of the excluded category of defamation. Nothing in the various concurrences or dissents is inconsistent with the plurality’s statements on this point.

⁴¹² *Id.* at 148 (plurality opinion).

⁴¹³ *Id.* at 147-48 (citations and internal quotation marks omitted) (ellipsis in original).

Noting that both Mr. Butts and Mr. Walker were public figures at least for all relevant purposes,⁴¹⁴ the Supreme Court then concluded “that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard.”⁴¹⁵

In other words, whatever standard might ultimately be determined to apply *within* the First Amendment, *Curtis Publishing* established the principle that defamatory speech directed at the public conduct of public *figures*—like that directed at public *officials*—would enjoy First Amendment protection.⁴¹⁶ Because such defamatory speech would be protected by the First Amendment, it no longer fell within the excluded category of defamation—unless uttered with “actual malice.” Thus, the excluded category of wholly *unprotected* defamation had been further narrowed from its traditional scope.

Gertz v. Robert Welch, Inc. (1974):⁴¹⁷ A decade after *Sullivan*, the Supreme Court declined to extend its requirement of proving “actual malice” to situations where a private person seeks to recover actual damages for defamation even if the subject matter was of public concern.⁴¹⁸ But in doing so, the Supreme Court continued to “federalize” the law of libel,⁴¹⁹ which essentially is a different way of stating that the traditional excluded category of defamation continued to narrow. For this dissertation’s purposes in understanding the

⁴¹⁴ The *Curtis Publishing* Court also foreshadowed the later distinction between general purpose public figures and limited purpose public figures. See *id.* at 154-55 (“[B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled ‘public figures’ under ordinary tort rules. Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements.” (citations and internal quotation marks omitted)).

⁴¹⁵ *Id.* at 155.

⁴¹⁶ See also, e.g., *Greenbelt Coop. Publ’g Ass’n, Inc., v. Bresler*, 398 U.S. 6 (1970) (establishing that even objectively false assertions of fact, such as accusations of “blackmail,” not sufficient to establish liability of newspaper when speech directed toward public figure).

⁴¹⁷ 418 U.S. 323.

⁴¹⁸ Some voluntary act or set of acts generally are required to transform a private person into a public figure for First Amendment purposes. See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (former wife of famous industrialist not a ‘public figure’ for defamation law purposes merely because she married or divorced a ‘public figure’).

⁴¹⁹ *Gertz*, 418 U.S. at 370 (White, J., dissenting).

development of the Doctrine of Categorical Exclusion, the significance of *Gertz* lies not in its conclusion but in its method, and the important analysis is not in Justice Lewis Powell's majority opinion but in Justice White's dissent.

Elmer Gertz was a reputable attorney representing the family of a young man shot and killed in 1968 by a Chicago police officer named Richard Nuccio. Robert Welch, Inc., was the corporate publisher of the John Birch Society's monthly magazine, *American Opinion*. When the officer was prosecuted for murder in connection with the shooting, the magazine published an article alleging that the officer's prosecution was part of a "nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship."⁴²⁰ Elmer Gertz had no involvement in the criminal trial; he represented the shooting victim's family in a related civil suit. Nonetheless, the *American Opinion* article, under the title 'FRAME-UP: Richard Nuccio And the War On Police,' took Mr. Gertz to task:

Notwithstanding petitioner's remote connection with the prosecution of [Officer] Nuccio, respondent's magazine portrayed him as an architect of the 'frame-up.' According to the article, the police file on petitioner took 'a big, Irish cop to lift.' The article stated that petitioner had been an official of the 'Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.' It labeled Gertz a 'Leninist' and a 'Communist-fronter.' It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that 'probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention.'⁴²¹

Many of the published statements about Mr. Gertz were inaccurate, and the *American Opinion* editorial staff not only failed to verify asserted facts but also inserted a false editorial notation that the article's writer had "conducted extensive research into the Richard Nuccio Case."⁴²²

⁴²⁰ *Id.* at 325 (majority opinion).

⁴²¹ *Id.* at 325-26.

⁴²² *Id.* at 327.

Mr. Gertz sued for libel. The jury awarded him \$50,000 in damages, but the district court set aside the jury verdict, holding that the *Sullivan* standard governed the case and that “actual malice” had not been proven. The Seventh Circuit Court of Appeals affirmed the action of the district court, relying on a recent Supreme Court case which it “read . . . to require application of the *New York Times* [*v. Sullivan*] standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed, and it concluded that respondent’s statements concerned such an issue.”⁴²³ The Supreme Court granted certiorari “to reconsider the extent of a publisher’s constitutional privilege against liability for defamation of a private citizen.”⁴²⁴

The *Gertz* Court framed the question presented this way: “The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.”⁴²⁵ The *Gertz* Court’s less-than-satisfying answer: Well, sort of.

The *Gertz* Court engaged in explicit and transparent balancing of various interests. It concluded that the state has a greater interest in protecting the reputation of private individuals than of public officials or public figures in part because private individuals had fewer

⁴²³ *Id.* at 330-31 (citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971)). In *Rosenbloom*, a plurality of the Supreme Court seemed to hold that the *Sullivan* rule required a showing of actual malice by private plaintiffs if the defamatory statements related to any matter of public concern. *Rosenbloom* itself was the high-water mark for the prophylactic rule it articulated, and its holding was effectively scaled back by *Gertz*.

⁴²⁴ *Gertz*, 418 U.S. at 325. The *Gertz* Court’s description of the *Rosenbloom* decision offers a revealing snapshot of the Supreme Court’s struggle in the early 1970s to apply its still-new doctrine from *Sullivan*: “This Court [in *Rosenbloom*] affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case, they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment. One approach has been to extend the *New York Times* test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation.” *Id.* at 333.

⁴²⁵ *Id.* at 332.

opportunities for “self-help” when their reputation is tarnished by falsehoods.⁴²⁶ Moreover, unlike public officials or public figures, private individuals have done nothing to expose themselves to such risk to reputation. “[P]rivate individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.”⁴²⁷

However, instead of applying the Doctrine of Categorical Exclusion in the traditional manner to conclude that the Constitution commands *no* limitation on state power to punish private libels, the *Gertz* Court concluded that yet another set of rules should be fashioned as follows:

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here.⁴²⁸

But the *Gertz* Court was not finished. There was more to its new constitutional test for applying the First Amendment to defamations of private individuals:

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times* [*v. Sullivan*]. . . . This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* [*v. Sullivan*] privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.⁴²⁹

⁴²⁶ *Id.* at 343-44.

⁴²⁷ *Id.* at 345.

⁴²⁸ *Id.* at 347.

⁴²⁹ *Id.* at 348-49.

So the *Gertz* Court's newly articulated constitutional test was this: A private individual who is defamed may recover in a civil suit his actual damages on a showing of mere negligence, but if he seeks presumed or punitive damages he must show actual malice. Thus, although the *Gertz* majority "refus[ed] to extend the *New York Times* [*v. Sullivan*] privilege to defamation of private individuals,"⁴³⁰ it did *not* refuse to extend the protection of the First Amendment to such defamations. What, then, remains of the excluded category of defamation after *Gertz*?

Justice Harry Blackmun implied that *something* remained of the excluded category for defamation. For him, the *Gertz* decision "fixes the outer boundary of the *New York Times* [*v. Sullivan*] doctrine and says that beyond that boundary, a State is free to define for itself the appropriate standard of media liability so long as it does not impose liability without fault."⁴³¹ The reference to the "outer boundary" of the *Sullivan* principles implies that something lies beyond those boundaries, and presumably what lies beyond would be the remnants of the traditional excluded category of defamatory speech unprotected by the First Amendment. With the benefit of hindsight, it now is apparent that what continued to lie fully outside the First Amendment after *Gertz* was defamatory speech uttered with actual malice.

But Justice Blackmun stood alone in even this weak implication. Justice William Douglas would have gone further than the majority and expressly applied the First Amendment to *all* government regulation of speech because "[t]he identity of the oppressor is, I would think, a matter of relative indifference to the oppressed."⁴³² Likewise with Justice Brennan, who concluded:

[V]oluntarily or not, we are all 'public' men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. Thus, the idea that certain 'public' figures have

⁴³⁰ *Id.* at 351.

⁴³¹ *Id.* at 353 (Blackmun, J., dissenting).

⁴³² *Id.* at 359 (Douglas, J., dissenting).

voluntarily exposed their entire lives to public inspection, while private individuals have kept their carefully shrouded from public view is, at best, a legal fiction.⁴³³

From the standpoint of the Doctrine of Categorical Exclusion, the most important portion of *Gertz* is the dissent of Justice White. Justice White joined the *Gertz* majority, presumably because he concluded it correctly refused to extend the *Sullivan* decision to cover defamation of private individuals even related to matters of public concern.⁴³⁴ But he also filed a lengthy dissent that lamented the passing of the traditional, unprotected category of defamation in the post-*Sullivan* world:

For some 200 years—from the very founding of the Nation—the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures. . . . The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.⁴³⁵

For Justice White, the *Sullivan* rule had made constitutional sense as a bulwark against oppressive government proscription of seditious libels, those directed toward the government or its officials. But in his view, the liberal expansion of *Sullivan* principles after 1964 into other contexts, such as the defamation of private persons, had effectively ended the longstanding, traditional categorical exclusion for defamation by subjecting all defamation laws to scrutiny under the First Amendment:

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. . . .

⁴³³ *Id.* at 364 (Brennan, J., dissenting) (citation omitted).

⁴³⁴ See generally Bernard W. Bell, *Judging in Interesting Times: The Free Speech Clause Jurisprudence of Justice Byron R. White*, 52 CATH. U. L. REV. 893 (2003).

⁴³⁵ *Gertz*, 418 U.S. at 369-70 (White, J., dissenting).

As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves.⁴³⁶

This “federaliz[ing]” of “the traditional law of libel” would have an effect “immediately obvious and indisputable”⁴³⁷ because “[t]hese are radical changes in the law and severe invasions of the prerogatives of the States.”⁴³⁸ In Justice White’s view, the *Gertz* Court was “yielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment” and, in so doing, “the Court discards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices.”⁴³⁹ But Justice White was just getting started:

The Court does not contend, and it could hardly do so, that those who wrote the First Amendment intended to prohibit the Federal Government, within its sphere of influence in the Territories and the District of Columbia, from providing the private citizen a peaceful remedy for damaging falsehood. . . .

Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers. . . .

This Court in bygone years has repeatedly dealt with libel and slander actions [from federal jurisdictions] . . . [and] the opinions of the Court unmistakably revealed that the classic law of libel was firmly in place in those areas where federal law controlled.⁴⁴⁰

In Justice White’s view, the *Sullivan* decision had been a watershed moment in that longstanding tradition of treating libel as an excluded category of speech unprotected by the First Amendment:

The Court’s consistent view prior to *New York Times Co. v. Sullivan* was that defamatory utterances were wholly unprotected by the First Amendment. . . .

. . . .

⁴³⁶ *Id.* at 370.

⁴³⁷ *Id.* at 375.

⁴³⁸ *Id.* at 376.

⁴³⁹ *Id.* at 380.

⁴⁴⁰ *Id.* at 380-84.

The Court could not accept the generality of this historic view in *New York Times Co. v. Sullivan*. . . .

The central meaning of *New York Times*, and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the State. . . . Simply put, the First Amendment did not confer a license to defame the [private] citizen.

. . . .

. . . But the Court [in *Gertz*] nevertheless extends the reach of the First Amendment to all defamation actions. . . .

The [*Gertz*] Court proceeds as though it were writing on tabula rasa. . . . [but] [o]f course, the Court necessarily discards the contrary judgment arrived at in the 50 States that the reputation interest of the private citizen is deserving of considerably more protection.⁴⁴¹

Justice White concluded this fundamental shift in the law of libel, the shrinking of the Doctrine of Categorical Exclusion as it relates to defamation, and the concurrent dramatic expansion of the First Amendment's application not only had no historical root but would cause harm:

The publication may be wholly false and the wrong to [the private citizen] unjustified, but his case will nevertheless be dismissed for failure to prove negligence or other fault on the part of the publisher. I find it unacceptable to distribute the risk in this manner and force the wholly innocent victim to bear the injury

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth but, on the contrary, may frustrate that search⁴⁴²

Thus, for Justice White, the *Sullivan* decision was consistent with the history and purposes of the First Amendment because it stood against seditious libel and helped guarantee the freedom of all persons to criticize the government—a core First Amendment value. But

⁴⁴¹ *Id.* at 384-89.

⁴⁴² *Id.* at 392.

extending *Sullivan* principles to cover private libels made no sense, and in so doing the Supreme Court, in Justice White's view, had effectively abandoned any pretense that the Doctrine of Categorical Exclusion continued to apply to defamatory speech. Nine years later, the Supreme Court would accept one more opportunity to clarify its jurisprudence in this area, but clarity would remain elusive.

Dun & Bradstreet v. Greenmoss Builders (1985):⁴⁴³ This case addressed the remaining circumstance left open after *Sullivan*, *Butts* and *Gertz*: What does the Constitution require when the government seeks to permit civil punishment of defamations of private persons related solely to matters of private concern?

Because of a clerical error, Dun & Bradstreet, the credit reporting agency, improperly released false and defamatory confidential financial information that it incorrectly represented to pertain to Greenmoss Builders. Greenmoss filed a defamation suit in Vermont state court seeking both compensatory and punitive damages.⁴⁴⁴ The trial court held that the *Gertz* rule applied and, therefore, Greenmoss Builders would have to prove Dun & Bradstreet acted with actual malice in order to recover punitive damages, a standard it could not meet in this case because of the inadvertent nature of the error. The Vermont Supreme Court reversed, finding *Gertz* inapplicable.⁴⁴⁵ The Supreme Court granted certiorari to determine “whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.”⁴⁴⁶

⁴⁴³ 472 U.S. 749.

⁴⁴⁴ *Id.* at 751-52 (plurality opinion).

⁴⁴⁵ *Id.* at 753. The U.S. Supreme Court affirmed the decision of the Vermont Supreme Court but determined the Vermont court's reasoning was flawed. That lower court reasoning is immaterial here.

⁴⁴⁶ *Id.* at 751.

The Supreme Court determined that because “speech on matters of public concern . . . is at the heart of the First Amendment’s protection,”⁴⁴⁷ it follows that “speech on matters of purely private concern is of less First Amendment concern.”⁴⁴⁸ Thus, “[i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”⁴⁴⁹

From the standpoint of the Doctrine of Categorical Exclusion, however, the importance of *Dun & Bradstreet* was its reasoning, not its outcome. The three-justice plurality based its conclusion on the “*reduced* constitutional value of speech involving no matters of public concern,”⁴⁵⁰ not on the *absence* of constitutional protection. Indeed, the plurality expressly wrote that such private speech about private parties regarding private matters “is not totally unprotected by the First Amendment” although the constitutional protections “are less stringent.”⁴⁵¹ Thus, the plain language of the plurality’s opinion implies that it considered but rejected applying the Doctrine of Categorical Exclusion, opting instead to extend the First Amendment’s protection to this sort of private speech on private matters.

This was simply too much for Chief Justice Burger, who after seeing how the *Gertz* analysis was applied in this case, even though not controlling the outcome, concluded that *Gertz* was “ill-conceived[] and . . . should be overruled.”⁴⁵² Justice White renewed his criticism of the abandonment by *Gertz* of any remaining excluded category for defamatory speech unprotected by the First Amendment, characterizing that decision as having “seemingly left no defamation

⁴⁴⁷ *Id.* at 758-59 (internal quotation marks omitted).

⁴⁴⁸ *Id.* at 759.

⁴⁴⁹ *Id.* at 761 (footnote omitted).

⁴⁵⁰ *Id.* (emphasis added).

⁴⁵¹ *Id.* at 760.

⁴⁵² *Id.* at 764 (Burger, C.J., concurring in judgment).

actions free from federal constitutional limitations.”⁴⁵³ By the time of *Dun & Bradstreet*, Justice White had “c[o]me to have increasing doubts about the soundness of the Court’s approach and about some of the assumptions underlying”⁴⁵⁴ the *Sullivan* departure from traditional libel law. While he had joined the majority in *Sullivan*, and continued to believe that *Sullivan* itself was consistent with the First Amendment’s intended limitation on government power to dissuade criticism of itself, the extensions of the *Sullivan* principles since that case had caused him great concern because “*New York Times Co. v. Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander.”⁴⁵⁵ By the time of *Dun & Bradstreet*, Justice White “still believe[d] the common-law rules”—specifically, the longstanding historical rule that defamation was a proscribable category of speech excluded from the protection of the First Amendment—“should have been retained where the plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases.”⁴⁵⁶ Like the Chief Justice, Justice White also would have overruled *Gertz*.

* * *

Thus, by the time of *Dun & Bradstreet* the broad contours of the First Amendment law of libel were as follows: The First and Fourteenth Amendment prohibited states from authorizing public officials (*Sullivan*) or public figures (*Butts*) to prevail in civil defamation suits unless they could prove the defamatory statement was made with “actual malice,” defined as known falsity or reckless disregard for the truth. If the plaintiff were a private person, civil recovery of actual damages was constitutionally permitted upon a showing of negligent defamation (*Gertz*); if the

⁴⁵³ *Id.* at 767 (White, J., concurring in judgment).

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 766.

⁴⁵⁶ *Id.* at 772.

subject matter of the defamation were private in nature, punitive damages also could be recovered by a private plaintiff showing negligence (*Dun & Bradstreet*), but if the subject matter were of public concern then even a private plaintiff must show “actual malice” before punitive damages would be permitted (*Gertz*).

It is difficult, indeed, to divine those somewhat complex rules from the pertinent fourteen words of the First Amendment—“Congress shall make no law . . . abridging the freedom of speech, or of the press”⁴⁵⁷—or from the historical record that showed the wide acceptance of government authority to proscribe slander and libel at the time the First Amendment was adopted. But, by the mid-1980s, such was the state of the newly “federalized” law of defamation after the *Sullivan* through *Dun & Bradstreet* decisions, and every component of traditional defamation law that was “federalized” necessarily was moved outside the Doctrine of Categorical Exclusion.⁴⁵⁸ It was doubtful, after *Dun & Bradstreet*, whether *any* justice then sitting thought a categorical exclusion from First Amendment protection continued to attach to defamatory speech, whether libelous or slanderous. Some, like Justice White and Chief Justice Burger, lamented that conclusion; others, like Justices Brennan, Thurgood Marshall, Blackmun and John Paul Stevens, welcomed it but would have gone further to afford defamatory speech additional protection *within* the First Amendment. Still others—the three-justice plurality of Justices Powell, William Rehnquist and Sandra Day O’Connor—merely described it.

But the modern Supreme Court continues to list “defamation” as a category of unprotected speech. The cleanest explanation for that is that “defamation” has become shorthand for “defamatory speech uttered with actual malice.” If actual malice is proven in any of the

⁴⁵⁷ U.S. CONST. amend. I.

⁴⁵⁸ Indeed, the “federalizing” of defamation law had proceeded so far that it became necessary for the United States Supreme Court to clarify that in a defamation lawsuit brought by a public figure against a publisher, the First Amendment did not bar the ordinary discovery process merely because part of the inquiry would be into the publisher’s editorial process or state of mind. *See* *Herbert v. Lando*, 441 U.S. 153 (1979).

various permutations for which the Supreme Court has fashioned its intricate constitutional rules, the outcome is that the government may punish, or permit the punishment, of the defamatory speech.

Does that rule remain true even if the government seeks to impose *criminal* liability for defamation? The next Subpart will address that question.

Subpart II: Criminal defamation

The modern First Amendment framework for analyzing government attempts to proscribe or punish defamatory statements, discussed in Subpart I, *supra*, was created in the context of *civil* liability by the *Sullivan* Court and its progeny. From the standpoint of those courts, the risk of civil liability was “a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.”⁴⁵⁹ On the other hand, it is conceivable that to the speaker the consequence of civil liability could be far less onerous than that of a criminal conviction. That would certainly be true, for example, if a defamed public official civilly “sought no damages but only to clear his name.”⁴⁶⁰ Thus, the inherent risk of imprisonment—the ultimate power of the government to deny a citizen’s constitutionally protected liberty interests—renders criminal prosecutions for defamation fundamentally different from civil suits.

The Supreme Court has decided three cases concerning the application of the First Amendment to criminal prosecutions for libel. The first was decided before *New York Times Co. v. Sullivan*, and the other two were decided in quick succession after *Sullivan*. The Supreme Court has not specifically addressed the Constitution’s limitations on state authority to impose criminal liability for defamation—i.e., to implicate a different sort of liberty interest by imprisoning a speaker—since 1966 but instead has left that question for determination by the lower courts in light of evolving constitutional and societal standards. Therefore, this Subpart considers initially the *Beauharnais-Garrison-Ashton* line of Supreme Court cases addressing criminal libel. It then turns to how the principles established by those cases have been applied by lower courts—federal circuits, federal district courts and state high courts—during the nearly

⁴⁵⁹ *Sullivan*, 376 U.S. at 278 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

⁴⁶⁰ *Dun & Bradstreet*, 472 U.S. at 771 (White, J., concurring in judgment).

half century since the Supreme Court last decided a criminal libel case, a period of time during which the constitutional law of defamation more generally has evolved substantially.

Section 1: Criminal defamation in the Supreme Court

Beauharnais v. Illinois (1952):⁴⁶¹ This case, which upheld as valid an Illinois law in the nature of a criminal libel law, pre-dates both *Sullivan* and *Garrison v. Louisiana*. To that end, it is “old law” and is now infrequently cited. However, it remains good law to the extent that it is not in conflict with successor cases. The principal proposition for which *Beauharnais* still stands is that criminal libel statutes that punish speech directed at *groups* of persons (as opposed to individuals) which are by nature composed of *private* individuals (as opposed to public officials or, later, public figures) may yet be enforceable even if they do not require proof of actual malice by the speaker.⁴⁶²

In *Beauharnais*, the defendant, Joseph Beauharnais, was president of a Chicago organization named the White Circle League, which objected to racial integration in the city. At issue was literature he distributed that called upon readers to “Preserve and Protect White Neighborhoods!” and that included the defamatory statement: “If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.”⁴⁶³ The city prosecutor in Chicago brought charges against Mr. Beauharnais alleging violation of a city ordinance that banned publication of “any lithograph” that portrayed “lack of virtue of a class of citizens, or any race, color, creed or religion.”⁴⁶⁴ Mr. Beauharnais was convicted in municipal

⁴⁶¹ 343 U.S. 250.

⁴⁶² But see *Gertz*, 418 U.S. at 350, holding that even private plaintiffs must show some amount of harm from the alleged defamation to support a successful action.

⁴⁶³ *Beauharnais*, 343 U.S. at 252.

⁴⁶⁴ *Id.* at 251 (quoting § 224a of Division 1 of the Illinois Criminal Code, Ill. Rev. Stat. 1949, c. 38, s 471, which read as follows: “It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama

court and fined \$200. He appealed to the Illinois Supreme Court, which upheld the conviction and noted that the underlying statute upon which the conviction rested was “a form of criminal libel law.”⁴⁶⁵ The Supreme Court granted certiorari “in view of the serious questions raised concerning the limitations imposed by the Fourteenth Amendment on the power of a State to punish utterances promoting friction among racial and religious groups.”⁴⁶⁶

The Supreme Court upheld the Illinois statute because it was narrowly drawn and was “directed at a defined evil.”⁴⁶⁷ Citing *Chaplinsky*, the *Beauharnais* Court found the Illinois statute to fall outside the protections of the First Amendment. From the standpoint of the application of the Doctrine of Categorical Exclusion to criminal libel laws, the *Beauharnais* Court’s key point was:

The precise question before us, then, is whether the protection of ‘liberty’ in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels—as *criminal libel has been defined, limited and constitutionally recognized time out of mind*—directed as designated collectivities and flagrantly disseminated. There is even authority, however dubious, that such utterances were also crimes at common law. It is certainly clear that some American jurisdictions have sanctioned their punishment under ordinary criminal libel statutes.⁴⁶⁸

Thus, the critical teaching of *Beauharnais* for the Doctrine of Categorical Exclusion is that “criminal libel has been . . . *constitutionally recognized time out of mind*.”⁴⁶⁹ That assessment would appear to satisfy the then-decade-old *Chaplinsky* requirement that proscribable

or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.”).

⁴⁶⁵ *Id.* at 253 (citing *Illinois v. Beauharnais*, 97 N.E.2d 343, 346 (Ill. 1951)).

⁴⁶⁶ *Id.* at 252.

⁴⁶⁷ *Id.* at 253 (“The statute before us is not a catchall enactment (left at large by the State court which applied it. It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions a meaning confirmed by the Supreme Court of that State in upholding this conviction.” (citations omitted)).

⁴⁶⁸ *Id.* at 258 (footnotes omitted) (emphasis added).

⁴⁶⁹ *Id.* (emphasis added).

speech has “never been thought to raise any Constitutional problem.”⁴⁷⁰ On this historical point,⁴⁷¹ the dissent agreed that “as constitutionally recognized that crime [libel] has provided for punishment of false, malicious, scurrilous charges against individuals.”⁴⁷² For the dissent, the narrow scope of historically permitted criminal libel punishments was constitutionally significant:

This limited scope of the law of criminal libel is of no small importance. It has confined state punishment of speech and expression to the narrowest of areas involving nothing more than purely private feuds. Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment.⁴⁷³

The themes that would arise in the civil law of defamation after *Sullivan* were thereby foreshadowed in the context of the criminal libel law at issue in *Beauharnais*. Important to the *Beauharnais* Justices were the historical acceptance of criminal prosecutions for defamation, the distinction between public and private “feuds,” and whether the subject matter being discussed was a “matter of public concern.”

A dozen years after *Beauharnais*, the *Sullivan* Court would commence “federalizing” the civil law of libel in 1964. That same year, the Supreme Court would consider the application of its new *Sullivan* approach in a criminal prosecution for libel arising out of Louisiana.

⁴⁷⁰ *Chaplinsky*, 315 U.S. at 572 (emphasis added).

⁴⁷¹ *Beauharnais*, 343 U.S. at 263 (“Every power may be abused, but the possibility of abuse is a poor reason to denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. While this Court sits it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel.” (internal quotation marks omitted)).

⁴⁷² *Id.* at 271-72 (Black, J., dissenting).

⁴⁷³ *Id.* at 272 (Black, J., dissenting).

***Garrison v. Louisiana* (1964):**⁴⁷⁴ The Supreme Court issued its landmark ruling in *New York Times Co. v. Sullivan* in March 1964. Only eight months later, in November of the same year, it applied the *Sullivan* principles to criminal prosecutions for defamation.

In *Garrison*, a district attorney in Louisiana, Jim Garrison, embroiled in a funding dispute with judges on a district court, convened a press conference at which he made public remarks critical of the judges' conduct.⁴⁷⁵ Criminal charges were brought against the district attorney under the Louisiana criminal libel statute. The state trial court entered a conviction, and the Louisiana Supreme Court affirmed the conviction. The defendant appealed to the United States Supreme Court, which unanimously concluded:

[W]e must decide whether, in view of the differing history and purposes of criminal libel, the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials. We hold that it does.

Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations.⁴⁷⁶

If anything, the *Garrison* Court concluded, the Constitution imposes a *heavier* burden on the state to justify criminal restrictions on speech than to sustain civil liability:

It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems

⁴⁷⁴ 379 U.S. 64.

⁴⁷⁵ *Id.* at 65-66 (reporting the district attorney's comments as follows: "The principal charges alleged to be defamatory were his attribution of a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges, and his accusation that, by refusing to authorize disbursements to cover the expenses of undercover investigations of vice in New Orleans, the judges had hampered his efforts to enforce the vice laws. In impugning their motives, he said: 'The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints. . . . This raises interesting questions about the racketeer influences on our eight vacation-minded judges.' "). In the mid-1960s, the Louisiana criminal defamation statute also was used to *protect* the reputation of the state's district attorneys. See *State v. Webster*, 159 So. 2d 140 (La. 1964) (ordering new trial for defendant convicted of criminal defamation for writing a letter to U.S. Attorney General Robert Kennedy accusing the district attorney of Iberia Parish of open lawlessness).

⁴⁷⁶ *Garrison*, 379 U.S. at 67 (footnote omitted).

evident that personal calumny falls in neither of those classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.⁴⁷⁷

Moreover, the modern practice had trended away from using criminal sanctions to enforce public policies against defamation:

[By the 1830s], preference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification for criminal libel laws. In fact, in earlier, more violent, times, the civil remedy had virtually pre-empted the field of defamation; except as a weapon against seditious libel, the criminal prosecution fell into virtual desuetude. Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.⁴⁷⁸

Thus, the *Garrison* Court applied the same requirements to scrutinizing state restrictions on defamatory falsehoods under penalty of criminal sanction as it had applied in *Sullivan* to laws imposing civil liability.⁴⁷⁹ From the standpoint of the Doctrine of Categorical Exclusion, however, the language of *Garrison* offered more hope than *Sullivan* that at least *some* excluded category of defamatory falsehood would remain unprotected by the First Amendment because “[t]he use of calculated falsehood . . . would put a different cast on the constitutional question. . . . That speech [calculated to be false] is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.”⁴⁸⁰

It is possible to read *Garrison* as suggesting that the standard for criminal liability is in fact higher than for civil liability, but it also is possible to read *Garrison* to more expressly

⁴⁷⁷ *Id.* at 69-70 (quoting Model Penal Code, Tent. Draft No. 13, § 250.7, Comments, at 44 (1961)).

⁴⁷⁸ *Id.* at 69 (citations and internal quotation marks omitted).

⁴⁷⁹ *Id.* at 74 (“We held in *New York Times* that a public official might be allowed a civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. The reasons which led us so to hold in *New York Times* apply with no less force merely because the remedy is criminal.” (citation omitted)).

⁴⁸⁰ *Id.* at 75.

preserve the existence of some excluded category of defamatory speech. The Doctrine of Categorical Exclusion survived *Garrison*, more clearly than it had *Sullivan*, at least insofar as the “calculated falsehood” is concerned: “[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.”⁴⁸¹ Thus, if the government can prove a defamatory statement was uttered with actual malice, *Garrison* says the First Amendment does not bar criminal prosecution of the speaker.

Ashton v. Kentucky (1966).⁴⁸² Two years after deciding *Sullivan* and *Garrison*, the Supreme Court once again turned its attention to applying the First Amendment to a criminal prosecution for defamation. *Ashton* remains the last time the Supreme Court has considered a state attempt to impose criminal liability for defamatory speech.

In *Ashton*, a bitter labor dispute was brewing in Kentucky’s coal country. Steve Ashton went to Hazard, Kentucky, to support the striking miners. In that pursuit, he printed and distributed a pamphlet that made false and defamatory statements about the police chief, the sheriff, and the publisher of the local newspaper.⁴⁸³ Mr. Ashton was charged with the common law crime of libel, convicted, and sentenced to six months in prison and fined \$3,000. The Kentucky Court of Appeals affirmed the conviction. Mr. Ashton appealed the conviction to the United States Supreme Court, which granted certiorari.

The Supreme Court held that Kentucky’s common-law crime of libel was too vague to withstand the First Amendment requirements imposed two years earlier by *Garrison*. From the standpoint of the Doctrine of Categorical Exclusion, the *Ashton* case is consequential for two narrow reasons: First, *Ashton* confirms that *Garrison* was not an aberration and that the Supreme Court has not upheld a single criminal conviction for defamation in the post-*Sullivan* era.

⁴⁸¹ *Id.*

⁴⁸² 384 U.S. 195.

⁴⁸³ *Id.* at 196-97.

Second, *Ashton* includes a single passage, in dicta, that is intriguing for those who speculate about the constitutional future of criminal libel statutes: “This kind of criminal libel ‘makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.’”⁴⁸⁴

* * *

Thus, the *Ashton* Court seemed disfavorably inclined toward any justification for criminal libel law that would rest upon an asserted need for prosecution in order to avoid violence, prevent breach of the peace, or otherwise provide a judicial avenue for preserving public order. Read together with the *Garrison* observation that “personal calumny” is “inappropriate for penal control,”⁴⁸⁵ this passage might lead one reasonably to conclude that *no justification* for the criminal punishment for libel would remain constitutionally persuasive to the modern Supreme Court: Criminal prosecution is not justified as an alternative to violence between the parties (*Garrison*), and criminal prosecution would be similarly impermissible to prevent violence by third parties who might be incited by defamatory speech (*Ashton*). That question, however, never has been squarely put to the Supreme Court, so it remains open.

Since *Garrison*, challenges to criminal prosecutions brought under state defamation statutes have been resolved by the federal Courts of Appeal, by federal district courts, and by state appellate courts. The lower courts have made explicit that the First Amendment analysis to be applied to criminal sanctions punishing defamatory speech is the same as that applied when reviewing civil sanctions. At the same time, the absence of a Supreme Court pronouncement on a criminal defamation case for almost five decades leaves open the possibility that the

⁴⁸⁴ *Id.* at 200 (quoting ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 151 (Harvard Univ. Press 1954)).

⁴⁸⁵ *Garrison*, 379 U.S. at 70.

constitutional requirements of civil and criminal law as applied to defamation may in fact have diverged but that divergence simply has not yet been recognized by the Supreme Court.

Because not all states that had criminal defamation statutes reacted immediately—or even swiftly—to the new requirements set forth in *Garrison*, prosecutions under pre-*Garrison* statutes continued for many years after *Garrison* was decided. As a result, nuances in the law developed. Therefore, consideration must be given to trends and practices that have developed in the lower courts.

Section 2: Post-*Garrison*, in the federal circuits

Four cases decided by the federal circuits illustrate the diversity of applications and varying approaches to criminal libel statutes in the half century since *Garrison*. One of those cases found a prosecutor liable for authorizing a search warrant during a criminal libel investigation that the court concluded had no basis in post-*Garrison* law, a second upheld a Kansas criminal libel statute that was silent on “actual malice” because state rules of construction would impute that requirement to it, a third struck down a Puerto Rico criminal libel statute for absence of an ‘actual malice’ requirement, and a fourth struck down a federal criminal defamation statute as unconstitutionally vague and overbroad but stopped just short of declaring all criminal libel laws unconstitutional. Those four decisions are considered below.

***Mink v. Knox* (10th Cir. 2010):**⁴⁸⁶ A student at the University of Northern Colorado, Thomas Mink, published an internet-based journal called *The Howling Pig*. In this journal, the student created a fictitious character named “Junius Puke,” an ill-concealed reference to a local university professor whose actual name was Junius Peake. The online journal published altered photographs of Professor Peake wearing dark sunglasses and a “Hitler-like mustache.” The fictitious character was given to saying things in language the real professor would be unlikely to use and expressing views inconsistent with those of the real Professor Peake.⁴⁸⁷

The real Professor Peake, “who was not amused,”⁴⁸⁸ complained to the local police department, which began an investigation into whether a violation of the Colorado criminal libel

⁴⁸⁶ 613 F.3d 995.

⁴⁸⁷ *Id.* at 1008. Statements in the online journal attributed to the fictitious character Junius Puke include: “This will be a regular bitch sheet that will speak truth to power, obscenities to clergy, and advice to all the stoners sitting around watching Scooby Doo,” “This will be a forum for the pissed off and disenfranchised in Northern Colorado, basically everybody,” “I made it to where I am through hard work, luck, and connections, all without a college degree,” “Dissatisfaction with a cushy do-nothing ornamental position led me to form this subversive little paper,” and “I don’t normally care much about the question of daycare since my kids are grown and other people’s children give me the willies[.]” *Id.*

⁴⁸⁸ *Id.* at 998.

statute had occurred. No charges ever were filed against Mr. Mink. However, as part of the criminal investigation a search warrant was executed on his residence based upon an affidavit prepared by police and reviewed by Deputy District Attorney Susan Knox. Mr. Mink subsequently filed a federal civil rights lawsuit against Ms. Knox, and his claim turned, in relevant part, on whether the affidavit, even if true, asserted facts that could support a prosecution for criminal libel. The Tenth Circuit Court of Appeals concluded that it did not because the statements included in *The Howling Pig* that reflected on Professor Peake constituted parody that no reasonable person would have believed to be true assertions of fact.⁴⁸⁹ Consequently, they could not—as a matter of law—damage the professor’s reputation or constitute a libel against him.⁴⁹⁰ From the standpoint of the Doctrine of Categorical Exclusion, the significance of *Mink* is this: The Tenth Circuit noted that “[c]ivil and criminal libel cases are subject to the same constitutional limitations”⁴⁹¹ and that Supreme Court precedent in civil cases “provides protection for statements such as parody, fantasy, rhetorical hyperbole, and imaginative expressions that cannot reasonably be interpreted as stating actual facts about an individual.”⁴⁹² “This provides assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the

⁴⁸⁹ *Id.* at 1008-09. The Tenth Circuit found it “significant” that *The Howling Pig* writings contained the following disclaimer: “The Howling Pig would like to make sure that there is no possible confusion between our editor Junius Puke and the Monfort Distinguished Professor of Finance, Mr. Junius “Jay” Peake. Mr. Peake is an upstanding member of the community as well as an asset to the Monfort School of Business where he teaches about microstructure. Peake is active in many community groups, married and a family man. He is nationally known for his work in the business world, and has consulted on questions of market structure. Junius Puke is none of those things and a loudmouth know-it-all to boot, but luckily he’s frequently right and so is a true asset to this publication.” *Id.* at 1009.

⁴⁹⁰ *Id.* at 1007 (“The test is not whether the story is or is not characterized as ‘fiction,’ ‘humor,’ or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated. If it could not be so understood, the charged portions could not be taken literally.” (quoting *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982)).

⁴⁹¹ *Id.* at 1005 n.7.

⁴⁹² *Id.* at 1005 (citations and internal quotation marks omitted).

discourse of our Nation.”⁴⁹³ Thus, the Tenth Circuit in *Mink* applied post-*Garrison* civil libel principles to decide this criminal libel case.

***Phelps v. Hamilton* (10th Cir. 1995):**⁴⁹⁴ Anti-homosexual activists brought suit against the District Attorney of Shawnee County, Kansas, seeking invalidation of the state criminal defamation law. The federal district court invalidated the statute. The district attorney appealed, and the Tenth Circuit upheld the Kansas criminal defamation statute despite the failure of the statute, by its terms, to incorporate the “actual malice” standard required by *Sullivan* and *Garrison*.⁴⁹⁵

The Tenth Circuit’s relied on state-law rules of statutory instruction to guide its application of First Amendment principles. There was no dispute that the Kansas criminal defamation statute must include an actual malice standard; rather, at issue in this case was the factual question of whether the statute did, in fact, contain such a requirement. The Tenth Circuit construed the Kansas statute to include an “actual malice” requirement despite the absence of those words in the statute⁴⁹⁶ because to do otherwise would cause “the unseemly result that the constitutionality of the statute would be determined by whether the challenge was brought in federal or state court.”⁴⁹⁷

⁴⁹³ *Id.* at 1005 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

⁴⁹⁴ 59 F.3d 1058.

⁴⁹⁵ The Kansas Legislature in 1995, the same year the *Phelps* case was decided, amended the state’s criminal defamation statute and expressly included in it an actual malice standard. The statute was then codified at K.S.A. 21-4004.

⁴⁹⁶ In this regard, *Phelps* stands virtually alone among the genre of cases in which inferior federal courts and state courts applied the *Garrison* rule to state criminal defamation statutes. (But see generally *People v. Ryan*, 806 P.2d 935 (Colo. 1991) (en banc), in which the Colorado Supreme Court used similar reasoning to preserve that state’s criminal defamation statute against constitutional attack.) As discussed *infra* at Section 4, the majority of state courts required state criminal defamation statutes to expressly include an actual malice standard in order to comply with *Garrison* and, if no such standard was included in the words of the statute, other courts struck down the statute as unconstitutional and left it to the respective state legislature to repair if it so desired. It is notable that, although the *Phelps* court upheld the Kansas statute by reading into it an implicit requirement to prove actual malice when required by *Garrison*, the Kansas Legislature reacted soon after this decision to amend its statute by inserting into it an express actual malice requirement.

⁴⁹⁷ *Phelps*, 59 F.3d at 1073.

The *Phelps* case is notable because of its reliance on the state rules of statutory construction to read into a criminal libel statute the “actual malice” requirement. Other courts presented with the same problem have refused to do so.⁴⁹⁸ This contrast shows how the Supreme Court’s silence on the constitutionality of criminal defamation laws for almost half a century has resulted in different applications of the same principles in different jurisdictions.

Mangual v. Rotger-Sabat (1st Cir. 2003):⁴⁹⁹ A newspaper reporter, Tomás De Jesús Mangual, challenged the constitutionality of Puerto Rico’s criminal libel statute principally on the basis that it failed to incorporate the requirement that actual malice be proven in the context of defamatory statements made about public officials or public figures.

The First Circuit Court of Appeals found the Puerto Rico statute unconstitutional because, *inter alia*, it did not include within its terms an “actual malice” requirement. The contrast between the approach of the Tenth Circuit in *Phelps* and the First Circuit in *Mangual* is as stark as the difference between considering a statute on its face or as applied.⁵⁰⁰ The *Mangual* court struck down the Puerto Rico criminal libel statute because “*on its face*, [the statute] is constitutionally deficient, in that it does not require that the *New York Times* [*v. Sullivan*] and

⁴⁹⁸ Compare *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C. 1991), with *Phelps*, 59 F.3d at 1073 n.24. The *Phelps* court at footnote 24 expressly compared its approach with that of the *Fitts* court: “The district court [in the *Phelps* case] also referred to *Fitts v. Kolb*, which noted that all state courts which have considered constitutional challenges to similar criminal defamation laws have invalidated them and ‘left the revisions to the state legislators.’ Moreover, the district court highlighted that *Fitts* refused to interpret the criminal defamation statute along the lines of South Carolina’s civil defamation law because that law has been judicially developed while its criminal counterpart has been the province of the legislature. However, the district court failed to note two essential differences between *Fitts* and the instant case: (1) that, unlike Kansas courts, South Carolina courts have been hesitant to interpret statutes liberally to uphold them against challenge, and (2) that unlike Kansas, South Carolina lacked an interpretation of a prior statute that included the actual malice standard for matters of public concern.” *Phelps*, 59 F.3d at 1073 n.24 (citations omitted).

⁴⁹⁹ 317 F.3d 45.

⁵⁰⁰ The difference is explained, in part, by the different rules of statutory construction applied by the different circuit courts. The *Mangual* court was not persuaded by arguments that case law had effectively inserted an actual malice standard into the Puerto Rico criminal libel statute.

Garrison standard of actual malice be proven in order for a statement disparaging a public official or figure to be successfully prosecuted.”⁵⁰¹

Tollett v. United States (8th Cir. 1973):⁵⁰² Ray Allen Tollett mailed eight postcards containing references to a former employee, and to the former employee’s wife, to the former employee’s new place of business. The postcards contained assertions that the former employee engaged in homosexual conduct and that the former employee’s wife was a prostitute. Federal prosecutors charged Mr. Tollett with violating a federal law prohibiting, *inter alia*, mailing letters that contained “defamatory” material written on the outside of the card or envelope where it could be seen by people other than the intended recipient.⁵⁰³ Mr. Tollett was convicted in the United States District Court, and he appealed on the ground the statute was unconstitutional.

The Eighth Circuit Court of Appeals struck down the statute on the ground it was an overbroad content-based regulation of speech.⁵⁰⁴ To the extent the statute barred “libelous” and “defamatory” writings,⁵⁰⁵ the Eighth Circuit used this case to express its doubt that the criminal law is a constitutionally appropriate tool for imposing liability for defamatory speech.⁵⁰⁶ The

⁵⁰¹ *Id.* at 66 (emphasis added).

⁵⁰² 485 F.2d 1087.

⁵⁰³ *Id.* at 1088. The federal statute read: “All matters otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which is written or printed or otherwise impressed or apparent any delineation, epithet, term, or language of libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, is nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postal Service shall prescribe.” *Id.* at 1088 n.1 (quoting 18 U.S.C. § 1718 (1948)).

⁵⁰⁴ *Id.* at 1091 (“The statute specifically punishes libelous, scurrilous, defamatory and threatening speech. The penal provision is invoked only when the content of the words written on the outside of the envelope are words of this nature. The statute does not bar the writing of all words on the outside of an envelope or postcard. The government asserts that the prohibited language can be safely sealed in an envelope. This fact has little relevancy to the issue at hand. It would be judicial sophistry to deny that the government, under the statute, is in the business of directly censoring the content of the exposed writing. The constitutionality of the statute must be measured in this light and not from the standpoint of merely regulating the form of the communication.”).

⁵⁰⁵ The case includes separate discussion of the statute’s prohibition on material that would be considered obscene. That is outside the scope of our discussion for purposes of this Part.

⁵⁰⁶ *Id.* at 1095-96 (“Thus, we conclude the only tenable basis upon which the government might justify a criminal libel act such as Sec. 1718 must relate to the claim that it serves as a supplement to the civil libel laws to protect the dignity of reputation of the individual. However, we think this, too, is a weak and questionable basis for

court found that if the purpose of libel laws is to compensate damage to a person's reputation, then

“[t]he attempt to inject the government into such issues through the libel laws should be struck down as opposed to the fundamental nature of the system, [and if the purpose is] to protect against injury to a person's feelings [then] A civil action for damages in this situation would have a minimal effect upon the operation of a system of free expression. The government's role is primarily that of umpire, with no interest of its own at stake.”⁵⁰⁷

Having made clear its disfavor of the very *concept* of using the criminal law to punish defamation, however, the Eighth Circuit stopped short of striking down this statute on that ground and, instead, rested its decision on vagueness and overbreadth.⁵⁰⁸

* * *

As the cases above illustrate, the federal circuits have endeavored to apply the *Sullivan* and *Garrison* rules to laws that punish defamation with criminal sanctions. The *Tollett* court, like *Garrison*, questioned the continued constitutional viability of criminal punishment for defamatory speech. The *Mangual* court and the *Phelps* court took opposite approaches to the question of whether the “actual malice” requirement must be expressly written into the statute by the legislature or whether it could be inferred from the common law, even after *Ashton* abolished the common law of libel. And the *Mink* court did not hesitate to apply post-*Sullivan* developments in the *civil* law of libel to the criminal libel case before it.

Those sorts of subtle divergences and thematic developments by the federal circuits in the half century since *Garrison* was decided also are reflected in the post-*Garrison* federal district court decisions, as is shown in the next section.

governmental intrusion into the delicate area of regulating expression. For the true danger flows not from the governmental proscription of ‘bad’ language but from the damage to First Amendment freedoms in deterring the free exchange of the ‘good.’ Self-censorship through fear of criminal punishment can diminish the boundaries of original thought and expression of utilitarian emotions and idea.” (footnotes omitted).

⁵⁰⁷ *Id.* at 1096 n.19 (quoting with approval THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 543 (Random House 1970)) (emphasis omitted).

⁵⁰⁸ *Id.* at 1096.

Section 3: Post-*Garrison*, in the federal districts

In general, federal district court decisions applying the First Amendment to criminal defamation statutes are unremarkable because their application is either consistent with established law or results in an appeal for clarification by the circuit. There are, however, three⁵⁰⁹ federal trial court decisions interpreting the post-*Sullivan* and post-*Garrison* view of the First Amendment law of defamation that deserve mention. Two of the cases are notable because they are oft cited by other courts rendering opinions on the subject.⁵¹⁰ The third case raises the interesting and unusual question whether the First Amendment analysis differs in any way if the criminal defamation prosecution is brought by action of a private citizen rather than by a public prosecutor.⁵¹¹

The two most-cited federal district court cases applying the post-*Garrison* rules to criminal libel statutes are *Fitts v. Kolb*⁵¹² and *United States v. Handler*.⁵¹³

⁵⁰⁹ A fourth group of related cases also is of interest but principally because they arose in the author's home state of Kansas and because of their soap opera-like facts, not because of their doctrinal contributions. See *Thomas v. City of Baxter Springs*, 369 F. Supp. 2d 1291 (2005). In *Thomas*, newspaper writer Ronald O. Thomas published an editorial critical of the city clerk of Baxter Springs, Kansas. He was charged in municipal court with criminal defamation pursuant to a city ordinance that was identical to the Kansas criminal defamation statute. When the city prosecutor recused himself for conflict of interest but then failed to timely appoint a special prosecutor, the charges were dismissed for failure to prosecute, although the city expressly reserved the possibility of refileing. Thomas filed an action in federal district court seeking to enjoin the prosecution on the ground that the criminal defamation ordinance was unconstitutional. *Id.* at 1293-94. The federal district court held that the Baxter Springs criminal defamation ordinance (and, therefore, the identical Kansas statute upon which it was based) was constitutional on its face. The court applied the Tenth Circuit's holding in *Phelps v. Hamilton* in concluding that the previous version of the statute, which had not by its terms included an "actual malice" requirement, was constitutional. Since the legislature had amended the statute (and the ordinance had been amended as well) to include an express actual malice requirement, the *Thomas* court concluded that the statute was constitutional. The *Thomas* court then proceeded to analyze and reject arguments that the statute (and ordinance) were unconstitutionally overbroad and vague. Thus, the post-*Phelps* Kansas criminal defamation statute was upheld against constitutional challenge. *Id.* at 1295-97. See also *How v. City of Baxter Springs*, 369 F. Supp. 2d 1300 (D. Kan. 2005); *How v. City of Baxter Springs*, 217 Fed. Appx. 787, 2007 WL 533881 (10th Cir. Feb. 22, 2007) (unpublished opinion).

⁵¹⁰ See *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C. 1991), and *United States v. Handler*, 383 F. Supp. 1267 (D. Md. 1974).

⁵¹¹ *Porter v. Kimzey*, 309 F. Supp. 993 (N.D. Ga. 1970) (per curiam).

⁵¹² 779 F. Supp. 1502 (D.S.C. 1991).

⁵¹³ 383 F. Supp. 1267 (D. Md. 1974).

Fitts v. Kolb (D.S.C. 1991):⁵¹⁴ The *Fitts* decision is notable for its oft-quoted outstanding assembly of the history of criminal libel.⁵¹⁵ The case arose when James A. Fitts, the publisher of

⁵¹⁴ 779 F. Supp. 1502.

⁵¹⁵ Because this may be the most thorough yet concise judicial summary of the long history of criminal libel, and is oft quoted by other courts, the history assembled in *Fitts* is quoted here extensively: “Criminal libel is notoriously intertwined with the history of governmental attempts to suppress criticism. The notion that expression may be penalized goes back at least as far as 880 A.D. when Alfred the Great decreed that ‘[i]f anyone is guilty of public slander, and it is proved against him, it is to be compensated with no lighter penalty than the cutting off of his tongue. . . .’ Throughout the centuries, criminal libel has experienced what one court has referred to as an ‘ignominious history.’ One commentator has suggested that the law of defamation is ‘a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities.’

“In medieval England, prosecutions for libel were originally under the jurisdiction of the ecclesiastical courts, but as early as 1275, the royal courts assumed jurisdiction over seditious libel, the branch of libel dealing with false statements about the affairs of the state and those who administered the government. The most notorious example of the use of the criminal law to punish seditious libel occurred in the royal Court of Star Chamber. There, truth was not a defense, and a defendant was not entitled to a jury trial on the issue of whether the alleged statement was defamatory. Eventually, the Star Chamber’s use of criminal libel was adopted by the common-law courts in England, which at least provided trials by jury.

“The modern law of criminal libel is said to have its origin in *De Libellis Famosis*, which arose out of a libel in verse directed against the Archbishop of Canterbury, then deceased, and a living Bishop. Lord Coke analyzed the principal points resolved: ‘Every libel is made either against a private man, or against a magistrate or public person. If it be against a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of the shedding of blood and great inconvenience; if it be against a magistrate, or other public person, it is a greater offense; for it concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt and wicked magistrates to be appointed by the King to govern his subject under him?’

“Thus, one of the principal rationales for punishing private libels was that they tended toward breach of the peace. A corollary to this proposition was that truth was irrelevant; in fact the true insult was considered more likely to give offense ‘for, as the woman said, she would never grieve to be told of her red nose if she had not one indeed.’

“In the colonies, the law of criminal libel was applied against critics of the Crown with equal ferocity. A New York publisher’s attack of the colonial governors in 1735 led to the famous trial of John Peter Zenger. Indicted for criminal libel, he was defended by Andrew Hamilton, who sought to have the jury pass on his defense of truth. The royal judge denied this defense, but the jury disregarded the charge and acquitted Zenger. Zenger’s case became a symbol of the oppressions of the Crown during the revolution.

“With the establishment of independence, the states adopted new constitutions with guarantees of freedom of speech and the press, the first being that of Virginia in 1776. By the opening of the Constitutional Convention in 1787, eleven states had such provisions embodied in their constitutions or bill of rights. Such was the background of the First Amendment. The free speech provisions of the federal and state constitutions were the subject of much debate among those who had enacted them, but it seems probable that one of the principal targets at which they were aimed was the law of seditious libel, that branch of criminal libel law which had been used to control criticism of the government.

“Ironically, in 1798, less than a decade after ratification of the First Amendment, Congress passed the Alien & Sedition Act, which made it a crime, punishable by five years in prison and a \$5,000 fine, to: ‘write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them or either or any of them, the hatred of the good people of the United States.’

“The Alien & Sedition Act was immediately and vigorously attacked as unconstitutional by Thomas Jefferson and James Madison, and the Virginia legislature passed the famous Virginia Resolutions of 1798 condemning it, saying that the Act exercised: ‘a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal

a newspaper in South Carolina, published a criticism of two state legislators. He was charged with criminal libel pursuant to the South Carolina penal code and arrested. The charges later were dropped at the request of the two legislators. Mr. Fitts sought a declaratory judgment that the South Carolina criminal libel statute was unconstitutional because it failed to require proof of actual malice as required by *Sullivan* and *Garrison*.⁵¹⁶

In interpreting the South Carolina criminal libel statute, the *Fitts* court, like the First Circuit in *Mangual*, interpreted the statute before it strictly. This contrasts with the Tenth Circuit in *Phelps*, which interpreted the Kansas criminal libel statute liberally and in favor of its constitutionality. The difference, as explained by the *Phelps* court, was the differing standards for statutory construction that prevailed in the respective jurisdictions. Nonetheless, *Fitts* and *Phelps* generally represent the two different approaches to applying the post-*Garrison* requirement that criminal libel statutes obligate the state to prove “actual malice”: *Fitts* insists the legislature expressly insert the “actual malice” requirement into the statute,⁵¹⁷ while *Phelps*

alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.’

“The Alien & Sedition Act expired of its own terms in 1800, and was never tested in a court; however, ‘the attack upon its validity has carried the day in the court of history.’ Thomas Jefferson pardoned those convicted under it, and Congress voted to repay fines levied under it. John C. Calhoun, in an 1836 report, assumed that its invalidity was a matter ‘which no one now doubts.’

“Although the Act by its terms only applied to criticism of government itself, Madison left no doubt that he believed the same strictures applied to any attempt to punish criticism of public officials, or candidates for office. In his report supporting the Virginia Resolutions, he wrote: ‘[I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions of their character and conduct.’

“Let it be recollected, lastly, that the right of electing members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.” *Id.* at 1506-08 (citations, internal quotation marks, and footnotes omitted).

⁵¹⁶ *Fitts*, 779 F. Supp. at 1505-06, 1514.

⁵¹⁷ *Id.* at 1511.

finds sufficient a judicial interpretation that a statute demands proof of “actual malice” notwithstanding the absence of those terms from its wording.

United States v. Handler (D. Md. 1974):⁵¹⁸ The *Handler* case arose when Wilfred Handler mailed a series of postcards containing critical and defamatory statements about former U.S. Supreme Court Justice Arthur Goldberg⁵¹⁹ and another member of the bar. The government brought criminal charges against Mr. Handler under a federal statute prohibiting the printing of “libelous, scurrilous, defamatory or threatening” material on the exterior of mailable materials such that it is visible.⁵²⁰ Defendant challenged the constitutionality of the federal statute, which was “a sort of postal criminal libel statute.”⁵²¹

The *Handler* court struck down the federal statute in what would be an unremarkable opinion but for two matters. First, *Handler* suggests that in addition to any other analyses, a court reviewing a criminal libel statute must ensure that the state convincingly shows an ‘overriding and compelling state interest’ in the individual prosecution under review.⁵²²

[E]ven if criminal libel statutes are constitutional in general, in any given case a court is required to weigh the purposes furthered by the particular statute against the particular restraints placed by that statute on expression, before that statute may be held to be constitutionally valid.⁵²³

⁵¹⁸ 338 F. Supp. 1267.

⁵¹⁹ *Id.* at 1269 (noting that one of the postcards contained this writing: “Arthur J. Goldberg . . . is an habitual repugnant criminal—one of the most dangerous in the United States. So is his wife. Or else, to protect his own reputation for piety, Criminal Ex-Justice Goldberg makes it appear that his wife perpetrates certain of his despicable crimes.”).

⁵²⁰ *Id.* at 1269 n.1 (“All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which is written or printed or otherwise impressed or apparent any delineation, epithet, term, or language of libelous, scurrilous, defamatory or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, is nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postal Service shall prescribe. Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.” (quoting 18 U.S.C. § 1718)).

⁵²¹ *Id.* at 1277.

⁵²² *Id.*

⁵²³ *Id.* at 1278.

Obviously, if that case-by-case balancing approach were the prevailing law, then nothing would remain of the Doctrine of Categorical Exclusion in relation to criminal prosecutions for libel.

Second, the *Handler* court appears to call into question the very concept of criminal libel statutes to the extent that they are justified “to punish an indigent who could not be reached by a civil judgment for damages.”⁵²⁴ The *Handler* court found that such a justification of the need for criminal remedies to punish libel “might possibly meet a ‘rational basis’ test” but would not “[rise] to the level necessary to meet the ‘compelling interest’ test applicable in cases involving restrictions on First Amendment protected speech.”⁵²⁵

Neither of these legal concepts, broached in *Handler*, has been adopted by any federal court of appeals. Because of *Handler*, however, these concepts have been articulated and remain available for consideration by future litigants who have an interest in advancing them to challenge criminal defamation statutes.

Porter v. Kimzey (N.D. Ga. 1970):⁵²⁶ The third and final noteworthy federal district court decision arose when a Georgia state prison guard, Harold Porter, made critical and allegedly defamatory statements about state Department of Corrections officials. In an unusual maneuver, *criminal* defamation charges were brought against Mr. Porter by the filing of a *private* complaint, not a filing of the district attorney. Mr. Porter brought a pre-prosecution facial challenge to the Georgia criminal defamation statute in federal district court under a little-used provision of

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ 309 F. Supp. 993.

federal civil-rights law that allowed a federal three-judge panel to hear challenges to and, when appropriate, to enjoin state prosecutions as being in violation of federal law.⁵²⁷

The three-judge panel held that this was not a circumstance in which pre-prosecution federal review of a state criminal case was appropriate and declined to consider the matter on its merits. The case would, therefore, be unremarkable except for an obscure passage in the panel's ruling arising from the fact that these charges were brought by private complaint rather than a filing of the district attorney. The panel wrote:

[T]he arrest here is based upon a private warrant taken out by one citizen of the state against another. It is not founded on an organized effort at law enforcement or harassment by public officials. As such, the accused's rights are amply safeguarded by Grand Jury action, by his ability to raise his constitutional issues in the state court, and by the many defenses available on the merits.⁵²⁸

While the unusual circumstances of this case, and the history of federal involvement in Georgia to protect federal civil rights, counsel against reading too much into this opinion, it is conceivable that these judges saw a constitutionally significant distinction between a criminal complaint brought by the state itself through its employee-prosecutors and one, as here, brought by private citizens. In that sense, *Porter* raises the question by analogy whether a constitutional distinction between private actions, including civil libel, and government actions, such as traditional criminal libel prosecutions, may still exist.

⁵²⁷ *Id.* at 994-95. The plaintiff claimed federal jurisdiction under *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Because this dissertation is focused on First Amendment issues, not on federal jurisdiction issues, no further analysis of this jurisdictional issue will be made here.

⁵²⁸ *Id.* at 996.

Section 4: Post-*Garrison*, in the state courts

Because the bulk of criminal prosecutions are creatures of state law, state courts are the most prolific interpreters of the First Amendment's limitations on the power of government to impose criminal sanctions on those who speak or publish defamatory falsehoods. This Section 4 will review a selection of cases in which state appellate courts have reviewed criminal prosecutions for defamation for compliance with the commands of the First Amendment. The general result, of course, has been that state courts have struck down criminal defamation statutes that failed to meet the requirements of *Garrison*.

However, two distinct approaches have emerged. The majority approach has been for the court to strike down the state statute in its entirety and leave it to the legislature to reconstitute the statute in a manner conforming to the First Amendment if it so wishes. This majority approach is akin to finding the statute unconstitutional on its face. The minority approach has been to strike down only the portion of the state statute that violates the First Amendment and leave the remainder of the statute intact. This minority approach is akin to finding the statute unconstitutional as applied.

Survey of cases adopting the majority approach (striking down statute)

For decades after *Garrison*, state courts grappled with applying its commands to state criminal defamation prosecutions. Most of those statutes did not expressly include a requirement for proof of "actual malice." The majority of state courts, as illustrated by the cases below, struck down the offending statute in its entirety, leaving it to the legislature subsequently to decide whether to rewrite the statute to conform with *Garrison*'s commands. In that sense, the

majority rule in state courts is in harmony with the line of cases described by the federal district court in South Carolina in *Fitts*,⁵²⁹ declining to repair a statutory defect by judicial construction.

Commonwealth v. Armao (Pennsylvania 1972):⁵³⁰ Defendant Eugene Armao was the managing editor and Defendant Arnold Orsatti the publisher of a weekly newspaper. They published a front-page article regarding a different publication, a tabloid named ‘Observer’, under the headline: “Liquor Trade Tabloid ‘Observer’ Linked to Operation of Notorious S.A. Club.”⁵³¹ Defendants were charged in the Court of Common Pleas with criminal libel under Pennsylvania law, convicted at a bench trial, granted a new trial, convicted a second time at a jury trial, sentenced to fines and prison time, and the Superior Court affirmed without opinion. Defendants then appealed to the Supreme Court of Pennsylvania.⁵³² The Pennsylvania Supreme Court held the state’s criminal libel statute unconstitutional because it did not incorporate the actual malice standard required by the United States Supreme Court.⁵³³

Weston v. State (Arkansas 1975):⁵³⁴ Joseph Weston was editor and publisher of the *Sharp Citizen*, a weekly newspaper in Arkansas. He published an article under the headline: “Sharp Citizen makes a mistake in reporting story of Corning and discovers that narcotics racket

⁵²⁹ *Fitts*, 779 F. Supp. 1502.

⁵³⁰ 286 A.2d 626.

⁵³¹ *Armao*, 286 A.2d at 627-28. The alleged libelous statement was: “The name James Buchanan, Associate Editor of the liquor trade tabloid ‘Observer’ (which wields considerable influence with members of the liquor industry and the Pennsylvania State Liquor Control Board) also appears as the President and Director of the notorious S.A. Club (Sports Alliance) at 212 South 13th Street, while Mr. James Buchanan is also listed as a director of the CR Club (Club Revel, Incorporated) at 810-12 South Darien Street. The S.A. Club has been well-known as a hangout for sex deviates. It is housed in a building owned by COVE, Inc., with relatives of Frank Palumbo on the Board.” *Id.*

⁵³² *Id.* at 628.

⁵³³ *Id.* at 632 (“The statutory language makes no provision for truth being an absolute defense. Likewise, no recognition is given the reckless disregard and knowing falsity standard mandated by *New York Times* and *Garrison*. The Pennsylvania criminal libel statutes are only limited in their application to criticisms of ‘public officers’ or ‘candidates’, but *Rosenbloom* clearly extends the First Amendment guarantees in this area to public issues and events of public of general interest. Finally, as *New York Times* and *Garrison* strongly intimate ‘negligence’ is a wholly inappropriate concept in the area of freedom of speech and of the press. Only a knowing falsity or reckless disregard of the truth are actionable in civil defamation. It would violate all sound and fundamental principles of justice to have a merely negligent statement an occasion for the imposition of criminal penalties, and the First Amendment as interpreted by the United States Supreme Court forbids such a result.” (footnote omitted)).

⁵³⁴ *Weston v. State*, 528 S.W.2d 412 (Ark. 1975).

flourishes in Clay County and Corning under direction of Sheriff Liddell Jones, an appointee of Governor Dale Bumpers.”⁵³⁵ Mr. Weston was charged with the criminal libel of Sheriff Jones and was convicted at a jury trial in the circuit court. He was fined \$4,000 and sentenced to three months in prison. He appealed to the Arkansas Supreme Court.⁵³⁶

The Arkansas Supreme Court held the state criminal libel statute unconstitutional because it did not incorporate the *Garrison* requirements of truth being an absolute defense or of the necessity to prove actual malice when the criticism involves a public official. The Arkansas Supreme Court cited *Armao* in declining to read into the statute the nonexistent language that would conform it to First Amendment requirements, and went further to hold that jury instructions, which correctly stated the law, were insufficient to save the defective statute, which did not.⁵³⁷

Eberle v. Municipal Court (California Court of Appeals 1976):⁵³⁸ Paul Eberle, Shirley Eberle and Mickey Leblovic were charged in Los Angeles municipal court with criminal libel in violation of California law for expressions they made about actor Angie Dickinson.⁵³⁹ The defendants sought a writ of prohibition from the California Superior Court barring the municipal court from proceeding to hear the underlying criminal prosecution on the ground that the

⁵³⁵ *Id.* at 413, The body of the article went on to state: “In the meantime, however, we also discovered that law enforcement in Clay County has dropped to a low level again under the direction of the present sheriff, Liddell Jones, appointee of Governor Dale Bumpers who took office following the passing away of Sheriff Pond. It was Sheriff Liddell Jones and his deputies who made the threats of violence to witnesses of the death of Street Shaw.” *Id.*

⁵³⁶ *Id.* at 414.

⁵³⁷ *Id.* at 415-16.

⁵³⁸ 127 Cal. Rptr. 594.

⁵³⁹ *Id.* at 596. The particulars of what they said or published are were not presented to the court, but the court did note that all parties conceded that Angie Dickinson was a public figure for purposes of criminal defamation analysis and went on to speculate about the harm she may have suffered as a result of the defamation: “Although the substance of the alleged libel has not been submitted to this court for consideration at this stage in the proceedings, we note that with respect to well-known performers, such as the individual herein named, a broad range of material might be considered harmful or damaging to her professional career. While not a public official, she is clearly a notable and well known public figure, as the trial court and both parties concede.” *Id.* at 596 n.2.

California criminal libel statute being applied was unconstitutional. The Superior Court agreed and entered the writ of prohibition barring the prosecution. The state appealed.⁵⁴⁰

The California Court of Appeals applied *Garrison* and held the California criminal libel statute unconstitutional. The California court followed the majority rule and struck down the entire statute rather than attempting to construe it in a manner that preserved some portions while striking others,⁵⁴¹ explaining its decision to do so as follows:

The exclusion of the objectionable portions of the California criminal libel statutes as mandated by *New York Times [v. Sullivan]* and *Garrison*, as hereinbefore discussed, requires a wholesale rewriting, and any attempt at draftsmanship on our part would transgress both the legislative intent and the judicial function. It would constitute a flagrant breach of the doctrine of separation of powers. This we refuse to do.⁵⁴²

Gottschalk v. State (Alaska 1978):⁵⁴³ Alaska State Trooper Phillip Gilson responded one evening to a reported disturbance at the Fisherman's Bar in Naknek and found George Gottschalk patronizing the establishment, at which time the two had a "disagreeable exchange of words."⁵⁴⁴ The trooper then impounded Mr. Gottschalk's truck for violations of various traffic safety laws. The next day, when Mr. Gottschalk went to reclaim his truck from impoundment, he accused Trooper Gilson of stealing \$250 from the truck's glove compartment. An investigation determined no money was stolen. Mr. Gottschalk later recanted his accusation of theft and admitted that the \$250 was never in the truck.⁵⁴⁵

⁵⁴⁰ *Id.* at 596-97.

⁵⁴¹ Interestingly, however, the California court did not cite as persuasive authority either the Pennsylvania court's earlier decision in *Armao* or the Arkansas court's decision in *Weston*. We do not know, therefore, whether the California court was aware that it was participating in developing what would become the majority approach to reviewing state criminal defamation laws under the requirements of *Garrison*.

⁵⁴² *Id.* at 600 (citation omitted).

⁵⁴³ 575 P.2d 289.

⁵⁴⁴ *Id.* at 289.

⁵⁴⁵ *Id.* at 289-90.

Mr. Gottschalk was charged with, *inter alia*, violating Alaska’s criminal defamation statute for having falsely accused Trooper Gilson of a crime.⁵⁴⁶ Mr. Gottschalk was convicted and sentenced to a six-month jail sentence, four months of which were suspended, and a \$500 fine.⁵⁴⁷ Gottschalk appealed on the ground that the Alaska criminal defamation statute was unconstitutional.

The Alaska Supreme Court struck down the Alaska criminal defamation statute as unconstitutional. The court found the statute unconstitutional for failing to satisfy the *Garrison* requirements for proof of actual malice. The Alaska court concluded it would be “improper for us to engage in the radical reconstruction necessary to save [the Alaska criminal defamation statute] from unconstitutionality.”⁵⁴⁸

State v. Defley (Louisiana 1981):⁵⁴⁹ Joseph Defley, Jr., appeared at a public meeting and disparaged the job performance of a former school superintendent and a former school supervisor, both of whom were deceased, by calling them “drunkards.” The state brought criminal defamation charges against Mr. Defley for his comments. Mr. Defley filed a motion to quash the charges on the ground that applying the criminal defamation statute to punish speech directed at the job performance of public officials would be unconstitutional. The trial court denied the motion to quash, ruling that “deceased public officials are entitled to the same protection from criminal defamation accorded private citizens.”⁵⁵⁰

⁵⁴⁶ *Id.* at 290. The Alaska statute provided: “Libel and Slander. A person who willfully speaks, writes, or in any other manner publishes defamatory or scandalous matter concerning another with intent to injure or defame him is guilty of a misdemeanor, and upon conviction is punishable by imprisonment in a jail for not less than six months nor more than one year, or by a fine of not less than \$50 nor more than \$500, or by both. This section applies to an allusion to person or family, with intent to injure, defame or maliciously annoy the family.” *Id.* at 290 n.1 (quoting Alaska Statute 11.15.310).

⁵⁴⁷ *Id.* at 289.

⁵⁴⁸ *Id.* at 296. In reaching this conclusion, and following the developing majority rule, the Alaska Supreme Court cited the persuasive precedents of *Armao* (Pennsylvania), *Weston* (Arkansas), and *Eberle* (California).

⁵⁴⁹ 395 So. 2d 759.

⁵⁵⁰ *Id.* at 760-61.

The Louisiana Supreme Court applied the *Garrison* rule and reversed the trial court. The Louisiana Supreme Court required a showing of actual malice and held that requirement to persist even after the public official's death.

The deceased have no opportunity to counteract false statements and are unable to rebut defamatory allegations. Their reputations, like those of private individuals, are thus vulnerable to injury. However, one who in life accepts the responsibilities of a public position has relinquished some of his protection from defamation.⁵⁵¹

State v. Powell (New Mexico Court of Appeals 1992):⁵⁵² David William Powell was a professor at Western New Mexico University who made defamatory comments about the job performance of the university's acting vice president for academic affairs. The state charged Professor Powell with criminal libel under the New Mexico criminal libel statute.⁵⁵³ He was convicted in magistrate court and appealed to the district court, where the professor moved to dismiss the case on the ground that the New Mexico criminal libel statute was unconstitutional. The district court found the statute unconstitutional and dismissed the case. The State of New Mexico appealed the dismissal.⁵⁵⁴

The New Mexico Court of Appeals held the state criminal libel statute unconstitutional as applied, as here, to a public statement involving a matter of public concern. The *Powell* court followed what by then had become the well-established majority rule and refused to read into the New Mexico criminal libel statute a requirement for the state to prove actual malice in order to sustain a conviction for public libel.⁵⁵⁵ The *Powell* court expressly acknowledged the emergence of two distinct approaches to applying the *Garrison* rule to state criminal defamation statutes, the

⁵⁵¹ *Id.* at 761 (citation omitted).

⁵⁵² 839 P.2d 139.

⁵⁵³ *Id.* at 141. The statute read in its entirety: "Libel consists of making, writing, publishing, selling or circulating without good motives and justifiable ends, any false and malicious statement affecting the reputation, business or occupation of another, or which exposes another to hatred, contempt, ridicule, degradation or disgrace. Whoever commits libel is guilty of a misdemeanor." *Id.* (quoting N.M.S.A. 1978, Section 30-11-1 (Repl. Pam. 1984)).

⁵⁵⁴ *Id.* at 140.

⁵⁵⁵ *Id.* at 147.

majority rule of invalidating statutes that lack express requirements and the minority rule of construing statutes in a manner that satisfies *Garrison*.⁵⁵⁶ It followed the majority rule.

State v. Helfrich (Montana 1996):⁵⁵⁷ Richard Helfrich distributed leaflets in Silver Bow County, Montana, that asserted an identified person had committed crimes. The state filed, *inter alia*, criminal defamation charges against Mr. Helfrich in Justice Court, and he was convicted. Mr. Helfrich appealed his conviction to district court and moved to dismiss on the ground that the Montana criminal defamation statute was unconstitutional. The district court denied the motion to dismiss, and Mr. Helfrich then entered a guilty plea conditioned upon his right to appeal on the issue of the statute's constitutionality.⁵⁵⁸

The Montana Supreme Court struck down the state's criminal defamation statute as unconstitutional on its face⁵⁵⁹ because it did not recognize truth as an absolute defense. The real significance of *Helfrich* is its express recognition of the long line of cases it found persuasive. By the time of *Helfrich*, more than two decades after *Garrison*, the majority and minority approaches to applying *Garrison* had become settled law.

Ivey v. State (Alabama 2001):⁵⁶⁰ In the late 1990s, State Senator Steve Windom was the Republican nominee for Lieutenant Governor of Alabama. Melissa Myers filed a civil suit accusing Mr. Windom of soliciting prostitution and engaging in sexual misconduct. Mr. Windom accused Ms. Myers, in cahoots with Garfield M. Ivey, of fabricating the whole story.

⁵⁵⁶ *Id.* In the former category, the *Powell* court places *Gottschalk v. State*, 575 P.2d 289; *Weston v. State*, 528 S.W.2d 412; *Eberle v. Municipal Court*, 127 Cal. Rptr. 594; and *Commonwealth v. Armao*, 286 A.2d 626. In the latter category, the *Powell* court places *People v. Ryan*, 806 P.2d 935.

⁵⁵⁷ 922 P.2d 1159.

⁵⁵⁸ *Id.* at 1160.

⁵⁵⁹ *Id.* The statute at issue read, in pertinent part: “(1) Defamatory matter is anything which exposes a person or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or injury to his or its business or occupation. (2) Whoever, with knowledge of its defamatory character, orally, in writing, or by any other means communicates any defamatory matter to a third person without the consent of the person defamed commits the offense of criminal defamation and may be sentenced to imprisonment for not more than 6 months in the county jail or a fine of not more than \$500, or both.” *Id.* (quoting MCA 45-8-212).

⁵⁶⁰ 821 So. 2d 937.

The State of Alabama then charged Mr. Ivey with, *inter alia*, criminal defamation. He was tried, convicted and sentenced to 30 days in jail and a \$500 fine. Mr. Ivey appealed and the case was transferred to the Alabama Supreme Court.⁵⁶¹

The Alabama Supreme Court held the state's criminal defamation statute unconstitutional because it failed to provide that when the speech was directed toward actions of a public official, such as Senator Windom, a constitutional conviction must include a showing of actual malice.⁵⁶² Following the majority rule, the Alabama Supreme Court declined to allow jury instructions to repair the constitutional flaw in the underlying criminal defamation statute and also declined to interpret the statute narrowly in a manner that effectively reads into it a requirement to prove actual malice where the words of the statute include no such requirement.⁵⁶³

I.M.L. v. State (Utah 2002):⁵⁶⁴ The *I.M.L.* court summarized the facts of the case as follows:

In this case we consider the application of a law drafted more than one hundred years ago to the most modern of preoccupations—the Internet. *I.M.L.*, a high school student, was charged with criminal libel for creating an Internet web site on which he displayed disparaging comments about his teachers, classmates, and principal. He moved to dismiss, claiming that the statute under which he was charged unduly burdens free speech and is unconstitutional on its face. The juvenile court denied the motion.⁵⁶⁵

The student, *I.M.L.*, lodged an interlocutory appeal. In a by-then familiar result, the Utah Supreme Court struck down the state criminal libel statute for failing to satisfy the commands of

⁵⁶¹ *Id.* at 938-40.

⁵⁶² *Id.* at 949.

⁵⁶³ *Id.* at 948. The *Ivey* court engaged in a review of case law addressing the question of whether a court interpreting a criminal libel statute that does not by its terms require a showing of actual malice in prosecutions relating to speech directed at public persons or on matters of public concern. While the *Ivey* court acknowledged that the Tenth Circuit in *Phelps, supra*, had allowed such an interpretation that reads such a requirement into a criminal defamation statute that does not expressly include it, it also demonstrated that that is the minority rule that had not been adopted in other jurisdictions. Specifically, the *Ivey* court noted that Pennsylvania, Colorado, California and Arkansas had reached the opposite conclusion.

⁵⁶⁴ 61 P.3d 1038.

⁵⁶⁵ *Id.* at 1040.

Garrison, particularly the requirement for proof of actual malice. Following the majority rule, the *I.M.L.* court refused to apply a saving construction to the state’s criminal libel statute.⁵⁶⁶

Survey of cases adopting the minority approach (upholding statute)

A minority of state courts have applied a saving construction to their state’s criminal defamation statute and upheld it notwithstanding *Garrison*. In that sense, the minority approach is similar to that taken by the Tenth Circuit in *Phelps*.⁵⁶⁷ However, the *reason* a state statute survives *Garrison* analysis is not always the same. To the extent challenged statutes in these two cases were construed to apply only to private libels of private persons, they illustrate how the surviving, narrowed excluded category of defamatory speech may apply in the modern Doctrine of Categorical Exclusion.

People v. Heinrich (Illinois 1984)⁵⁶⁸: Defendant Paul Heinrich distributed leaflets stating that a private citizen in Illinois was “an unfit mother due to her promiscuity, deviate sexual behavior, illicit drug habit, and four pregnancies out of wedlock.”⁵⁶⁹ The leaflet stated that after giving birth to her first child, the woman had two abortions and a miscarriage. The leaflet contained a picture of the woman along with her name, the name and address of the woman’s parents, and the name of the woman’s daughter. The leaflet encouraged readers to contact local churches or the State of Illinois to help “protect the complainant’s ‘bastard child’ from her mother’s ‘deviate moral behavior.’”⁵⁷⁰

⁵⁶⁶ *Id.* at 1048. Interestingly, Utah had both a criminal libel statute, which was enacted before *Garrison* and which was under attack in this case, and also a criminal defamation statute, which was enacted post-*Garrison* and contained a requirement that the state prove actual malice. In attempting to save the pre-*Garrison* criminal libel statute from constitutional attack, the State of Utah argued that the two statutes should be read together as both requiring proof of actual malice. The Utah Supreme Court was not persuaded.

⁵⁶⁷ *Phelps*, 59 F.3d 1058.

⁵⁶⁸ 470 N.E.2d 966.

⁵⁶⁹ *Id.* at 967.

⁵⁷⁰ *Id.* at 967-68.

The State of Illinois brought criminal defamation charges against Mr. Heinrich for the statements published in the leaflet. Mr. Heinrich moved to dismiss, and the lower court found the Illinois criminal defamation statute unconstitutional and dismissed the case. The State of Illinois appealed the dismissal.⁵⁷¹

The Illinois Supreme Court reversed and upheld the state's criminal defamation statute. First, the *Heinrich* court construed the Illinois criminal defamation statute⁵⁷² to apply only to expressions that constitute fighting words.⁵⁷³ Therefore, the court reasoned, this criminal defamation statute did not need to satisfy the post-*Garrison* requirement for the state to prove actual malice because the Doctrine of Categorical Exclusion as applied to fighting words, not to criminal defamation, governed this case.⁵⁷⁴ While that specific statutory construction is relevant only in Illinois as applied to Illinois law, it is notable that the *Heinrich* court, like the Tenth Circuit in *Phelps*,⁵⁷⁵ relied on state-specific methods of statutory construction to salvage the constitutionality of a criminal defamation statute. In that manner, its approach was more akin to the developing minority approach than to the emerging majority rule.

⁵⁷¹ *Id.* at 967.

⁵⁷² *Id.* at 968. The pertinent element of the offense of criminal defamation in the Illinois statute stated: “(a) A person commits criminal defamation when, with intent to defame another, living or dead, he communicates by any means to any person matter which tends to provoke a breach of the peace.” *Id.* (emphasis added) (quoting Ill. Rev. Stat. 1981, ch. 38, par. 27-1).

⁵⁷³ *Id.* at 970 (“Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safe-guarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.” (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 256-57 (1952) (emphasis omitted))).

⁵⁷⁴ *Id.* at 969. In reaching this conclusion, the Illinois Supreme Court relied heavily on the comments to the Illinois statute, which expressly referred to the doctrines established by the United States Supreme Court in another case arising from Illinois law three decades earlier, *Beauharnais*, 343 U.S. 250. The Illinois Supreme Court wrote: “Although the court in *Beauharnais* stated that libelous words were outside the protection of the first amendment, subsequent Supreme Court decisions evidence that the guarantees of the first amendment do place some limitation on the State’s power to proscribe defamation. The extent of these limitations will be discussed below. At this point, it suffices to note that the reference to *Beauharnais* in the committee comments to section 27-1 concerns the use ‘fighting words’ not ‘libelous’ words. Although *Beauharnais* has been criticized in regard to statements there concerning libel, the court’s position on ‘fighting words’ appears to have retained validity.” *Heinrich*, 470 N.E.2d at 969 (citations omitted).

⁵⁷⁵ *Phelps*, 59 F.3d 1058.

Second, the *Heinrich* court concluded that because the complainant in this case was a private citizen, *Garrison* did not require a showing of actual malice. The court expressly distinguished the facts of this case, involving libel directed at a private citizen about private matters, from the facts of other post-*Garrison* cases.⁵⁷⁶ The *Heinrich* court noted that, in *Garrison*, the United States Supreme Court “expressly reserved judgment on whether the defense of truth could be limited by the additional requirements of good motives and justifiable ends where the defamation was one in which the public had no interest.”⁵⁷⁷ The important holding in *Heinrich* is that state criminal defamation laws that do not otherwise satisfy the requirements of *Garrison* may nonetheless survive constitutional scrutiny if they are applied only to private defamations of private individuals regarding only matters of private, not public, concern.⁵⁷⁸

People v. Ryan (Colorado 1991):⁵⁷⁹ Dennis Edward Ryan, a disgruntled former boyfriend, mailed copies of a fictitious “Wanted” poster referencing a woman he had previously dated to several businesses, bars and residences in a trailer court in Fort Collins, Colorado. The poster contained the name and picture of the woman and stated that she was wanted for “fraud, conspiracy [sic] to commit fraud, various flimflam schemes, spouse abuse, child abuse-neglect, sex abuse, abuse of the elderly, prostitution, assault, larceny, theft of services, wage chiseling, [and] breach of contract.”⁵⁸⁰ Mr. Ryan was charged with violating the Colorado criminal

⁵⁷⁶ *Heinrich*, 470 N.E.2d at 972 (finding that the trial court’s reliance on *Weston v. State*, 528 S.W.2d 412, was misplaced because that case had involved defamation of a public official, its reliance on *Eberle v. Municipal Court*, 127 Cal. Rptr. 594, was misplaced because that case had involved a matter of public interest, and its reliance on *Gottschalk v. State*, 575 P.2d 289, was misplaced because that case had involved defamation of a public official).

⁵⁷⁷ *Id.* at 971. The Illinois Supreme Court went on to quote from footnote 8 in *Garrison*: “We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels.” *Id.* (citing *Garrison*, 379 U.S. at 72 n.8).

⁵⁷⁸ The constitutional law governing private libels has been further developed in the context of the civil law. See, e.g., *Gertz*, 418 U.S. 323 (private plaintiffs need not prove actual malice to obtain compensatory damages but must do so to obtain punitive damages); see also *Dun & Bradstreet*, 472 U.S. 749.

⁵⁷⁹ 806 P.2d 935 (en banc).

⁵⁸⁰ *Id.* at 936. The court further described the poster: “The poster further stated that the victim ‘frequents local bars in company of men with longest hair and/or best contraband,’ was ‘86’d from bars in two states for soliciting

defamation statute⁵⁸¹ and filed a pretrial motion to dismiss the case on the ground that the Colorado criminal defamation statute was unconstitutional. The trial court found the statute to be unconstitutional because it lacked an actual malice standard as required by *Garrison*; the trial court then entered an order of dismissal. The State of Colorado appealed.⁵⁸²

The Colorado Supreme Court upheld the state's criminal defamation statute by construing it narrowly. The court found the statute "invalid only insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public concern" and reinstated the criminal prosecution of Mr. Ryan because "[t]he statute remains valid to the extent that it penalizes libelous attacks under the facts of this case, where one private person has disparaged the reputation of another private individual."⁵⁸³

The notable aspect of *Ryan* is that the Colorado Supreme Court, foreshadowing the action of the Tenth Circuit four years later in the *Phelps v. Hamilton* case, construed a pre-*Garrison* criminal defamation statute in a manner that preserved it despite the absence in the statutory language of the *Garrison*-mandated requirement that the state prove actual malice. The *Ryan* court read the Colorado statute to apply only to private libels that would be outside the scope of the explicit *Garrison* requirement of proof of actual malice. In this manner, the *Ryan* court followed the minority view in which courts are willing to construe criminal defamation statutes

multiple male customers,' 'often masquerades as peace workers, day care workers, cook, waitress, dancer,' 'has harbored various forms of VD,' and is at 'high risk for AIDS.' In addition, the poster set forth the victim's age, hair color, weight, height, eye color, birth date, and residence, and offered a \$3,000 reward for 'information leading to the criminal or civil prosecution' of the victim." *Id.*

⁵⁸¹ *Ryan*, 806 P.2d at 936. The statute stated, in relevant part: "(1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation of expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel." *Id.* (quoting § 18-13-105, 8B C.R.S. (1986)).

⁵⁸² *Ryan*, 806 P.2d at 937.

⁵⁸³ *Id.* at 940-41.

in manners not obvious from the statutory language itself in order to save the statute from constitutional failure on its face.

* * *

On the whole, criminal prosecution for defamation no longer is preferred either in the United States or internationally,⁵⁸⁴ although criminal defamation laws continue to have their supporters.⁵⁸⁵ The Supreme Court long ago acknowledged the “preference for the civil remedy.”⁵⁸⁶ More than half a century ago, the *Garrison* Court implied as much by quoting with approval passages from commentators such as: “Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community’s sense of security. . . . It seems evident that personal calumny . . . is therefore inappropriate for penal control”⁵⁸⁷ And, similarly:

Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that “. . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.”⁵⁸⁸

⁵⁸⁴ See, e.g., *IPI White Paper: Our Stand on Criminal Defamation*, International Press Institute (Vienna, Austria), available at http://www.freemedia.at/fileadmin/resources/application/IPI_White_Paper_Website_Version_Final.pdf (“International organisations and rights groups have long viewed civil defamation laws as legitimate avenues for the resolution of libel allegations, as long as the fines foreseen by such laws as punishment for defamation are not aimed at silencing journalists or news organisations, but solely at redressing the damage caused. In a report to the UN Human Rights Council in 2010, the UN Special Rapporteur for Freedom of Expression asserted, ‘any attempt to criminalise freedom of expression as a means of limiting or censoring that freedom must be resisted’, and the rapporteur recommended that states ‘make civil liability proceedings the sole form of redress for complaints of damage to reputation.’”).

⁵⁸⁵ Consider, for example, the failed attempt by this author in 2003 to persuade the Kansas Senate to repeal the Kansas criminal defamation statute. Despite what might have been a persuasive argument that the law “is an archaic statute whose use smacks of the tactics of repressive nations,” the Senate rejected the repeal effort by a wide margin, in part favoring the assertion that “without the threat of criminal prosecution, people with few assets could say whatever they wanted about someone else knowing it was unlikely they would be sued for damages.” See *Kansas Senate won’t budge on criminal-defamation law*, The Associated Press (Feb. 19, 2003) (wire report), available at <http://www.firstamendmentcenter.org/kansas-senate-wont-budge-on-criminal-defamation-law>.

⁵⁸⁶ *Garrison*, 379 U.S. at 69.

⁵⁸⁷ *Id.* at 70 (quoting Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44.).

⁵⁸⁸ *Id.* at 69 (quoting first name Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 924 (1963)) (footnote omitted).

Even before *Garrison*, the use of criminal prosecution as a remedy for defamation was in decline.⁵⁸⁹ Yet, *Garrison* left open the door for criminal prosecution of false and defamatory statements provided exacting constitutional requirements are satisfied, and such prosecutions do continue to occur both in the context of defaming private individuals⁵⁹⁰ and defaming public officials when actual malice is proven.⁵⁹¹

Since *Garrison*, however, lower courts have further questioned whether criminal prosecution is constitutionally appropriate at all as a remedy for the harm caused by false and defamatory statements.⁵⁹² While it has generally been asserted that the constitutional requirements governing civil liability and criminal liability for false defamations have converged, the absence for half a century of Supreme Court cases addressing criminal defamation prosecutions renders that conclusion speculative.⁵⁹³ Because of the significant liberty interests implicated by criminal prosecution, it has been suggested that proof of actual malice may be constitutionally required in *all* criminal defamation prosecutions, even those involving private defamations, because:

[w]hile it might be appropriate to subject the defamer of a private person to civil liability in the absence of actual malice, it is quite another matter to subject that

⁵⁸⁹ See, e.g., Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984 (1956) (A comprehensive study of criminal defamation prosecutions in the United States between 1920 and 1955 finding 58 cases from 1920-29, 34 cases from 1930 through 1941, and only 18 from 1942 through 1955).

⁵⁹⁰ See, e.g., *Heinrich*, 470 N.E.2d 966; *Ryan*, 806 P.2d 935.

⁵⁹¹ See, e.g., *State v. Carson*, 95 P.3d 1042, 2004 WL 1878312 (Kan. Ct. App. 2004) (unreported opinion) (sustaining the criminal defamation conviction of a newspaper publisher who published the defamatory falsehood that the mayor of Kansas City and her husband, a state judge, in fact resided outside Wyandotte County in violation of law).

⁵⁹² See, e.g., *Powell*, 839 P.2d at 143 (“One message of *Garrison* is that criminal libel laws serve very little, if any, purpose.”); see also *Gottschalk*, 575 P.2d at 292 (“[O]ne final word should be said about the nature of the offense of criminal defamation. Although one of its reasons for being was to prevent statements having a tendency to excite a violent response, that tendency is not generally regarded as an element of the offense. It has become clear that the real interest being protected by criminal defamation statutes is personal reputation. Whether that purpose justifies use of the criminal law has been questioned.” (footnote omitted)).

⁵⁹³ The possibility that post-*Sullivan* developments in the constitutional requirements governing civil liability for false and defamatory statements may not apply in the criminal context was acknowledged by the New Mexico Court of Appeals in *Powell*, 839 P.2d at 143 (“[W]e have no explicit instructions from the Supreme Court regarding the extent of any constitutional privilege against criminal prosecution for defamatory statements involving matters of public concern when the defamed person is neither a public official nor a public figure.”).

same defamer to a conviction for criminal libel in the absence of any proof whatever that the statement was false or that the person making the statement either knew it to be false or, at a minimum, acted with reckless disregard of its truth or falsity.⁵⁹⁴

The dissent in *Ryan* argued that the government should be constitutionally required to prove actual malice in all criminal defamation prosecutions regardless of whether the victim is a public official or figure or a private figure and regardless of whether the speech is on a matter of public concern or merely related to private issues⁵⁹⁵ in order to avoid the constitutionally impermissible risk that fear of criminal prosecution will chill protected speech.⁵⁹⁶

Thus, in modern practice, it is doubtful that *any* criminal prosecution for defamation would avoid scrutiny within the First Amendment, at least in the absence of the government proving actual malice. It seems plausible to conclude that the modern excluded category of defamation may be invoked only with respect to civil liability. In the realm of civil libel, it is highly likely all that remains of the excluded category is defamations uttered with actual malice; in the realm of criminal libel, that limitation on the excluded category is certain. The next Subpart will evaluate those tentative conclusions more thoroughly.

⁵⁹⁴ *Ryan*, 806 P.2d at 942 (Quinn, J., dissenting) (citation omitted).

⁵⁹⁵ *Id.* at 941-44.

⁵⁹⁶ *Id.* at 942 (“A construction of statutory criminal libel that does not incorporate as essential elements of that crime the falsity of the statement and knowledge of its falsity, or at a minimum reckless disregard of truth or falsity, will inexorably induce silence as an alternative to avoiding entrapment in the amorphous and uncertain zone of criminality created by the statute.”).

Subpart III: Does any excluded category for defamation remain?

The notion that *New York Times v. Sullivan* was a “new constitutional development”⁵⁹⁷ in the First Amendment law of defamation, including the Doctrine of Categorical Exclusion, is without question a substantial understatement. Indeed, in the post-*Sullivan* era, it is reasonable to wonder: Does *anything* remain of the tradition rule that libel is a category of speech excluded from the protection of the First Amendment? Or is it the case that *all* defamation cases now turn on analysis of the tertiary question—*how* the Speech Clause applies—and the implicit answer to the threshold question whether the Speech Clause applies *at all* is always “Yes”?

The Supreme Court itself has been less than clear about the answer to that question. For example, in *Sullivan*, the majority wrote:

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.*⁵⁹⁸

The emphasized part of that passage, taken alone, would suggest that *Sullivan* ended the consideration of libel or defamation as an excluded category. But the entirety of the passage leaves the matter muddled: If libel is “like” the other stated categories of speech and thus “must be measured by standards that satisfy the First Amendment,” does that mean that the *other* stated categories also are *not* excluded? Surely this passage in *Sullivan*, without more, was not intended as a declaration that obscenity, for example, or advocacy of unlawful acts are no longer excluded categories.⁵⁹⁹

⁵⁹⁷ *Curtis Publishing*, 388 U.S. at 148.

⁵⁹⁸ *Sullivan*, 376 U.S. at 269 (emphasis added) (footnotes omitted).

⁵⁹⁹ Perhaps a preferred reading of the above passage would lead to the conclusion that defamation, “like” obscenity and incitement, has been substantially narrowed by the Supreme Court in the decades since *Chaplinsky* but that something does indeed remain of the traditionally excluded category.

Moreover, only eight months after deciding *Sullivan*, and before the end of 1964, the Supreme Court decided *Garrison* in which it stated that:

the use of calculated falsehood . . . falls into that class of utterances which ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’ Hence the knowingly false statement and the false statement made with reckless disregard of the truth, *do not enjoy constitutional protection*.⁶⁰⁰

So the mixed signals were apparent from the dawn of the *Sullivan* era. On the one hand, the Supreme Court seemed to suggest the traditional excluded category of defamatory speech unprotected by the First Amendment no longer existed; on the other hand, it seemed to suggest that the excluded category was narrowed but not abandoned.

In light of that seeming contradiction within *Sullivan* itself, as well as that between *Sullivan* and *Garrison*, what is the implication of *Sullivan* and its progeny on the Doctrine of Categorical Exclusion as it relates to defamatory speech?

It is apparent that the *historic* excluded category of defamation is broader than whatever remains today because the Supreme Court’s “decisions since the 1960’s have narrowed the scope of the traditional categorical exception[] for defamation.”⁶⁰¹ To that end, it is clear that, at a minimum, defamatory statements about the official or public acts of public officials or public figures now enjoy First Amendment protection and are no longer excluded unless uttered with “actual malice.”⁶⁰² Justice Brennan employed a double negative in concluding that the *Gertz* majority had further narrowed any remaining unprotected category for defamation: “The Court does not hold that First Amendment guarantees do not extend to speech concerning private

⁶⁰⁰ *Garrison*, 379 U.S. at 75 (emphasis added) (citation omitted) (quoting *Chaplinsky*, 315 U.S. at 572).

⁶⁰¹ *R.A.V.*, 505 U.S. at 383.

⁶⁰² *Sullivan*, 376 U.S. 254; *Curtis Publishing*, 388 U.S. 130.

persons' involvement in events of public or general interest."⁶⁰³ It may well be, as the holding in *Dun & Bradstreet* suggests, that some types of private statements about matters of private concern involving private persons—specifically, those uttered at least negligently—remain a category of defamatory statements excluded from First Amendment protection. The concept would be consistent with the long-recognized view that “different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned.”⁶⁰⁴ However, even as it issued its holding, the *Dun & Bradstreet* plurality included this contradictory passage: “While [defamatory] speech is *not totally unprotected by the First Amendment*, its protections are less stringent.”⁶⁰⁵

It is clear that Justice White, who participated in the *Sullivan-Curtis Publishing-Gertz-Dun & Bradstreet* line of cases, sometimes in dissent, thought the effect of that line of cases was to eliminate defamation as an unprotected category. From the standpoint of plain reason, Justice White's analysis is persuasive. It does, indeed, appear that both the *effect* of the prevailing opinions since *Sullivan*, as well as the *intent* of those opinions as indicated in their language, was to bring defamation and libel within the fold of the First Amendment, thus bringing to an end the traditional excluded category for defamation. That seems particularly true with respect to limiting the government's use of the criminal law to punish defamatory speech as evidenced by the absence of *any* criminal libel cases reaching the Supreme Court since *Garrison* (1964) and *Ashton* (1966).

But if that was what *really* happened—and what really was *intended* to happen—by the *Sullivan* to *Dun & Bradstreet* line of cases, then why has the Supreme Court in subsequent cases persisted in identifying “libel” or “defamation” as an excluded category of speech? It did so in

⁶⁰³ *Gertz*, 418 U.S. at 361 (Brennan, J., dissenting).

⁶⁰⁴ *Garrison*, 379 U.S. at 72 n.8.

⁶⁰⁵ *Dun & Bradstreet*, 472 U.S. at 760 (emphasis added) (citation omitted).

Stevens in 2010, but curiously cited to *Beauharnais*—a pre-*Sullivan*, pre-*Garrison* case—as authority for that proposition.⁶⁰⁶ It did so again in *Alvarez* in 2012, but oddly cited to *Sullivan* and *Gertz* for that proposition.⁶⁰⁷ There would be no reason to continue to include defamation as an unprotected category if, indeed, the effect of *Sullivan* and its progeny were to bring *all* defamatory speech within the protection of the First Amendment. Rather, if that were the effect, the Supreme Court should have simply stopped mentioning defamation in the list of unprotected categories, as it has done with profanity. But that has not been the Supreme Court’s practice. Something different must be afoot.

Thus, the most likely statement of the modern Doctrine of Categorical Exclusion as it applies to defamatory statements is this: Although the Supreme Court has not prohibited criminal defamation laws and such prosecutions do still occur,⁶⁰⁸ it is questionable whether *any* criminal prosecution of defamatory statements would survive Supreme Court review today and it is nearly certain that any such review would be conducted *within* the First Amendment, not without it. Thus, the likelihood—but not the currently expressed state of the law—is that *criminal* proscriptions on defamation no longer fall within the excluded category.

⁶⁰⁶ *Stevens*, 559 U.S. at 468 (citing a pre-*Sullivan* and pre-*Garrison* case to support the proposition that a constitutionally unprotected category for defamatory speech remains).

⁶⁰⁷ *Alvarez*, 132 S. Ct. at 2544. Even more curiously, *Alvarez* characterizes *Sullivan* as “providing substantial protection for speech about public figures” and *Gertz* as “imposing some limits on liability for defaming a private figure.” *Id.* It is peculiar that in support of the assertion that defamation remains an unprotected category, the *Alvarez* Court pointed to two cases that it expressly acknowledged as extending constitutional protection to defamatory statements. It is almost as if *Alvarez* merely included defamation in the historical list of unprotected categories without actual thought or analysis.

⁶⁰⁸ Consider, for example, *State v. Carson*, 95 P.3d 1042, 2004 WL 1878312 (Kan. Ct. App. 2004) (unreported opinion). David Carson and Edward Powers published a newspaper in Wyandotte County, Kansas, called *The New Observer*. The *Observer* published allegations that Carol Marinovich, the mayor/CEO of the Unified Government of Wyandotte County, Kansas City, Kansas, and her husband, Ernest Johnson, a district court judge in Wyandotte County, actually resided outside of the county in violation of law. The District Attorney filed criminal defamation charges against the defendants for those defamatory statements, and they were convicted at jury trial of seven counts of criminal defamation in violation of Kansas law. Defendants appealed on the ground, inter alia, that the Kansas criminal defamation statute was unconstitutional. The Kansas Court of Appeals upheld the constitutionality of the Kansas criminal defamation statute and affirmed the conviction.

The excluded category for *civil* defamation today is far narrower than it was prior to *New York Times v. Sullivan*. Even in cases involving defamatory statements about private persons solely on matters of private concern, the Supreme Court has brought itself only so far as to conclude that in such cases “[t]he role of the Constitution in regulating state libel law is far more limited.”⁶⁰⁹ For example, even within that narrow category, any remedy that goes beyond mere compensation for actual damages—i.e., punitive damages or criminal sanctions—is almost certain to attract scrutiny within the First Amendment, not outside it.

The most likely surviving scope of any modern excluded category of defamation is that of the “calculated falsehood”—defamatory statements that are “knowingly false” or are “made with reckless disregard of the truth.” Even then, courts impose a speech-protective set of tests to keep such an excluded category narrow. To be subject to sanction, the speaker or publisher must be shown to have acted with a high degree of awareness that the statements were probably false and evidence must show that the speaker or publisher actually entertained serious doubts about the truth of the publication.⁶¹⁰ Courts look toward the totality of the factual record in each case to determine whether the “actual malice” standard has been met,⁶¹¹ and of course anything analyzed under the “totality of the circumstances” is effectively being subjected to case-by-case balancing within the Constitution’s framework, not categorically excluded from the protection of the First Amendment.

The precise boundaries of whatever rump category may remain have not been clearly determined, but it is clear that through various narrowing doctrines—such as concern about

⁶⁰⁹ *Dun & Bradstreet*, 472 U.S. at 759-60. See also *Garrison*, 379 U.S. 64, which expressly left open the possibility of drawing a similar distinction between public libels and private libels in the context of the criminal law.

⁶¹⁰ See generally *Liberman v. Gelstein*, 605 N.E.2d 344 (N.Y. 1992).

⁶¹¹ See generally *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657 (1989).

chilling effects,⁶¹² breathing space,⁶¹³ and an aversion to prior restraint in all applications⁶¹⁴—the Supreme Court is inclined to keep any surviving unprotected category narrow indeed while simultaneously refusing to eliminate the intellectual possibility of its use.

In a sense, proscribable defamation is to the modern Supreme Court what the “intractable obscenity problem” used to be: The Supreme Court “know[s] it when [they] see it.”⁶¹⁵ Thus, with defamation as with obscenity, the Supreme Court has been content to have laid down the principles and then for decades allowed the lower courts to apply them without Supreme Court review. From the standpoint of the Doctrine of Categorical Exclusion, the historic category of defamation may be the ultimate example of speech that remains unprotected in principle but rarely if ever in practice. That would explain why Justice Scalia chose defamation as his example to illustrative impermissible viewpoint-based discrimination in *R.A.V.*: “[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.”⁶¹⁶ The result is a Doctrine of Categorical Exclusion, as applied to defamatory falsehoods, that is muddled in its articulation, applied conservatively in the lower courts, and perhaps awaiting the day—likely triggered eventually by some improvident lower court decision—when the Supreme Court must again wade into it to

⁶¹² See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) (“So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.”); see also generally Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV 685 (1978); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV 1473 (2013).

⁶¹³ *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“First Amendment freedoms need breathing space to survive . . .”).

⁶¹⁴ It is well-established that the courts would prefer to review the propriety of post-publication liability for questioned material rather than a prior restraint of the publication itself. See generally *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994); see also *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (avoiding prior restraints is preferred because “[a] criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. . . . A prior restraint, by contrast, . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.”).

⁶¹⁵ *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

⁶¹⁶ *R.A.V.*, 505 U.S. at 384.

answer the ultimate question: In actual practice, does *anything* remain of the excluded category of defamatory speech?

If the Supreme Court were to address that question today, the most likely answer would be this: Only defamatory falsehoods published with “actual malice” —perhaps the alter ego of the “calculated falsehood” that *Garrison* recognized— may remain wholly excluded from the protection of the First Amendment, and even that statement is more likely true if the remedy sought against the speaker is civil rather than criminal in nature. In all other applications, the binary threshold Speech Clause question is bypassed—expressly or implicitly deemed satisfied and the Speech Clause applicable—and the defamatory speech at issue (along with the attempt to punish it) then is analyzed under the open-ended tertiary Speech Clause question—*how* does the Speech Clause apply in the case at hand?

Part D: The insulting or ‘fighting’ words

Of the four categories of unprotected speech articulated by the *Chaplinsky* Court, only one apparently was considered to require definition. In *Chaplinsky*, the Supreme Court simply mentioned “the lewd and obscene,” “the profane,” and “the libelous” as unprotected categories. But for the fourth, the Supreme Court described the category as “the insulting or ‘fighting’ words,” which it proceeded to define as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁶¹⁷ Perhaps the *Chaplinsky* Court considered necessary this additional verbiage explaining the nature, or meaning, of “the insulting or ‘fighting’ words” because that was the category it would apply in the case to affirm Walter Chaplinsky’s conviction for verbally accosting Marshal Bowering. Or perhaps the further explanation and definition was required, in the Supreme Court’s view, because it is difficult to discern from the precedent available in 1942 either the source of the *Chaplinsky* Court’s terminology or its meaning. This Part considers separately the two terms used by the *Chaplinsky* Court in describing this category: “the *insulting* or ‘*fighting*’ words.”

Insulting words: The notion that “insulting” speech is proscribable by the government appears to have no established precedent, and after *Chaplinsky* the Supreme Court never subsequently used it to analyze a government regulation or included it in any articulation of unprotected categories of speech.⁶¹⁸ It appears to have been a one-time anomaly in the jurisprudence inserted into the language of *Chaplinsky* for reasons unknown. Perhaps the term “insulting” was merely intended as a modifier, further explaining what the *Chaplinsky* Court meant when it used the vague term “fighting words.” Walter Chaplinsky’s face-to-face epithets

⁶¹⁷ *Chaplinsky*, 315 U.S. at 572.

⁶¹⁸ There are, of course, references to “insults” being speech that is unwelcome, a fact that *might* have legal significance, but the notion that “insulting” speech is constitutionally unprotected was not directly articulated before *Chaplinsky*. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (“It is not claimed that he intended to *insult* or affront the hearers by playing the record.” (emphasis added)).

uttered to Marshal Bowering certainly were insulting words, but attaching that label to them does nothing to explain why the Constitution permits the government to proscribe their use. The term “insulting words” is best viewed as redundant surplussage that conveys no identifiable independent meaning.

Fighting words: It appears the *Chaplinsky* Court adopted the term ‘fighting words’ solely from the construction of the Supreme Court of New Hampshire in this case which, in upholding Mr. Chaplinsky’s conviction, wrote as follows:

The word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would *be words likely to cause an average addressee to fight*. . . . The English language has a number of words and expressions which by general consent are ‘fighting words’ when said without a disarming smile. . . . Such words, as ordinary men know, are *likely to cause a fight*.⁶¹⁹

The New Hampshire Supreme Court proceeded to construe the statute at issue in *Chaplinsky* as doing:

no more than prohibit[ing] the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including ‘*classical fighting words*’, words in current use less ‘classical’ but equally *likely to cause violence*, and other disorderly words. . . .⁶²⁰

But the New Hampshire court, in use of the term ‘fighting words,’ did not appear to intend that term to describe a separate and distinct category of speech. For example, the New Hampshire court described the term ‘fighting words’ to encompass “other disorderly words, *including* profanity, obscenity and threats.”⁶²¹ Notable from this construction of the New Hampshire court, as compared with the United States Supreme Court’s construction of its categorical doctrine in *Chaplinsky*, are three points:

⁶¹⁹ *Chaplinsky*, 315 U.S. at 573 (emphasis added).

⁶²⁰ *Id.* (emphasis added).

⁶²¹ *Id.*

First, the New Hampshire court apparently considered ‘fighting words’ to be a general description of *why* certain other types of expression were constitutionally proscribable—namely, that their utterance tends to result in unlawful *conduct*, particularly violence. This is apparent in how the New Hampshire court used “fighting words” to encompass “profanity, obscenity and threats.” Thus, for the New Hampshire court, “profanity” may be proscribed *because* it is a “fighting word”; likewise with “obscenity” and likewise with “threats.” But in adopting the terminology, the United States Supreme Court without explanation reconfigured the relationship among the terms such that “profanity” and “obscenity” were positioned as individual categories of unprotected speech separate and distinct from “fighting words.” The Supreme Court, it seems, conflated the description of the reasoning that justifies the category with the description of the category itself.

Second, the New Hampshire court expressly considered “threats” to be a type of unprotected “fighting word.” The *Chaplinsky* Court, however, made no reference to “threats” in its articulation of the categories of unprotected speech. That omission by the *Chaplinsky* Court would explain why “true threats” would later be recognized by the Supreme Court as an unprotected category, as discussed in Chapter 6, Part D, *infra*. Essentially, the Supreme Court later was correcting a mere oversight of the *Chaplinsky* Court when it acknowledged “true threats” as unprotected speech.

Third, the New Hampshire court was focused on the statute’s purpose of prohibiting “conduct lying within the domain of state power,” namely a breach of the peace. In that regard, the New Hampshire court rested its analysis on the historical authority of the government to regulate speech that is integral to criminal conduct, a category of unprotected speech not articulated by *Chaplinsky* but later recognized by the Supreme Court.

In key aspects, therefore, it appears important details were simply lost in translation as the United States Supreme Court considered, interpreted and characterized—or mischaracterized—what the New Hampshire Supreme Court had said in *State v. Chaplinsky*. That mischaracterization reasonably explains why the United States Supreme Court has not invoked the “fighting words” doctrine since *Chaplinsky* itself in order to uphold a government regulation of speech. “Fighting words” have often been *discussed* by the Supreme Court but rarely found to *control* the outcome of a case. For example, in a line of cases involving expressive non-verbal conduct,⁶²² the Supreme Court has repeatedly considered but declined designation of provocative expression as unprotected “fighting words.” After the Supreme Court’s analysis of the “fighting words” doctrine and decision not to apply it to control the cross-burning incident in *R.A.V. v. City of St. Paul*, it is unclear whether the doctrine survives at all as a separate category of speech excluded from First Amendment protection. There remains sufficient interest among at least some Justices that the doctrine of unprotected “fighting words” remains conceptually alive even if not commanding a majority of the Supreme Court to apply it.⁶²³ However, by the time of *Stevens*, the Supreme Court had stopped referring to “fighting

⁶²² Even though these cases involving non-verbal expressive conduct were decided without reliance on categorical analysis, this section will include them to illustrate how the Supreme Court has chosen to avoid use of the fighting words doctrine. *See, e.g.*, *United States v. O’Brien*, 391 U.S. 367 (1968) (draft card burning); *Street v. New York*, 394 U.S. 576 (1969) (flag burning); *Texas v. Johnson*, 491 U.S. 397, (1989) (flag burning); *R.A.V.*, 505 U.S. 377 (cross burning); *Snyder v. Phelps*, 562 U.S. 443 (2011) (funeral protests). These cases are pertinent to the Doctrine of Categorical Exclusion because the Supreme Court *considers* application of the fighting words doctrine to them. *See, e.g., Johnson*, 491 U.S. at 409 (considering but rejecting application of fighting words doctrine to flag burning); *Snyder*, 562 U.S. at 451 n.3 (“[T]here is no suggestion that the speech at issue falls within one of the categorical exclusions . . . such as . . . fighting words.” (internal quotation marks omitted)).

⁶²³ *See, e.g., Snyder*, 131 S. Ct. at 1222-29 (Alito, J., dissenting) (preferring to decide case by applying ‘fighting words’ doctrine to categorically exclude the conduct of Westboro Baptist Church protesters from First Amendment protection).

words” as a separate category of speech excluded from First Amendment protection and instead characterized the pertinent category in *Stevens* only as “incitement,”⁶²⁴ a narrower construction.

To be sure, *that* concept—the narrower notion that words inciting violence may be constitutionally proscribable—existed well before *Chaplinsky*. As discussed in Chapter 1, *supra*, Justice Holmes’ famous declaration that the Constitution would not protect the speech of one who “falsely shout[s] fire in a crowded theater and causes a panic” dates to 1919.⁶²⁵ Only two years before *Chaplinsky*, the Supreme Court had rejected Connecticut’s attempt to prosecute Jehovah’s Witnesses for peacefully and respectfully proselytizing on New Haven city streets precisely because their speech and behavior did not incite others to violence:

Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse.⁶²⁶

Part of that passage was cited by the *Chaplinsky* Court, which clearly was mindful that “incitement” was intimately related to the concept of “fighting words.”

That narrower concept that speech may be proscribable because it incites violence retains favor with the modern Supreme Court. Thus, “incitement” remains an articulated category of unprotected speech. The reasoning behind that categorical exclusion is closely connected with the modern notion that speech integral to criminal conduct may be proscribed.

For the reasons describe above, this section discusses the development of the “fighting words” doctrine since *Chaplinsky* in two parts: First, in Subpart I, it will trace the relatively

⁶²⁴ Characterizing what remains of the fighting words doctrine solely as incitement is underinclusive and fails to account for other speech closely related to fighting words, such as “true threats,” that also is excluded from constitutional protection. See discussion of *Snyder v. Phelps, infra*, at notes 690-698.

⁶²⁵ *Schenck*, 249 U.S. at 52.

⁶²⁶ *Cantwell*, 310 U.S. at 309-10.

broad “fighting words” doctrine through *R.A.V. v. City of St. Paul*, which effectively ended it as a broad category. Second, in Subpart II, it will trace the narrower incarnation of the “fighting words” doctrine post-*R.A.V.*, characterized as “incitement,” which survives to this day.

Subpart I: From *Terminiello* to *R.A.V.*

The existence of “fighting words” as an articulated category of unprotected speech was born with *Chaplinsky*. This Subpart I traces the Supreme Court’s struggle with its potentially broad meaning and application through three cases: *Terminiello*, *Edwards* and *R.A.V.*

***Terminiello v. Chicago* (1949):**⁶²⁷ Father Arthur Terminiello was a controversial priest from Birmingham, Alabama, held in disfavor by the Catholic Church. Against the backdrop of the post-World War II conflict between “Fascists” and “Communists,” he was brought to Chicago by the Christian Veterans of America to deliver a speech against communism. Father Terminiello’s speech was publicized in advance, and the response—both positive and negative—had been strong. On the night of the speech, the Chicago auditorium was filled to capacity with more than 800 people crowding inside to hear Father Terminiello’s remarks. Entering the auditorium, Father Terminiello had to pass through the large and unruly crowd that had gathered outside, mostly to protest against him.⁶²⁸ The Supreme Court described the 1,500 person crowd’s conduct outside the auditorium:

Picket lines obstructed and interfered with access to the building. The crowd constituted ‘a surging, howling mob hurling epithets at those who would enter and tried to tear their clothes off.’ One young woman’s coat was torn off and she had to be assisted into the meeting by policemen. Those inside the hall could hear the loud noises and hear those on the outside yell, ‘Fascists, Hitlers!’ and curse words like ‘damn Fascists.’ Bricks were thrown through the windowpanes before and during the speaking. About 28 windows were broken. The street was black with people on both sides for at least a block either way; bottles, stink bombs and brickbats were thrown. Police were unable to control the mob, which kept

⁶²⁷ 337 U.S. 1.

⁶²⁸ *Id.* at 2-3, 14-16.

breaking the windows at the meeting hall, drowning out the speaker's voice at times and breaking in through the back door of the auditorium. About 17 of the group outside were arrested by the police.⁶²⁹

Aware of the size and nature of the mob outside, and the mixed views of the crowd inside, Father Terminiello delivered a lengthy, anti-semitic speech, including comments directed to the gathered mob:

You know I have always made a study of the psychology, sociology of mob reaction. It is exemplified out there. . . .

. . . We will not be tolerant of that mob out there. We are not going to be tolerant any longer.

We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and dare them to smear us.

So, my friends, since we spent much time tonight trying to quiet the howling mob, I am going to bring my thoughts to a conclusion, and the conclusion is this. We must all be like the Apostles before the coming of the Holy Ghost. We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionist Jews, and those are not American Jews. We don't want them here; we want them to go back where they came from.⁶³⁰

The effect of Father Terminiello's speech on the crowd, both inside and outside, was described by the Supreme Court:

Evidence showed that it stirred the audience not only to cheer and applaud but to expressions of immediate anger, unrest and alarm. One called the speaker a 'God damned liar' and was taken out by the police. Another said that 'Jews, niggers and Catholics would have to be gotten rid of.' One response was, 'Yes, the Jews are all killers, murderers. If we don't kill them first, they will kill us.' The anti-Jewish stories elicited exclamations of 'Oh!' and 'Isn't that terrible!' and shouts of 'Yes, send the Jews back to Russia,' 'Kill the Jews,' 'Dirty kikes,' and much more of ugly tenor. This is the specific and concrete kind of anger, unrest and alarm, coupled with that of the mob outside, that the trial court charged the jury might find to be a breach of peace induced by Terminiello.⁶³¹

⁶²⁹ *Id.* at 17 (Jackson, J., dissenting).

⁶³⁰ *Id.* at 21.

⁶³¹ *Id.* at 22.

After the crowd became “angry and turbulent,”⁶³² Father Terminiello was charged with violating a city ordinance that prohibited breach of the peace.⁶³³ He was tried and convicted in municipal court. His conviction was affirmed by the Illinois appellate court and the Illinois Supreme Court. The United States Supreme Court granted certiorari.⁶³⁴

The Supreme Court overturned Father Terminiello’s conviction. Although the lower courts had concluded that the provocative speech constituted unprotected “fighting words”⁶³⁵ within the meaning of *Chaplinsky*, the *Terminiello* majority expressly declined to reach that question of whether the speech was “outside the scope of the constitutional guarantees.”⁶³⁶ Thus, in this early post-*Chaplinsky* case, the Supreme Court began what would become a longstanding practice of acknowledging the *existence* of the ‘fighting words’ doctrine but then finding reason to conclude it did not apply to the case before the Court.

In this case, the Supreme Court overturned the conviction on First Amendment grounds, but did so by applying general, somewhat amorphous First Amendment principles. The *Terminiello* majority included this passage, which is oft cited:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for

⁶³² *Id.* at 3 (majority opinion).

⁶³³ *Id.* at 2. The Chicago city code at the time stated: “All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense.” *Id.* at 2 n.1 (quoting § 1(1), ch. 193, Rev. Code 1989, City of Chicago).

⁶³⁴ *Id.* at 3.

⁶³⁵ *Id.* at 6 (“But it is said that throughout the appellate proceedings the Illinois courts assumed that the only conduct punishable and punished under the ordinance was conduct constituting ‘fighting words.’”).

⁶³⁶ *Id.* at 3.

a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.⁶³⁷

The *Terminiello* dissent saw matters differently. Justice Robert H. Jackson would have upheld the conviction as punishing only proscribable “fighting words:”

A trial court and jury has found only that in the context of violence and disorder in which it was made, this speech was a provocation to immediate breach of the peace and therefore cannot claim constitutional immunity from punishment. Under the Constitution as it has been understood and applied, at least until most recently, the State was within its powers in taking this action.⁶³⁸

The proscribable nature of Father Terminiello’s speech, in Justice Jackson’s view, arose from its tendency to incite violence:

Rioting is a substantive evil, which I take it no one will deny that the State and the City have a right and a duty to prevent and punish. Where an offense is induced by speech, the Court has laid down and often reiterated a test of the power of the authorities to deal with the speaking as also an offense. . . . In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate. If this Court has not silently abandoned this long standing test and substituted for the purposes of this case an unexpressed but more stringent test, the action of the State would have to be sustained.⁶³⁹

But Justice Jackson was in the minority. The Supreme Court found no “fighting words” present in the virulent speech delivered by Father Terminiello. It is difficult to harmonize the *Chaplinsky* Court’s conclusion that Walter Chaplinsky’s brief calling of Marshal Bowering a “God damned Fascist” constituted unprotected fighting words while Arthur Terminiello’s long-winded diatribe clearly designed, in part, to whip a large and unruly crowd into a frenzy, and observed to result in violence, did not. *Terminiello*, therefore, was an early signal that the Supreme Court was reluctant to apply its newly articulated “fighting words” doctrine to control the outcome of cases before it.

⁶³⁷ *Id.* at 4-5 (citations omitted).

⁶³⁸ *Id.* at 25 (Jackson, J., dissenting).

⁶³⁹ *Id.* at 25-26.

That same reluctance will be apparent in the next case, which presents the question whether “fighting words” might be present when civil rights protesters gather on a South Carolina sidewalk.

Edwards v. South Carolina (1963).⁶⁴⁰ After declining to uphold Arthur Terminiello’s conviction as unprotected “fighting words,” the Supreme Court’s approach to peaceful protests in *Edwards v. South Carolina* was unsurprising. The case is mentioned here only briefly to confirm the Supreme Court’s approach.

In 1961, a group of African American high school and college students gathered at the South Carolina state Capitol and walked peacefully and respectfully about the grounds to demonstrate their opposition to state laws that disadvantaged African Americans. After being asked by police to leave the area, they declined and instead continued to peacefully demonstrate, at that point breaking into song including the Star Spangled Banner. At that point, many were arrested and a total of 187 of the protesters were charged and convicted in a magistrate’s court of the common law crime of breach of the peace. The South Carolina Supreme Court upheld the convictions, and the United States Supreme Court granted certiorari.⁶⁴¹

The Supreme Court concluded that the arrest and conviction of these protesters violated their First and Fourteenth Amendment rights, including the right to free speech.⁶⁴² As the *Edwards* Court noted, “The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form.”⁶⁴³

⁶⁴⁰ 372 U.S. 229.

⁶⁴¹ *Id.* at 229-30.

⁶⁴² *Id.* at 235 (“[I]t is clear to us that in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners’ constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances.”).

⁶⁴³ *Id.*

The *Edwards* Court drew upon the *Terminiello* majority’s general language regarding the First Amendment but made no reference to “fighting words.” In this case, the protesters “were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.”⁶⁴⁴ Noting that the state may not “make criminal the peaceful expression of unpopular views,” the *Edwards* Court noted that “the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech ‘stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those counts may not stand.’”⁶⁴⁵

Significantly, the *Edwards* dissent concluded that government regulation was justified because the protesters’ actions threatened to cause violence. The dissent hearkened back to *Cantwell v. Connecticut*’s⁶⁴⁶ formulation that “[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.”⁶⁴⁷ The dissent would have upheld the convictions based on evidence that hundreds of demonstrators “were being aroused to a ‘fever pitch’ before a crowd of some 300 people who undoubtedly were hostile”⁶⁴⁸ and that the demonstrations “tended directly to immediate violence.”⁶⁴⁹

The significance of *Edwards* is what it did *not* include. Although the case turned on whether the speech in question could be proscribed because it tended to incite violence—with the majority concluding *Edwards* involved no speech of that sort, and the dissent concluding it did—

⁶⁴⁴ *Id.* at 237.

⁶⁴⁵ *Id.* at 237-38 (quoting *Terminiello*, 337 U.S. at 5).

⁶⁴⁶ 310 U.S. 296 (1940).

⁶⁴⁷ *Id.* at 243 (Clark, J., dissenting) (quoting *Cantwell*, 31 U.S. at 308).

⁶⁴⁸ *Id.* at 244.

⁶⁴⁹ *Id.*

neither the majority nor the dissent invoked the “fighting words” doctrine. Indeed, the dissent reaches back to pre-*Chaplinsky* days, drawing its analytical framework from *Cantwell*, a pre-“fighting words” case.

By 1961, therefore, it appears that the “fighting words” doctrine as formulated in *Chaplinsky* had faded from use. Thirty years later, in reviewing a conviction for burning a cross in Minnesota, the Supreme Court would squarely address the continued validity of “fighting words” as a broad, categorical exclusion of speech from First Amendment protection.

R.A.V. v. City of St. Paul (1992):⁶⁵⁰ A juvenile, identified only by the initials “R.A.V.,” participated in the burning of a makeshift cross on the lawn of an African American family in St. Paul, Minnesota. The juvenile was prosecuted under a city ordinance forbidding bias-motivated crimes.⁶⁵¹ The trial court granted R.A.V.’s motion to dismiss because the ordinance was unconstitutional, but the Minnesota Supreme Court reversed, upheld the ordinance, and reinstated the prosecution on the basis that the ordinance did nothing more than regulate “fighting words” that were unprotected by the First Amendment. The United States Supreme Court granted certiorari.⁶⁵²

The Supreme Court found the ordinance to violate the First Amendment and, in so doing, cast serious doubt upon the continued viability of “fighting words” as a category of unprotected speech. Even accepting the Minnesota Supreme Court’s conclusion that the ordinance regulated only “fighting words,”⁶⁵³ the *R.A.V.* majority nonetheless subjected the ordinance to First

⁶⁵⁰ 505 U.S. 377.

⁶⁵¹ *R.A.V.*, 505 U.S. at 380. The St. Paul ordinance read, in pertinent part: “Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.” *Id.* (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)).

⁶⁵² *Id.* at 380-81.

⁶⁵³ *Id.* at 381 (“[W]e accept the Minnesota Supreme Court’s authoritative statement that the ordinance reaches only those expressions that constitute ‘fighting words’ within the meaning of *Chaplinsky*. . . . Assuming, *arguendo*, that

Amendment analysis as a content-based restriction on speech. Even while reaffirming that “a limited categorical approach has remained an important part of our First Amendment jurisprudence,”⁶⁵⁴ the *R.A.V.* Court imposed the new requirement that even within the universe of fighting words “[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”⁶⁵⁵ In other words, in the *R.A.V.* majority’s view, the government may proscribe *all* fighting words but it may not proscribe only *some* fighting words that it disfavors. It is truly difficult to grasp how this approach is at all related to categorical exclusion doctrine except in name. Indeed, four dissenting Justices described the majority’s reproach as a “rejection of the Court’s categorical analysis.”⁶⁵⁶

The difference between the *R.A.V.* majority’s description of the “fighting words” doctrine and the dissent’s description is striking. For the majority:

We have sometimes said that these categories of expression are not within the area of constitutionally protected speech or that the protection of the First Amendment does not extend to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity as not being speech at all. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.⁶⁵⁷

all of the expression reached by the ordinance is proscribable under the ‘fighting words’ doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”).

⁶⁵⁴ *Id.* at 383.

⁶⁵⁵ *Id.* at 386.

⁶⁵⁶ *Id.* at 406 (White, J., concurring in the judgment).

⁶⁵⁷ *Id.* at 383-84 (majority opinion) (citations and internal quotations marks omitted); *see also* Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 875 (2005) (“The [*R.A.V.*] Court’s conclusion is illogical if the Court continues to make the assumption, which it purports to make, that free speech value reliably can be deemed absent or overwhelmingly outweighed in the realm of unprotected speech. The Court’s conclusion makes sense, however, if one begins with the premise that unprotected speech categories are a necessary evil—that they are important and valid tools of free speech doctrine, but that there are reasons not fully to trust the judgments that they embody. From this perspective, one can proceed reasonably to the conclusion that the use of categorization must be contained and that content-distinction principles have some role to play in the realm of unprotected speech.”).

The *R.A.V.* majority sought to characterize “fighting words” as describing only the mode of delivering a message, not the content of the message itself:

In other words, the exclusion of ‘fighting words’ from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a ‘nonspeech’ element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a ‘mode of speech; . . . both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.⁶⁵⁸

By contrast, for the *R.A.V.* dissent:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.⁶⁵⁹

The dissent proceeded to re-assert the traditional concept of the categorical approach to analysis of speech restrictions: “A prohibition on fighting words is not a time, place, or manner restriction; it is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence.”⁶⁶⁰

The essential difference is this: The dissent viewed speech categorically excluded from the First Amendment as unprotected from government regulation; the majority viewed regulation of speech categorically excluded as subject to further judicial review. In other words, the dissent answered the binary threshold question in the Speech Clause analysis “no” (the First Amendment does not protect this speech), while the majority answered the threshold question “yes” and thus

⁶⁵⁸ *R.A.V.*, 505 U.S. at 386.

⁶⁵⁹ *Id.* at 401 (White, J., concurring in the judgment) (citation omitted). The concurring Justices also would have struck down the ordinance but would have done so on the established basis that it is overbroad, not on the new basis articulated by the majority.

⁶⁶⁰ *Id.* at 408-09.

proceeded to the variable, tertiary question (*how* does the First Amendment apply to this speech?)

The majority's new approach is inconsistent with the Supreme Court's stated basis for categorical exclusion, namely that excluded speech has deep historical roots that put it outside the Constitution's protection. That fundamental rationale for categorical exclusion cannot coexist with the *R.A.V.* approach; speech cannot be both historically unprotected by the Constitution and also subject to judicial protection, in this case the application of strict scrutiny based on content-based discrimination.

Overall, *R.A.V.* stands as a substantial departure from the traditional manner of applying the Doctrine of Categorical Exclusion and leaves uncertain whether "fighting words" remain a viable category within the framework of speech categorically excluded from First Amendment protection. The fact that subsequent cases, such as *Stevens*, articulating the various categories of unprotected speech tend to omit "fighting words" is a potent indication that it is no longer a viable, stand-alone category.⁶⁶¹

After *R.A.V.*, a more precise way of characterizing the concept that underlies the categorical exclusion of "fighting words" from constitutional protection is the narrower notion that only "incitement" is unprotected. Therefore, attention must be given to the incitement cases.

⁶⁶¹ But see Justice Alito's dissent in *Snyder v. Phelps*—he would have permitted tort liability for the Westboro picketers because their speech constituted unprotected fighting words. 562 U.S. at 472 (Alito, J., dissenting).

Subpart II: Post-R.A.V., the category is narrowed to “incitement”

Since *R.A.V.*, Supreme Court majorities have declined to articulate “fighting words” among the unprotected categories of speech excluded from First Amendment protection. Instead, cases such as *Stevens* and *Alvarez* have referred to the excluded category more narrowly and precisely as “incitement,” not “fighting words.”

As described above, the concept that “incitement”—speech that tends to provoke immediate violence or lawless action—is unprotected by the First Amendment has historical roots deeper than *Chaplinsky*. The concept was famously recognized in *Schenck* and later acknowledged in *Cantwell*. The *Chaplinsky* Court may have injected confusion into the matter by substituting the *effect* of an expression—“fighting words” that provoke a fight—for one of the underlying categories, “incitement.” In any event, the line of cases focused narrowly on government regulation of speech that “incites” to violence or lawless action continued soon after *Chaplinsky*. On the whole, these cases have permitted the government greater regulatory latitude than have the broader “fighting words” cases. To demonstrate, this Subpart will consider a line of three cases: *Feiner*, *Harisiades*, and *Brandenburg*.

Feiner v. New York (1951).⁶⁶² On March 8, 1949, Irving Feiner climbed upon a wooden box on a street corner in Syracuse, New York, to announce to a crowd that the location of a meeting that evening, regarding race relations, was being moved from its planned location to a local hotel. Mr. Feiner used a loudspeaker, and about 75 people, some black and some white, gathered to hear him speak. His comments ranged far and wide, including commentary on contemporary issues and criticism of President Truman, the American Legion, the Mayor of

⁶⁶² 340 U.S. 315.

Syracuse, and others.⁶⁶³ During the roughly 30 minutes he spoke, he included statements such as:

“Mayor Costello (of Syracuse) is a champagne-sipping bum; he does not speak for the negro people.

. . . .

“President Truman is a bum.

“The American Legion is a Nazi Gestapo.

“The negroes don’t have equal rights; they should rise up in arms and fight for their rights.”⁶⁶⁴

As Mr. Feiner continued to speak, some in the crowd became restless. His call for equal rights “stirred up a little excitement.”⁶⁶⁵ The police were summoned, and officers present “heard and saw angry mutterings, pushing, shoving and milling around, and restlessness.”⁶⁶⁶ About 20 minutes into Mr. Feiner’s speech, one man in the crowd said to the police officers, “If you don’t get that son of a bitch off, I will go over and get him off there myself.”⁶⁶⁷

At that point, the police officers intervened, and the *Feiner* Court described the officers’ conduct in some detail:

Because of the feeling that existed in the crowd both for and against the speaker, the officers finally ‘stepped in to prevent it from resulting in a fight.’ One of the officers approached the petitioner [Mr. Feiner], not for the purpose of arresting him, but to get him to break up the crowd. He asked petitioner to get down off the box, but the latter refused to accede to his request and continued talking. The officer waited for a minute and then demanded that he cease talking. Although the officer had thus twice requested petitioner to stop over the course of several minutes, petitioner not only ignored him but continued talking. During all this time, the crowd was pressing closer around the petitioner and the officer. Finally, the officer told petitioner he was under arrest and ordered him to get down from the box, reaching up to grab him. Petitioner stepped, announcing over the

⁶⁶³ *Id.* at 316-17.

⁶⁶⁴ *Id.* at 330 (Douglas, J., dissenting).

⁶⁶⁵ *Id.* at 317 (majority opinion).

⁶⁶⁶ *Id.* at 324 (Black, J., dissenting) (internal quotation marks omitted).

⁶⁶⁷ *Id.* at 330 (Douglas, J., dissenting).

microphone that ‘the law has arrived, and I suppose they will take over now.’ In all, the officer had asked petitioner to get down off the box three times over the space of four or five minutes.⁶⁶⁸

Mr. Feiner was arrested and charged with disorderly conduct. The bill of particulars described his misdemeanor unlawful conduct as follows:

By ignoring and refusing to heed and obey reasonable police orders issued at the time and place mentioned in the Information to regulate and control said crowd and to prevent a breach or breaches of the peace and to prevent injury to pedestrians attempting to use said walk, and being forced into the highway adjacent to the place in question, and prevent injury to the public generally.⁶⁶⁹

Mr. Feiner was convicted at a bench trial. His conviction was affirmed by the County Court and the New York Court of Appeals. The United States Supreme Court granted review.⁶⁷⁰

Rejecting a First Amendment challenge, the Supreme Court affirmed Mr. Feiner’s conviction. Two important points can be gleaned from the brief opinion.

First, the *Feiner* majority rejected the First Amendment challenge because it found Mr. Feiner’s speech to constitute “incitement to riot” that is constitutionally unprotected. The critical passage:

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. A State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the *speaker passes the bounds of argument or persuasion and undertakes incitement to riot*, they are powerless to prevent a breach of the peace.⁶⁷¹

⁶⁶⁸ *Id.* at 317-18.

⁶⁶⁹ *Id.* at 318-19.

⁶⁷⁰ *Id.* at 316.

⁶⁷¹ *Id.* at 320-21 (emphasis added) (citation and internal quotation marks omitted).

The findings of “the imminence of greater disorder coupled with petitioner’s deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.”⁶⁷²

Second, although *Feiner* was decided nine years after *Chaplinsky*, it drew heavily upon the incitement teaching of *Cantwell* and not upon the fighting words teaching of *Chaplinsky*. The *Feiner* majority and both dissents all cited to and quoted from *Cantwell* in support of their conclusions. The only mention of *Chaplinsky* is in Justice Douglas’s dissent, in which he distinguishes it: “A speaker may not, of course, incite a riot any more than he may incite a breach of the peace by the use of ‘fighting words.’ See *Chaplinsky v. New Hampshire*. But this record shows no such extremes.”⁶⁷³

Thus, within the first decade after *Chaplinsky*, a pair of cases decided only two years apart provide a sharp contrast. On the one hand, in deciding *Terminiello* in 1949, the Supreme Court was unwilling to invoke the “fighting words” doctrine to permit the government to punish Father Terminiello’s speech that agitated a crowd of thousands to break windows and otherwise actually engage in violence. On the other hand, in deciding *Feiner* only two years later, the Supreme Court allowed the punishment of a speech to 75 people that was, at most, mildly agitating to some of them and did so because Mr. Feiner’s speech constituted “incitement to riot.”

It was clear that “incitement” was a doctrine that found a more favorable welcome on the post-*Chaplinsky* Supreme Court than did “fighting words.” That would remain true the year after *Feiner* was decided, when the Supreme Court confronted a case involving aliens alleged to be affiliated with the Communist Party.

⁶⁷² *Id.* at 321.

⁶⁷³ *Id.* at 331 (Douglas, J., dissenting) (citation omitted).

Harisiades v. Shaughnessy (1952):⁶⁷⁴ One year after allowing the State of New York to punish Mr. Feiner’s street-corner speech because of its tendency to incite a riot, the Supreme Court held that the First Amendment does not bar deportation of resident aliens who advocate for the violent adoption of Communism. The United States sought to deport three aliens—Mr. Harisiades, from Greece; Mr. Mascetti, of Italy; and Mrs Coleman, of Russia—all of whom had at one time been members of the Communist Party. “The ultimate question in these three cases is whether the United States constitutionally may deport a legally resident alien because of membership in the Communist Party which terminated before enactment of the Alien Registration Act, 1940.”⁶⁷⁵ Most of this consolidated case revolves around matters unrelated to freedom of speech, but the First Amendment argument briefly considered by the Supreme Court is relevant here.

The Supreme Court rejected First Amendment protection and allowed the deportations to proceed. “The [First Amendment] claim is that in joining an organization advocating overthrow of government by force and violence the alien has merely exercised freedoms of speech, press and assembly which that Amendment guarantees to him. . . . We think the First Amendment does not prevent the deportation of these aliens.”⁶⁷⁶ In briefly analyzing the First Amendment claim, the Supreme Court offered a clear distinction between speech that constitutes “incitement to violence,” which is constitutionally unprotected, and that which merely “is advocacy of political methods,” which is shielded by the First Amendment:

The assumption [by Mr. Harisiades] is that the First Amendment allows Congress to make no distinction between advocating change in the existing order by lawful elective processes and advocating change by force and violence, that freedom for

⁶⁷⁴ 342 U.S. 580.

⁶⁷⁵ *Id.* at 581.

⁶⁷⁶ *Id.* at 591-92.

the one includes freedom for the other, and that when teaching of violence is denied so is freedom of speech.⁶⁷⁷

The *Harisiades* Court rejected the notion that that Constitution forbids the government from distinguishing between protected advocacy of change and unprotected incitement to violence:

Our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative—attack by ballot. To arm all men for orderly change, the Constitution put in their hands a right to influence the electorate by press, speech and assembly. This means freedom to advocate or promote Communism by means of the ballot box, but *it does not include the practice or incitement of violence.*⁶⁷⁸

In rejecting Mr. Harisiades’ First Amendment claim, the Supreme Court then made clear that “advocacy” is constitutionally different from “incitement”:

True, it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence. . . . We apprehend that the Constitution enjoins upon us the duty, however difficult, of distinguishing between the two.⁶⁷⁹

Thus, by 1952—ten years after deciding *Chaplinsky*—the Supreme Court had *twice* upheld government proscriptions on speech as constitutionally permissible because the speech constituted “incitement.” In both cases, it did so with little or no reference to *Chaplinsky*’s “fighting words”—*Harisiades* never cites *Chaplinsky*, and *Feiner* did so only when the dissent sought to distinguish it. While “fighting words” doctrine foundered out of the gate, “incitement” doctrine was alive and well.

But any categorical exclusion from constitutional protection for speech that incites violence is narrow.⁶⁸⁰ The *Harisiades* Court left open the question of just how narrow:

⁶⁷⁷ *Id.* at 592.

⁶⁷⁸ *Id.* (footnote omitted) (emphasis added).

⁶⁷⁹ *Id.*

⁶⁸⁰ This dissertation has chosen *Harisiades* as the case to most clearly illustrate the effect of anti-Communism on speech regulation during the pre-*Brandenburg* era because of its succinct description of the First Amendment issues. However, other cases of the era are more oft-cited. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951) (upholding against First Amendment challenge prosecution of conspiracy to organize the Communist Party of the United States and to overthrow government of the United States); *Yates v. United States*, 354 U.S. 298 (1957)

Communist Governments avoid the inquiry [into where protected advocacy ends and unprotected incitement to violence begins] by suppressing everything distasteful. Some would have us avoid the difficulty by going to the opposite extreme of permitting incitement to violent overthrow *at least unless it seems certain to succeed immediately*.⁶⁸¹

Seventeen years after concluding that Mr. Harisiades' support for violent overthrow of the government constituted unprotected "incitement to violence," the Supreme Court did indeed limit the "incitement" doctrine to those situations involving "imminent lawless action." The case involved another emotional topic—a Ku Klux Klan rally in Ohio.

Brandenburg v. Ohio (1969):⁶⁸² Clarence Brandenburg was a member of the Ku Klux Klan in Ohio and a publicity hound. He invited a television news crew to attend a Klan rally on an Ohio farm, and the crew filmed the proceedings including various statements by Mr. Brandenburg and others related to organizing for the advancement of their unsavory political and cultural views.⁶⁸³ Based on those films, the State of Ohio brought a criminal prosecution against Mr. Brandenburg alleging violations of the Ohio Criminal Syndicalism Act.⁶⁸⁴ Ohio rested its prosecution, in part, on the fact that a similar Criminal Syndicalism Act in California had been upheld decades earlier by the United States Supreme Court in *Whitney v. California*.⁶⁸⁵ Mr.

(limiting application of statute upheld in *Dennis*), overruled on other grounds by *Burks v. United States*, 437 U.S. 1 (1978).

⁶⁸¹ *Harisiades*, 342 U.S. at 592 (emphasis added).

⁶⁸² 395 U.S. 444.

⁶⁸³ *Id.* at 446 The full text of the filmed speech, which was uttered by Mr. Brandenburg while wearing Klan regalia, stated: "This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you." *Id.*

⁶⁸⁴ *Id.* at 444-45 The Ohio Criminal Syndicalism Act prohibited, in pertinent part, "advocat(ing) . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and also barred "voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines off criminal syndicalism." *Id.* (quoting Ohio Rev. Code Ann. § 2923.13).

⁶⁸⁵ 274 U.S. 357 (1927), overruled in part by *Brandenburg*, 395 U.S. 444.

Brandenburg was convicted, and his conviction was upheld on appeal by the Ohio appellate court and the Supreme Court of Ohio.⁶⁸⁶ The United States Supreme Court granted certiorari.

In a landmark decision, the Supreme Court reversed Mr. Brandenburg's conviction and struck down the Ohio Criminal Syndicalism Act as an unconstitutional infringement on the right of free speech and of assembly. The *Brandenburg* Court expressly overruled *Whitney v. California*.⁶⁸⁷ In doing so, the court noted the substantial evolution in the law of the First Amendment in the 40 years since *Whitney* was decided and concluded that the general teaching of the Supreme Court's First Amendment jurisprudence in those four decades was that speech such as Mr. Brandenburg's was protected.

The *Brandenburg* Court then articulated the controlling test for determining whether speech constituting "incitement" may be proscribed without running afoul of the First Amendment:

These later decisions [since *Whitney*] have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless action* and is likely to incite or produce such action. . . . [T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from government control.⁶⁸⁸

The main proposition of *Brandenburg* is the critical constitutional distinction between protected speech that merely advocates for violence or lawlessness and unprotected speech that is intended

⁶⁸⁶ *Brandenburg*, 395 U.S. at 445.

⁶⁸⁷ *Id.* at 449 ("[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California, supra*, cannot be supported, and that decision is therefore overruled." (footnote omitted)).

⁶⁸⁸ *Id.* at 447-48 (emphasis added) (citations, internal quotation marks and footnote omitted).

to incite or produce “imminent lawless action.”⁶⁸⁹ As the passage above shows, to fall within the narrow category of unprotected incitement of violence or lawlessness, speech must be shown to satisfy a two-part test: (1) It must be *intended* to incite imminent lawless action, and (2) it must be likely to *actually result* in such imminent lawless action.

Thus, *Brandenburg* represents a significant narrowing of the unprotected category of speech constituting “incitement” to violence or, more particularly, to “imminent lawless action.” The *Brandenburg* test remains the law today, and when cases such as *Stevens* or *Alvarez* state that “incitement” is categorically unprotected, what they are referencing is speech that meets the test of *Brandenburg*.

* * *

In modern jurisprudence, the Supreme Court seems largely to have excised “fighting words” from the list of unprotected categories of speech and instead substituted the narrower term “incitement,” by which it means speech that is intended to produce “imminent lawless action” *and* that is likely to actually result in such action. The notion that “incitement” is historically unprotected speech has deep roots reaching earlier than *Chaplinsky* to cases such as *Cantwell* and *Schenck*. Given that “incitement” both predates and follows *Chaplinsky* as a judicially recognized category of unprotected speech that has been relied upon to sustain government regulation, and that in contrast the only case that has actually upheld a government regulation as being unprotected “fighting words” is *Chaplinsky* itself, a sound argument can be

⁶⁸⁹ *Id.* at 448. Consider this excerpt, which is the key to the *Brandenburg* holding: “[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.” *Id.* (citations and internal quotation marks omitted).

made that *Chaplinsky* simply got it wrong. The better description of the unprotected category long has been, and remains, “incitement,” not “fighting words.”

But, of course, there is the exception that proves the rule. Even as the Supreme Court, on the whole, had quietly abandoned the terminology “fighting words” in favor of “incitement,” one justice has argued recently that the “fighting words” doctrine should be considered alive and well and should be invoked.⁶⁹⁰ This Chapter 4 will close, therefore, with a description of that valiant but failed effort by Justice Alito in a 2011 case arising from the actions of a Topeka, Kansas, church that pickets military funerals.

Snyder v. Phelps (2011):⁶⁹¹ Albert Snyder is the father of Marine Corps Cpl. Matthew Snyder, who was killed while serving in Iraq. During the funeral of Matthew Snyder, members of the Topeka-based Westboro Baptist Church, led by the Phelps family, engaged in pre-arranged, peaceful protests on public land about 200 feet from the funeral procession in accordance with all requirements of local authorities. The signs they held contained deeply offensive assertions about the state of American morality, objections to homosexuality, and at least a few references that clearly were directed at Mr. Snyder. Albert Snyder filed a tort action against members of the church claiming, *inter alia*, intentional infliction of emotional distress. The United States District Court for the District of Maryland, where the funeral was held, awarded a multi-million dollar judgment to Mr. Snyder. The Phelps appealed, and the U.S. Court of Appeals for the Fourth Circuit reversed upon holding that the Phelps’ speech in this

⁶⁹⁰ Justice Alito’s categorical approach also ran counter to prevailing academic analysis of the cases, both before and after the Supreme Court review. See, e.g., Deana Pollard Sacks, *Snyder v. Phelps, the Supreme Court’s Speech-Tort Jurisprudence, and Normative Considerations*, 120 Yale L.J. Online 193 (2010), <http://yalelawjournal.org/forum/snyder-v-phelps-the-supreme-courts-speech-tort-jurisprudence-and-normative-considerations> (arguing for rejection of the Fourth Circuit’s categorical approach to deciding the case and instead for Supreme Court adoption of a balancing approach).

⁶⁹¹ 562 U.S. 443.

case was constitutionally protected. Albert Snyder appealed, and the United States Supreme Court granted certiorari.⁶⁹²

The Supreme Court found the Phelps protesters' speech in this case to be on a matter of public concern and, therefore, the protesters were entitled to First Amendment protection. As a result, the Supreme Court refused to allow tort liability to attach to the picketers' conduct on the facts of this case.

The majority opinion, which was signed by eight Justices, is not particularly informative in the context of this dissertation's discussion of fighting words because its analysis and holding are based on different, mostly unrelated First Amendment doctrines. The majority expressly declined to apply the fighting words doctrine, citing a finding in the lower courts that 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.'"⁶⁹³ Clearly, however, the fighting words doctrine is in the background of this decision. In his concurring opinion, Justice Breyer makes clear that he would not stop his analysis of the facts of this case merely upon finding that the Phelps protesters' speech related to a matter of public concern. He then proceeds to offer a hypothetical and references the 'fighting words' doctrine to acknowledge that "in some circumstances the use of certain words as means would be similarly unprotected."⁶⁹⁴

The dissent of Justice Alito, however, finds no such need to avoid the application of the fighting words doctrine—to the contrary, Justice Alito applies it and, based upon that doctrine, reaches a conclusion opposite the majority. In a classic application of the doctrine, it matters not for Justice Alito that the Phelps picketers may have a First Amendment right to their speech because "[i]t does not follow . . . that they may intentionally inflict severe emotional injury on

⁶⁹² *Snyder*, 562 U.S. at 448-51.

⁶⁹³ *Id.* at 451 n. 3.

⁶⁹⁴ *Id.* at 461 (Breyer, J., concurring) (citing *Chaplinsky*, 315 U.S. 568).

private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate.”⁶⁹⁵ Justice Alito then expressly invoked the *Chaplinsky* fighting words doctrine:

This Court has recognized that words may “by their very utterance inflict injury” and that the First Amendment does not shield utterances that form “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.”⁶⁹⁶

Justice Alito would have found that the words of the Phelps picketers went “far beyond commentary on matters of public concern” and “specifically attacked Matthew Snyder” who was a “private figure.”⁶⁹⁷ In light of that specific attack on Cpl. Snyder, Justice Alito found it irrelevant that some of the Phelps speech related to a matter of public concern and that all of it occurred in a public place: “Neither classic ‘fighting words’ nor defamatory statements are immunized when they occur in a public place, and there is no good reason to treat a verbal assault based on the conduct or character of a private figure like Matthew Snyder any differently.”⁶⁹⁸ In other words, Justice Alito would find that the fighting words uttered by the Phelps protesters in this case should be categorically excluded from the protection of the First Amendment.

The *Snyder* case is notable, for purposes of this dissertation, for the manner in which the three groups of Justices handle the fighting words doctrine. The *Snyder* majority entirely avoids a fighting words analysis because the record below suggests that fighting words are not at issue in this case. Justice Breyer, in concurrence, avoids a fighting words analysis because, in his view, the holding in this case is narrow and it is not necessary to reach fighting words analysis—

⁶⁹⁵ *Id.* at 464 (Alito, J., dissenting). Note the similarity in language to *Chaplinsky*, 315 U.S. at 572, which Justice Alito later expressly cites.

⁶⁹⁶ *Id.* at 465 (quoting *Chaplinsky*, 315 U.S. at 572).

⁶⁹⁷ *Id.* at 470.

⁶⁹⁸ *Id.* at 472.

but he acknowledges that fighting words might be applicable in a similar circumstance, just not in this case. But Justice Alito, in dissent, believes a fighting words analysis is precisely the right analysis to make, does so, and based upon that analysis reaches a conclusion opposite that of the majority.

So the fighting words doctrine remains alive and well as recently as the 2011 *Snyder* case—even if not predictably applied. This sequence of three cases in successive years is notable: In 2010, the *Stevens* Court offered the most comprehensive articulation since *Chaplinsky* of the categories of speech unprotected by the First Amendment, and “fighting words” were not mentioned. One year later, in 2011, the *Snyder* Court grappled with the Phelps picketers from Westboro Baptist Church, and all nine Justices acknowledged “fighting words” as a potential factor in deciding the case, although only Justice Alito in dissent actually would have applied the “fighting words” doctrine to control the outcome. A year after that, in 2012, the Supreme Court decided *Alvarez*, the “Stolen Valor” case, and again attempted an apparently comprehensive articulation of the unprotected categories—this time, the list again included “fighting words.”

Perhaps it is coincidence. Perhaps it is imprecise research or articulation. Or, perhaps, thanks to the Westboro Baptist Church, the doctrine that “fighting words” enjoy no First Amendment protection has been resurrected and restored to a viable position within the Doctrine of Categorical Exclusion.

* * *

For the reasons described throughout this Chapter 4, the nearly seven decades between *Chaplinsky* and *Stevens* saw the Supreme Court substantially refine, and generally narrow, the four excluded categories it first had collected and articulated in *Chaplinsky*. By the time of

Stevens in 2010, the four excluded categories gathered and articulated in *Chaplinsky* had been effectively narrowed to three—“profane” speech had been quietly dropped from the list—and each of those three had been substantially narrowed compared with its 1942 concept.

But those changes to the *Chaplinsky* categories were not the only jurisprudential development relevant to the Doctrine of Categorical Exclusion between 1942 and 2010. As seen in Chapters 5 and 6, *infra*, by the time of *Stevens* other factors outside the scope of the *Chaplinsky* categories must be considered to see what speech falls within the “First Amendment Free Zone” that is outside the “freedom of speech” protected by the First Amendment.

CHAPTER 5: The rise and fall of “commercial speech” as an excluded category

Before a decade had passed, the Supreme Court articulated two additional unprotected categories that were not mentioned in *Chaplinsky*. One of those new post-*Chaplinsky* categories, speech integral to criminal conduct, would prove enduring and is the subject of extensive discussion in Chapter 6. The other, commercial speech, would prove fleeting. The notion that commercial speech was an unprotected category was announced by the Supreme Court less than five weeks after *Chaplinsky*'s four unprotected categories were published.⁶⁹⁹ By the end of the Supreme Court term in 1942, therefore, it appeared that five categories of unprotected speech had been discovered—the four set forth in *Chaplinsky* plus the subsequent “commercial speech” category.

From the beginning, however, the apparent inclusion of “commercial speech” in the Doctrine of Categorical Exclusion was peculiar. For example, it was odd, indeed, that the *Chaplinsky* Court—the same Court that obviously had considered the categorical approach in some depth and had defined unprotected categories of speech as having, as one characteristic, long historical acceptance—omitted any reference to commercial speech as an unprotected category, yet only a month later discovered its existence. How did the Supreme Court, with the same members sitting on both cases, miss “commercial speech” in March but discover it in April? That inexplicable peculiarity in the origin of “commercial speech” as an unprotected category proved a harbinger of trouble to come for this category. This chapter traces the rise

⁶⁹⁹ The spring of 1942 was monumental for the categorical approach to First Amendment analysis. *Chaplinsky* (articulating four unprotected categories) was argued February 5 and decided March 9. *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (describing commercial speech as an unprotected category), was argued March 31 and decided April 13.

and fall of the Supreme Court's treatment of "commercial speech" as an unprotected category within the Doctrine of Categorical Exclusion.

Part A: The rise

Valentine v. Chrestensen (1942):⁷⁰⁰ F.J. Chrestensen was a Floridian who had purchased a retired submarine from the United States Navy. He transported his submarine to various locations around the country, where he charged admission to allow the public to see it. In 1940, Mr. Chrestensen brought his submarine to New York City and moored it at a pier in the East River; his intention was to make money by charging New Yorkers for the privilege of visiting his submarine. Mr. Chrestensen prepared a leaflet advertising the availability of his submarine for public visitation upon the payment of a required admission fee and began to have the leaflet distributed to people on the streets of New York. That is how Mr. Chrestensen came to know Lewis J. Valentine, who at the time was the New York City police commissioner. When Commissioner Valentine became aware of Mr. Chrestensen's leaflets, he advised Mr. Chrestensen that their distribution violated § 318 of the New York City Sanitary Code,⁷⁰¹ which prohibited distribution on the city's streets of commercial and business advertising materials.⁷⁰² But the police commissioner also advised Mr. Christensen "that he might freely distribute handbills solely devoted to 'information or a public protest.'"⁷⁰³

So Mr. Christensen, apparently a clever man, set out to protest the city's treatment of his effort to bring his submarine to New Yorkers.⁷⁰⁴ He revised his leaflet into a two-sided

⁷⁰⁰ 316 U.S. 52.

⁷⁰¹ The sanitary code read as follows: "Handbills, cards and circulars. No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letter-box therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter." *Id.* at 53 n.1 (quoting Sanitary Code, City of New York § 318).

⁷⁰² *Id.* at 52-53 (narrating facts of the case).

⁷⁰³ *Id.* at 53.

⁷⁰⁴ *Id.* at 52-53. Mr. Christensen had been required to dock his submarine at a state-owned wharf on the East River, not at one owned by the city.

document. On one side remained the original commercial advertisement for tours of his submarine, although he toned it down by removing the express reference to payment of an admission fee. On the reverse side, he added new content “protest[ing] against the action of the City Dock Department in refusing [Mr. Christensen] wharfage facilities at a city pier for the exhibition of his submarine”⁷⁰⁵ The new content on the reverse side of the flyer contained no commercial advertising. Mr. Christensen then showed a proof of his revised leaflet to city officials, who were not impressed. “The Police Department advised that distribution of a bill containing only the protest would not violate § 318, and would not be restrained, but that distribution of the double-faced bill was prohibited.”⁷⁰⁶

That’s when Mr. Christensen went to court. He filed suit in federal district court seeking to enjoin Commissioner Valentine from enforcing § 318 of the Sanitary Code of the City of New York to prevent Mr. Christensen from distributing his advertising/protest leaflets. The district court favored Mr. Christensen and granted the injunction, and the Circuit Court of Appeals affirmed. The question presented to the United States Supreme Court was: “[W]hether the application of the ordinance to the respondent’s activity was, in the circumstances, an unconstitutional abridgement of the freedom of the press and of speech.”⁷⁰⁷

The Supreme Court noted that it had “unequivocally” held that public streets are a proper forum for public discourse and that the government may not “unduly burden” or prohibit the communication of information or spreading of opinion on the streets, but the Court then proceeded to distinguish commercial advertising as being unprotected by those “unequivocal” holdings:

⁷⁰⁵ *Id.* at 53.

⁷⁰⁶ *Id.*

⁷⁰⁷ *Id.* at 54.

We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of use, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.⁷⁰⁸

The Supreme Court then held that since Mr. Christensen’s leaflets were “commercial advertising,” New York could constitutionally prohibit their distribution on its streets.⁷⁰⁹

Even at the time it was delivered, the *Chrestensen* decision was peculiar. The Supreme Court had declared in *Chaplinsky* that categories of unprotected speech necessarily had deep historical roots—they had “never been thought to raise any Constitutional problem”⁷¹⁰—and yet when the Court only a month later declared the existence of another unprotected category it did so without any effort to show a historical basis for the exclusion of commercial speech from First Amendment protection. *Chrestensen* contains no analysis attempting to show a history of accepted government prohibitions on commercial speech, no citation to any prior case in which the Supreme Court had excluded commercial speech from constitutional protection, and no reference to any scholarly assessment or any other external analysis that might imply a historical basis for the *Chrestensen* Court’s declaration. Indeed, even the language the *Chrestensen* Court used does not imply a historical basis.⁷¹¹ The *Chrestensen* Court—which was composed of the

⁷⁰⁸ *Id.* at 54-55.

⁷⁰⁹ The Supreme Court summarily rejected the argument that because the reverse side of Christensen’s leaflet contained non-commercial material the leaflet in its entirety should be judged by a non-commercial standard. *Id.* at 55 (“It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law’s command.”).

⁷¹⁰ *Chaplinsky*, 315 U.S. at 572 (emphasis added).

⁷¹¹ In the key paragraph summarily asserting that commercial speech is categorically unprotected, the *Chrestensen* Court contrasted the “freedom of communicating information and disseminating opinion”—which the “[t]his court

same nine Justices who only five weeks earlier had decided that Walter Chaplinsky’s cursing to the face of a New Hampshire police officer enjoyed no constitutional protection—did not even cite to or otherwise reference the *Chaplinsky* decision.

Despite the weak footings upon which the Supreme Court rested its newfound conclusion that commercial speech was categorically unprotected by the First Amendment, the Supreme Court would once again—but only once—use similar categorical reasoning to deny First Amendment protection to commercial speech restricted by a local ordinance. The case, *Breard v. City of Alexandria*, arose a decade after the *Chrestensen* decision and reached the Supreme Court in 1951.

Breard v. City of Alexandria (1951):⁷¹² At issue was a so-called “Green River Ordinance” in the city of Alexandria, Louisiana. Jack Breard was a regional representative for a Pennsylvania company called Keystone Readers Service, Inc. His job was to sell subscriptions for nationally known magazines and to do so through door-to-door solicitations. He engaged in soliciting by leading a small team of door-to-door solicitors from town to town, where they would knock on the doors of residents and offer to sell them magazine subscriptions.⁷¹³ At one point, Mr. Breard’s team of solicitors came to Alexandria, Louisiana, where their sales practices ran afoul of the local Green River Ordinance, which prohibited the practice of door-to-door sales unless the homeowner specifically invited the solicitation at his doorstep.⁷¹⁴ Mr. Breard was

has unequivocally held” to be constitutionally protected—with “purely commercial advertising”—which “[w]e are equally clear” falls outside the Constitution. *Chrestensen*, 316 U.S. at 54. The language used in the former is past tense and references holdings, which taken together at least imply a history of jurisprudence supporting the assertion, even though none is cited or expressly referenced; by contrast, the language used in the latter is present tense and makes no reference, express or implied, to holdings or anything else other than the Supreme Court’s raw assertion within the *Chrestensen* opinion itself.

⁷¹² 341 U.S. 622.

⁷¹³ *Id.* at 624.

⁷¹⁴ *Id.* at 624-25 The Alexandria ordinance read as follows: “Section 1. Be it ordained by the council of the city of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise

arrested, prosecuted and convicted of violating the ordinance. He moved to quash the prosecution on the ground, *inter alia*, that the local ordinance violated the First Amendment's protection of freedom of speech and of the press.⁷¹⁵ His argument was rejected by the trial court, where he was convicted, and rejected again by the Louisiana Supreme Court, where his conviction was upheld.⁷¹⁶

The United States Supreme Court rejected Mr. Breard's First Amendment claims because "[o]nly the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes."⁷¹⁷ Deploying a puzzling analysis that essentially argued "on-the-one-hand, on-the-other-hand" without ever explaining why the hand chosen was constitutionally preferable, the Supreme Court wrote:

This kind of distribution is said to be protected because the mere fact that money is made out of the distribution does not bar the publications from First Amendment protection. We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature.⁷¹⁸

The *Breard* majority found that "commercial feature" of door-to-door magazine sales sufficient to protect the Alexandria ordinance from First Amendment attack:

It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. We see no abridgment of the principles of the First Amendment in this ordinance.⁷¹⁹

not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor." *Id.*

⁷¹⁵ Mr. Breard also raised arguments under the Commerce Clause and the Due Process Clause that are not relevant here.

⁷¹⁶ *Id.* at 625.

⁷¹⁷ *Id.* at 641.

⁷¹⁸ *Id.* at 641-42 (footnotes omitted).

⁷¹⁹ *Id.* at 645.

Years earlier, the Supreme Court had held that the First Amendment barred application of a similar Ohio ordinance regulating door-to-door soliciting when the solicitors were distributing information advertising a religious meeting. The *Breard* majority acknowledged that precedent but distinguished *Martin v. Struthers*⁷²⁰ because the religious information being distributed there was not aimed “solely at commercial advertising”:

As no element of the commercial entered into this free solicitation [at issue in *Martin v. Struthers*] and the opinion was narrowly limited to the precise fact of the free distribution of an invitation to religious services, we feel that it is not necessarily inconsistent with the conclusion reached in this case.⁷²¹

The conclusion that upholding the Alexandria ordinance against First Amendment attack because it regulated commercial speech was “not necessarily inconsistent” with precedent was hardly a ringing endorsement for the constitutional test applied by the *Breard* Court. Indeed, even as the *Breard* Court invoked language that *seemed* to apply the Doctrine of Categorical Exclusion to the commercial speech involved in this case, three factors make clear that *Breard* was at best a weak attempt.

First, the *Breard* Court never cites to or references *Chrestensen*, the landmark case that had declared commercial speech an unprotected category. *Breard* also does not cite to or reference *Chaplinsky*. It is difficult to conceive how the Supreme Court could have thought it was conducting a categorical analysis of commercial speech without reference to the landmark case holding that commercial speech is an excluded category or the landmark case describing the overall categorical approach.

Second, the three Justices who dissented in *Breard* did so forcefully. Two dissented for reasons relating to the Commerce Clause⁷²² and having no relevance here, but the other two-

⁷²⁰ 319 U.S. 141 (1943).

⁷²¹ *Breard*, 341 U.S. at 643.

⁷²² *Id.* at 645 (Vinson, C.J., and Douglas, J., dissenting).

justice dissent⁷²³ squarely targeted the majority's interpretation of the First Amendment, characterizing the majority's holding as "a revitalization of the judicial view which prevailed before this Court embraced the philosophy that the First Amendment gives a preferred status to the liberties it protects."⁷²⁴ The dissenters continued with language for the time unusually forceful but today commonplace in First Amendment jurisprudence:

It is my belief that the freedom of the people of this Nation cannot survive even a little governmental hobbling of religious or political ideas, whether they be communicated orally or through the press.

The constitutional sanctuary for the press must necessarily include liberty to publish and circulate. In view of our economic system, it must also include freedom to solicit paying subscribers. Of course homeowners can if they wish forbid newsboys, reporters or magazine solicitors to ring their doorbells. But when the homeowner himself has not done this, I believe that the First Amendment, interpreted with due regard for the freedoms it guarantees, bars laws like the present ordinance which punish persons who peacefully go from door to door as agents of the press.⁷²⁵

This brief dissent by Justice Black in *Breard* reflected a view of the First Amendment that later would prevail in the Supreme Court's jurisprudence. The Supreme Court would go no further than *Breard* in experimenting with the notion that commercial speech was excluded from all protection under the First Amendment.

Third, the *Breard* majority by its own concluding language makes clear that what it was in fact doing was applying a balancing test, not a categorical exclusion. After distinguishing various prior cases, the majority concluded that the constitutionality of the City of Alexandria ordinance at issue in *Breard* "turn[s] upon a balancing of the conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise

⁷²³ Justice Douglas joined both dissents.

⁷²⁴ *Id.* at 650 (Black, J., dissenting).

⁷²⁵ *Id.*

way that those soliciting for him think brings the best results.”⁷²⁶ The *Breard* majority then proceeded to describe at some length the annoyance a homeowner would experience when interrupted by a knock at the door and the asymmetrical economic power between the homeowner and the corporate entity that had hired *Breard*’s door-to-door sales team to solicit for them.⁷²⁷ Taken as a whole, this language suggests that the *Breard* majority may have been motivated less by a principled judicial philosophy of the First Amendment and more by a very human annoyance at door-to-door peddlers.

Breard was the second, and final, case in which the Supreme Court used, or purported to use, the Doctrine of Categorical Exclusion to uphold a law or ordinance proscribing commercial speech. While subsequent cases acknowledged the language of categorical exclusion as it related to commercial speech and then distinguished the speech at issue in those cases as not “purely commercial,”⁷²⁸ those cases never again relied on the categorical exclusion for commercial speech as the basis for deciding the case. If *Chrestensen* was both the origin and the high water mark of the inclusion of commercial speech within the Doctrine of Categorical Exclusion, *Breard* was its last gasp. The remaining cases in this line are those that dismantle this all-but-stillborn category.

⁷²⁶ *Id.* at 644 (majority opinion).

⁷²⁷ *Id.* at 644-45 (“This makes the constitutionality of Alexandria’s ordinance turn upon a balancing of the conveniences between some householders’ desire for privacy and the publisher’s right to distribute publications in the precise way that those soliciting for him think brings the best results. The issue brings into collision the rights of the hospitable housewife, peering on Monday morning around her chained door with those of Mr. *Breard*’s courteous, well-trained but possibly persistent solicitor, offering a bargain on culture and information through a joint subscription to the Saturday Evening Post, Pic and Today’s Woman. Behind the housewife are many housewives and homeowners in the towns where Green River ordinances offer their aid. Behind Mr. *Breard* are ‘Keystone’ with an annual business of \$5,000,000 in subscriptions and the periodicals with their use of house-to-house canvassing to secure subscribers for their valuable publications, together with other housewives who desire solicitors to offer them the opportunity and remind and help them, at their doors, to subscribe for publications. Subscriptions may be made by anyone interested in receiving the magazines without the annoyances of house-to-house canvassing. We think those communities that have found these methods of sale obnoxious may control them by ordinance.”).

⁷²⁸ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 759 (1976) (collecting cases).

Part B: The fall

Almost as soon as the *Chrestensen* rule was announced, the Supreme Court began struggling with its application and meaning.⁷²⁹ Only three years after deciding *Chrestensen*, the Supreme Court in deciding the application of the First Amendment to labor regulations changed course and spoke as if *Chrestensen*'s categorical rule had never been announced:

The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge . . . that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities'⁷³⁰

Six years later, the Supreme Court whipsawed back toward *Chrestensen*'s categorical reasoning and decided *Breard*. If *Breard* was the Supreme Court's final application of the categorical exclusion of commercial speech announced in *Chrestensen*, it was only the start of four-decade criticism of both *Chrestensen* itself and the doctrine for which it stood. In 1959, Justice Douglas—who had joined the majority in deciding *Chrestensen*—wrote about that decision: “The ruling was casual, almost offhand. And it has not survived reflection.”⁷³¹ In its 1964 landmark decision *New York Times Co. v. Sullivan*, the Supreme Court's majority effectively rejected the categorical exclusion announced in *Chrestensen*: “That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.”⁷³² And in 1974, Justice Brennan noted about *Chrestensen*: “There is some

⁷²⁹ See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943) (“Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital.”); see also *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (“The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have ‘a civil appeal, or a moral platitude’ appended. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.” (citation omitted) (quoting *Chrestensen*, 316 U.S. at 55)).

⁷³⁰ *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

⁷³¹ *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

⁷³² *Sullivan*, 376 U.S. at 266.

doubt concerning whether the ‘commercial speech’ distinction announced in *Valentine v. Chrestensen* . . . retains continuing validity.”⁷³³ Only one year after Justice Brennan wrote those words of doubt, the Supreme Court had the opportunity to remove any remaining uncertainty about the continued validity of *Chrestensen*.

***Bigelow v. Virginia* (1975):**⁷³⁴ The question whether commercial speech still could be considered categorically excluded from First Amendment protection squarely reached the Supreme Court in 1975 in *Bigelow v. Virginia*. Jeffrey Bigelow was the managing editor of the *Virginia Weekly*, a self-styled “underground newspaper”⁷³⁵ published in and around the college town of Charlottesville and particularly distributed on campus. The newspaper published a paid advertisement from a New York organization that promoted the availability of legal abortion services in New York.⁷³⁶ The State of Virginia charged Mr. Bigelow with violating a Virginia statute that made it a misdemeanor to “encourage . . . the procuring of abortion”⁷³⁷ Mr. Bigelow was convicted in the County Court, convicted again upon trial de novo in the Circuit Court, and his conviction was upheld by the Supreme Court of Virginia.⁷³⁸

⁷³³ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting).

⁷³⁴ 421 U.S. 809.

⁷³⁵ *Id.* at 811 n.1.

⁷³⁶ *Id.* at 811. The advertisement stated: “UNWANTED PREGNANCY LET US HELP YOU Abortions are now legal in New York. There are no residency requirements. FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST Contact WOMEN’S PAVILION 515 Madison Avenue New York, N.Y. 10022 or call any time (212) 371-6670 or (212) 371-6650 AVAILABLE 7 DAYS A WEEK STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.” *Id.*

⁷³⁷ *Id.* at 812-13. At the time the advertisement was published in Bigelow’s newspaper, the Virginia statute read: “If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.” *Id.* at 812 (quoting Va. Code. Ann. § 18.1-63 (1960)). The statute soon thereafter was modified by the Virginia Legislature. *Id.*

⁷³⁸ *Id.* at 813-14. The Virginia Supreme Court actually considered the case twice—once before the United States Supreme Court’s decision in *Roe v. Wade* and again after remand from the Supreme Court with instructions to consider in light of *Roe v. Wade*. The Virginia court’s opinion remained unchanged after remand; thus, the procedural fact of the case making two trips to the United States Supreme Court is immaterial to its First Amendment teachings.

The Virginia Supreme Court “rejected Bigelow’s First Amendment claim. This, the court said, was a commercial advertisement and, as such, may be constitutionally prohibited by the state, particularly where, as here, the advertising relates to the medical-health field.”⁷³⁹ The Virginia Supreme Court also held that Mr. Bigelow lacked standing to pursue a First Amendment claim because he “lacked a legitimate First Amendment interest, inasmuch as his activity was of a purely commercial nature.”⁷⁴⁰

The United States Supreme Court granted certiorari. After finding that Mr. Bigelow had standing to press the First Amendment claims, the Supreme Court reached the core issue before it:

The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form.

The fact that the particular advertisement in appellant’s newspaper had commercial aspects or reflected the advertiser’s commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or solicitations, or because appellant was paid for printing it, or because appellant’s motive or the motive of the advertiser may have involved financial gain. The existence of commercial activity, in itself, is not justification for narrowing the protection of expression secured by the First Amendment.⁷⁴¹

While stopping short of expressly overruling *Valentine v. Christensen*, the *Bigelow* Court proceeded to expressly narrow *Chrestensen* substantially:

[T]he Supreme Court of Virginia[] relies on *Valentine v. Chrestensen*, where a unanimous Court, in a brief opinion, sustained an ordinance which had been interpreted to ban the distribution of a handbill advertising the exhibition of a submarine. . . . But the holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all

⁷³⁹ *Id.* at 814 (internal quotation marks omitted).

⁷⁴⁰ *Id.* at 815 (internal quotation marks omitted).

⁷⁴¹ *Id.* at 818 (citations and internal quotation marks omitted).

statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected per se.

This Court's cases decided since *Chrestensen* clearly demonstrate as untenable any reading of that case that would give it so broad an effect.⁷⁴²

It is notable that the *Bigelow* Court then observed with approval the existence of the categorical approach to excluding certain speech from First Amendment protection.⁷⁴³ Clearly, the *Bigelow* Court's objection was not directed to the Doctrine of Categorical Exclusion as a whole; rather, it objected specifically to the inclusion of commercial speech as one of the excluded categories.

The *Bigelow* Court summarized its holding:

We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection. . . .

. . . To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

. . . Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees.⁷⁴⁴

On the conclusion that commercial speech is *not* categorically excluded from First Amendment protection, if not on the outcome in this case, the United States Supreme Court in *Bigelow* appeared unanimous.⁷⁴⁵ It is unclear why the *Bigelow* Court stopped short of overruling

⁷⁴² *Id.* at 819-20 (citations and footnote omitted).

⁷⁴³ *Id.* at 819 ("Although other categories of speech—such as fighting words, or obscenity, or libel, or incitement, have been held unprotected, no contention has been made that the particular speech embraced in the advertisement in question is within any of these categories." (citations omitted)).

⁷⁴⁴ *Id.* at 825-26.

⁷⁴⁵ *Id.* at 832 ("As the Court recognizes, ante, at 2231-2232 a purely commercial proposal is entitled to little constitutional protection.") (Rehnquist, J., dissenting); *id.* at 836 ("Since the statute in question is a 'reasonable

Chrestensen outright and instead sought only to narrowly limit its meaning. But any remaining ambiguity would be eliminated only a year later.

Virginia Board of Pharmacy v. Consumer Council (1976):⁷⁴⁶ The case that finally, and expressly, put an end to the Supreme Court’s flirtation with “commercial speech” as an unprotected category within the Doctrine of Categorical Exclusion came one year after the decision in *Bigelow* and also arose out of Virginia. The Commonwealth of Virginia had attempted to prohibit pharmacists from advertising the prices at which they sell various prescription pharmaceuticals,⁷⁴⁷ a practice deemed desirable by the Commonwealth to protect the integrity of pharmacy as a profession.⁷⁴⁸ The statute was challenged by consumers and retail purchasers of pharmaceuticals as violating the First Amendment, and the Supreme Court was required—as a threshold matter—to decide whether the statute was subject to analysis under the First Amendment or whether it fell wholly without the Constitution’s protection because it regulated only commercial speech. The Supreme Court was aware that only a year earlier it had addressed this question, but perhaps because *Bigelow* related to the constitutionally, politically and socially difficult issue of abortion services, the Supreme Court decided it advisable to

regulation that serves a legitimate public interest,’ ante, at 2234, I would affirm the judgment of the Supreme Court of Virginia.”).

⁷⁴⁶ 425 U.S. 748.

⁷⁴⁷ *Id.* at 750. The pertinent section of the challenged statute read as follows: “Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcast by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.” *Id.* at 750 n.2 (quoting § 54-524.35 of the Virginia Code Annotated (1974)) (emphasis added).

⁷⁴⁸ *Id.* at 769-70 (“It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the ‘professional’ pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the professional because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.”).

address the continued viability of the categorical exemption for commercial speech more thoroughly in this case involving less-volatile subject matter:

Last Term, in *Bigelow v. Virginia*, the notion of unprotected “commercial speech” all but passed from the scene. . . . We rejected the contention that the publication was unprotected because it was commercial. [*Valentine v. Chrestensen*’s continued validity was questioned and its holding was described as “distinctly a limited one” that merely upheld “a reasonable regulation of the manner in which commercial advertising could be distributed.” . . .

Some fragment of hope for the continuing validity of a “commercial speech” exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*. . . .

Here, in contrast, the question whether there is a First Amendment exception for “commercial speech” is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The “idea” he wishes to communicate is simply this: “I will sell you the X prescription drug at the Y price.” Our question, then, is whether this communication is wholly outside the protection of the First Amendment.⁷⁴⁹

The *Virginia Board of Pharmacy* Court then began its analysis by articulating “several propositions that already are settled or beyond serious dispute”:

It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is ‘sold’ for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money.⁷⁵⁰

The Supreme Court then proposed that the test for whether commercial speech could be regulated by the government necessarily involved some assessment of the content of the communication but that declaring all speech with commercial content outside the Constitution’s boundaries was too much:

If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content

⁷⁴⁹ *Id.* at 760-61 (citation omitted).

⁷⁵⁰ *Id.* at 761 (citations omitted).

deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matters of public interest may claim protection.⁷⁵¹

Having set the stage, the *Virginia Board of Pharmacy* Court then articulated a test for whether speech is categorically exempted from the First Amendment's protection:⁷⁵²

Our question is whether speech which does no more than propose a commercial transaction is so removed from any exposition of ideas and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, that it lacks all protection. Our answer is that it is not.⁷⁵³

With that, the Supreme Court effectively put an end to *Valentine v. Christensen* as useful authority upon which courts could rely to analyze restrictions on commercial under the Doctrine of Categorical Exclusion. But the *Virginia Board of Pharmacy* Court was not done; it proceeded to explain *why* commercial speech was to be considered to enjoy constitutional protection at some level and was *not* categorically excluded from the First Amendment. The Court offered four reasons:

First, the fact that a speaker's purpose may be "purely economic" would "hardly disqualif[y] him from protection under the First Amendment."⁷⁵⁴ From the standpoint of

⁷⁵¹ *Id.* at 761-62.

⁷⁵² Thirty-four years later, in *United States v. Stevens*, 559 U.S. 460, the Supreme Court would reject the notion that there is a "test" that may be applied to determine whether a category of speech is to be exempted from First Amendment protection. Rather, the Supreme Court would conclude that any "test" such as this is merely descriptive of what has "historically" been exempted.

⁷⁵³ *Va. Bd. of Pharmacy*, 425 U.S. at 762 (citations omitted).

⁷⁵⁴ *Id.* at 762-63 ("Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. We know of no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general or to any subject beyond their immediate dispute. It was observed in *Thornhill* that the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. Since the fate of such a single factory could as well turn on its

whether the First Amendment applies, it is simply irrelevant whether a speaker is financially motivated.

Second, individual persons who *receive* commercial speech—the listeners—may have an interest in the message that is every bit as great as, if not greater than, their interest in hearing political or other speech.⁷⁵⁵

Third, society as a whole has an interest in receiving at least certain types of commercial messages, and a categorical exclusion would thwart efforts to distinguish commercial messages with broad societal value from those without such value.⁷⁵⁶

Fourth, the free enterprise system requires that individual economic actors have access to the information they need to make informed economic choices. Because the United States economy rests on a system of free enterprise, and since one of the functions of government is to properly regulate that system, ensuring the free flow of commercial information to individual economic decision makers—who also are the voters who choose the government that in turn

ability to advertise its product as on the resolution of its labor difficulties, we see no satisfactory distinction between the two kinds of speech.” (citations, internal quotation marks and footnotes omitted)).

⁷⁵⁵ *Id.* at 763-64 (“As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate. Appellees’ case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.” (footnote omitted)).

⁷⁵⁶ *Id.* at 764-65 (“Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely ‘commercial,’ may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available; that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals; and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs. Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.” (citations omitted)).

regulates the free enterprise system—really is a close cousin, if not an alter ego,⁷⁵⁷ of political speech. “[E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of [commercial] information does not serve that goal.”⁷⁵⁸

* * *

In 1942, in deciding *Valentine v. Christensen*, the United States Supreme Court consumed four pages in the United States Reports to establish the idea that “commercial speech” is a category wholly excluded from the protection of the First Amendment.⁷⁵⁹ Coming as it did only five weeks after the Supreme Court’s landmark categorical-analysis case *Chaplinsky v. New Hampshire*, and yet not mentioning *Chaplinsky*, “[t]he ruling was casual, almost offhand.”⁷⁶⁰ But it persisted for more than 30 years as a notion available to courts reviewing the constitutionality of government restrictions on commercial speech. When its end finally came, the Supreme Court in 1975 deployed 17 pages of analysis⁷⁶¹ to limit it and another 52 pages to repudiate it in 1976.⁷⁶² Even then, the Supreme Court did not bring itself to use the term “overruled” in connection with *Christensen* until 1991.⁷⁶³ Thus, the “offhand” concept that

⁷⁵⁷ *Id.* at 765 (footnote omitted) (“Moreover, there is another consideration that suggests that no line between publicly ‘interesting’ or ‘important’ commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.” (citations and footnotes omitted)).

⁷⁵⁸ *Id.* at 765 (footnotes omitted).

⁷⁵⁹ *Christensen*, 316 U.S. at 52-55.

⁷⁶⁰ *Cammarano*, 358 U.S. at 514 (Douglas, J., concurring).

⁷⁶¹ *Bigelow*, 421 U.S. at 809-26 (Parts I-III).

⁷⁶² *Va. Bd. of Pharmacy*, 425 U.S. at 748-70 (Parts I-III).

⁷⁶³ See *Payne v. Tennessee*, 501 U.S. 808, 828 n.1 (1991) (collecting cases in which the Supreme Court in the preceding 20 years had overruled prior decisions and characterizing *Virginia Board of Pharmacy* as “overruling” *Christensen*). *Payne* was death penalty case having nothing to do with free speech issues.

emerged in a mere four pages when the Supreme Court allowed New York to enforce its ban on street distribution of advertising leaflets against an eccentric chap who wanted tourists to visit his decommissioned submarine endured for 49 years and required a total of 69 pages of negative assessment from the Supreme Court in an abortion case⁷⁶⁴ and a drug-pricing case⁷⁶⁵ before finally being acknowledged as “overruled” in a footnote in a death penalty case.⁷⁶⁶ The First Amendment does, indeed, invite strange bedfellows.

Thus was the end of the ill-fated attempt by the Supreme Court to classify “commercial speech” as an unprotected category of speech governed by the Doctrine of Categorical Exclusion. To be sure, commercial speech even today in many applications receives lesser constitutional protection than other types of speech such as political or religious speech, but the Supreme Court has reached the conclusion that commercial speech—unless it is false, misleading or deceptive or otherwise integral to unlawful conduct as discussed in Chapter 6 below—must be analyzed *within* the framework of the First Amendment not *excluded* entirely from constitutional protection.

Even as it presided over the long, slow decline of the doctrine that “commercial speech” was an unprotected category, the Supreme Court reiterated that other categories of speech—including at least one category not articulated in *Chaplinsky*—were indeed outside the scope of the First Amendment’s protection. The contrast between the failure of “commercial speech” as a post-*Chaplinsky* category and the successful rooting of another new post-*Chaplinsky* category is stark and was foreshadowed in the Supreme Court’s cases.⁷⁶⁷ Chapter 6, therefore, will discuss

⁷⁶⁴ See *Bigelow*, 421 U.S. 809.

⁷⁶⁵ See *Va. Bd. of Pharmacy*, 425 U.S. 748.

⁷⁶⁶ See *Payne*, 501 U.S. 808.

⁷⁶⁷ For example, *Pittsburgh Press Co. v. Human Relations Comm’n*, 425 U.S. 748 (1976), was characterized by the Supreme Court in *Virginia Board of Pharmacy*, 425 U.S. at 749 (“There [in *Pittsburgh Press*] the Court upheld an ordinance prohibiting newspapers from listing employment advertisements in columns according to whether male or female employees were sought to be hired. The Court, to be sure, characterized the advertisements as ‘classic

the second major new excluded category in the post-*Chaplinsky* era: Speech that is itself part of unlawful conduct.

examples of commercial speech,' and a newspaper's printing of the advertisements as of the same character. The Court, however, upheld the ordinance on the ground that the restriction it imposed was permissible because the discriminatory hirings proposed by the advertisements, and by their newspaper layout, *were themselves illegal.*" (emphasis added) (citations omitted)).

CHAPTER 6: “Speech as part of unlawful conduct” recognized as an excluded category

Viewing the almost 75 years since *Chaplinsky* as a whole, the clearest and most enduring expansions of the Doctrine of Categorical Exclusion have involved the relationship of the First Amendment to speech that is intertwined with unlawful conduct. While at least one other excluded category has come and gone during that time,⁷⁶⁸ and the four categories recognized by *Chaplinsky* have been either effectively abandoned⁷⁶⁹ or narrowed,⁷⁷⁰ the Supreme Court has by contrast not only recognized but expanded and rather often applied the excluded category of speech as part of unlawful conduct in order to permit the government to proscribe or regulate speech. In other words, this is the one category of proscribable speech that has grown and remained wider, not shrunk and become narrower, since *Chaplinsky*. Nonetheless, this category remains “a well-defined and narrowly limited class[] of speech”⁷⁷¹ and the Supreme Court certainly has declined invitations further to expand it.

There is a certain irony that *Chaplinsky* itself never articulated this category,⁷⁷² although to be sure there is a close intellectual relationship between the reasoning that allows the government to proscribe “fighting words” that constitute incitement and that which justifies the proscription of speech integral to criminal conduct.⁷⁷³ “Fighting words” were said in *Chaplinsky*

⁷⁶⁸ See Chapter 5, *supra* (“The rise and fall of ‘commercial speech’ as a category”).

⁷⁶⁹ See Chapter 4, Part B, *supra* (“The profane”).

⁷⁷⁰ See Chapter 4, *supra* (“From *Chaplinsky* to *Stevens*: The Evolution of *Chaplinsky*’s four categories”).

⁷⁷¹ *Chaplinsky*, 315 U.S. at 571.

⁷⁷² The *Chaplinsky* categories “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.” *Id.* at 572. Of course, by stating the unprotected categories “include” the four listed, *Chaplinsky* implied that its list was not necessarily exhaustive.

⁷⁷³ Notably, the *Chaplinsky* Court merely *listed* three of its articulated categories, but with respect to the fourth—‘fighting words’—the Court apparently felt the need to *define* the term by adding the defining phrase “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Perhaps the Supreme Court added that definition because the meaning of the phrase ‘fighting words’ was not obvious, but it is also reasonable to speculate that the Court may have added that phrase because the real concept it intended to express was broader than mere ‘fighting words’ that ‘incite’ but instead more akin to speech that is part of criminal conduct such that it results in ‘breach of the peace.’

to include those that “tend to incite an immediate breach of the peace,”⁷⁷⁴ and the narrower formulation of that category that survives—incitement—has been refined by the Supreme Court to apply only to speech “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁷⁷⁵ That sounds remarkably similar to the rationale for allowing government proscription of speech integrally related to criminal conduct, which has as its “sole, unlawful immediate objective”⁷⁷⁶ to produce unlawful action. That close relationship is well-illustrated by the Supreme Court’s approach to flag burning, which will be discussed in this chapter.

Of course, the concept itself has roots far earlier than *Chaplinsky*. Long before 1942, the Supreme Court had held speech that is itself part of unlawful conduct does not enjoy the protection of the First Amendment.⁷⁷⁷ Although the analysis on this point was not extensive, the Supreme Court had foreshadowed more than a century ago that there were at least two distinct *types* of speech intertwined with unlawful conduct that may fall outside the First Amendment’s scope:

First, *untruthful* statements about otherwise *lawful* activities may be unprotected.⁷⁷⁸ The government may prohibit or regulate speech if it is part of “schemes or devices for obtaining money or property of any kind by means of false or fraudulent pretenses, representations, or promises.”⁷⁷⁹ As is apparent from the Supreme Court’s phrasing, particularly the connection to

⁷⁷⁴ *Id.* at 572.

⁷⁷⁵ *Brandenburg*, 395 U.S. at 447.

⁷⁷⁶ *Giboney*, 336 U.S. at 502.

⁷⁷⁷ See Chapter 2, *supra*; see also *Elonis*, 135 S. Ct. at 2024-26 (Thomas, J., dissenting) (discussing history of government proscriptions of threatening speech since eighteenth century England).

⁷⁷⁸ Presumably, untruthful statements about *unlawful* activities also would be unprotected. The key to this first type of speech intertwined with unlawful conduct is not only that it is *untruthful* but that it is *intended* to defraud, a necessary though not sufficient attribute for proscription. See, e.g., *Public Clearing House v. Coyne*, 194 U.S. 497, 516 (1904) (“[T]he misrepresentation of existing facts is not necessary to a conviction The significant fact is the intent and purpose.” (internal quotation marks omitted) (citing *Durland v. United States*, 161 U.S. 306 (1896))).

⁷⁷⁹ *Coyne*, 194 U.S. at 505, 516.

“obtaining money or property,” this sort of unprotected speech is necessarily a type of commercial speech,⁷⁸⁰ although it may be proscribed because it is false and fraudulent and not merely because it is commercial. In the post-*Chaplinsky* world, this type would come to be described as deceptive or misleading speech aimed at defrauding, and the intent of the speaker would become a critical part of the constitutional analysis.⁷⁸¹ As will be seen below, this is the *Read Magazine—Virginia Board of Pharmacy—Central Hudson* line of cases.

Second, even *truthful*⁷⁸² statements that are part of advancing *illegal* activities may be unprotected. “[T]he misrepresentation of existing facts is not necessary to a conviction under a statute applying to ‘any scheme or artifice to defraud.’”⁷⁸³ This type of speech is not necessarily commercial in nature, although it may be. In the post-*Chaplinsky* world, it would come to be described as speech integral to criminal conduct. Although the First Amendment case law related to this type of speech—unlike the case law related to fraud—rarely expressly demands intent as part of the Constitution’s requirement, intent would implicitly but necessarily be required because the associated criminal conduct requires the state to prove criminal intent. As will be seen below, this is the *Giboney—Pittsburgh Press* line of cases that are inherently commercial and also includes the child pornography cases, which may or may not be commercial in nature, and the true threats cases, which typically are not commercial in nature.

⁷⁸⁰ Compare, e.g., *Alvarez*, 132 S. Ct. at 2542 (plurality opinion) (false statements that “do not seem to have been made to secure employment or financial benefits or admission to privileges” are protected by the First Amendment).

⁷⁸¹ See, e.g., *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). In upholding the State of Illinois’ attempt to apply its general anti-fraud law to a charitable solicitor who misstated material information, including the portion of each dollar contributed that would go to the charitable purpose, the Supreme Court stated that “false statement alone does not subject a fundraiser to fraud liability” and found it important to the constitutional analysis that under Illinois law, “to prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.” *Id.*

⁷⁸² Presumably, *untruthful* statements about illegal activities also could be proscribed. The key to this type of speech is that it is about *illegal* activities, a necessary though not sufficient attribute for its proscription.

⁷⁸³ *Coyne*, 194 U.S. at 516. Despite the Supreme Court’s use of the term “defraud” in this context, this type of proscribable speech intertwined with unlawful conduct really describes non-commercial speech. The key words in the Court’s formulation are “scheme” and “artifice,” not “defraud.”

Part A: Fraud

To fall within the unprotected category of “fraud,” speech must not only be false, deceptive or misleading and intended to defraud, but it also must relate to a commercial or financial matter. As the Supreme Court later would make clear in rejecting a statute that criminalized lies about having received the Congressional Medal of Honor, the government may not rely upon the “fraud” exception to the First Amendment to prohibit or punish false statements that are not made “to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.”⁷⁸⁴ A government prohibition on false speech that is “entirely without regard to whether the lie was made for the purpose of material gain” does not fit within the “fraud” exception.⁷⁸⁵

As discussed above,⁷⁸⁶ the notion that the government may regulate—punish or even prohibit—speech that is fraudulent in nature has deep roots in American jurisprudence. “[T]he First Amendment does not shield fraud.”⁷⁸⁷ Those roots extend earlier than *Chaplinsky*, and even in the years immediately before *Chaplinsky* the Supreme Court was actively applying this notion to allow the government to prohibit or punish fraudulent speech.⁷⁸⁸ Congress could prohibit “use of the mails for the purpose of fraud or deception,” and “[i]t has never been supposed that the exclusion of these articles denied to their owners any of their constitutional rights.”⁷⁸⁹ So it is curious, indeed, that *Chaplinsky* makes no mention of fraud or anything

⁷⁸⁴ *Alvarez*, 132 S. Ct. at 2542 (plurality opinion).

⁷⁸⁵ *Id.* at 2547.

⁷⁸⁶ See Chapter 2, *supra*.

⁷⁸⁷ *Madigan*, 538 U.S. at 612.

⁷⁸⁸ See Chapter 2, *supra*.

⁷⁸⁹ *Coyne*, 194 U.S. at 507-08. The latter of these two quotations actually referred in the opinion to “a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact; such, for instance, as liquids, poisons, explosives, and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor.” *Id.* at 507. However, the Supreme Court was applying the same principle to fraudulent mailings.

similar to it in its articulation of the categories of speech that fall outside First Amendment protection.

One reasonable—although unprovable—explanation for this omission is that it simply never occurred to the *Chaplinsky* Court that it might be necessary to explain because it was so obvious. If neither commercial speech—which, five weeks later in *Chrestensen* the Supreme Court would declare unprotected by the First Amendment—nor speech that is part of criminal conduct—such as that declared unprotected seven years later in *Giboney*—enjoyed any protection, then in the context of the times, perhaps the *Chaplinsky* Court viewed those conclusions as so self-evident that it was unnecessary to state or explain them.

In any event, the Supreme Court was silent in *Chaplinsky* both on the Constitution’s effect on government power to regulate commercial speech and on its power to regulate speech that is part of criminal conduct. Starting with that reality, it may be perfectly understandable that the *Chaplinsky* Court said nothing about fraudulent speech—which is, of course, *both* commercial speech and speech that is part of unlawful conduct. Why would it even *occur* to anybody that the First Amendment might cover such a thing?

But that silence in *Chaplinsky*, whatever its cause, did not accurately reflect the state of the law, either then or subsequently. As the Supreme Court has somewhat recently summarized the law regarding prohibition or punishment of fraudulent speech, “What the First Amendment and our case law emphatically do *not* require . . . is a blanket exemption from fraud liability for a [person] who intentionally misleads [to obtain money].”⁷⁹⁰ Starting soon after *Chaplinsky*, the Supreme Court made clear that its longstanding and enduring view remained valid: The Constitution does not prohibit government from prohibiting, punishing or otherwise regulating

⁷⁹⁰ *Madigan*, 538 U.S. at 621 (emphasis added).

fraudulent speech. To illustrate that point, consider the development of the law in a line of three post-*Chaplinsky* cases:

Donaldson v. Read Magazine (1948):⁷⁹¹ Six years after deciding *Chaplinsky*, the Supreme Court was presented with a test of the First Amendment’s application to the government’s power to punish or prohibit fraudulent speech. An investigation by the Postmaster General had revealed that Read Magazine and its related entities were conducting a Hall of Fame “[P]uzzle [C]ontest [that] was a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises” in violation of federal law.⁷⁹² As authorized by statute, the Postmaster entered a fraud order that stopped the flow of fraudulent solicitations outbound through the mail and also the flow of responses and money returning through the mail. Read Magazine sued the Postmaster claiming, *inter alia*, that their game was speech protected by the First Amendment and that the Postmaster’s fraud order disrupting their game was an unconstitutional act of censorship. After years of wrangling in the courts below about the scope of the fraud order, a revision and narrowing of that order by the Postmaster, and a preliminary trip to the Supreme Court on a different issue in this case, the First Amendment question finally was presented to the Supreme Court in 1948.⁷⁹³ The question was whether the federal statutes granting authority for the Postmaster’s fraud order “authorize a prior censorship and thus violate the First Amendment.”⁷⁹⁴

⁷⁹¹ 333 U.S. 178.

⁷⁹² *Id.* at 180 (internal quotation marks omitted).

⁷⁹³ *Id.* at 180-83.

⁷⁹⁴ *Id.* at 189.

The Supreme Court reviewed the lengthy history of statutes authorizing government actions to prevent fraudulent use of the mails.⁷⁹⁵ Based upon that review, the Supreme Court concluded:

All of the foregoing statutes, and others which need not be referred to specifically, manifest a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. *This governmental power has always been recognized in this country and is firmly established.* The particular statutes here attacked have been regularly enforced by the executive officers and the courts for more than half a century. They are now a part and parcel of our governmental fabric.⁷⁹⁶

Although the *Read Magazine* Court never cited to or otherwise referenced *Chaplinsky*, its analysis above is consistent with the *Chaplinsky* notion that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has *never been thought to raise any Constitutional problem.*”⁷⁹⁷ The *Read Magazine* Court proceeded to reject the “contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes.”⁷⁹⁸ The Court considered and rejected an argument that the anti-fraud order was an unconstitutional prior restraint on speech, concluding that “[i]ts future effect is merely to enjoin the continuation of conduct found fraudulent” and “it only keeps respondents from getting the money of others by false pretenses and deprives them of a right to speak or print only to the

⁷⁹⁵ *Id.* at 189-90 (“In 1872 Congress first authorized the Postmaster General to forbid delivery of registered letters and payment of money orders to persons or companies found by the Postmaster General to be conducting an enterprise to obtain money by false pretenses through the use of the mails. In the same statute Congress made it a crime to place letters, circulars, advertisements, etc., in the mails for the purpose of carrying out such fraudulent artifices or schemes. In 1889 Congress declared ‘non-mailable’ letters and other matters sent to help perpetrate frauds. In 1895 the Postmaster General’s fraud order powers were extended to cover all letters or other matters sent by mail. And Congress has passed many more statutes, such, for illustration, as the Securities Act of 1933 and the Federal Trade Commission Act, as amended, to protect people against fraudulent use of the mails.” (citations omitted)).

⁷⁹⁶ *Id.* at 190 (emphasis added).

⁷⁹⁷ *Chaplinsky*, 315 U.S. at 571-72 (emphasis added).

⁷⁹⁸ *Read Magazine*, 333 U.S. at 191.

extent necessary to protect others from their fraudulent artifices.”⁷⁹⁹ While the narrowness of the anti-fraud order and the fact that it did not unnecessarily burden any of *Read Magazine’s* operations other than those determined to be fraudulent were important to the Court’s analysis—thus, foreshadowing the First Amendment “overbreadth” analysis the Supreme Court would much later adopt—the essence of *Read Magazine* is categorical analysis in the spirit of *Chaplinsky*. It stands for the proposition that the Doctrine of Categorical Exclusion holds fraudulent speech to be categorically unprotected by the First Amendment.

But what, precisely, constitutes “fraudulent” speech for First Amendment purposes? The Supreme Court would turn its attention to refining its language and analysis on that point almost three decades later in a challenge to Virginia’s authority to prohibit pharmacists from advertising the prices at which they sell prescription drugs.

Virginia Board of Pharmacy v. Consumer Council (1976):⁸⁰⁰ In striking down the Virginia statute barring prescription pharmaceutical price advertising, as discussed in Chapter 5,⁸⁰¹ the Supreme Court did not intend to bar *all* government regulation of commercial speech or even to insist that *all* commercial speech required constitutional protection.⁸⁰² Even as the

⁷⁹⁹ *Id.*

⁸⁰⁰ 425 U.S. 748.

⁸⁰¹ See Chapter 5, Part B, *supra*.

⁸⁰² The *Virginia Board of Pharmacy* majority explained at length its intention that certain types of commercial speech would remain subject to government regulation—perhaps extensive regulation—and did so in a footnote that perhaps better reflects the Supreme Court’s unease about its overall holding than articulates a new rule that can be readily applied. *Va. Bd. of Pharmacy*, 425 U.S. at 771 n.24 (“In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does ‘no more than propose a commercial transaction,’ and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *Sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. They may also make it appropriate to require that a commercial message appear in such a form, or

Supreme Court abandoned the notion that a constitutional line existed between unprotected commercial speech and other speech that enjoyed First Amendment protection it sought to draw a *new* line between *types* of commercial speech: Those that were constitutionally protected and those that were not. The Supreme Court was mindful, for example, that if its holding were interpreted broadly it would “call[] into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising.”⁸⁰³ Therefore, the *Virginia Board of Pharmacy* Court went out of its way to make clear that the case before it presented no “claim that prescription drug price advertisements are forbidden because they are false or misleading in any way”⁸⁰⁴ and the Court was not addressing that question. Mindful of the door it was casting open by abandoning a bright-line categorical bar on applying the First Amendment to commercial speech, the *Virginia Board of Pharmacy* Court’s majority narrowly stated the question it was deciding:

What is at issue is whether a State may *completely suppress* the dissemination of concededly *truthful information* about *entirely lawful activity*, fearful of that information’s effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.⁸⁰⁵

The majority described those “other questions” it was “[r]eserving” as follows:

We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional Services of almost infinite variety and nature, with the consequent *enhanced possibility for confusion and deception* if they were to undertake certain kinds of advertising.⁸⁰⁶

include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. They may also make inapplicable the prohibition against prior restraints.” (citations omitted)).

⁸⁰³ *Id.* at 776 (Stewart, J., concurring).

⁸⁰⁴ *Id.* at 771 (majority opinion).

⁸⁰⁵ *Id.* at 773 (footnote omitted) (emphasis added).

⁸⁰⁶ *Id.* at 773 n.25 (emphasis added).

Under the new constitutional dividing line in *Virginia Board of Pharmacy*, the government still might permissibly “require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.”⁸⁰⁷ Thus, the new constitutional boundary between protected commercial speech that is truthful and unprotected commercial speech that is false in a way that renders it misleading or deceptive was justified:

to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seek to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. . . .

. . . It is not difficult to choose statements, designs and devices which will not deceive.⁸⁰⁸

Chief Justice Burger noted with approval that the *Virginia Board of Pharmacy* Court “wisely leaves these issues to another day.”⁸⁰⁹ So it is a fair assessment to conclude that the Court was uneasy about the new constitutional lines it was drawing and, therefore, attempted to proceed cautiously.

Thus, even as it abandoned the old distinction between non-commercial speech protected by the First Amendment and commercial speech that, as a category, was unprotected, the *Virginia Board of Pharmacy* majority set out to draw a new boundary for the Doctrine of Categorical Exclusion. In the majority’s view, not *all* commercial speech falls outside the First Amendment’s scope; only *some* does. The new boundary essentially subdivided the erstwhile category of “commercial speech” into two groups: (a) unprotected commercial speech that remained outside the protection of the First Amendment because it was deceptive, false or

⁸⁰⁷ *Id.* at 771 n.24.

⁸⁰⁸ *Id.* at 771 n.24 (citations and internal quotation marks omitted).

⁸⁰⁹ *Id.* at 775.

misleading and (b) all other commercial speech, which enjoyed at least some level of First Amendment protection.

Through this new line-drawing exercise, the *Virginia Board of Pharmacy* Court articulated what were in effect two new groupings of speech unprotected by the First Amendment. The first grouping is commercial speech that is deceptive or misleading:

Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.⁸¹⁰

The second grouping is commercial speech in which “the transactions proposed in the forbidden advertisements are themselves illegal in any way.”⁸¹¹

Clearly, both of these types of speech have logical roots in *Giboney*'s concept that “speech integral to criminal conduct” falls outside the protection of the First Amendment, although they do not necessarily fit neatly into *Giboney*'s analysis. For that reason, the *Virginia Board of Pharmacy* Court's articulation of the new constitutional boundary, which protects some types of commercial speech but not others, was a substantial development in the Doctrine of Categorical Exclusion. It appears that the Supreme Court at the time understood the jurisprudential earthquake its decision would cause, and that was addressed in tidy contrast by comparing the concurring opinion of Justice Stewart and the dissenting opinion of Justice Rehnquist.

Justice Stewart embraced the *Virginia Board of Pharmacy* majority's shrinking the universe of potentially unprotected speech by shifting the constitutional boundary line away from the unprotected commercial speech/protected non-commercial speech distinction and moving it

⁸¹⁰ *Id.* at 771-72 (citations and footnote omitted)

⁸¹¹ *Id.* at 772.

instead to an unprotected *false and deceptive* commercial speech/protected *all other* commercial speech distinction. To emphasize that the majority's decision should not be interpreted to "preclude such governmental regulation" of "false or deceptive advertising,"⁸¹² he analyzed at length the *rationale* for the new constitutional boundary line. After drawing upon the Supreme Court's precedents regarding libel and defamation,⁸¹³ Justice Stewart explained:

The principles recognized in the libel decisions suggest that government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from other harm caused by defamation.⁸¹⁴

The nature of commercial falsehoods, he continued, rendered them different from falsehoods that might be uttered or printed during the course of political debate or discussion of other matters of societal importance.⁸¹⁵ That difference was critical in assessing how the values protected by the First Amendment were to be applied to commercial falsehoods as opposed to noncommercial falsehoods. The key point is that there exist "important differences between commercial price and product advertising, on the one hand, and ideological communication on the other."⁸¹⁶

Justice Stewart proceeded to explain those differences between the nature of "ideological communication," where the Constitution requires that tolerance for falsehood be greater in order

⁸¹² *Id.* at 776 (Stewart, J., concurring).

⁸¹³ *Id.* at 777 ("The Court has on several occasions addressed the problem posed by false statements of fact in libel cases. Those cases demonstrate that even with respect to expression at the core of the First Amendment, the Constitution does not provide absolute protection for false factual statements that cause private injury. In *Gertz v. Robert Welch, Inc.*, the Court concluded that there is no constitutional value in false statements of fact. As the Court had previously recognized in *New York Times Co. v. Sullivan*, however, factual errors are inevitable in free debate, and the imposition of liability for erroneous factual assertions can dampen the vigor and limit the variety of public debate by inducing self-censorship. In order to provide ample breathing space for free expression, the Constitution places substantial limitations on the discretion of government to permit recovery for libelous communications." (citations and internal quotation marks omitted)).

⁸¹⁴ *Id.* at 777.

⁸¹⁵ *Id.* at 777-78 ("In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction some falsehood in order to protect speech that matters." (internal quotation marks omitted)).

⁸¹⁶ *Id.* at 779.

to avoid chilling or improperly punishing protected speech, and “commercial price and product advertising,” where the Constitution permits the government to forbid and punish falsehoods.

On the one hand:

Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the “truth” may be employed to give force to the underlying idea expressed by the speaker. Under the First Amendment there is no such thing as a false idea, and the only way that ideas can be suppressed is through the competition of other ideas.⁸¹⁷

In contrast, on the other hand:

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the information of potential interest and value conveyed rather than because of any direct contribution to the interchange of ideas. Since the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. Indeed, the elimination of false and deceptive claims services to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.⁸¹⁸

Thus, in the view of Justice Stewart, any government regulation of “ideological communication,” even if such communication is false or deceptive, risks *thwarting* values protected by the First Amendment; by contrast, government regulation that reduces the amount of false and deceptive commercial information in the marketplace actually *promotes* First Amendment values.

Justice Rehnquist, by contrast, viewed the changed constitutional boundary with less intellectual affection. He was unpersuaded by the premise that commercial speech, on the

⁸¹⁷ *Id.* at 779-80 (internal quotation marks omitted).

⁸¹⁸ *Id.* at 780-81 (citations omitted).

whole, should be afforded more constitutional protection than it had historically been given.⁸¹⁹ He articulated the majority's new boundary as permitting that "legislatures may prohibit false and misleading advertisements, and may likewise prohibit advertisements seeking to induce transactions which are themselves illegal" and then criticized the majority for abandoning the "effort to draw a bright line between 'commercial speech' on the one hand and 'protected speech' on the other" even though that erstwhile categorical test posed "undoubted difficulties".⁸²⁰

In this case, however, the Court has unfortunately substituted for the wavering line previously thought to exist between commercial speech and protected speech a no more satisfactory line of its own—that between "truthful" commercial speech, on the one hand, and that which is "false and misleading" on the other. The difficulty with this line is not that it wavers, but on the contrary that it is simply too Procrustean to take into account the congeries of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.⁸²¹

Justice Rehnquist readily acknowledged the longstanding difficulty in drawing a bright constitutional line between commercial and noncommercial speech, but in his view the reality that such a line is "difficult to draw" did not justify abandoning that effort and replacing it with a similarly difficult line-drawing exercise between commercial speech that is protected and deceptive or false commercial speech that is not.⁸²² Further criticizing the majority's new test as creating "second-class First Amendment rights" for commercial speech, Justice Rehnquist

⁸¹⁹ *Id.* at 787 (Rehnquist, J., dissenting) ("The Court insists that the rule it lays down is consistent even with the view that the First Amendment is primarily an instrument to enlighten public decisionmaking in a democracy. I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection off the First Amendment." (citation and internal quotation marks omitted)).

⁸²⁰ *Id.* at 785, 787.

⁸²¹ *Id.*

⁸²² *Id.* at 787-88.

proceeded to offer hypothetical examples of commercial advertisements that would be protected by the Constitution unless the state could show that they are “actually untruthful or misleading”:

“Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief.”

“Can’t shake the flu? Get a prescription for Tetracycline from your doctor today.”

“Don’t spend another sleepless night. Ask your doctor to prescribe Seconal without delay.”⁸²³

In Justice Rehnquist’s view, the proper regulation of commercial statements like those above is better left to state legislatures than to courts. He did not “believe that the First Amendment mandates the Court’s ‘open door policy’ toward such commercial advertising.”⁸²⁴

In the context of understanding the Supreme Court’s doctrine that “fraud” is categorically excluded from First Amendment protection, the importance of *Virginia Board of Pharmacy* is that even as the Supreme Court finally abandoned its long defense of the doctrine that “commercial speech” is categorically excluded, it preserved in practical effect the exclusion of certain types of commercial speech—the deceptive or that which promotes illegal conduct. The Supreme Court accomplished that outcome with reasoning that more closely resembles *Giboney* than *Chrestensen*. As shall be seen, that reasoning would be further applied in subsequent cases to make clear that the Constitution does not prohibit the government from punishing fraud.

Central Hudson Gas & Electric Corp. v. Public Service Commission (1980):⁸²⁵ Four years after deciding *Virginia Board of Pharmacy*, the Supreme Court had occasion to elaborate on its approach to policing the newly declared boundary line between commercial speech that is constitutionally protected and false or deceptive commercial speech that is not. The dispute arose from the Mideast oil embargo and energy crisis of the early 1970s. In response to that

⁸²³ *Id.* at 786, 788.

⁸²⁴ *Id.* at 790.

⁸²⁵ 447 U.S. 557.

national emergency, the New York State Public Service Commission, which regulates public utilities, adopted a prohibition on any electric utility advertising that “promot[es] the use of electricity.” The Commission justified its prohibition as being necessitated by the energy crisis; without sufficient fuel or energy sources to meet electric demand, it was essential that demand for energy not be increased, especially during the winter when the need for home heating was at its peak. Years later, however, when the energy crisis had passed, the Commission extended its prohibition on “promotional-advertising intended to stimulate the purchase of utility services.”⁸²⁶ It did so to promote the national policy of energy conservation and to avoid producing additional power that would be priced below the cost of generation under the pricing regime then in effect.⁸²⁷

Central Hudson Gas & Electric Corporation, an electric utility subject to the Commission’s ban on promotional advertising, filed suit challenging the advertising restriction on First Amendment grounds. The state trial court upheld the Commission’s restriction as did the intermediate appellate court and the New York Court of Appeals.⁸²⁸ Applying a balancing test, the Court of Appeals “concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue.”⁸²⁹ Thus, the case when presented to the United States Supreme Court was one in which no categorical analysis had been conducted.

The Supreme Court struck down the promotional advertising ban as a violation of the First Amendment. After summarizing the status of the law regarding commercial speech,⁸³⁰ the

⁸²⁶ *Id.* at 559.

⁸²⁷ *Id.* at 559-60.

⁸²⁸ *Id.* at 560-61.

⁸²⁹ *Id.* at 561.

⁸³⁰ *Id.* at 561-62 (“The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible

Central Hudson Court concluded that “[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the *nature both of the expression* and of the governmental interests served by its regulation.”⁸³¹ The Court then made clear that what it meant by the “nature . . . of the expression” included, in part, a continuing application of the Doctrine of Categorical Exclusion to commercial speech that was deceptive or misleading:

The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be *no constitutional objection* to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may *ban* forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity.

[However,] [i]f the communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed.⁸³²

Thus, the *Central Hudson* Court reinforced that there exist two subsets of commercial speech—that which is deceptive or misleading even if related to lawful activities and that which is related to unlawful activities—that are categorically excluded from First Amendment protection. It is that categorical exclusion that allows the government to “ban” those types of speech with “no constitutional objection.”

The *Central Hudson* majority then announced a four-pronged test it would apply to determine whether any government regulation of commercial speech would survive a First Amendment challenge:

dissemination of information. In applying the First Amendment to this area, we have rejected the highly paternalistic view that government has complete power to suppress or regulate commercial speech. People will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication rather than to close them. Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.” (citations, internal quotation marks and ellipses omitted).

⁸³¹ *Id.* at 562-63 (emphasis added) (citation omitted) (emphasis added).

⁸³² *Id.* at 563 (emphasis added) (citations omitted).

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁸³³

In relation to the Constitution's lack of protection for fraud, the *Central Hudson* test essentially codifies the new boundary drawn by the *Virginia Board of Pharmacy* Court by confirming that commercial speech that is deceptive or misleading or that relates to unlawful activity falls outside the protection of the First Amendment. It is notable, however, that the *Central Hudson* Court described this boundary line as "at least" excluding such speech, leaving open the possibility that there are other types of commercial speech that fall outside the First Amendment's scope. For all other commercial speech, the *Central Hudson* Court establishes a form of balancing test that requires some form of heightened scrutiny.⁸³⁴

The *Central Hudson* majority's articulation of a four-part test for evaluating restriction of commercial speech spawned significant disagreement on the court. Two separate opinions, each concurring in the judgment but criticizing the majority's new test and its application in this case, were filed. But the most direct criticism came from the dissent filed by Justice Rehnquist, who reiterated the dramatic change in doctrine that *Virginia Board of Pharmacy* had ushered in by extending the First Amendment⁸³⁵ to provide at least some level of protection to all commercial

⁸³³ *Id.* at 566.

⁸³⁴ *Central Hudson* itself was decided based upon the final three prongs of this four-part test because the speech involved was not alleged to be misleading or deceptive or to involve unlawful conduct.

⁸³⁵ *Id.* at 584 (Rehnquist, J., dissenting) ("Prior to this Court's recent decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* . . . commercial speech was afforded *no protection under the First Amendment whatsoever*." (emphasis added) (citation omitted)).

speech except false and misleading commercial speech that “is not entitled to any First Amendment protection.”⁸³⁶

Justice Rehnquist lamented that the *Virginia Board of Pharmacy* rule had “unlocked a Pandora’s Box” by protecting commercial speech on par with “traditional political speech.”⁸³⁷

The line between “commercial speech,” and the kind of speech that those who drafted the First Amendment had in mind, may not be technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since *Virginia Board*.⁸³⁸

After elaborating upon his reasoning as to why the Supreme Court should not have abandoned the bright-line constitutional boundary between “commercial speech” and “protected speech,”⁸³⁹ Justice Rehnquist punctuated the essential reasoning of his argument: “[I]n a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.”⁸⁴⁰

* * *

Thus, it is well-established that fraudulent speech—lies told for economic gain—receives no protection from the First Amendment. While the Supreme Court would continue to grapple after *Virginia Board of Pharmacy* and *Central Hudson* with the question of what *amount* of protection should be afforded to that subset of commercial speech that falls within the First Amendment’s protective umbrella, those two cases made clear that a consensus had developed

⁸³⁶ *Id.* at 593.

⁸³⁷ *Id.* at 598.

⁸³⁸ *Id.*

⁸³⁹ *Id.* (“[T]he world of political advocacy and its marketplace of ideas, there is no such thing as a ‘fraudulent’ idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the ‘marketplace of ideas’ through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective ‘truth,’ but because it is essential to our system of self-government. [By contrast, t]he notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim ‘caveat emptor.’”).

⁸⁴⁰ *Id.* at 599.

that commercial speech that is deceptive or misleading is constitutionally unprotected under the Doctrine of Categorical Exclusion. The rationale for this remaining categorical exclusion has roots far deeper in the doctrine that renders unprotected that speech closely intertwined with violations of the law than in the doctrine of commercial speech itself. In other words, the remaining categorical exclusion of false and misleading commercial speech after *Central Hudson* resembles more closely the accepted reasoning of *Giboney* and its progeny than the repudiated reasoning of *Chrestensen*.

In addition to allowing the government to prohibit and punish fraudulent speech, the *Virginia Board of Pharmacy* and *Central Hudson* cases also contemplate a second type of speech that would remain unprotected by the First Amendment, namely speech that is itself related to illegal conduct or proposing illegal transactions. This second type of unprotected speech differs from fraud because it need not be false or misleading in order to be proscribable, nor must it necessarily involve commercial speech. As we shall see below, the attributes of this second type are more readily understood by analysis under the *Giboney-Pittsburgh Press* line of cases allowing government prohibitions of speech, whether or not commercial and whether or not false, that is itself an integral part of a criminal act.

Part B: Speech proposing criminal acts

The idea that speech integrally intertwined with criminal conduct becomes proscribable under the Doctrine of Categorical Exclusion has deep roots in American jurisprudence.⁸⁴¹ Speech need not be false and fraudulent to be proscribable under this principle; rather, it may be enough that the underlying conduct is properly classified as criminal, or at least as unlawful. The very concept of a categorical exclusion for speech integral to criminal conduct has received scholarly disapproval and has been rejected as “a poor basis for analyzing speech restrictions,”⁸⁴² but there is no doubt the Supreme Court continues to acknowledge and apply a categorical exclusion of this sort. Regardless of whether scholars think they *should* use it, the fact is the Justices *do*.

In the same decade it decided *Chaplinsky*, in which it articulated four categories of speech outside the protection of the First Amendment, the Supreme Court seemed to recognize a fifth category. The Supreme Court held that “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”⁸⁴³ With that, the excluded category of “speech integral to criminal conduct,” which the Supreme Court previously had signaled to be outside the First Amendment’s scope,⁸⁴⁴ was squarely recognized. However, the Supreme Court would continue to grapple with the difficult intersection of speech and unlawful conduct even after recognizing, in principle, the excluded

⁸⁴¹ See Chapter 2, *supra*.

⁸⁴² Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1326 (2005).

⁸⁴³ *Giboney*, 336 U.S. at 502.

⁸⁴⁴ For example, in *Lovell*, 303 U.S. at 451, the Court had suggested that speech that advocates “unlawful conduct” may be outside the protection of the First Amendment.

category of speech integral to criminal conduct.⁸⁴⁵ This wide-ranging area of the Doctrine of Categorical Exclusion has been refined and focused significantly in the decades since *Chaplinsky*, but the basic principle has not changed. As Justice Holmes put it many years ago:

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.⁸⁴⁶

The landmark case articulating this principle in the modern, post-*Chaplinsky* era reached the Supreme Court before the 1940s ended. While specific applications and outgrowths of this excluded category have been developed by the Supreme Court, and will be discussed later in Parts C and D of this chapter related to child pornography and true threats, the basic principle was established in *Giboney* and *Pittsburgh Press*.

Giboney v. Empire Storage & Ice Co. (1949):⁸⁴⁷ A labor dispute in Kansas City, Missouri, resulted in the Supreme Court’s first expansion of its *Chaplinsky* list of categories. The Ice and Coal Drivers and Handlers Local Union No. 953 represented local drivers who delivered ice door-to-door in Kansas City, and the union had attempted—but largely failed—to persuade all of its non-union competitors who also delivered ice door-to-door to join the union. To further its efforts, the union devised a strategy to make it impossible for non-union drivers to

⁸⁴⁵ Consider, for example, the Supreme Court’s articulation of this ongoing problem of the regulation of speech that is interwoven with unlawful conduct two decades after *Chaplinsky* in *O’Brien*, 391 U.S. at 376-77 (“[E]ven on the assumption that the alleged communicative element in O’Brien’s conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” (footnotes omitted)).

⁸⁴⁶ *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).

⁸⁴⁷ *Giboney*, 336 U.S. 490.

sell ice in the Kansas City market—thereby forcing all delivery drivers either to join the union or to go out of business—by seeking from ice wholesalers in the city agreements not to supply ice to non-union drivers. All but one wholesaler in the Kansas City market agreed; the lone holdout was Empire Storage and Ice Company (“Empire”).⁸⁴⁸

To break Empire’s resistance, union members, including Joseph Giboney, began picketing in front of Empire’s place of business. The picketers carried placards making clear that “the avowed immediate purpose of the picketing was to compel Empire to agree to stop selling ice to nonunion peddlers.”⁸⁴⁹ Confronted with difficult options,⁸⁵⁰ Empire chose to respond to the picketing by filing suit in Missouri state court challenging the picketing as part of an illegal scheme to violate a Missouri statute that barred certain “combinations in restraint of trade.”⁸⁵¹ Empire sought an injunction to bar the picketing. The state trial court enjoined the picketers from “placing pickets or picketing around or about the buildings” of Empire.⁸⁵² The Missouri Supreme Court affirmed, rejecting the picketers’ argument that their picketing was constitutionally protected by the First and Fourteenth Amendments “because the picketers publicized only the truthful information that appellee was selling ice to peddlers who are not members of the said defendant union.”⁸⁵³ The Missouri Supreme Court also found that “the purpose of the picketing was to force Empire to become a party to such [illegal] combination,”⁸⁵⁴ in violation of state criminal law.

⁸⁴⁸ *Id.* at 492.

⁸⁴⁹ *Id.*

⁸⁵⁰ *Id.* at 493 (“In this dilemma, Empire was faced with three alternatives: It could continue to sell ice to nonunion peddlers, in which event it would be compelled to wage a fight for survival against overwhelming odds; it could stop selling ice to nonunion peddlers thereby relieving itself from further conflict with the union, in which event it would be subject to prosecution for crime and suits for triple damages; it could invoke the protection of the law. The last alternative was adopted.”).

⁸⁵¹ *Id.* at 491 n.1.

⁸⁵² *Id.* at 494.

⁸⁵³ *Id.* at 493-94 (internal quotation marks omitted).

⁸⁵⁴ *Id.* at 494.

The picketers appealed to the United States Supreme Court and presented the question, as Justice Black framed it: “[C]oncerning the constitutional power of a state to apply its antitrust restraint law to labor union activities, and to enjoin union members from peaceful picketing carried on as an *essential and inseparable part of a course of conduct which is in violation of state law*.”⁸⁵⁵

The Supreme Court held that on the facts of this case it was clear the picketing was but one element in a “single and integrated course of conduct” that violated Missouri’s restraint of trade law.⁸⁵⁶ The picketers’ efforts “peacefully to publicize truthful facts about a labor dispute” could not, on the record of this case, “be treated in isolation.”⁸⁵⁷ But instead of deciding this case simply on the facts and record presented, the Supreme Court then went further and articulated a broader rule: “It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as *an integral part of conduct in violation of a valid criminal statute*. We reject the contention now.”⁸⁵⁸ After acknowledging that it was “mindful of the essential importance to our society of a vigilant protection of freedom of speech and press,” the Supreme Court expanded its test to make explicit that “[s]tates cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances.”⁸⁵⁹ But the *Giboney* Court then proceeded to explain in detail why the picketers’ placards themselves—the signs bearing words that constituted the actual speech that was at issue in this case—were *not* constitutionally protected:

⁸⁵⁵ *Id.* at 491-92 (emphasis added) (footnote omitted).

⁸⁵⁶ *Id.* at 498 (“Thus all of appellants’ activities—their powerful transportation combination, their patrolling, their formation of the picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri’s valid law. In this situation, the injunction did not more than enjoin an offense against Missouri law, a felony.”).

⁸⁵⁷ *Id.*

⁸⁵⁸ *Id.* (emphasis added).

⁸⁵⁹ *Id.* at 501-02.

[P]lacards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. For the placards were to effectuate the purposes of an unlawful combination and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.⁸⁶⁰

Thus, *Giboney* stands for the proposition that a category of speech that is “an integral part of conduct in violation of a valid criminal statute” is outside the protection of the First Amendment. Statutes proscribing or governing that category of unprotected speech are reviewed under the Doctrine of Categorical Exclusion. The *Giboney* Court never acknowledged or described the relationship, if any, between the category of unprotected speech it identified and the four categories articulated only seven years earlier in *Chaplinsky*, although the *Giboney* Court was, of course, mindful of the existence of *Chaplinsky* and apparently saw no conflict between the two decisions.⁸⁶¹ The *Giboney* rule certainly was consistent with the pronouncement in *Chaplinsky* that the “prevention and punishment” of certain categories of speech “has never been thought to raise any Constitutional problem;”⁸⁶² the *Giboney* Court acknowledged that factor by finding important to its constitutional analysis that “[t]he Missouri policy against

⁸⁶⁰ *Id.* at 502 (citations omitted).

⁸⁶¹ *Giboney* mentions *Chaplinsky* only once and then only in passing as part of a string citation. *Giboney*, 336 U.S. at 502 (citing *Chaplinsky*, 315 U.S. 568, in support of this proposition: “[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”). Presumably, this single reference was intended to incorporate *Chaplinsky*’s discussion and analysis of “fighting words” as an unprotected category of speech although, interestingly, no pinpoint cite to any particular portion of *Chaplinsky* was provided.

⁸⁶² *Chaplinsky*, 315 U.S. at 572 (emphasis added).

restraints of trade is of *long standing* and is in most respects the same as that which the Federal Government has followed for *more than half a century*.⁸⁶³

The *Giboney* Court also tied its newly articulated category to historical roots by spending considerable attention on distinguishing the pre-*Chaplinsky* case *Thornhill v. Alabama* from the situation presented in *Giboney*—and, ultimately, finding the constitutional rules applied in both cases to be in harmony. In the *Giboney* Court’s view, the principal difference between the two cases—which both involved First Amendment challenges to laws used to suppress picketing—was that the ordinance struck down in *Thornhill* was “so broad that [it] could not only be utilized to punish conduct plainly illegal but could also be applied to ban all truthful publications of the facts of a labor controversy.”⁸⁶⁴ By contrast, the picketers in *Giboney* were “doing more than exercising a right of free speech or press[;] [t]hey were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade.”⁸⁶⁵ In other words, the very purpose of the *Thornhill* ordinance was to suppress speech, while the burden on picketers’ speech imposed by the *Giboney* law was an incidental application of the law’s broader and valid purpose.⁸⁶⁶

It should be noted that *Giboney*’s reasoning has been criticized as imprecise and unilluminating. One respected author has critiqued *Giboney*’s reasoning and constitutional

⁸⁶³ *Giboney*, 336 U.S. at 502 (emphasis added).

⁸⁶⁴ *Id.* at 498-99.

⁸⁶⁵ *Id.* at 503.

⁸⁶⁶ Indeed, it is clear that the *Giboney* Court viewed the dispute before it as one framed principally as a power struggle between two different entities—the union and the state—each seeking primacy in the regulation of trade and economics, not of speech. *Id.* at 504 (“While the State of Missouri is not a party in this case it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines. We hold that the state’s power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its antitrade restraint law to groups of workers, businessmen or others.” (citations omitted)).

test⁸⁶⁷ and concluded that we should “reject *Giboney* as a guide to modern free speech law.”⁸⁶⁸ In his view, the utility in *Giboney* is in great part an outgrowth of labor law, not free speech law, and *Giboney* really stands for the narrow proposition that picketing is subject to lesser protection under the First Amendment than other forms of expression.⁸⁶⁹

Whether one views *Giboney* as a groundbreaking intellectual development in the Doctrine of Categorical Exclusion or merely as a somewhat feeble-minded footnote in the law of labor relations, the fact remains that it has been oft-cited by the courts—including by the United States Supreme Court—for the proposition that there exists a category of speech integral to criminal conduct that falls outside the protection of the First Amendment. In the years since deciding *Giboney*, the Supreme Court has rhetorically buttressed *Giboney* as standing for the notion that the government may punish speech that is “brigaded with illegal action.”⁸⁷⁰ As we see throughout this chapter, *Giboney* is—rightly or wrongly—the common ancestor of the modern Doctrine of Categorical Exclusion that excludes from First Amendment protection speech closely intertwined with illegal conduct, including fraud, true threats, or child pornography.

The rather broad and somewhat ill-defined concern that justified *Giboney*—that a contrary rule would make “practically impossible” the enforcement of legitimate laws against

⁸⁶⁷ Volokh, *supra* note 841, at 1311-26. After posing the question: “But What Exactly Does *Giboney* Mean?,” Professor Volokh offers six possible answers and then rejects each: (1) “Course of Conduct” Referring to the Noncommunicative Harms of Speech, (2) Conduct Evidenced by Means of Language, (3) Illegal Course of Conduct Meaning Speech that Itself Violates a Law, (4) Illegal Course of Conduct Meaning Speech That Violates a Generally Applicable Law, (5) Conduct Referring to a Broader Course of Illegal Behavior by the Speaker, (6) Conduct Referring to a Broader Course of Illegal Behavior by People Other Than the Speaker, (7) Conduct Carried Out by Means of Language Referring to Threat of Action, and (8) Conduct Referring to Picketing.

⁸⁶⁸ *Id.* at 1326.

⁸⁶⁹ *Id.* at 1322 & nn. 217 & 218 (“But even if one endorses this lesser protection for picketing, such an exception offers no support for applying *Giboney* to other speech.”).

⁸⁷⁰ See, e.g., *Garrison*, 379 U.S. at 82 (Douglas, J., concurring); *Roth*, 354 U.S. at 514 (Douglas, J., dissenting). In both cases, the opinion by Justice Douglas characterizing *Giboney* as permitting government regulation of speech that is “brigaded with illegal action” was joined by Justice Black, the author of *Giboney*.

“conspiracies deemed injurious to society”⁸⁷¹—would be honed by the Supreme Court over the years. But the most important refining of the general rule came a quarter century later in connection with a dispute involving the contents and placement of classified advertisements in a Pittsburgh newspaper; in that case, the Supreme Court made clear that speech proposing a transaction that was itself unlawful fell squarely within the *Giboney* rule.

Pittsburgh Press Co. v. Comm’n on Human Relations (1973):⁸⁷² Two years before it began in *Bigelow* the express dismantling of the “commercial speech” exception to the First Amendment, the Supreme Court upheld the application of a Pittsburgh, Pennsylvania, non-discrimination ordinance to forbid a local newspaper to publish classified “help wanted” advertisements in columns separated by gender. While a cursory reading of this decision would understandably leave the reader with the impression that it is about the commercial speech doctrine, in fact its enduring contribution to First Amendment law lies in its application of the Doctrine of Categorical Exclusion to speech proposing illegal transactions.

The Pittsburgh Press had a practice of printing paid “help wanted” advertisements either in a column captioned “Male Help Wanted (or “Jobs—Male Interest”), “Female Help Wanted (or “Jobs—Female Interest”), or “Male-Female Help Wanted” (or “Male-Female”).⁸⁷³ Employers who placed advertisements in this sex-segregated manner ran afoul of a local anti-discrimination ordinance,⁸⁷⁴ and in 1969 the National Organization for Women filed a complaint with the Pittsburgh Commission on Human Relations accusing the Pittsburgh Press of illegally

⁸⁷¹ *Giboney*, 336 U.S. at 502.

⁸⁷² *Pittsburgh Press*, 413 U.S. 376

⁸⁷³ *Id.* at 379.

⁸⁷⁴ *Id.* at 378 (quoting §8 (e) of the ordinance, which made it unlawful “[f]or any ‘employer,’ employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to ‘employment’ or membership which indicates any discrimination because of . . . sex.”).

aiding employers in this practice.⁸⁷⁵ The Commission “ordered Pittsburgh Press to cease and desist such violations and to utilize a classification system with no reference to sex.”⁸⁷⁶ The Commission’s order was narrowed but generally upheld by the lower Pennsylvania state courts, and the Pennsylvania Supreme Court denied review.⁸⁷⁷

In agreeing to review the case, the United States Supreme Court noted the “narrowness of the recognized exceptions to the principle that the press may not be regulated by the Government. Our inquiry must therefore be whether the challenged order falls within any of these exceptions.”⁸⁷⁸ The Supreme Court eventually concluded that the Commission’s order did, indeed, fall within a First Amendment exception that permitted it to stand—but not the exception urged upon it. The Commission had invoked *Valentine v. Chrestensen* and urged the Supreme Court to sustain the order on the reasoning that “this regulation is permissible because the speech is commercial speech unprotected by the First Amendment.”⁸⁷⁹ As a threshold matter, the Supreme Court concluded that the challenged ordinance, and the order issued pursuant thereto, did not threaten to “muzzl[e]” the newspaper,⁸⁸⁰ a conclusion that likely was important in the Supreme Court’s ultimate holding that the ordinance and order survived

⁸⁷⁵*Id.* (quoting §8 (j) of the ordinance, which made it unlawful “[f]or any person, whether or not an employer, employment agency or labor organization, to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance. . . .”).

⁸⁷⁶*Id.* at 380.

⁸⁷⁷*Id.* at 380-81.

⁸⁷⁸*Id.* at 382.

⁸⁷⁹*Id.* at 384.

⁸⁸⁰*Id.* at 382-83 (“This is not a case in which the challenged law arguably disables the press by undermining its institutional viability. As the press has evolved from an assortment of small printers into a diverse aggregation including large publishing empires as well, the parallel growth and complexity of the economy have led to extensive regulatory legislation from which the publisher of a newspaper has no special immunity. Accordingly, this Court has upheld application to the press of the National Labor Relations Act; the Fair Labor Standards Act; and the Sherman Antitrust Act. Yet the Court has recognized on several occasions the special institutional needs of a vigorous press by striking down laws taxing the advertising revenue of newspapers with circulations in excess of 20,000; requiring a license for the distribution of printed matter; and prohibiting the door-to-door distribution of leaflets. But no suggestion is made in this case that the Ordinance was passed with any purpose of muzzling or curbing the press. Nor does Pittsburgh Press argue that the Ordinance threatens its financial viability or impairs in any significant way its ability to publish and distribute its newspaper. In any event, such a contention would not be supported by the record” (citations, internal quotation marks and footnote omitted).

constitutional challenge. The Supreme Court engaged in analysis of the “commercial speech” exclusion first articulated in *Chrestensen* and concluded that the classified advertisements at issue in this case are “classic examples of commercial speech.”⁸⁸¹

The *Pittsburgh Press* Court then proceeded to reject various arguments about why the circumstances of this case should remove the newspaper’s actions in accepting and printing the advertisements “from the category of commercial speech.”⁸⁸² In light of the rather extensive discussion of *Chrestensen* and the then-existing doctrine that commercial speech was categorically exempted from First Amendment protection, it is understandable that even the Chief Justice concluded that the *Pittsburgh Press* decision “represents . . . a disturbing enlargement of the ‘commercial speech’ doctrine.”⁸⁸³

The better reading of the *Pittsburgh Press* decision, however, is that it is not about the constitutional status of commercial speech at all—despite the decision’s somewhat extensive discussion of that doctrine. The better reading revealed itself after the *Pittsburgh Press* argued that if the commercial speech doctrine applied then the Supreme Court should rule that *Chrestensen* was wrongly decided and that commercial speech should receive constitutional protection. In response to this point, the *Pittsburgh Press* majority wrote:

Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, *it is illegal commercial activity* under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned ‘Narcotics for Sale’ and ‘Prostitutes Wanted’ rather than stated within the four corners of the advertisement.⁸⁸⁴

⁸⁸¹ *Id.* at 385.

⁸⁸² *Id.* at 387.

⁸⁸³ *Id.* at 393 (Burger, C.J., dissenting).

⁸⁸⁴ *Id.* at 388 (majority opinion) (emphasis added) (footnote omitted).

The *Pittsburgh Press* majority then made clear that it considered the placement of the employment advertisements at issue in this case to be illegal sex-based discrimination:

The illegality in this case may be less overt, but we see no difference in principle here. . . .

. . . The Commission and the courts below concluded that the practice of placing want ads for nonexempt employment in sex-designated columns did indeed ‘aid’ employers to indicate illegal sex preferences. The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions.⁸⁸⁵

In *Pittsburgh Press*, the Court gave lip service to the existence of a commercial speech exclusion but in fact did not rely upon it at all—perhaps knowing that the doctrine soon would be abandoned, as it was only two years later. Rather, the importance of *Pittsburgh Press* is that the Supreme Court neatly pivoted from an assertion that the challenged speech fell outside the First Amendment’s protection because it was *commercial* to a conclusion that it was unprotected because it was part of conduct that was *illegal*. This, then, is the heart of the *Pittsburgh Press* rule:

Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.⁸⁸⁶

The *Pittsburgh Press* decision, therefore, is an outgrowth of the *Giboney* principle that speech integral to criminal conduct may be proscribed by the government. That is why, as quoted immediately above, the government may constitutionally impose a “restriction” on speech that is “incidental” to an “activity” that “itself is illegal.” To be sure, the *Pittsburgh Press* majority apparently did not view its decision in those terms; the majority opinion never cites or otherwise references *Giboney* although it repeatedly cites the soon-to-be-repudiated

⁸⁸⁵ *Id.* at 388-89.

⁸⁸⁶ *Id.* at 389.

Valentine v. Chrestensen and includes an extensive discussion of commercial speech doctrines. Indeed, the only reference to *Giboney* in the entirety of the *Pittsburgh Press* decision is a passing reference in the dissent of Justice Douglas offered solely for the purpose of distinguishing it.⁸⁸⁷ But in later years, the Supreme Court would often refer to *Giboney* and *Pittsburgh Press* together as representing the general proposition that speech proposing a transaction that is itself illegal may not be protected by the First Amendment. This constitutional rule happened to arise in *Pittsburgh Press* in the context of commercial speech, but as will be discussed in Parts C (child pornography) and D (true threats) of this chapter, this categorical exclusion does not necessarily *require* that the speech involved be commercial in nature. Of course, as discussed in Part A (fraud) of this chapter, that fact the speech integral to illegal activity happens to be commercial certainly would do nothing to save it.

⁸⁸⁷ *Id.* at 398 (Douglas, J., dissenting) (“There are here, however, no such unusual circumstances.”).

Part C: Visual depictions of child pornography

The Supreme Court has repeatedly made clear that visual depictions of child pornography created with the use of real children fall within the “First Amendment Free Zone” that is outside the “freedom of speech” protected by the Constitution. While that outcome is morally unassailable and is consistently reflected in an unbroken line of the Supreme Court’s cases, the doctrinal reasoning upon which it rests has been difficult to articulate. Is “child pornography” really a separate and distinct category of unprotected speech as the Supreme Court has repeatedly stated?

Unlike “fraud,” speech in this unprotected category need not be untruthful, deceptive or misleading—to the contrary, the very fact that the visual depiction *truthfully* represents *actual* child abuse is one of the essential reasons for its exclusion. Moreover, while part of the rationale for denying First Amendment protection to these visual depictions of child pornography is a strong governmental interest in eliminating the market demand for such films and images, and therefore eliminating the demand to abuse children in order to create the visual depictions, there is no *requirement* that the government prove a “commercial” element in order to proscribe these visual depictions.⁸⁸⁸

As discussed above in Chapter 1, the Supreme Court could have taken any one of at least three doctrinal approaches to declaring visual depictions of child pornography unprotected by the Constitution.⁸⁸⁹ The Supreme Court itself has most often referred to “child pornography” as a separate and distinct category of unprotected speech.⁸⁹⁰ That doctrinal construction is problematic because “child pornography” was never recognized as an unprotected category

⁸⁸⁸ See, e.g., *Osborne v. Ohio*, 495 U.S. 103 (1990) (mere possession of proscribed images, without a showing that they were commercially produced or acquired, is sufficient for criminal liability).

⁸⁸⁹ See notes 146-156, *supra*.

⁸⁹⁰ This reference to child pornography as a separate excluded category is common in the cases since *Ferber*, 458 U.S. 747, was decided. See, e.g., *Stevens*, 559 U.S. at 471; *Alvarez*, 132 S. Ct. at 2544.

before *Chaplinsky*; indeed, the “serious national problem” arising “[i]n recent years” of “the exploitive use of children in the production of pornography”⁸⁹¹ that has animated the Supreme Court since *New York v. Ferber* really is a function of twentieth century photographic and communications technology. Therefore, it was impossible for the Supreme Court to conclude in *Ferber* that excluding from First Amendment protection visual depictions of child pornography has “never been thought to raise any Constitutional problem”⁸⁹² by pointing to historical practice—and it made no attempt to do so.

But this abandonment in *Ferber* of the traditional mooring to historical practice that the court has scrupulously required in other contexts has rendered its child pornography jurisprudence subject to misinterpretation or intellectual criticism. For example, while the Supreme Court saw no problem declaring proscribable images that capture actual *child* abuse it sharply recoiled at the suggestion it should do the same for images of actual *animal* abuse and rejected the government’s invitation to do so as “startling and dangerous”⁸⁹³—even though *neither* circumstance presented “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.”⁸⁹⁴ Purely from the standpoint of First Amendment doctrine, there is no articulable distinction that explains these two quite different outcomes—the only difference is the unique, obvious and understandable revulsion and universal societal opprobrium that attaches to the sexual abuse of children.

Thus, it is reasonable to conclude—even if it cannot be empirically proven—that what actually happened in the cases regarding visual depictions of child pornography is this: The Supreme Court *first* reached the conclusion that such depictions should not enjoy First

⁸⁹¹ *Ferber*, 458 U.S. at 749.

⁸⁹² *Chaplinsky*, 315 U.S. at 572.

⁸⁹³ *Stevens*, 559 U.S. 470.

⁸⁹⁴ *EMA*, 131 S. Ct. at 2734.

Amendment protection and *then* set about devising an articulable reason for that outcome. That speculative conclusion about the Supreme Court’s motivation and process would explain the doctrinal anomaly that results from considering “child pornography” as a distinct category of unprotected speech created by *Ferber* in 1982 without any “tradition of proscription.”⁸⁹⁵ That speculation is buttressed by the Supreme Court’s later explanation that in *Ferber*, it had “made clear” that child pornography “presented a special case.”⁸⁹⁶ Consider these two contrasting upshots of the approach selected by the Supreme Court:

On the one hand, declaring “child pornography” to reside in a separate, distinct category of speech without constitutional protection has the doctrinal benefit of absolving the Court of any need to harmonize the outcome in child pornography cases with others that are arguably similar. Child pornography is constitutionally unprotected, the circular reasoning would go, because “child pornography” is an unprotected category. It is easy for the Supreme Court to reject subsequent efforts to extend that reasoning to other proposed categories because by definition it would not apply. For example, visual depictions of *animal* abuse would not enjoy First Amendment protection akin to visual depictions of child abuse, the reasoning would go, because they obviously are *not* part of the unprotected category of *child* pornography.

On the other hand, the doctrinal drawback of the Supreme Court’s abandonment of its usual requirement that any newly discovered categories demonstrate a “tradition of proscription”⁸⁹⁷ is that it invites analogy from future advocates. If visual depictions of child abuse could be excluded from First Amendment protection without any demonstration of historical exclusion, the reasoning would go, then *why not* visual depictions of animal cruelty? Or why not some other future category if the opprobrium were sufficient?

⁸⁹⁵ *Id.* at 2734.

⁸⁹⁶ *Stevens*, 559 U.S. at 471.

⁸⁹⁷ *EMA*, 131 S. Ct. at 2734.

Thus, from a doctrinal standpoint, it may be preferable to consider child pornography not as a new and separate category of unprotected speech but rather as a *specific application* of the longstanding category of speech integral to criminal conduct. This doctrinal approach would explain the exclusion of child pornography from First Amendment protection by *Ferber* in 1982 as part of the well-established *Giboney-Pittsburgh Press* principle that, as demonstrated above, has deep pre-*Chaplinsky* roots in American jurisprudence. In this application the “speech,” in the form of visual depictions of child pornography, is integral to the criminal conduct, the underlying acts of child abuse performed on real children.

In any event, one thing is certain: The “tradition of proscription” for visual depictions of child pornography extends *at least* as far back as 1982, when the Supreme Court considered the First Amendment implications of the State of New York prosecuting Paul Ferber for selling films that contained pornographic images of children. Since that inception, the body of law excluding from First Amendment protection visual depictions of child pornography that is created by recording actual unlawful acts involving real children has grown ever more solid. The line of Supreme Court cases upholding government proscription of speech in the form of visual depictions of child pornography involving real children is unbroken from *Ferber* through *Osborne* and *Williams*, and the reasoning that visual depictions of child pornography are constitutionally unprotected because of their inherent connection to the underlying crime of child abuse was buttressed by *Free Speech Coalition*.

New York v. Ferber (1982).⁸⁹⁸ The Supreme Court first determined that visual depictions of child pornography fall into a category of speech unprotected by the First Amendment in this 1982 case, the Supreme Court’s “first examination of a statute directed at and

⁸⁹⁸ *Ferber*, 458 U.S. 747.

limited to depictions of sexual activity involving children.”⁸⁹⁹ The case arose after Paul Ferber, the operator of a sexually oriented bookstore on Manhattan Island, sold to an undercover officer two films “devoted almost exclusively to depicting young boys masturbating.”⁹⁰⁰ At that time, New York state law contained three relevant prohibitions. First, it prohibited use of a child in the *making* of child pornography.⁹⁰¹ Second, it prohibited the knowing *dissemination* of child pornography that is “obscene” as that term had come to be defined through years of First Amendment litigation.⁹⁰² Third, it prohibited the knowing *dissemination* of child pornography that was *not* “obscene.”⁹⁰³ All three prohibitions constituted felony crimes.⁹⁰⁴

Mr. Ferber was prosecuted for violating both of the statutory prohibitions on dissemination of child pornography, but the jury acquitted him of the counts related to disseminating obscene pornographic materials.⁹⁰⁵ Therefore, his only conviction was for the act of disseminating films containing visual depictions of children engaged in sexual acts that a jury determined *not* to be obscene. Although the maximum penalty for this conviction could have

⁸⁹⁹ *Id.* at 753.

⁹⁰⁰ *Id.* at 751-52.

⁹⁰¹ *Id.* at 750-51 The New York statute read in pertinent part: “A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.” A “[s]exual performance” is defined as “any performance or part thereof which includes sexual conduct by a child less than sixteen years of age. §263.00(1). ‘Sexual conduct’ is in turn defined in §263.00(3): ‘Sexual conduct’ means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.’ ‘A performance is defined as ‘any play, motion picture, photograph or dance’ or ‘any other visual representation exhibited before an audience.’ §263.00(4).” *Id.* (quoting New York Penal Law §263.05).

⁹⁰² *Ferber*, 458 U.S. at 751. The prohibition on distributing child pornography that was “obscene” was contained in the New York Penal Law § 263.10.

⁹⁰³ *Ferber*, 458 U.S. at 751 (“At issue in this case is § 263.15, defining as a class D felony: ‘A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.’ To ‘promote’ is also defined: ‘Promote’ means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.’ § 263.00(5).”).

⁹⁰⁴ *Id.* at 750-51.

⁹⁰⁵ *Id.* at 752.

been seven years in prison, Mr. Ferber was sentenced to only 45 days.⁹⁰⁶ Mr. Ferber challenged his conviction on the ground that the material he disseminated was protected under the First Amendment; the trial court rejected that argument and the Appellate Division affirmed the conviction. But the New York Court of Appeals reversed, holding that the state statute barring dissemination of child pornography that is *not* obscene—the statute under which Mr. Ferber was convicted—violated the First Amendment because it would “prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.”⁹⁰⁷

The United States Supreme Court granted certiorari and a single question was presented: “To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?”⁹⁰⁸ As a case of first impression, and perhaps foreshadowing the mindset with which the Justices approached this dispute, the Supreme Court began its inquiry “with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children.”⁹⁰⁹ While acknowledging the “dangers of censorship inherent in unabashedly content-based laws” and noting that “[l]ike obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy,” the Supreme Court answered its own threshold question in the affirmative: “States are entitled to

⁹⁰⁶ *Id.* at 751 n.3.

⁹⁰⁷ *Id.* at 752 (citations and footnote omitted).

⁹⁰⁸ *Id.* at 753.

⁹⁰⁹ *Id.*

greater leeway in the regulation of pornographic depictions of children.”⁹¹⁰ The Supreme Court articulated five reasons that led it to this conclusion:

First, “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling’”.⁹¹¹ “The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”⁹¹²

Second, “[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”⁹¹³

Third, “[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.”⁹¹⁴

Fourth, “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work.”⁹¹⁵

⁹¹⁰ *Id.* at 756.

⁹¹¹ *Id.* at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

⁹¹² *Id.* at 757.

⁹¹³ *Id.* at 759 (footnote omitted).

⁹¹⁴ *Id.* at 761.

⁹¹⁵ *Id.* at 762-63.

Fifth, “[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.”⁹¹⁶

The Supreme Court used eight pages in the United States Reports to elaborate on these five justifications for concluding that “States are entitled to greater leeway in the regulation of pornographic depictions of children.” But the groundbreaking opinion in *Ferber*—the only post-*Chaplinsky* opinion to articulate a new category of unprotected speech without any reference to pre-*Chaplinsky* historical roots—raises numerous interesting observations and points that were not expressly stated by the Court:

First, four separate opinions were filed in *Ferber*, and five Justices—a majority of the Court—apparently felt the need to express their views separate from the majority.⁹¹⁷ This splintering likely reflects the delicate constitutional ground upon which the Justices understood they were treading, and it appears to reflect a deep division on the Supreme Court about whether child pornography that might somehow involve “material with serious literary, scientific, or educational value,”⁹¹⁸ a concept borrowed from the law governing obscenity, should be subject to government regulation. The majority declined to adopt that distinction and concluded that obscenity analysis was inapplicable:

The *Miller* [obscenity] standard, like all general definitions of what may be banned as obscene, does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be

⁹¹⁶ *Id.* at 763.

⁹¹⁷ In addition to Justice White’s majority opinion, Justice O’Connor filed a concurring opinion; Justices Brennan and Marshall filed an opinion concurring in the judgment; and Justice Stevens filed an opinion concurring in the judgment. In addition, Justice Blackmun concurred in the result without filing any opinion. Thus, while all nine Justices agreed that New York could punish Paul Ferber for his actions, five Justices—Brennan, Marshall, Stevens, Blackmun and O’Connor felt the need to do so for reasons that in some manner differed from Justice White’s majority.

⁹¹⁸ *Ferber*, 458 U.S. at 774 (O’Connor, J., concurring).

“patently offensive” in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.⁹¹⁹

Justice O’Connor wrote separately to emphasize her view that even a demonstration that such value existed would not provide a constitutional shield for child pornography:

The compelling interests identified in today’s opinion suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph “edifying” or “tasteless.” The audience’s appreciation of the depiction is simply irrelevant to New York’s asserted interest in protecting children from psychological, emotional, and mental harm.⁹²⁰

Indeed, in Justice O’Connor’s view, attempting to draw a line between child pornography with “serious literary, scientific, or educational value,” which might be constitutionally protected, and that without such value, which the government could ban, would *exacerbate* any encroachment on the First Amendment by further injecting the government into a case-by-case assessment of which depictions have substantive merit and which do not.⁹²¹ Justice O’Connor seemed concerned that anything less than a categorical First Amendment exclusion could draw the courts into a never-ending assessment of “protected” versus “unprotected” child pornography as it had been drawn into a decades-long attempt to separate the “obscene” from that which is not. She wanted no part of that.

⁹¹⁹ *Id.* at 761 (alterations in original) (citations and internal quotation marks omitted).

⁹²⁰ *Id.* at 774-75 (O’Connor, J., concurring) (citation omitted).

⁹²¹ *Id.* at 775 (“An exception for depictions of serious social value, moreover, would actually increase opportunities for the content-based censorship disfavored by the First Amendment” whereas the categorical exclusion of visual depictions of child pornography from First Amendment protection “attempts to protect minors from abuse without attempting to restrict the expression of ideas by those who might use children as live models.”).

By contrast, Justices Brennan and Marshall wrote separately from the majority, despite concurring the judgment,⁹²² for reasons precisely *opposite* those of Justice O'Connor. In their view, the categorical exclusion announced in the majority opinion was constitutionally undesirable because it would result in no constitutional shield for any visual depictions of child pornography, unlike those in this case, that might have “serious literary, artistic, scientific, or medical value”:

[I]n my view application of [the New York statute] or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment . . . The First Amendment value of depictions of children that are in themselves serious contributions to art, literature, or science, is, by definition, simply not “*de minimis*.” At the same time, the State’s interest in suppression of such materials is likely to be far less compelling. . . . In short, it is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed “material outside the protection of the First Amendment.”⁹²³

Sharing concerns similar to those of Justices Brennan and Marshall, Justice Stevens would have brought visual depictions of child pornography within the protective umbrella of the First Amendment but then would have upheld the statute because the speech it regulates is of low value.⁹²⁴

Despite this strong disagreement about the doctrinal reasoning, there was not dissent from the outcome in *Ferber*. The Justices were unanimous in favoring the result: The State of New York could, without violating the First Amendment, punish Paul Ferber for selling films depicting child pornography. The majority reached that conclusion by relying on the Doctrine of

⁹²² Justices Brennan and Marshall would have upheld the statute but left open the possibility for future “as applied” challenges if it were applied to visual depictions of child pornography that had “serious literary, artistic, scientific, or medical value.” *Id.* at 776 (Brennan, J., concurring in judgment). Their concurrent basis for upholding the statute: “[T]he State has a special interest in protecting the well-being of its youth. This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material.” *Id.* (citations omitted).

⁹²³ *Id.* at 776-77 (citations omitted).

⁹²⁴ *Id.* at 777-81 (Stevens, J., concurring in judgment).

Categorical Exclusion but without drawing upon or incorporating concepts from the First Amendment law of obscenity and expressly noted that “[t]he test for child pornography is separate from the obscenity standard enunciated in *Miller*. . . .”⁹²⁵

Second, it is clear from the language used that the *Ferber* Court intended to create, and thought it was creating, a new category of speech unprotected by the First Amendment—visual depictions of “child pornography.” The majority described its action:

When a *definable class of material*, such as that covered by [the New York statute at issue], bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as *without the protection of the First Amendment*.⁹²⁶

After further referencing the “*category of child pornography* which, like obscenity, is unprotected by the First Amendment,”⁹²⁷ the majority then characterized its holding in the language of categorical analysis: “We hold that [the New York statute at issue] sufficiently describes a *category of material* the production and distribution of which is *not entitled to First Amendment protection*.”⁹²⁸ Justice Stevens, who did not share the majority’s view that visual depictions of child pornography should be categorically excluded from First Amendment protection,⁹²⁹ characterized the majority’s opinion as referencing a “*category of nonobscene child pornography that New York may legitimately prohibit*”⁹³⁰ and as “[h]aving defined that *category* [of speech that may be prohibited] in an abstract setting.”⁹³¹ And he refers to the

⁹²⁵ *Id.* at 764 (majority opinion).

⁹²⁶ *Id.* (emphasis added).

⁹²⁷ *Id.* (emphasis added).

⁹²⁸ *Id.* at 765 (emphasis added).

⁹²⁹ *Id.* at 781 (Stevens, J., concurring in judgment) (emphasis added) (“Although I *disagree with the Court’s position that such speech is totally without First Amendment protection*, I agree that generally marginal speech does not warrant the extraordinary protection afforded by the overbreadth doctrine.” (emphasis added)).

⁹³⁰ *Id.* at 778 (emphasis added).

⁹³¹ *Id.* (emphasis added).

“category of speech that is covered by the New York statute”⁹³² as being of low value. It appears that all Justices involved in the *Ferber* case thought the rule being laid down by the majority was one that visual depictions of child pornography were categorically excluded from First Amendment protection; there is no indication that any Justice viewed the effect of the opinion differently.

Third, it is unclear why the *Ferber* Court’s majority thought it necessary to articulate a new category—child pornography—along with the five justifications, noted *supra*, for that category. While it is clear the *Ferber* Court considered visual depictions of child pornography to fall outside the established category of obscenity, it is equally clear the Court considered those depictions to fall *within* the established category of speech incidental to criminal conduct:

The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. “It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”⁹³³

After noting that the very “act of selling these materials is guaranteeing that there will be additional abuse of children,”⁹³⁴ the *Ferber* Court noted that any burden on the First Amendment resulting from a prohibition on dissemination of child pornography was no greater than the burden on the First Amendment from prohibiting the production of the child pornography in the first instance by enforcing general laws against child labor rather than laws targeted specifically at combating child pornography.⁹³⁵ In either scenario, the government ban results in no dissemination of visual depictions of child pornography, either because they never are created or

⁹³² *Id.* at 781.

⁹³³ *Id.* 761-62 (majority opinion) (quoting *Giboney*, 336 U.S. at 498 (footnote omitted)).

⁹³⁴ *Id.* at 761 n. 13.

⁹³⁵ *Id.* at 762 (“We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.” (footnote omitted)).

because they are created but not disseminated. The Supreme Court then noted that in this case effectively combating the underlying illegal conduct—namely, the sexual abuse of children for the purpose of creating visual depictions of child pornography that can be marketed—has been determined by legislatures to require restrictions on the dissemination of those visual depictions after they are produced:

[T]here is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.⁹³⁶

The *Ferber* Court then noted the holding in *Giboney* that speech incidental to criminal conduct is categorically excluded from First Amendment protection and further noted the application of that rule in *Pittsburgh Press*, from which the *Ferber* Court quoted approvingly:

Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.⁹³⁷

Unlike the Court's analysis of why the *Roth-Miller* approach to obscenity did not control the outcome in *Ferber*, there is no critique by any Justice of applying the *Giboney-Pittsburgh Press* approach to speech incidental to criminal conduct. Nor does *Ferber* make any attempt to distinguish those cases. Indeed, the *Ferber* Court seems satisfied that the *Giboney-Pittsburgh Press* rule squarely applies. So it is puzzling, indeed, why the Court saw application of the *Giboney-Pittsburgh Press* exclusion from the First Amendment of speech incidental to criminal conduct as only *one factor of five* it articulated to justify the creation of a *new* category of

⁹³⁶ *Id.* at 759-60.

⁹³⁷ *Id.* at 762 n.14.

excluded speech, namely visual depictions of child pornography. It would seem that the *Giboney-Pittsburgh Press* rule should have controlled the outcome in *Ferber* and that its application to the *Ferber* facts alone should have been sufficient to resolve the case without manufacturing a new category and, therefore, new doctrine.

Fourth, the similarity of the *Ferber* rule—that visual depictions of child pornography are categorically excluded from First Amendment protection to the previously recognized categories of speech integral to criminal conduct—and fraud is buttressed by the *Ferber* Court’s assessment that criminal intent is required for liability in a child pornography distribution case. “[C]riminal responsibility [for disseminating child pornography] may not be imposed without some element of scienter on the part of the defendant.”⁹³⁸ That requirement of the presence of a guilty mind is part of the Supreme Court’s analysis in allowing government prohibition of deceptive or fraudulent commercial speech⁹³⁹ and also part of its analysis permitting government prohibition of speech that is integral to criminal conduct.⁹⁴⁰ The common requirement of criminal intent makes the newly declared category of child pornography that much more akin to the previously existing categories of fraud and speech incidental to criminal conduct and makes the new category that much more difficult to distinguish from the latter.

Fifth, the *Ferber* Court’s decision to declare child pornography to be a new, separate category rather than part of the existing *Giboney* category is particularly peculiar because this new category—unlike every other one the Supreme Court has recognized—has no historical roots. Since *Chaplinsky*, the Supreme Court had adhered to its evaluation that the “well-defined and narrowly limited classes of speech” that fall outside the First Amendment were those that

⁹³⁸ *Id.* at 765.

⁹³⁹ See generally *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003).

⁹⁴⁰ See generally *Giboney*, 336 U.S. 490. Obviously, the underlying criminal conduct—a necessary precondition to which the prohibited speech must be incidental—requires an element of criminal intent.

“have *never* been thought to raise any Constitutional problem.”⁹⁴¹ The *Ferber* Court *quotes* that formulation from *Chaplinsky*, but never *analyzes* or *applies* it to explain how the *Ferber* situation might satisfy it. That formulation generally has meant that any new categories recognized as without the First Amendment must be, as the Supreme Court later would put it, “part of a long (if heretofore unrecognized) tradition of proscription.”⁹⁴² Indeed, the entire framework of analyzing categorical exclusion was rooted in the notion that the Supreme Court was not free to make up categories as it saw fit but was, instead, limited in part by the historical approach of excluding any particular type of speech.

But in *Ferber*, the Supreme Court abandoned that requirement of demonstrating the historical roots of the category it declared excluded from First Amendment protection. The *Ferber* Court acknowledged that it was only “[i]n *recent years* [that] the exploitive use of children in the production of pornography has become a serious national problem.”⁹⁴³ The opinion is wholly devoid of any asserted historical basis for government banning or regulating visual depictions of child pornography, and of course the *Ferber* Court was mindful that developments in technology by the time of *Ferber* were making child pornography a far more intractable problem than ever before in history.⁹⁴⁴ The *Ferber* Court also understood that those technological changes—even changes as simple as the ability to mass-produce and distribute traditional magazines with relatively little capital investment—had made both the production and dissemination of child pornography far easier, and the *Ferber* Court clearly was troubled that the exploding volume of child pornography was also producing a corresponding explosion in child

⁹⁴¹ *Chaplinsky*, 315 U.S. at 571-72.

⁹⁴² *EMA*, 131 S. Ct. at 2734.

⁹⁴³ *Ferber*, 458 U.S. at 749 (emphasis added).

⁹⁴⁴ *Id.* at 759 n.10 (“[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.”).

sexual abuse.⁹⁴⁵ It appears that the *Ferber* Court's profound concern about the extent and the nature of the relatively new problem of mass-marketed child pornography effectively trumped its otherwise rigid adherence to the *Chaplinsky* formulation that any categories of speech identified as falling outside the protection of the First Amendment have deep and identifiable historical roots. The best the *Ferber* Court could muster, in a jurisprudential tip of the hat to the *Chaplinsky* requirement of historical exclusion, was the assurance that this new "recogni[tion] and classif[ication of] child pornography as a category of material outside the protection of the First Amendment" was "*not incompatible* with our earlier decisions."⁹⁴⁶ Hardly a dispositive formulation.

Sixth, the Supreme Court reached its conclusion that visual depictions of child pornography should be recognized as a category of speech that is excluded from First Amendment protection by applying a balancing test. It is unusual indeed for the Supreme Court to expressly employ a balancing test to determine whether a category exists, but once the Court abandoned the critical *Chaplinsky* limitation of historical exclusion it was left to find some different, articulable rationale for recognizing child pornography as an unprotected category. It is this reasoning process, if nothing else, that makes *Ferber* unique in the Supreme Court's categorical approach to identifying speech excluded from the First Amendment.

The *Ferber* Court formulated the balancing test as follows: "[W]ithin the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive

⁹⁴⁵ *Id.* at 749 n.1 ("[C]hild pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale. One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. Such magazines depict children, some as young as three to five years of age . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism. In Los Angeles alone, police reported that 30,000 children have been sexually exploited." (citations and internal quotation marks omitted).

⁹⁴⁶ *Id.* at 763 (emphasis added).

interests, if any, at stake, that no process of case-by-case adjudication is required.”⁹⁴⁷ Taken as a whole, the *Ferber* opinion shows the Supreme Court weighing two factors against each other:

On the one hand, the *Ferber* Court weighed the significant harm done to children by disseminating visual depictions of child pornography.⁹⁴⁸ “The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”⁹⁴⁹ The fact that the harm sought to be avoided would fall upon children was a fact of heavy weight to the *Ferber* Court.⁹⁵⁰

On the other hand, the *Ferber* Court weighed the relatively slight burden on the First Amendment if government is allowed to ban such dissemination. “The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.”⁹⁵¹ Noting that any ideas being conveyed by depictions of children in sexual circumstances could as readily be accomplished by simulated images or by using adult actors who looked like younger children, the *Ferber* Court concluded that there is not

⁹⁴⁷ *Id.* at 763-64.

⁹⁴⁸ *Id.* at 757 (“[T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances” (quoting legislative findings accompanying passage of New York statute at issue)).

⁹⁴⁹ *Id.* at 758; *see also id.* at 758 n.9 (collecting scientific literature describing how child pornography harms children).

⁹⁵⁰ *Id.* at 756-57 (“It is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute’s effect on a First Amendment activity. In *Ginsberg v. New York*, we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government’s interest in the well-being of its youth justified special treatment of indecent broadcasting received by adults as well as children” (citations and internal quotation marks omitted)).

⁹⁵¹ *Id.* at 762.

“any question here of censoring a particular literary theme or portrayal of sexual activity.”⁹⁵²

Therefore, “[t]he First Amendment interest is limited to that of rendering the portrayal somewhat more ‘realistic’ by utilizing the photographing of children.”⁹⁵³

As the Supreme Court balanced those two factors—the weighty harm caused to children by child pornography and the slight imposition on the First Amendment of banning its dissemination—it was mindful of the nature of the marketplace for child pornography.⁹⁵⁴ The evidence showed that the government was unlikely to significantly alleviate the harm to children merely by prosecuting those who produce child pornography; it must also “dry up the market for this material.”⁹⁵⁵

Seventh, the Court was mindful that a national consensus had emerged that preventing dissemination of child pornography was necessary to protect children. It noted that twenty states “prohibited the dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene,” fifteen states “prohibit the dissemination of such material only if it is obscene,” and twelve states “prohibit only the use of minors in the production of the material.”⁹⁵⁶ “[V]irtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating ‘child pornography.’”⁹⁵⁷ “We shall not second-guess this legislative judgment. . . . That judgment, we think, easily passes muster under the First Amendment.”⁹⁵⁸

It is reasonable to conclude that the *Ferber* Court found comfort in the existence of this contemporary national consensus as a sort of surrogate for *Chaplinsky*’s required historical basis

⁹⁵² *Id.* at 763.

⁹⁵³ *Id.*

⁹⁵⁴ *Id.* at 763 n.11 (collecting evidence that mere prosecution of those who produce child pornography unlikely to prevent the harm to children).

⁹⁵⁵ *Id.* at 760.

⁹⁵⁶ *Id.* at 749 n.2 (collecting state laws).

⁹⁵⁷ *Id.* at 758.

⁹⁵⁸ *Id.*

for categorically excluding visual depictions of child pornography from the First Amendment’s protection, a requirement from which the Supreme Court strayed in this case. Both characteristics—either long historical acceptance or a broad contemporary national consensus—are similar in that they reflect clear social rejection of the speech at issue coupled with a societal willingness to abandon its constitutional protection. While those factors are not, alone, sufficient to justify excluding speech from the First Amendment’s protection—if they were, all unpopular speech could be rendered unprotected—they are one relevant factor underlying the Supreme Court’s jurisprudence defining the excluded categories.

Eighth, since the Supreme Court takes great pains to explain why its obscenity doctrine does not control the outcome in *Ferber*, it is somewhat ironic that the actual test the *Ferber* Court applied to generate the unprotected category of child pornography resembles its obscenity doctrine in at least one vital respect: Both involve an element of “I know it when I see it.”⁹⁵⁹ The balancing test applied by the *Ferber* Court to explain its child pornography category—that “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake”⁹⁶⁰—could as easily justify excluding from First Amendment protection almost any type of speech that is of slight value and results in great societal revulsion. Indeed, if that were the actual test for discovery of a new category of unprotected speech, the Supreme Court almost certainly would have applied it 28 years later to justify excluding horrific “animal crush” and other animal cruelty videos from the First Amendment’s shield; instead, the Supreme Court in the “animal crush” case sharply *rejected* the government’s similar balancing test as “startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories

⁹⁵⁹ *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

⁹⁶⁰ *Ferber*, 458 U.S. at 763-64.

of speech that survive an *ad hoc* balancing of relative social costs and benefits.”⁹⁶¹ A more likely explanation for what really was happening in *Ferber* is this: The Justices were unanimously abhorred by the nature and scope of the “serious national problem”⁹⁶² of child pornography, saw no reason to apply the First Amendment to impede or block the national consensus favoring certain efforts to address that problem, and thus fabricated a new category of unprotected speech to allow action consistent with that national consensus. As for the proper legal rationale to apply in order to reach that outcome, well, one might conclude that they knew it when they saw it.

Ninth, it is worth observing that the *Ferber* Court coupled its recognition of a new category with a strong recitation of the First Amendment overbreadth doctrine. Even as the *Ferber* Court recognized the new, unprotected category of visual depictions of child pornography, it immediately noted that the category was subject to close policing:

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here, the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age. The category of “sexual conduct” proscribed must also be suitably limited and described.⁹⁶³

Indeed, the lengthy discussion of the overbreadth doctrine in *Ferber* seems somewhat out of place since not a single Justice concluded that it operated in this case to prohibit the government regulation at issue. The fact that the *Ferber* Court discussed overbreadth at such length suggests that the Supreme Court understood that having unmoored itself from *Chaplinsky*’s requirement that unprotected categories have historical roots, it might be opening the door to numerous other

⁹⁶¹ *Stevens*, 559 U.S. at 470. The test proposed by the government in *Stevens* was: “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.” *Id.*

⁹⁶² *Ferber*, 458 U.S. at 749.

⁹⁶³ *Id.* at 764 (footnote omitted).

requests to declare whole categories of speech outside the First Amendment's scope. Perhaps the Supreme Court wanted to signal that it had no intention of doing so and was willing to deploy the "strong medicine"⁹⁶⁴ of overbreadth analysis to prevent its more permissive approach to the Doctrine of Categorical Exclusion from getting out of hand.

Overall, *Ferber* stands as one of the landmark cases in the Doctrine of Categorical Exclusion. It is the only post-*Chaplinsky* case to have fabricated a new category of unprotected speech, expressly acknowledging that it was doing so. It is the only case to identify a category of unprotected speech that has no demonstrated historical roots. It is perhaps the strongest articulation of the continued vitality of categorical exclusion in the last quarter of the twentieth century. As discussed below, its approach of categorically excluding regulations related to child pornography from the protection of the First Amendment continues to be followed, and although the *Ferber* Court spoke in terms of the "commercial" nature of the trade in visual depictions of child pornography, it soon would become clear that the Supreme Court's doctrine holding that child pornography is without First Amendment protection did not rest on the presence of "commercial speech."

As Clyde Osborne of Columbus, Ohio, would discover less than a decade later, merely possessing the forbidden images would permit criminal prosecution without affront to the First Amendment.

⁹⁶⁴ *Id.* at 769 ("The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its fact at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'" (citation omitted)).

Osborne v. Ohio (1990):⁹⁶⁵ In recognizing visual depictions of child pornography as speech categorically excluded from the First Amendment, the *Ferber* Court allowed the government to prohibit or regulate their “production and distribution” without running afoul of the First Amendment.⁹⁶⁶ But is the Supreme Court’s placement into the “First Amendment Free Zone” of visual depictions of child pornography sufficient to prevent the First Amendment from barring government actions that prohibit or regulate the mere *possession* of visual depictions of child pornography? What if that possession is accomplished entirely within the confines of one’s own home and with no commercial purpose or connection?

Eight years after deciding *Ferber*, the Supreme Court was presented with that question about *Ferber*’s scope. At the home of Clyde Osborne in Columbus, Ohio, police executed a valid search warrant and discovered four photographs of a nude male teenager in sexually explicit poses.⁹⁶⁷ The photographs were seized from an album in a desk drawer in Mr. Osborne’s bedroom, and there was “no evidence that the photographs had been produced commercially or distributed.”⁹⁶⁸ The State of Ohio prosecuted Mr. Osborne for possessing child pornography in violation of state law, and he was convicted.⁹⁶⁹ The state appellate courts upheld his conviction, and the United States Supreme Court granted Mr. Osborne’s request to review the case.

⁹⁶⁵ 495 U.S. 103.

⁹⁶⁶ *Ferber*, 458 U.S. at 765.

⁹⁶⁷ *Osborne*, 495 U.S. at 107.

⁹⁶⁸ *Id.* at 139.

⁹⁶⁹ *Id.* at 106-07. The Ohio statute at issue read, in pertinent part, as follows: “(A) No person shall do any of the following: . . . (3) Possess or view any material or performance that shows a minor who is not the person’s child or ward in a state or nudity, unless one of the following applies: (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance. (b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.” *Id.*

While several issues were presented,⁹⁷⁰ the central question was the scope of the Doctrine of Categorical Exclusion for visual depictions of child pornography: How broad was the excluded category announced in *Ferber*? The key question was “whether Ohio may constitutionally proscribe the possession and viewing of child pornography.”⁹⁷¹ The answer to that question, the Supreme Court held, is “Yes.” In reaching that conclusion, the Supreme Court focused once again, as it had in *Ferber*, on the significant harms that the creation of child pornography causes to children: “It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.”⁹⁷² Once again applying a balancing test, as it did in *Ferber*, the Supreme Court seemed persuaded that the need for state authority to prohibit possession of child pornography in order to address “the child pornography problem” was, in part, made greater by the Supreme Court’s decision in *Ferber*:

Given the importance of the State’s interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. According to the State, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution.⁹⁷³

The *Osborne* Court also reiterated its continued focus on several factors or concerns that had animated the *Ferber* Court. For example, the *Osborne* Court found comfort in the fact that 19 states had “found it necessary to proscribe the possession of this material,”⁹⁷⁴ a similar approach to the *Ferber* Court’s observation that a national consensus favoring government regulation or prohibition of child pornography had developed. The *Osborne* Court also noted that the rule it

⁹⁷⁰ The opinion extensively discusses the overbreadth doctrine as well as due process considerations, one of which became the basis for the Supreme Court’s reversal of Mr. Osborne’s conviction and remand for a new trial. Those issues are not pertinent to this section and, therefore, are not discussed here.

⁹⁷¹ *Osborne*, 495 U.S. at 108.

⁹⁷² *Id.* at 109-10.

⁹⁷³ *Id.* at 110.

⁹⁷⁴ *Id.* at 110-11.

was adopting would further the interest, expressed in *Ferber*, in minimizing ongoing harm to victims from the existence of images:

[T]he materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. *The State's ban on possession and viewing encourages the possessors of these materials to destroy them.*⁹⁷⁵

Furthermore, the *Osborne* Court reasoned, "encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."⁹⁷⁶ Like the *Ferber* Court, the *Osborne* Court found it constitutionally significant that the State was required to prove Mr. Osborne's criminal intent and that mere innocent possession of the visual depictions of child pornography would not have been enough to avoid First Amendment protection.⁹⁷⁷ The *Osborne* Court then made crystal clear that the nature of the interests it was balancing in this case were critical to its conclusion: "Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography."⁹⁷⁸

The *Osborne* case is significant in the Doctrine of Categorical Exclusion because it makes clear that the Supreme Court's approach to First Amendment analysis in child pornography cases more closely resembles its *Giboney* analysis of speech integral to criminal conduct rather than its *Roth/Miller* analysis of obscenity. The *Osborne* Court quotes favorably

⁹⁷⁵ *Id.* at 111 (emphasis added) (citation omitted).

⁹⁷⁶ *Id.*

⁹⁷⁷ *Id.* at 115 ("The Ohio Supreme Court also concluded that the State had to establish scienter in order to prove a violation of [the Ohio law at issue] based on the Ohio default statute specifying that recklessness applies when another statutory provision lacks an intent specification. The statute on its face lacks a *mens rea* requirement, but that omission brings into play and is cured by another law that plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter." (citation omitted))

⁹⁷⁸ *Id.* at 111.

from *Giboney* and applies its reasoning⁹⁷⁹ while taking pains to distinguish its reasoning in *Miller* and rejecting Mr. Osborne’s invitations to apply *Miller*-based reasoning.⁹⁸⁰ The *Osborne* Court specifically rejected Mr. Osborne’s argument that precedent from obscenity law should control the outcome in this case. In *Stanley v. Georgia*,⁹⁸¹ a pre-*Ferber* case, the Supreme Court had held that even though obscenity as a category of speech was outside the protection of the First Amendment, the Constitution nonetheless bars the government from prohibiting the possession and viewing of obscene materials in the privacy of a private home.⁹⁸² The *Osborne* Court made clear that child pornography was constitutionally different from obscenity “because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*.”⁹⁸³ The *Osborne* Court described the constitutionally significant differences between obscenity and child pornography:

In *Stanley*, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. We responded that “[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.” The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne’s mind. Rather, Ohio has enacted [the statute at issue] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.⁹⁸⁴

After *Osborne*, it is clear that the Supreme Court considers child pornography to be a greater “evil” than obscenity because of the actual harm it causes, directly or indirectly, to children. It also considers the expressive value of visual depictions of child pornography so slight, and the harm to children that state regulation seeks to prevent so weighty, that balancing

Id. at 110. The discussion of *Giboney* is contained in the portion of the opinion related to categorical analysis; *Miller* is not even mentioned in that portion.

⁹⁸⁰ See *id.* at 111-17. The discussion of *Miller* is contained in portions of the opinion outside the categorical analysis.

⁹⁸¹ 394 U.S. 557 (1969).

⁹⁸² *Osborne*, 495 U.S. at 108 (citing *Stanley*, 394 U.S. 557).

⁹⁸³ *Id.*

⁹⁸⁴ *Id.* at 109 (citations omitted).

the interests involved results in a more permissive application of First Amendment protections. Therefore, the Supreme Court is willing to allow the government greater leeway to regulate or prohibit various conduct related to visual depictions of child pornography—possession as well as production and distribution—provided the government can demonstrate that its actions are a “reasonable”⁹⁸⁵ step to reduce or eliminate the substantial harm to children. Overall, by the time it decided *Osborne* the Supreme Court clearly viewed any activity related to visual depictions of child pornography as much more closely intertwined with criminal conduct, and therefore subject to a *Giboney* exception from the First Amendment, than like “the intractable obscenity problem.”⁹⁸⁶ But as the Supreme Court later would observe, “The broad authority to proscribe child pornography is not . . . unlimited.”⁹⁸⁷ In two subsequent cases, the Supreme Court would turn its attention to more clearly defining the boundaries of this unprotected category of speech.

Ashcroft v. Free Speech Coalition (2002):⁹⁸⁸ Concerned about the effect of rapid technological advances since *Ferber* on enabling the trade in visual depictions of child pornography, Congress enacted prohibitions on images that “appear[] to be”⁹⁸⁹ of real children engaged in pornographic acts and on advertising that “conveys the impression”⁹⁹⁰ the image is of real children engaged in pornographic acts. These new prohibitions, contained in the Child Pornography Prevention Act of 1996 (CPPA), were aimed at “virtual child pornography”—generated entirely by computers and never involving any real child in its production—and “youthful adult pornography”⁹⁹¹—involving the depiction of actual conduct by youthful-looking adult actors who appear to be minors. A coalition of adult-entertainment industry representatives,

⁹⁸⁵ *Id.*

⁹⁸⁶ *Miller*, 413 U.S. at 16 (referencing Justice Harlan’s famous reference to “the intractable obscenity problem”).

⁹⁸⁷ *Williams*, 553 U.S. at 289.

⁹⁸⁸ 535 U.S. 234.

⁹⁸⁹ *Id.* at 241 (quoting 18 U.S.C. § 2256(8)(B) (1996)).

⁹⁹⁰ *Id.* at 242 (quoting 18 U.S.C. § 2256(8)(D) (1996)).

⁹⁹¹ The phrase is Justice O’Connor’s. See *id.* at 261 (O’Connor, J., concurring in the judgment in part and dissenting in part).

publishers of books about nudity, a painter who specialized in nude subjects, and a photographer specializing in taking nude photographs, filed suit in federal court in California arguing that the CPPA amendments were sufficiently broad as to punish their various lawful enterprises, “chilling them from producing works protected by the First Amendment.”⁹⁹² The district court rejected the First Amendment challenge. The Ninth Circuit disagreed and found the challenged provisions of the CPPA facially invalid. The Supreme Court granted certiorari.

The Supreme Court struck down the two challenged provisions of the CPPA because the case “provides a textbook example of why we permit facial challenges to statutes that burden expression.”⁹⁹³ Although “[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people,”⁹⁹⁴ the Supreme Court reasoned, “[t]he prospect of crime . . . by itself does not justify laws suppressing protected speech.”⁹⁹⁵ “The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.”⁹⁹⁶ The *Free Speech Coalition* Court noted that “virtual” images of child pornography fell outside the previously recognized and constitutionally unprotected category of visual depictions of child pornography:

The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA. [A dissenting judge below] recognized this to be the law and proposed that virtual child pornography should be regarded as an additional category of unprotected speech. It would be necessary for us to take this step to uphold the statute.⁹⁹⁷

⁹⁹² *Id.* at 243 (majority opinion).

⁹⁹³ *Id.* at 244.

⁹⁹⁴ *Id.*

⁹⁹⁵ *Id.* at 245.

⁹⁹⁶ *Id.* at 244.

⁹⁹⁷ *Id.* at 245-46 (citations omitted),

After concluding that the challenged CPPA provisions could not be properly read to prohibit only “obscene” speech that falls outside the First Amendment’s protection, the *Free Speech Coalition* Court turned its attention to comparing the First Amendment implications of *virtual* child pornography with those of visual depictions of child pornography produced through the use of *real* children. The *Free Speech Coalition* Court first explained the reasoning behind the categorical exclusion identified in *Ferber*:

Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants.⁹⁹⁸

Drawing upon language closely reminiscent of *Giboney*’s exclusion from First Amendment protection of speech integral to criminal conduct, the *Free Speech Coalition* Court then noted that the real child pornography considered in *Ferber* enjoyed no constitutional protection because the “acts” it recorded “were intrinsically related to the sexual abuse of children.”⁹⁹⁹ In *Ferber*, “the speech had what the Court in effect held was a proximate link to the crime from which it came”¹⁰⁰⁰ because *Ferber* involved a government prohibition on “speech that itself is the record of sexual abuse.”¹⁰⁰¹

The Supreme Court reasoned that the rationale of *Ferber* was absent when no real children were involved in the making of the visual depictions that the government sought to proscribe because the speech at issue in *Free Speech Coalition* “records no crime and creates no victims by its production.”¹⁰⁰² The concern that justified the *Ferber* rule that the government may constitutionally ban child pornography “was based upon how it was made, not on what it

Id. at 249 (citations omitted).

⁹⁹⁹ *Id.* (internal quotation marks omitted).

¹⁰⁰⁰ *Id.* at 250.

¹⁰⁰¹ *Id.*

¹⁰⁰² *Id.*

communicated.”¹⁰⁰³ Indeed, the *Ferber* Court had specifically contemplated virtual child pornography and youthful adult pornography in its analysis:

[T]he [*Ferber*] Court recognized some works in this category [of child pornography] might have significant value but relied on virtual images—the very images prohibited by the CPPA [and being challenged in *Free Speech Coalition*—as an alternative and permissible means of expression: “[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative.” *Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.¹⁰⁰⁴

In defense of the CPPA provisions, the government advanced several theories of how the prohibited speech—virtual child pornography or youthful adult pornography—was connected to criminal conduct and, therefore, should be subject to regulation. But the Supreme Court rejected each of them. “The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it”¹⁰⁰⁵ and “[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”¹⁰⁰⁶ The Supreme Court explained that the facts presented in *Free Speech Coalition* are fundamentally different from the facts presented in *Ferber*, and the difference is constitutionally significant:

There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.¹⁰⁰⁷

The *Free Speech Coalition* Court then reached its ultimate conclusion:

¹⁰⁰³ *Id.* at 251.

¹⁰⁰⁴ *Id.* (citations omitted) (quoting *Ferber*, 458 U.S. at 763).

¹⁰⁰⁵ *Id.* at 253.

¹⁰⁰⁶ *Id.* (quoting *Hess*, 414 U.S. at 108).

¹⁰⁰⁷ *Id.* at 253-54.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. . . .

. . . .

In sum, [the challenged statutory provision] covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment.¹⁰⁰⁸

The *Free Speech Coalition* case, therefore, begins to define the outer limits of the post-*Chaplinsky* unprotected category of visual depictions of child pornography. Because *Ferber*'s new excluded category of child pornography is closely related to the historical category of speech integral to criminal conduct, there must be an underlying criminal act involved in the production of the pornographic images of children before the First Amendment's protection will yield. "In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse," but in *Free Speech Coalition* "there is no underlying crime at all."¹⁰⁰⁹ The government's interest in protecting children, which justified the First Amendment exception articulated in *Ferber*, is absent or at least substantially diminished in *Free Speech Coalition* where visual depictions prohibited by the government "record[] no crime and create[] no victims by its production."¹⁰¹⁰ Thus, the *Ferber* exclusion is not available when "the speech is neither obscene nor the product of sexual abuse" and, in those cases, visual depictions of child pornography "do[] not fall outside the protection of the First Amendment."¹⁰¹¹ The teaching of *Free Speech Coalition* is that "the distribution of descriptions or other depictions of sexual

¹⁰⁰⁸ *Id.* at 255-56.

¹⁰⁰⁹ *Id.* at 254.

¹⁰¹⁰ *Id.* at 250.

¹⁰¹¹ *Id.* at 251.

conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.”¹⁰¹²

United States v. Williams (2008):¹⁰¹³ If the *Free Speech Coalition* Court prevented the government from enforcing prohibitions on virtual or simulated child pornography that did not involve the use of real children in its creation, the *Williams* Court made clear that a defendant who *intended* to participate in the market for child pornography created with real children but in truth no real children were involved could still be subjected to criminal prosecution.

The practical effect of the Supreme Court’s decision in *Free Speech Coalition*, coupled with the explosive advancement in information technology over the 1990s and 2000s, was that the very rationale for the categorical exclusion of visual depictions of child pornography from First Amendment protection was at risk of being undermined. When the *Free Speech Coalition* Court held that virtual images of child pornography were constitutionally protected because the weighty concern about real harm to real children was absent, and when the rapid growth of the Internet made visual depictions of child pornography far more readily available and also made it increasingly difficult to distinguish actual depictions from virtual depictions, the government expressed concern “that limiting the child-pornography prohibition to material that could be proved to feature actual children . . . would enable many child pornographers to evade conviction.”¹⁰¹⁴ In response, Congress enacted a new statute, the PROTECT Act, aimed at dissuading the same “pandering and solicitation” of child pornography that was the subject of the

¹⁰¹² *Id.* (quoting *Ferber*, 458 U.S. at 764-65).

¹⁰¹³ 553 U.S. 285.

¹⁰¹⁴ *Id.* at 290 (emphasis omitted).

Child Pornography Protection Act of 1996 but intended to avoid the constitutional defects the *Free Speech Coalition* Court had identified in that prior act.¹⁰¹⁵

Michael Williams ran afoul of the new PROTECT Act when he met an undercover Secret Service agent, masquerading as “Lisa n Miami,” in an Internet chat room. In the course of a back-and-forth exchange, Mr. Williams posted a “hyperlink that, when clicked, led to seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals.”¹⁰¹⁶ The government then obtained a search warrant and searched Mr. Williams’s home, “where agents seized two hard drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sadomasochistic.”¹⁰¹⁷ Mr. Williams was charged with violating the PROTECT Act and pled guilty, reserving the right to challenge the constitutionality of the pandering conviction. The federal district court rejected his constitutional argument and sentenced Mr. Williams to prison. The Eleventh Circuit reversed the pandering conviction, holding that portion of the PROTECT Act unconstitutional. The Supreme Court granted certiorari.¹⁰¹⁸ Although the questions presented in the appeal involved overbreadth and vagueness,¹⁰¹⁹ the Supreme Court nonetheless used the *Williams* opinion to further clarify the nature and scope of the category of speech involving visual depictions of child pornography that fall outside the protection of the First Amendment.

¹⁰¹⁵ *Id.* at 289-90. Relevant portions of the new PROTECT Act read as follows: “(a) Any person who— . . . (3) knowingly - . . . (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct, . . . shall be punished as provided [by law].” *Id.* (quoting 18 U.S.C. § 2252A). Violation of this section carried a penalty of five to twenty years in prison. *Id.* .

¹⁰¹⁶ *Id.* at 291.

¹⁰¹⁷ *Id.* at 291-92.

¹⁰¹⁸ *Id.* at 292.

¹⁰¹⁹ *Id.* at 288. Overbreadth, of course, is also a First Amendment concept. Vagueness is a concept arising from the Due Process Clause of the Fifth Amendment.

The Supreme Court reaffirmed the principle that “obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment.”¹⁰²⁰ It then acknowledged that its approach to defining the relationship between child pornography and the First Amendment had been developed “[o]ver the last 25 years”—language confirming that child pornography was a newly created category of unprotected speech and not entirely consistent with the *Chaplinsky* formulation that unprotected categories had “never” been thought protected by the First Amendment. This relatively new category of child pornography, the *Williams* Court explained, was in fact a “related and overlapping category” with obscenity.¹⁰²¹ The *Williams* Court then summarized the First Amendment doctrine applicable to the government’s authority to proscribe visual depictions of child pornography at the time it considered the *Williams* case:

Over the last 25 years, we have confronted a related and overlapping category of proscribable speech: child pornography. This consists of sexually explicit visual portrayals that feature children. We have held that a statute which proscribes the *distribution* of all child pornography, *even material that does not qualify as obscenity*, does not on its face violate the First Amendment. Moreover, we have held that the government may criminalize the *possession* of child pornography, even though it may *not* criminalize the mere possession of obscene material involving adults.¹⁰²²

After construing the terms of the statute, the *Williams* Court explained why the PROTECT Act’s prohibition on pandering in child pornography was permissible under the First Amendment. The Supreme Court concluded the Eleventh Circuit had incorrectly analyzed the unprotected category of visual depictions of child pornography as an outgrowth of the commercial speech doctrine, protected at some level by the First Amendment.¹⁰²³ “This mistakes the rationale for the

¹⁰²⁰ *Id.*

¹⁰²¹ *Id.*

¹⁰²² *Id.* (emphasis added) (citations omitted).

¹⁰²³ *Id.* at 297-98 (“The Eleventh Circuit, however, believed that the exclusion of First Amendment protection extended only to *commercial* offers to provide or receive contraband: ‘Because [the statute] is not limited to

categorical exclusion,” the Supreme Court explained, because the excluded category of visual depictions of child pornography “is based not on the less privileged First Amendment status of commercial speech”¹⁰²⁴ In other words, the universe of visual depictions of child pornography that fall outside the protection of the First Amendment is not limited to those that are used for or connected with a commercial purpose—*all* child pornography is unprotected. “[N]oncommercial proposals to engage in illegal activity have no greater protection than commercial proposals to do so.”¹⁰²⁵ The *Williams* Court then explained that despite the “overlapping” nature of child pornography and obscenity, the reason child pornography as a category is not protected—whether or not it is obscene, and whether or not it is commercial in nature—is that the First Amendment does not protect speech that is integral to criminal conduct:

Offers to engage in illegal transactions are categorically excluded from First Amendment protection. One would think that this principle resolves the present case, since the statute criminalizes only offers to provide or requests to obtain contraband—child obscenity and child pornography involving actual children, both of which are proscribed and the proscription of which is constitutional.¹⁰²⁶

In addition to describing visual depictions of child pornography as “contraband”¹⁰²⁷ that is by definition illegal, the *Williams* Court cited *Pittsburgh Press* and *Giboney* as principal authority for the preceding proposition. In other words, the *Williams* Court viewed allowing the government to prohibit pandering or soliciting for the exchange of visual depictions of child pornography as conduct the government may prohibit for the same reason it could prohibit advertisements to engage in unlawful employment discrimination or picketing to compel

commercial speech but extends also to non-commercial promotion, presentation, distribution, and solicitation, we must subject the content-based restriction of the PROTECT Act pandering provision to strict scrutiny”) (brackets and ellipsis in original).

¹⁰²⁴ *Id.* at 298.

¹⁰²⁵ *Id.* at 298 n.2.

¹⁰²⁶ *Id.* at 297 (citations omitted).

¹⁰²⁷ The Court illustrated its point about the nature of contraband. *Id.* at 298 (“It would be an odd constitutional principle that permitted the government to prohibit offers to sell illegal drugs, but not offers to give them away for free.”).

antitrust law violations. Visual depictions of child pornography, whether commercial in nature or not, are excluded from First Amendment protection and may be proscribed by the government based “on the principle that offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection.”¹⁰²⁸ The *Williams* Court then proceeded to buttress its conclusion by surrounding its analysis of the government prohibition on pandering in child pornography with the language of, and examples from, the criminal law generally:

Many long established criminal proscriptions—such as laws against conspiracy, incitement and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities. Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are similarly undeserving of First Amendment protection.¹⁰²⁹

The *Williams* Court was careful to distinguish between *proposals to engage* in illegal activity, which are unprotected by the First Amendment, and *advocacy* of illegality, which is constitutionally protected:

To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality. The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it. There is no doubt that this prohibition falls well within constitutional bounds. The constitutional defect we found in the pandering provision at issue in *Free Speech Coalition* was that it went *beyond* pandering to prohibit possession of material that could not otherwise be proscribed.¹⁰³⁰

Because pandering to obtain child pornography is constitutionally unprotected speech incidental to the criminal conduct of possessing child pornography, the *Williams* Court held “that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.”¹⁰³¹

¹⁰²⁸ *Id.*

¹⁰²⁹ *Id.* (citations omitted).

¹⁰³⁰ *Id.* at 298-99 (citations omitted).

¹⁰³¹ *Id.* at 299.

The *Williams* Court then further elaborated on its analysis of categorically excluded speech that is integral to criminal conduct. The unprotected speech in the *Williams* case differed from the protected speech in the *Free Speech Coalition* case because the government’s focus in *Williams* was on the intent and conduct of the person who *intended* to engage in an illegal transaction, not on whether the transaction itself was illegal. On the facts of *Williams*, “[a] crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts *real* children.”¹⁰³²

Offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer. The pandering and solicitation made unlawful by the Act [challenged in *Williams*] are sorts of inchoate crimes—acts looking toward the commission of another crime, the delivery of child pornography. As with other inchoate crimes—attempt and conspiracy, for example—impossibility of completing the crime because the facts were not as they defendant believed is not a defense.¹⁰³³

Thus, unlike in *Free Speech Coalition*, the actual content of the images in *Williams* is not what the government sought to punish: Rather, the punishment is directed at the criminal intent of the participant, who *believes* he is acting as part of the marketplace for illegal materials and *intends* to do so—a marketplace of visual depictions of real children engaged in child pornography. The *Williams* Court then connected its distinction between permissible government regulation of intended participation in the marketplace for child pornography depicting real children with its general criminal-law analysis of the *Williams* case and the notion that the visual depictions that Mr. Williams intended to obtain were inherently illegal ‘contraband’:

We fail to see what First Amendment interest would be served by drawing a distinction between two defendants who attempt to acquire contraband, one of whom happens to be mistaken about the contraband nature of what he would acquire. Is Congress prohibited from punishing those who attempt to acquire what they believe to be national-security documents, but which are actually fakes?

¹⁰³² *Id.* at 303.

¹⁰³³ *Id.* at 300.

To ask is to answer. There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts.¹⁰³⁴

* * *

A quarter century after first declaring in *Ferber* that child pornography falls into the “First Amendment Free Zone” of speech outside the “freedom of speech” protected by the Constitution, the Supreme Court in *Williams* clearly anchored its analysis to the reasoning of *Giboney*. Visual depictions of pornography depicting real children may be proscribed by the government because they are speech incidental to the crime of child sexual abuse.

The state of the law after *Williams*, therefore, may be summarized this way: Visual depictions of pornography depicting real children fall within a category of speech excluded from First Amendment protection. The category of proscribable child pornography is “related and overlapping”¹⁰³⁵ with the *Roth/Miller* category of proscribable obscenity, but it really is an outgrowth of the *Giboney-Pittsburgh Press* category of speech proscribable because it is an integral part of criminal conduct. For that reason, the government must prove criminal intent in a prosecution arising from possession or distribution of visual depictions of child pornography.

Because criminal intent is an essential element of any prosecution involving child pornography, it is permissible for the government to prohibit and punish both the *actual* and *intended* creation, dissemination and possession or visual depictions of child pornography involving images of *real* children because the images are contraband. The government may constitutionally declare such depictions to be contraband because any *de minimis* social benefit derived from them is far outweighed by the substantial societal interest in preventing the grave harm to children caused by the making of child pornography.

¹⁰³⁴ *Id.* at 303-04.

¹⁰³⁵ *Id.* at 288.

To the extent the government wishes to suppress the creation or dissemination of images of *virtual* child pornography—images created without involvement of any real children—it may do so *only* if such images rise to the level of obscenity. However, if the government wishes to punish a person for *attempting* to participate in the market for child pornography it may do so based on the *intent* of the person to obtain images of real children regardless of whether such images actually exist.

Although the Supreme Court continues to describe “child pornography” as a separate and distinct category of proscribable speech, the authority to ban visual depictions of pornography depicting real children is better understood as a specific application of the general and longstanding *Giboney* principle that speech that is itself an integral part of criminal conduct may be proscribed. Understood this way, “child pornography” is not a new category with characteristics—such as an absence of any “tradition of proscription”—inconsistent with all others. To the contrary, it is wholly consistent with the long tradition of enacting laws criminalizing conduct that harms the well-being of children.

In the years since *Chaplinsky* and *Giboney*, the Supreme Court has developed a second group of cases specifically applying the *Giboney* principle that speech incidental to criminal conduct enjoys no constitutional protection. We turn our attention now to this second grouping: True threats.

Part D: True threats

The *Chaplinsky* Court posited that speech may be constitutionally proscribable if it is “no essential part of any exposition of ideas” and is “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”¹⁰³⁶ Imagine how the Supreme Court in 1942 might have expounded on that principle if Walter Chaplinsky had added but ten small words to his diatribe against Marshal Bowering: “‘You are a God damned racketeer’ and ‘a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists’ [*and I am going to punch you in the nose*].”¹⁰³⁷ Or even more starkly, imagine that Mr. Chaplinsky had punctuated his actual statement with only seven added words: “*and I am going to kill you.*” May the government punish a person for threatening to harm another or is a verbal threat a form of speech protected by the First Amendment?

On the one hand, the answer seems obvious from a long history of widely accepted and enforced prohibitions. The Supreme Court long has accepted, without much analysis, that at least certain threats may be punished by the government:

[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.¹⁰³⁸

The principle that threats may be punished by the government without running afoul of the First Amendment, therefore, has “never been thought to raise any Constitutional problem.”¹⁰³⁹ In

¹⁰³⁶ *Chaplinsky*, 315 U.S. at 572.

¹⁰³⁷ *Id.* at 569 (words in italics added).

¹⁰³⁸ *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (citation omitted).

¹⁰³⁹ *Chaplinsky*, 315 U.S. at 571-72.

modern practice, examples abound. Every state has one or more laws prohibiting forms of “criminal threat.”¹⁰⁴⁰ There also are numerous specific examples that have become the lore of modern life—for example, it is widely understood that uttering at an airport, even in jest, words indicating that one has a bomb with intent to carry it on an airplane will result in a visit from federal law enforcement and potential prosecution.¹⁰⁴¹

On the other hand, analyzing *why* the government may punish threats without running afoul of the First Amendment is more difficult.¹⁰⁴² Threats need not be false—indeed, to be truly threatening they likely need to be true—so they are not intellectually akin to fraud or libel. They also need not involve the commission of an actual crime so, in that sense, they differ from the “speech acts” integral to otherwise criminal conduct and considered by the Supreme Court on the facts presented in *Giboney* and *Pittsburgh Press*. Nor are they evidence that a crime has been committed or an essential part of an illicit marketplace that the government has a legitimate interest in quashing and so, in that sense, they differ from “child pornography.” They also are not intended to, or likely to, incite violence or criminal conduct by another—rather, they typically foreshadow acts the speaker *himself* intends to undertake in violation of the law—so they are in that sense dissimilar from “incitement.”

¹⁰⁴⁰ The State of Kansas, for example, on January 14, 2015, obtained a verdict of guilty against an individual charged with making criminal threats to harm or kill individuals working in the legal system in Cheyenne County. See *St. Francis man found guilty of threatening Cheyenne County courthouse officials*, Office of the Attorney General news release (January 15, 2015), available at <http://ag.ks.gov/media-center/news-releases/2015/01/15/st.-francis-man-found-guilty-of-threatening-cheyenne-county-courthouse-officials>.

¹⁰⁴¹ Cases determining whether the First Amendment permits prosecution of particular speakers who have threatened various persons abound. One oft-discussed example is *United States v. Turner*, 720 F.3d 411, 423 (2nd Cir. 2013), in which the court held that a blogger who, distressed by a federal appeals court’s upholding of a Chicago gun-control ordinance, posted a “lengthy discussion of killing the three judges, his reference to the killing of Judge Lefkow’s family, and his update the next day with detailed information regarding how to locate Judges Easterbrook, Bauer, and Posner” had provided “powerful evidence of a true threat” sufficient to sustain a conviction. Another current example is *United States v. Dillard*, ___ F.3d ___ (2015 WL 4540551)(10th Cir. 2015), in which the court held that whether an abortion protester’s letter to a prospective abortion provider constituted a proscribable “true threat” or protected political speech was a fact question for a jury that precluded summary judgment for the author of the letter.

¹⁰⁴² See, e.g., Nina Petraro, *Harmful Speech and True Threats: Virginia v. Black and the First Amendment in an Age of Terrorism*, 20 J. CIV. RTS. & ECON. DEV. 531 (2006).

The Supreme Court has from time to time confronted this question of the application of the First Amendment to threatening speech. Declaring “I’m going to kill you,” or even “I am going to punch you in the nose,” with the criminal intent to actually do so is a punishable offense in every state, and that the First Amendment permits such prohibitions is not seriously questioned. But *why* is that sort of speech proscribable, and how does that fit into the doctrines of categorically excluded speech? In the decades since *Chaplinsky*, the Supreme Court has developed a specific application of the general *Giboney-Pittsburgh Press* doctrine to speech such as this—an application known as the “true threats” doctrine. It has been developed in a line of cases from *Watts* to *Rankin* to *Black* and, during the most recent concluded term of the Supreme Court, *Elonis*.

While the *concept* that threats are unprotected is old, only in 1969 did the Supreme Court first address the *reasoning* behind that widely accepted notion and began to define the boundaries of what appeared to be a categorical exclusion.

Watts v. United States (1969):¹⁰⁴³ The dispute arose when 18-year-old Robert Watts, a man who objected to the Vietnam War draft, participated in a protest near the base of the Washington Monument on August 27, 1966. After it was suggested by a person near the protest “that the young people present should get more education before expressing their views,” Mr. Watts responded:

“They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. *If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.* They are not going to make me kill my black brothers.”¹⁰⁴⁴

¹⁰⁴³ 394 U.S. 705.

¹⁰⁴⁴ *Id.* at 706 (emphasis added)

Unfortunately for Mr. Watts, an investigator for the Army Counter Intelligence Corps was present and overheard the comment.¹⁰⁴⁵ Mr. Watts was arrested and charged with violating, by virtue of having uttered the italicized words quoted above, a World War I-era federal law that made it a felony to threaten the President of the United States.¹⁰⁴⁶ He was convicted by a jury, and his conviction was upheld by the U.S. Court of Appeals for the District of Columbia Circuit.¹⁰⁴⁷ The Supreme Court granted certiorari.

The *Watts* Court began with an implicit adoption of the long-accepted proposition that threats are not constitutionally protected speech by summarily concluding: “Certainly the statute under which petitioner was convicted is constitutional on its face.”¹⁰⁴⁸ But because the statute in question sought to punish “pure speech,” the Supreme Court concluded, in effect, that it must be construed as applied to the specific utterances of the defendant. “What is a threat,” the Supreme Court explained, “must be distinguished from what is constitutionally protected speech.”¹⁰⁴⁹ To that end, the *Watts* Court then held that in order to sustain a conviction under the statute, the government must “prove a true ‘threat.’”¹⁰⁵⁰ Although the *Watts* Court, as evidenced by its placement of quotation marks, may not have considered the two-word term as a singular phrase, this is nonetheless the first use by the Supreme Court of the phrase “true threat.” That phrase apparently was intended to distinguish speech that falls outside the First Amendment’s

¹⁰⁴⁵ *Id.*

¹⁰⁴⁶ *Id.* at 705. The federal statute provided: “Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.” *Id.* at 705 n.1 (quoting 18 U.S.C. § 871(a)).

¹⁰⁴⁷ *Id.* at 706.

¹⁰⁴⁸ *Id.* at 707 (“The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.”).

¹⁰⁴⁹ *Id.*

¹⁰⁵⁰ *Id.* at 708.

protection—namely, “true threats”—from other, constitutionally protected speech that may be threatening in nature but that “taken in context”¹⁰⁵¹ did not in fact convey an actual intent to cause harm.

In the case of Mr. Watts, the Supreme Court concluded that his speech was “political hyperbole” and not a “true threat” and that, therefore, the First Amendment barred the government from prosecuting him for his utterance.¹⁰⁵² A minority of the Court led by Justice Douglas, recounting the deep historical roots of the statute under which Mr. Watts was prosecuted, would have gone further and stricken the statute on its face without regard to what actually was uttered.¹⁰⁵³

¹⁰⁵¹ *Id.*

¹⁰⁵² *Id.* (“We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term [the term ‘threat’]. For we must interpret the language Congress chose against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was ‘a kind of very crude offensive method of stating a political opposition to the President.’ Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.” (citations and internal quotation marks omitted)).

¹⁰⁵³ *Id.* at 709-12 (Douglas, J., concurring) (“The charge in this case is of an ancient vintage. The federal statute under which petitioner was convicted traces its ancestry to the Statute of Treasons which made it a crime to ‘compass or imagine the Death of . . . the King.’ It is said that one Walter Walker, at 15th century keeper of an inn known as the ‘Crown,’ was convicted under the Statute of Treasons for telling his son: ‘Tom, if thou behaves thyself well, I will make thee heir to the CROWN.’ He was found guilty of compassing and imagining the death of the King, hanged, drawn, and quartered. In the time of Edward IV, one Thomas Burdet who predicted that the king would ‘soon die, with a view to alienate the affections’ of the people was indicted for ‘compassing and imaging of the death of the King—the crime of constructive treason with which the old reports are filled. In the time of Charles II, one Edward Brownlow was indicted ‘for speaking these words, that he wished all the gentry in the land would kill one another, so that the commonalty might live the better.’ In the same year (1662) one Robert Thornell was indicted for saying ‘that if the Kinge did side with the Bishops, the Divell take Kinge and the Bishops too.’ While our Alien and Sedition Laws were in force, John Adams, President of the United States, en route from Philadelphia, Pennsylvania, to Quincy, Massachusetts, stopped in Newark, New Jersey, where he was greeted by a crowd and by a committee that saluted him by firing a cannon. A bystander said, ‘There goes the President and they are firing at his ass.’ Luther Baldwin was indicted for replying that he did not care ‘if they fired through his ass.’ He was convicted in the federal court for speaking ‘seditious words tending to defame the President and Government of the United States’ and fined, assessed court costs and expenses, and committed to jail until the fine and fees were paid. The Alien and Sedition Laws constituted one of our sorriest chapters; and I had thought we had done with them forever. Yet the present statute has hardly fared better. Like the Statute of Treasons, [the statute at issue in this case] was passed in a relatively calm peacetime spring, but has been construed under circumstances when intolerance for free speech was much greater than it normally might be. Convictions under [this statute] have been sustained for displaying posters urging passersby to ‘hang (President) Roosevelt’; for declaring that ‘President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself.’; for declaring

The *Watts* Court's as-applied approach did not disturb prior district court rulings upholding prosecutions under the same statute for the making of threatening statements about Presidents Woodrow Wilson and Franklin Roosevelt.¹⁰⁵⁴ *Watts*, therefore, confirmed the existence of a category of speech known as "true threats" that fall outside the protection of the First Amendment, but the boundaries of the category were left undefined. The Supreme Court would have its next opportunity to clarify its "true threats" doctrine years later when the protests against Lyndon Johnson and the Vietnam War draft were a fading memory and a new President, Ronald Reagan, had recently assumed office.

Rankin v. McPherson (1987):¹⁰⁵⁵ On March 30, 1981, John Hinckley, Jr., shot and attempted to kill President Reagan outside the Washington Hilton. The news traveled fast, and it reached 19-year-old Ardith McPherson while she was on break at her new job in Harris County, Texas. Ms. McPherson was a clerical employee in the office of Constable Walter H. Rankin, the elected constable of Harris County. She was a new hire, still within the 90-day probationary period. Ms. McPherson was in a break room at the constable's office with several other employees, including her co-worker and boyfriend Lawrence Jackson, when news came over the

that 'Wilson is a wooden-headed son of a bitch. I wish Wilson was in hell, and if I had the power I would put him there'. In sustaining an indictment under the statute against a man who indicated that he would enjoy shooting President Wilson if he had the chance, the trial court explained the thrust of [the statute]: 'The purpose of the statute was undoubtedly not only the protection of the President, but also the prohibition of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country. . . . It arouses resentment and concern. . . .' Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution." (citations, footnotes and internal quotation marks omitted)).

¹⁰⁵⁴ *Id.* at 711 (Douglas, J., concurring) (citing *United States v. Apel*, 44 F. Supp. 592, 593 (N.D. Ill. 1942) (sustaining a conviction for displaying posters urging passersby to "hang" President Roosevelt); *United States v. Stickrath*, 242 F. 151, 152 (S.D. Ohio 1917) (sustaining a conviction for declaring "President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself."); *Clark v. United States*, 250 F. 449 (5th Cir. 1918) (sustaining a conviction for declaring "Wilson is a wooden-headed son of a bitch. I wish Wilson was in hell, and if I had the power I would put him there.")).

¹⁰⁵⁵ 483 U.S. 378.

radio that President Reagan had been shot.¹⁰⁵⁶ She then had a brief conversation with Mr. Jackson, which she later recounted in undisputed testimony as follows:

Well, we were talking—it’s a wonder why they did that [shot President Reagan]. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use Medicaid, and at the time, I was thinking that’s what it was. . . . But then after I said that, and then Lawrence said, yeah, he’s cutting back Medicaid and food stamps. And I said, yeah, welfare and CETA. I said, *shoot, if they go for him again, I hope they get him.*¹⁰⁵⁷

Another employee heard Ms. McPherson’s comment in the break room and reported it to Constable Rankin, who confronted Ms. McPherson about it.¹⁰⁵⁸ Ms. McPherson admitted she made the comment, and the evidence differed on what her expressed intent was.¹⁰⁵⁹ In any event, Constable Rankin fired her, and Ms. McPherson brought a 42 U.S.C. § 1983 suit in federal district court claiming she had been unlawfully fired for uttering constitutionally protected speech. The district court held that Ms. McPherson’s speech “had been unprotected” by the Constitution and granted summary judgment to Constable Rankin. The U.S. Court of Appeals for the Fifth Circuit reversed. The Supreme Court granted certiorari.¹⁰⁶⁰

The Supreme Court’s majority quickly, and without much analysis, concluded that Ms. McPherson’s comment was not the sort of threat that was wholly outside the First Amendment’s protection. Although the *Rankin* Court never used the phrase “true threat,” it implicitly acknowledged that existence of a category of threatening speech that would be fall outside the First Amendment’s scope:

While a statement that amounted to a threat to kill the President would not be protected by the First Amendment, the District Court concluded, and we agree,

¹⁰⁵⁶ *Id.* at 380-81.

¹⁰⁵⁷ *Id.* at 381 (emphasis added).

¹⁰⁵⁸ *Id.* at 381-82.

¹⁰⁵⁹ Compare Ms. McPherson’s version of events, *id.* at 382 (“McPherson readily admitted that she had made the statement, but testified that she told Rankin, upon being asked if she made the statement, ‘Yes, but I didn’t mean anything by it.’”), with Mr. Rankin’s version, *id.* at 382 n.4 (“Rankin testified that, when he asked McPherson whether she meant the remark, she replied, ‘I sure do.’”).

¹⁰⁶⁰ *Id.* 382-83.

that McPherson’s statement did not amount to a threat punishable under [applicable federal statutes] or, indeed, that could properly be criminalized at all.¹⁰⁶¹

In reaching the conclusion that Ms. McPherson’s comment was *not* categorically excluded from First Amendment protection, the Supreme Court considered several factors:

Considering the statement in context . . . discloses that it plainly dealt with a matter of public concern. The statement was made in the course of a conversation addressing the policies of the President’s administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President.¹⁰⁶²

Having easily, and without much explanation, reached the conclusion that Ms. McPherson’s comments were not the sort of “true” threat that is categorically unprotected speech, the Supreme Court then devoted its analysis to a balancing test under the First Amendment to determine whether a public employee’s speech is protected.¹⁰⁶³

Justice Scalia’s dissent¹⁰⁶⁴ in *Rankin* is only slightly more helpful than the majority opinion in shedding light on the category of unprotected threats. While the dissent generally accepts the majority’s framework of analyzing Ms. McPherson’s comments under a First Amendment balancing test, Justice Scalia also devotes considerable verbiage to analysis suggesting that, in his view, it was a close call as to whether Ms. McPherson’s comment was deserving of First Amendment protection at all because it is:

¹⁰⁶¹ *Id.* at 386-87 (emphasis added).

¹⁰⁶² *Id.* at 386 (footnote omitted).

¹⁰⁶³ The balancing test applicable, at the time, to public employees’ speech was set forth in *Rankin*. Because it is a test for analyzing speech that falls within the First Amendment, not without, it is not applicable for purposes of this dissertation. *See id.* at 384 (“The determination whether a public employer has properly discharged an employee for engaging in speech requires ‘a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’ *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983). This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment.”).

¹⁰⁶⁴ The decision in *Rankin* was 5-4. Justice Powell, who joined the majority, apparently had misgivings about deciding the case at all and filed a concurring opinion that began: “It is not easy to understand how this case has assumed constitutional dimensions and reached the Supreme Court of the United States.” *Rankin*, 483 U.S. at 392 (Powell, J., concurring).

only one step removed from statements that we have previously held entitled to no First Amendment protection even in the nonemployment context—including assassination threats against the President; ‘fighting’ words; epithets or personal abuse; and advocacy of force or violence. A statement lying so near the category of completely unprotected speech cannot fairly be viewed as lying within the “heart” of the First Amendment’s protection¹⁰⁶⁵

Harkening back to the *Watts* Court’s analysis, Justice Scalia found persuasive the district court’s findings that Ms. McPherson’s comment was not “hyperbole” that would have been deserving of First Amendment protection.¹⁰⁶⁶ However, the dissent, like the majority, goes no further in articulating what the test is to determine whether any given threatening comment is of the sort categorically excluded from First Amendment protection or is one that is to be analyzed under some type of First Amendment framework. It would be five more years before the Supreme Court would again grapple with the Constitution’s approach to government efforts to regulate threats and 15 years before the Supreme Court would attempt to better define the boundaries of the “true threats” category of unprotected speech.

* * *

During the 15 years after deciding *Rankin*, the Supreme Court expressly or implicitly acknowledged the existence of a category of unprotected speech involving threats but said little to illuminate the nature or scope of that category. For example, even as it struck down a St. Paul, Minnesota, ordinance prohibiting certain cross-burnings as an impermissible content-based

¹⁰⁶⁵ *Id.* at 397-98 (Scalia, J., dissenting) (citations omitted).

¹⁰⁶⁶ *Id.* at 396 (“The statement for which she [Ms. McPherson] was fired—and the only statement reported to the Constable—was, ‘If they go for him again, I hope they get him.’ It is important to bear in mind the District Judge’s finding that this was *not* hyperbole. The Court’s opinion not only does not clarify that point, but beclouds it by a footnote observing that the District Judge did not explicitly resolve the conflict in testimony as to whether McPherson told the Constable that she ‘meant’ what she had said. He did not. But he assuredly found that, whether McPherson later said she meant it or not, and whether she even meant it at the time or not, the idea she expressed was not just an exaggerated expression of her disapproval for the President’s policies, but a voicing of the hope that, next time, the President would be killed. The District Judge rejected McPherson’s argument that her statement was ‘mere political hyperbole,’ finding, to the contrary, that it was, ‘in context,’ ‘violent words.’ ‘This is not,’ he said, ‘the situation where one makes an idle threat to kill someone for not picking them [*sic*] up on time, or not picking up their [*sic*] clothes. It was more than that.’ He ruled against McPherson at the conclusion of the second hearing because ‘I don’t think it is a matter of public concern to approve even more to [*sic*] the second attempt at assassination.’” (citations omitted)).

regulation of speech—even speech that was within a category wholly proscribable under the First Amendment—the Supreme Court acknowledged that “threats of violence are outside the First Amendment”¹⁰⁶⁷ Similarly, in striking down a 300-foot judicially imposed buffer zone around a Florida abortion clinic, the Supreme Court stated:

Clearly, threats to patients or their families, however communicated, are proscribable under the First Amendment. But rather than prohibiting the display of signs that could be interpreted as threats or veiled threats, the state court [prohibition on placard images went much further].¹⁰⁶⁸

In the same Florida case, the Supreme Court then reasoned that the buffer zone provision might have satisfied constitutional requirements had there been “evidence that the protesters’ speech is independently proscribable (i.e., ‘fighting words’ or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm”¹⁰⁶⁹ Later, in applying this same reasoning in upholding a judicially imposed fixed buffer zone around the entrance to a New York abortion clinic, the Supreme Court was mindful that a justification for the challenged injunction was that protesters “threatened the safety of entering patients and employees”;¹⁰⁷⁰ any First Amendment protection the protesters might have been able to assert was lost as “the result of their own previous harassment and intimidation of patients.”¹⁰⁷¹

These tangential assertions and acknowledgement did little to further explain how the unprotected category of “true threats” was to be applied in practiced. By 2003, however, the Supreme Court found itself squarely confronted by another case that required greater explanation of the “true threats” doctrine and the placement of threatening speech either within the “freedom of speech” or without it in the “First Amendment Free Zone.”

¹⁰⁶⁷ *R.A.V.*, 505 U.S. at 388.

¹⁰⁶⁸ *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 773 (1994).

¹⁰⁶⁹ *Id.* at 774.

¹⁰⁷⁰ *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 380 (1997).

¹⁰⁷¹ *Id.* at 385.

* * *

Virginia v. Black (2003):¹⁰⁷² The analysis in *R.A.V. v. City of St. Paul* left open the question whether the government could constitutionally prohibit cross-burning that was conducted with criminal intent and that did not discriminate among groups of persons who might be the target of intimidation. That question reached the Supreme Court in response to two separate cross-burnings in Virginia, resulting in three separate prosecutions. In the first case, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia, on August 22, 1998, during which speakers made various bigoted statements, including one, by a speaker who stated “he would love to take a .30/.30 and just random[ly] shoot the blacks,” that left an uninvolved listener “very . . . scared.”¹⁰⁷³ In the second case, Richard Elliott and Jonathan O’Mara of Virginia Beach, Virginia, attempted to burn a cross in the yard of Mr. Elliott’s next-door neighbor, James Jubilee, who was African American. Mr. Jubilee had expressed some concern about shots being fired on Mr. Elliott’s property, which Mr. Elliott’s mother had explained as part of Mr. Elliott’s hobby of target practice. On May 2, 1998, Mr. Elliott and Mr. O’Mara attempted to burn a cross in Mr. Jubilee’s yard to “get back” at him for complaining about the shooting. When Mr. Jubilee saw the partially burned cross the next morning, he “was ‘very nervous’ because he ‘didn’t know what would be the next phase,’ and because ‘a cross burned in your yard . . . tells you that it’s just the first round.’”¹⁰⁷⁴

All three cross-burners were prosecuted separately for violating a Virginia statute that prohibited burning a cross “with the intent of intimidating any person.”¹⁰⁷⁵ Barry Black was

¹⁰⁷² 538 U.S. 343.

¹⁰⁷³ *Id.* at 349 (alterations in original).

¹⁰⁷⁴ *Id.* at 350.

¹⁰⁷⁵ *Id.* at 348. At the time, the Virginia statute read, in pertinent part, as follows: “It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.” *Id.* (quoting Va. Code Ann. § 18.2-423 (1996)).

convicted after a jury trial.¹⁰⁷⁶ Jonathan O’Mara pleaded guilty.¹⁰⁷⁷ Richard Elliott was convicted by a jury.¹⁰⁷⁸ All three appealed, and their cases were consolidated by the Virginia Supreme Court into a facial challenge to the Virginia cross-burning statute as violating the First Amendment. The Virginia Supreme Court found the statute at issue constitutionally similar to the one struck down in *R.A.V.* and held the Virginia cross-burning law to violate the First Amendment, but three Justices dissented on the basis that the Virginia law fell outside the First Amendment because it prohibited only unprotected “true threats.”¹⁰⁷⁹ The United States Supreme Court granted certiorari.

A badly splintered Supreme Court found the Virginia statute facially valid but ultimately overturned the convictions because of faulty jury instructions.¹⁰⁸⁰ While no opinion garnered a majority of the Court, language used throughout contributes to the understanding of the “true threats” doctrine. The plurality, led by Justice O’Connor, recounted at length the historical roots of cross-burning, first in ancient Scottish rites and later throughout its long use by the Ku Klux Klan in the post-Civil War United States. The plurality noted that throughout the history of the Ku Klux Klan, “cross burnings have been used to communicate both threats of violence and messages of shared ideology.”¹⁰⁸¹ Since the former fell outside the First Amendment while the latter enjoyed its protection, the *Black* plurality found it necessary to distinguish between the two; in that regard, it was struggling with the same problem confronted by the *Watts* Court and the *Rankin* Court. The long history of violence associated with the Klan made drawing this distinction even more critical in this case:

¹⁰⁷⁶ *Id.* at 350.

¹⁰⁷⁷ O’Mara reserved the right to challenge the constitutionality of the statute under which he was convicted. *Id.*

¹⁰⁷⁸ *Id.* at 351.

¹⁰⁷⁹ *Id.*

¹⁰⁸⁰ While the fault in the jury instruction arose from First Amendment violations, it is not important here for purposes of *Black*’s contribution to our understanding of categorical analysis and so is not discussed.

¹⁰⁸¹ *Id.* at 354.

[W]hile cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan’s wishes unless the victim is willing to risk the wrath of the Klan. . . .

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.¹⁰⁸²

Unlike its precedent cases, the *Black* plurality then set about articulating—for the first time—a test for determining whether a particular utterance is an unprotected “true threat” or was speech subject to some level of First Amendment protection:

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility or that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.¹⁰⁸³

Applying that test to the case before it, the *Black* plurality was mindful that “the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.”¹⁰⁸⁴ It then distinguished the case before it from the situation in *R.A.V.*, characterizing that prior holding as not prohibiting all types of content-based discrimination within a proscribable category of speech; to the contrary, the *R.A.V.* Court “stated that some types of content discrimination did not violate the First

¹⁰⁸² *Id.* at 357.

¹⁰⁸³ *Id.* at 359-60 (citations and internal quotation marks omitted).

¹⁰⁸⁴ *Id.* at 360.

Amendment” and “that it would be constitutional to ban only a particular type of threat.”¹⁰⁸⁵ “[T]he First Amendment permits content discrimination ‘based on the very reasons why the particular class of speech at issue . . . is proscribable.’”¹⁰⁸⁶ Therefore, what distinguished and saved the Virginia law from the *R.A.V.* rule that had invalidated the Minnesota ordinance was that the Virginia law required the government to prove that a defendant burned a cross “with intent to intimidate,”¹⁰⁸⁷ and intimidation itself could constitutionally be made criminal by the government and was the “very reason” why “true threats” as a category of speech are “proscribable”:

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence. . . . A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.¹⁰⁸⁸

While that was the view of the four-justice plurality, the result also was consistent with the view of other Justices. Justice Stevens, who was part of the plurality, also wrote separately to make clear his categorical view that “Cross burning with ‘an intent to intimidate’ unquestionably qualifies as the kind of threat that is unprotected by the First Amendment.”¹⁰⁸⁹ Justices Scalia

¹⁰⁸⁵ *Id.* at 361-62.

¹⁰⁸⁶ *Id.* at 362 (ellipses in original).

¹⁰⁸⁷ *Id.* at 362-63 (“Similarly, Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward one of the specified disfavored topics. It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s political affiliation, union membership, or homosexuality. Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. Indeed, in the case of Elliott and O’Mara, it is at least unclear whether the respondents burned a cross due to racial animus.” (citations and internal quotation marks omitted)).

¹⁰⁸⁸ *Id.* at 363.

¹⁰⁸⁹ *Id.* at 368 (Stevens, J., concurring).

and Thomas¹⁰⁹⁰ joined in that portion of the plurality opinion that concluded the Virginia statute, because it was limited to cross-burning with ‘an intent to intimidate,’ applied only to speech that was categorically excluded from First Amendment protection.¹⁰⁹¹ Thus, six Justices shared the view that the Virginia statute was saved from a facial constitutional challenge by application of the Doctrine of Categorical Exclusion to “true threats.”¹⁰⁹²

Elonis v. United States (2015):¹⁰⁹³ In 2010, Anthony Douglas Elonis’s wife left him, taking with her the couple’s two children.¹⁰⁹⁴ Mr. Elonis thereafter began posting on the social networking site Facebook a variety of “crude, degrading, and violent material about his soon-to-be ex-wife,” including this statement:

“Did you know that it’s illegal for me to say I want to kill my wife? . . .

It’s one of the only sentences that I’m not allowed to say. . . .

Now it was okay for me to say it right then because I was just telling you that it’s illegal for me to say I want to kill my wife. . . .

Um, but what’s interesting is that it’s very illegal to say I really, really think someone out there should kill my wife. . . .”¹⁰⁹⁵

After viewing some of Mr. Elonis’s online posts, his wife became “extremely afraid for [her] life” and obtained from a state court a protection-from-abuse order against Mr. Elonis.¹⁰⁹⁶ Soon thereafter, Mr. Elonis posted online again: “Fold up your [protection-from-abuse order] and put it in your pocket. Is it thick enough to stop a bullet? Try to enforce an Order that was improperly

¹⁰⁹⁰ In addition to joining Justice Scalia’s concurrence, Justice Thomas wrote a separate dissent explaining that he would have held cross burning to be conduct, not speech, and thus entirely outside the First Amendment. *Id.* at 388-95 (Thomas, J., dissenting).

¹⁰⁹¹ *Id.* at 368 (Scalia, J., concurring) (“I agree with the Court that, under our decision in [*R.A.V.*], a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate.”).

¹⁰⁹² Justices Souter, Kennedy and Ginsburg would have applied *R.A.V.* analysis and stricken the Virginia law as unconstitutional. *Id.* at 380-87 (Souter, J., concurring in the judgment in part and dissenting in part).

¹⁰⁹³ 135 S. Ct. 2001.

¹⁰⁹⁴ *Id.* at 2004.

¹⁰⁹⁵ *Id.* at 2005 (ellipses in original).

¹⁰⁹⁶ *Id.* at 2006.

granted in the first place. Me thinks the Judge needs an education on true threat jurisprudence . . .
..¹⁰⁹⁷ Mr. Elonis continued to post similar sorts of statements online.

A federal grand jury indicted Mr. Elonis for violating a federal criminal statute that prohibits the “transmit[ing] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another”¹⁰⁹⁸ Mr. Elonis was convicted by a jury, and he appealed on the basis that he never actually intended to inflict harm on his wife. The Third Circuit upheld the conviction.¹⁰⁹⁹ The Supreme Court granted certiorari and was presented with these questions: “[W]hether the statute [under which Mr. Elonis was convicted] also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.”¹¹⁰⁰

The *Elonis* Court’s majority disposed of the case through statutory interpretation and thus did not reach any of the First Amendment issues.¹¹⁰¹ For purposes of this section, however, *Elonis* is significant because of language in the concurrence of Justice Alito and the dissent of Justice Thomas. Citing *Watts, R.A.V.* and *Black*, Justice Alito flatly confirmed that “[i]t is settled that the Constitution does not protect true threats.”¹¹⁰² He then proceeded to explain the reasoning behind that categorical exclusion:

[T]here are good reasons for that rule: True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation. It is true that a communication containing a threat may include other statements that have value and are entitled to protection. But that does not justify constitutional protection for the threat itself.¹¹⁰³

¹⁰⁹⁷ *Id.* at 2006.

¹⁰⁹⁸ *Id.* at 2008 (quoting 18 U.S.C. § 875(c)).

¹⁰⁹⁹ *Id.* at 2007-08.

¹¹⁰⁰ *Id.* at 2004.

¹¹⁰¹ *Id.* at 2012.

¹¹⁰² *Id.* at 2016 (Alito, J., concurring).

¹¹⁰³ *Id.*

For Justice Alito, the fact that Mr. Elonis uttered words that his wife reasonably construed as threatening to cause physical harm to her was sufficient to exclude those threats from constitutional protection. Thus even if Mr. Elonis’ intent were, as he asserted, to create a “therapeutic or cathartic” benefit to himself by posting those words, the Constitution still should not have afforded protection to his written utterances. It appears that Justice Alito was principally concerned with the effect of Mr. Elonis’ threatening speech on his estranged wife, and whatever benefit Mr. Elonis claimed from its utterance “cannot convert such hurtful, valueless threats into protected speech.”¹¹⁰⁴

In dissent, Justice Thomas concluded that “the communications transmitted by Elonis were ‘true threats’ unprotected by the First Amendment”¹¹⁰⁵ Justice Thomas then proceeded to articulate the test that, in his view, should be applied to determine whether a threatening statement constitutes a constitutionally unprotected “true threat”:

[T]he First Amendment requires that the term “threat” be limited to a narrow class of historically unprotected communications called “true threats.” To qualify as a true threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely political hyperbole; vehement, caustic, and sometimes unpleasantly sharp attacks; or vituperative, abusive, and inexact statements. It also cannot be determined solely by the reaction of the recipient, but must instead be determined by the interpretation of a *reasonable* recipient familiar with the context of the communication, lest historically protected speech be suppressed at the will of an eggshell observer. There is thus no dispute that, at a minimum, [the statute at issue] requires an objective showing: The communication must be one that a reasonable observer would construe as a true threat to another. And there is no dispute that the posts at issue here meet that objective standard.¹¹⁰⁶

After an extensive discussion of what mental state the Constitution might require in order to permit criminal liability of a defendant for uttering threatening statements, Justice Thomas pointed out that, as a general matter, the Supreme Court has “not required a heightened mental

¹¹⁰⁴ *Id.* at 2016-17.

¹¹⁰⁵ *Id.* at 2018 (Thomas, J., dissenting).

¹¹⁰⁶ *Id.* at 2018-19 (citations and internal quotation marks omitted).

state under the First Amendment for historically unprotected categories of speech” and to do so with respect to threats would “make threats one of the most protected categories of unprotected speech” and would “sow[] tension throughout our First Amendment doctrine.”¹¹⁰⁷ For example:

Had Elonis mailed obscene materials to his wife and a kindergarten class, he could have been prosecuted irrespective of whether he intended to offend those recipients or recklessly disregarded that possibility. Yet when he threatened to kill his wife and a kindergarten class, his intent to terrify those recipients (or reckless disregard of that risk) suddenly becomes highly relevant. That need not—and should not—be the case.¹¹⁰⁸

Thus, Justice Thomas would have adopted for “true threats” the same constitutional requirement of mere general intent that the New Hampshire Supreme Court long ago had applied in upholding Walter Chaplinsky’s conviction for uttering fighting words: “[T]he only intent required for conviction . . . was an intent to speak the words.”¹¹⁰⁹ Justice Thomas could discern “no reason why we should give threats pride of place among unprotected speech” by finding in the Constitution a heightened requirement for the intent of the speaker before the utterances could be held outside the protection of the First Amendment.¹¹¹⁰

* * *

Thus, in the post-*Chaplinsky* era—and particularly since *Giboney*—the Supreme Court generally has looked favorably upon legitimate government efforts to prohibit and punish criminal conduct even when that government action results in incidental suppression of speech integral to the illegal conduct. The illegal combinations sought by Mr. Giboney and his fellow picketers, the unlawful gender-based employment discrimination intertwined with the Pittsburgh Press Company’s classified advertisements, the real harm to sexually abused children from Mr.

¹¹⁰⁷ *Id.* at 2027.

¹¹⁰⁸ *Id.* at 2028.

¹¹⁰⁹ *Id.* at 2027 (quoting *State v. Chaplinsky*, 18 A.2d 754, 758 (N.H. 1941)).

¹¹¹⁰ *Id.* at 2028.

Ferber's enabling of the production of child pornography, and the harm caused to recipients of Mr. Black's racially charged "true threats" whether or not violence actually ensued, all proved sufficient to place the regulated speech in the "First Amendment Free Zone" that lies outside the "freedom of speech" protected by the Constitution.

But within the Doctrine of Categorical Exclusion, there exist limits to the Supreme Court's willingness to countenance burdens on speech in the name of suppressing unlawful conduct. Part E will review a case study of one of those limits: The Supreme Court's approach to government efforts to punish the burning of property as a form of expressive conduct.

Part E: A burning issue: Expressive criminal conduct may be protected

Although the Supreme Court has found speech incidental to criminal conduct to be proscribable by the government because it is unprotected by the First Amendment, the Court also has found that when the opposite is true—when the illegal *conduct* is incidental to the message the *speech* is supposed to convey—the First Amendment applies.¹¹¹¹ Therefore, the Supreme Court’s “expressive conduct” jurisprudence functions as an outer boundary of the Doctrine of Categorical Exclusion as applied to speech integral to criminal conduct. But as explained in one of the flag-burning cases discussed in this Part E, the Supreme Court generally declines to apply that boundary in a manner that would obviate the general rule of categorical exclusion for speech incidental to criminal conduct:

One may not justify burning a house, even if it is his own, on the ground, however sincere, that he does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest.¹¹¹²

This Part E is not intended as anything akin to a comprehensive analysis of the Supreme Court’s “expressive conduct” jurisprudence;¹¹¹³ such an assessment would itself fill volumes. Rather, this Part E discusses a particular type of expressive conduct—the burning of symbolic items such as the American flag—for the limited purpose of demonstrating how the Supreme Court’s jurisprudence in that “well-defined and narrowly limited”¹¹¹⁴ area interrelates with its

¹¹¹¹ See generally Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 FORDHAM L. REV. 793 (1994).

¹¹¹² *Street*, 394 U.S. at 617 (Fortas, J., dissenting).

¹¹¹³ See, e.g., *Johnson*, 491 U.S. at 404 (“In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it. Hence, we have recognized the expressive nature of students’ wearing of black armbands to protest American military involvement in Vietnam; of a sit-in by blacks in a ‘whites only’ area to protest segregation; of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam; and of picketing about a wide variety of causes.” (citations and internal quotation marks omitted)) (collecting cases).

¹¹¹⁴ *Chaplinsky*, 315 U.S. at 571-72.

broader jurisprudence of the Doctrine of Categorical Exclusion. To illustrate how the Supreme Court has, in practice, imposed that boundary on the overall category of speech that is unprotected under the *Giboney-Pittsburgh Press* rule because it is “incidental to criminal conduct,” this Part considers three incendiary cases involving the burning of personal property as a form of expressive conduct. *United States v. O’Brien* is selected, despite being unrelated to the American flag, because it offers a sense of the starting point for the Supreme Court’s modern expressive conduct analysis. *Street v. New York* and *Texas v. Johnson* are selected, despite the numerous other cases that have reached the Supreme Court related to flag desecration,¹¹¹⁵ because they tend to effectively illuminate the relationship of the Supreme Court’s flag burning jurisprudence to the Doctrine of Categorical Exclusion, in particular the excluded category of speech integral to criminal conduct.

***United States v. O’Brien* (1968):**¹¹¹⁶ David Paul O’Brien objected to the War in Vietnam. Distressed at being subject to the draft, on March 31, 1966, he burned his draft registration card before a crowd on the steps of the South Boston Courthouse¹¹¹⁷ as a “demonstration against the war and against the draft.”¹¹¹⁸ He unwisely did so in the presence of several Federal Bureau of Investigation agents, who witnessed the event and arrested him for violating a federal law prohibiting destruction of draft cards.¹¹¹⁹ He was prosecuted in federal district court and convicted of violating a federal statute that made criminal the conduct of any person “who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such

¹¹¹⁵ See, e.g., *Johnson*, 491 U.S. at 404-05 (“Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag; refusing to salute the flag; and displaying a red flag; we have held, all may find shelter under the First Amendment” as must “treating flag ‘contemptuously’ by wearing pants with small flag sewn into their seat.” (citations and internal quotation marks omitted)) (collecting cases).

¹¹¹⁶ 391 U.S. 367.

¹¹¹⁷ *Id.* at 369.

¹¹¹⁸ *Id.* at 376.

¹¹¹⁹ *Id.* at 369.

certificate”¹¹²⁰ The U.S. Court of Appeals for the First Circuit found the underlying statute unconstitutional as an abridgement of free speech because it “singl[ed] out persons engaged in protests for special treatment.”¹¹²¹ The government appealed, and the Supreme Court granted certiorari.¹¹²²

The Supreme Court ruled the statute constitutional, both on its face and as applied to Mr. O’Brien, and reinstated Mr. O’Brien’s conviction. As a threshold matter, the *O’Brien* Court found the statute:

plainly does not abridge free speech on its face . . . [because it] deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The [relevant statute] does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers’ licenses, or a tax law prohibiting the destruction of books and records.¹¹²³

The *O’Brien* Court then turned its attention to developing an as-applied test that could distinguish any unprotected expressive conduct, which could be punished without the First Amendment, from protected expressive conduct that would enjoy constitutional protection. It rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”¹¹²⁴ To invoke First Amendment protection for expressive conduct, therefore, the mere intent of the “speaker” to convey an idea or point of view, however worthy, is insufficient. But what more must be shown?

¹¹²⁰ *Id.* at 369-70. The pertinent provisions were added to 50 U.S.C. § 462(b) by amendments in 1965.

¹¹²¹ *Id.* at 371.

¹¹²² *Id.* at 372.

¹¹²³ *Id.* at 375 (citation omitted).

¹¹²⁴ *Id.* at 376.

Acknowledging that a balancing test was necessary to separate protected speech from unprotected speech in this context, the Supreme Court characterized its approach as follows: “[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element *can justify incidental limitations* on First Amendment freedoms.”¹¹²⁵ In other words, while *speech* incidental to *criminal conduct* may be categorically proscribed, *criminal conduct* incidental to *speech* does not result in the speech becoming proscribable and thus in that circumstance the First Amendment still applies. But how to know the difference? Half the balance requires an assessment of whether the “governmental interest” in prohibiting the expressive conduct is “sufficiently important,” and the *O’Brien* Court noted previous cases that had characterized the weight of governmental interest required for this purpose in potent terms such as “compelling, substantial, subordinating, paramount, cogent [and] strong.”¹¹²⁶ The *O’Brien* Court then offered a test for assessing the governmental interest side of the balance:

Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹¹²⁷

Applying that test, the Supreme Court found the substantial governmental interest in raising and supporting armies, a power that is “beyond question,”¹¹²⁸ to justify the prohibition on draft-card burning and any incidental limitation on Mr. O’Brien’s expressive rights. The *O’Brien* majority focused intently on measuring one-half of the balancing test—namely, the determination whether the “governmental interest” is “sufficiently important”—but it offered no analysis of the other

¹¹²⁵ *Id.* (emphasis added).

¹¹²⁶ *Id.* (footnotes omitted).

¹¹²⁷ *Id.* at 377.

¹¹²⁸ *Id.* at 377.

half of the balance—namely, the determination whether the limitation on Mr. O’Brien’s First Amendment freedom was “incidental.” That point was noted by Justice Harlan, who made clear that a restriction on expressive conduct even in support of an important government interest nonetheless still could violate the First Amendment if it “entirely prevented” a speaker from conveying his message.¹¹²⁹

O’Brien, therefore, opened the door to future claims that expressive conduct may indeed be proscribed by the government, a conclusion consistent with *Giboney* principles and with the long American tradition of categorically excluding certain speech incidental to unlawful acts from First Amendment protection. This, of course, makes sense: The Speech Clause does not permit one to punch the President in the nose and expect to be shielded from prosecution by concurrently yelling, “Incidentally, I object to your declining Medicaid coverage for reconstructive nasal surgery!” Neither can one invoke the First Amendment to avoid prosecution for selling prohibited pictures of child pornography as an incidental means to communicate even weighty and valuable ideas about, say, the nature of children.¹¹³⁰

Nevertheless, the Supreme Court in subsequent cases declined to apply this balancing test broadly in favor of the government and instead has generally limited it to narrow facts such as those in *O’Brien*.

Street v. New York (1969):¹¹³¹ Mr. Sidney Street, an African American male, was in his Brooklyn, New York, apartment on June 6, 1966, when he heard a report on the radio that James Meredith had been shot and killed by a sniper in Mississippi. Distressed, and saying to himself,

¹¹²⁹ *Id.* at 388-89 (Harlan, J., concurring) (“I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an ‘incidental’ restriction upon expression, imposed by a regulation which furthers an ‘important or substantial’ governmental interest and satisfies the Court’s other criteria, in practice has the effect of entirely preventing a ‘speaker’ from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O’Brien manifestly could have conveyed his message in many ways other than by burning his draft card.”).

¹¹³⁰ See generally discussion in Chapter 6, Part C, *supra* (“Visual depictions of child pornography”).

¹¹³¹ 394 U.S. 576.

“They didn’t protect him,” Mr. Street took from a drawer an American flag that he personally displayed on national holidays, went to the street corner outside, and lit the flag on fire with a match. When police arrived, Mr. Street was talking to a small group of people who had gathered at the scene. The officer heard Mr. Street state: “We don’t need no damn flag.” After confirming to the officer that the burning flag was owned and ignited by him, Mr. Street further stated: “If they let that happen to Meredith we don’t need an American flag.”¹¹³² Mr. Street was charged in New York municipal court with “Malicious Mischief” in violation of an ordinance¹¹³³ that prohibited both the physical desecration of an American flag and also the verbal defiling of a flag.¹¹³⁴ He was convicted. The conviction was sustained by the Appellate Term and subsequently sustained by the New York Court of Appeals. The Supreme Court granted certiorari.¹¹³⁵

The Supreme Court reversed the conviction on the ground that the New York ordinance, as applied in this case, impermissibly infringed upon constitutionally protected speech. Notably, the Court went to lengths to make clear that it did not reach the question whether the symbolic act of *burning* the American flag constituted protected speech; instead, the Supreme Court based its decision on that portion of the ordinance and prosecution that rested upon Mr. Street’s spoken words about the American flag.¹¹³⁶ Based solely and narrowly on the attempt by New York to criminally punish Mr. Street’s *verbal comments* about the American flag, the Supreme Court reversed the conviction and stated:

¹¹³² *Id.* at 578-79.

¹¹³³ The violated ordinance, in pertinent part, made it a misdemeanor “publicly (to) mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act (any flag of the United States)” *Id.* at 577-78.

¹¹³⁴ *Id.* at 578.

¹¹³⁵ *Id.* at 579.

¹¹³⁶ The pertinent portion of the city ordinance made it a crime “publicly (to) defy . . . or cast contempt upon (an American flag) *by words* . . .” *Id.* at 580 (quoting N.Y. Penal Law § 1425, subd. 16, par. D (1909) (emphasis added)).

We have no doubt that the constitutionally guaranteed freedom to be intellectually . . . diverse or even contrary, and the right to differ as to things that touch the heart of the existing order, encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

. . . .

We add that disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history. Nevertheless, we are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects.¹¹³⁷

By its narrow holding in this case, the Supreme Court reaffirmed its existing jurisprudence regarding protected verbal expression but left for another day the question of whether the symbolic act of burning the flag constituted protected speech within the scope of the First Amendment.¹¹³⁸ The dissent, however, criticized the *Street* majority for avoiding the obvious and difficult question of whether the act of igniting the flag, separate and apart from any associated verbal utterances, might have enjoyed constitutional protection. In a passage foreshadowing the eventual clash on that underlying question, Justice Abe Fortas expressed his view:

If a statute provided that it is a misdemeanor to burn one's shirt or trousers or shoes on the public thoroughfare, it could hardly be asserted that the citizen's constitutional right is violated. If the arsonist asserted that he was burning his shirt or trousers or shoes as a protest against the Government's fiscal policies, for example, it is hardly possible that his claim to First Amendment shelter would prevail against the State's claim of a right to avert danger to the public and to avoid obstruction to traffic as a result of the fire. This is because action, even if clearly for serious protest purposes, is not entitled to the pervasive protection that is given to speech alone. It may be subjected to reasonable regulation that appropriately takes into account the competing interests involved.

¹¹³⁷ *Id.* at 593-94 (citations and internal quotation marks omitted).

¹¹³⁸ *Id.* at 595 (Warren, C.J., dissenting). Chief Justice Warren lamented that the Court "declined to meet and resolve the basic question presented in the case." *Id.* In his view, the question the Court should have addressed was "whether the deliberate act of burning an American flag in public as a 'protest' may be punished as a crime." *Id.* The Supreme Court would not reach that fundamental question for another 20 years. *See generally* *Texas v. Johnson*, 491 U.S. 397 (1989).

. . . [T]he fact that the law is violated for purposes of protest does not immunize the violator.¹¹³⁹

As support for the emphasized sentence in the quoted passage above, Justice Fortas cited to both *O'Brien* and *Giboney*. Thus, the Supreme Court in deciding *Street* was aware of the constitutional tension between categorically proscribable speech incidental to criminal conduct and constitutionally protected expressive conduct that is incidental to the speech or message it conveys. The *Street* majority elected to expressly avoid addressing that tension, but the dissent, concerned about the direction the jurisprudence was headed, chose to lay down a clear marker of its views.

Twenty years later, the question would again reach the Supreme Court, and this time it would be answered.

***Texas v. Johnson* (1989):**¹¹⁴⁰ During the 1984 Republican National Convention in Dallas, a group of protesters who objected to policies of President Reagan's administration marched in the streets and staged "die-ins" to express their concern about the consequences of nuclear war. One of these protesters was Gregory Lee Johnson, who at one point during the march was handed an American flag by another protester, who had removed it from a building in the area.¹¹⁴¹ Mr. Johnson carried the flag until the march ended in front of Dallas City Hall,

¹¹³⁹ *Street*, 394 U.S. at 616 (Fortas, J., dissenting) (emphasis added) (citation omitted).

¹¹⁴⁰ 491 U.S. 397.

¹¹⁴¹ This information raises two interesting points. First, unlike Sidney Street, who had burned a flag that was his own property, the flag burned by Mr. Johnson was not his and he could claim no property interest in it. Thus, the First Amendment issue in *Texas v. Johnson* was even more squarely presented because no claim of separate authority to destroy one's own property could lie. Second, it is an interesting—and unanswered—question whether the government might have defeated Mr. Johnson's First Amendment objections if the prosecution here had been either for his participation in the theft of this flag, his knowing acceptance of stolen property, or for his knowing criminal destruction of the property of another. The *Johnson* majority does suggest that one reason the specific Texas statute barring flag desecration, under which Mr. Johnson was prosecuted, failed to serve a sufficient government interest is that the separate, generally applicable Texas statute proscribing breach of the peace might be sufficient to protect any state interest maintaining law and order. Thus, one may find in the reasoning of the majority support for the notion that a prosecution of Mr. Johnson under the more generally applicable proscriptions on theft, on acceptance of stolen property, or on criminal destruction of the property of another might have survived First Amendment challenge.

where he doused the flag with kerosene and ignited it while protesters chanted: “America, the red, white, and blue, we spit on you”¹¹⁴² along with other slogans and epithets. Of about 100 protesters involved in the matter, only Mr. Johnson was charged with a crime, and the only crime with which he was charged was desecration of a venerated object.¹¹⁴³ He was convicted, and on appeal the Texas Court of Criminal Appeals reversed the conviction as violating the First Amendment. The Supreme Court granted certiorari.

The *Johnson* Court found Mr. Johnson’s flag burning to be constitutionally protected expressive conduct¹¹⁴⁴ and found that the state impermissibly sought to regulate it precisely *because* it was expressive.¹¹⁴⁵ The *Johnson* majority explained:

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken words. It may not, however, proscribe particular conduct *because* it has expressive elements. [W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.¹¹⁴⁶

But the *Johnson* majority’s determination that the Texas statute at issue should be judged as if it were regulating *speech*, not merely *conduct*, left open the important question whether Mr.

¹¹⁴² *Johnson*, 491 U.S. at 399.

¹¹⁴³ *Id.* at 400. The pertinent provision of the Texas statute stated as follows: “Desecration of Venerated Object. (a) A person commits the offense if he intentionally or knowingly desecrates: (1) a public monument; (2) a place of worship or burial; or (3) a state or national flag. (b) For purposes of this section, ‘desecrate’ means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.” *Id.* at 400 n.1 (quoting Texas Penal Code Ann. § 42.09 (1989)). Violation of the section was a misdemeanor.

¹¹⁴⁴ *Id.* at 406 (“Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: ‘The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn’t have been made at that time.’”).

¹¹⁴⁵ *Id.* at 411 (“Johnson was prosecuted because he knew that his politically charged expression would cause ‘serious offense.’ If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag ‘when it is in such condition that it is no longer a fitting emblem for display,’ . . . and Texas has no quarrel with this means of disposal.”).

¹¹⁴⁶ *Id.* at 406 (citations and internal quotation marks omitted).

Johnson's speech/conduct in burning the American flag was entitled to constitutional protection. The Supreme Court's analysis on this point goes to the heart of the relevance of this case to the broader Doctrine of Categorical Exclusion.

First, the *Johnson* majority distinguished *O'Brien*:

[A]lthough we have recognized that where 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment Freedoms, we have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which the governmental interest is unrelated to the suppression of free expression.¹¹⁴⁷

Second, the *Johnson* majority rejected categorical exclusion for Mr. Johnson's flag desecration through its express finding that the flag-burning here did not tend to incite a breach of the peace,¹¹⁴⁸ did not constitute proscribable "incitement,"¹¹⁴⁹ and did not constitute proscribable "fighting words" within the categorical exception to the First Amendment's protection.¹¹⁵⁰ Having found the flag burning in this case to fall outside the existing "fighting words" exclusion from First Amendment protection, the *Johnson* majority then stated, in effect, that no historical basis for excluding flag burning from First Amendment protection existed:

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

*We have not recognized an exception to this principle even where our flag has been involved.*¹¹⁵¹

The *Johnson* majority then expressly refused to recognize flag burning as a type of speech categorically excluded from constitutional protection:

¹¹⁴⁷ *Id.* at 407 (citations and internal quotation marks omitted).

¹¹⁴⁸ *Id.* at 401.

¹¹⁴⁹ *Id.* at 409.

¹¹⁵⁰ *Id.* ("Nor does Johnson's expressive conduct fall within that small class of 'fighting words' that are likely to provoke the average person to retaliation, and thereby cause a breach of the peace. No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs." (citations and internal quotation marks omitted)).

¹¹⁵¹ *Id.* at 414 (citations omitted).

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. . . . We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.¹¹⁵²

The *Johnson* Court, therefore, considered but rejected the notion that flag burning could be properly included in one of the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”¹¹⁵³ It did so by rejecting efforts to include flag burning within existing, recognized categories such as “incitement” or “fighting words,” and in went further to consider but reject the creation of a new category that would exclude flag burning alone. Instead, the *Johnson* majority found that Mr. Johnson’s expressive conduct of burning the American flag, on the facts of this case, fell within the type of speech protected by the First Amendment against government regulation.¹¹⁵⁴

The dissent saw matters differently. Chief Justice Rehnquist, joined by Justices White and O’Connor, argued that flag desecration was *precisely* the type of conduct that was historically considered outside the “freedom of speech” protected by the First Amendment. “For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.”¹¹⁵⁵ Noting that “a page of history is worth a volume of logic,”¹¹⁵⁶

¹¹⁵² *Id.* at 417-18.

¹¹⁵³ *Chaplinsky*, 315 U.S. at 571-72.

¹¹⁵⁴ *Johnson*, 491 U.S. at 417 (“To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.”).

¹¹⁵⁵ *Id.* at 422 (Rehnquist, C.J., dissenting).

¹¹⁵⁶ *Id.* at 421.

the dissent offered a lengthy recitation of the historical importance and profound meaning of the American flag in American society.¹¹⁵⁷

Chief Justice Rehnquist then traced the long history of state and federal laws prohibiting flag desecration, which he noted extended at least as far back as a uniform state law proposed in 1917¹¹⁵⁸ and a Supreme Court case from 1907¹¹⁵⁹ that upheld a Nebraska statute barring use of the flag in advertising. Drawing upon reasoning that seven years earlier the Supreme Court had used to justify recognition of “child pornography” as an unprotected category,¹¹⁶⁰ he also set forth the widespread acceptance of laws barring flag desecration, as evidenced by their adoption in 48 states and by federal law. Summarizing his argument that both historical practice and widespread acceptance should lead the Supreme Court to recognize flag desecration as an unprotected category of speech, Chief Justice Rehnquist wrote:

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.¹¹⁶¹

The dissent then proceeded to analyze Mr. Johnson’s conduct under the *Chaplinsky* framework:

The [*Chaplinsky*] Court could not, and did not, say that Chaplinsky’s utterances were not expressive phrases—they clearly and succinctly conveyed an extremely low opinion of the addressee. The same may be said of Johnson’s public burning of the flag in this case; it obviously did convey Johnson’s bitter dislike of his country. But his act, like Chaplinsky’s provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen

¹¹⁵⁷ *Id.* at 422-27.

¹¹⁵⁸ *Id.* at 428.

¹¹⁵⁹ *Id.* at 429 (citing *Halter v. Nebraska*, 205 U.S. 34 (1907)).

¹¹⁶⁰ Chief Justice Rehnquist did not cite to or expressly reference *New York v. Ferber*; however, that case had justified recognition of child pornography as a new, unprotected category of speech even absent any demonstrated historical practice of exclusion. See Chapter 6, Part C, *supra* (“Visual depictions of child pornography”).

¹¹⁶¹ *Johnson*, 491 U.S. at 429 (Rehnquist, C.J., dissenting).

different ways. As with “fighting words,” so with flag burning, for purposes of the First Amendment: It is “no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed” by the public interest in avoiding a probable breach of the peace.¹¹⁶²

In the view of the *Johnson* dissenters, the Supreme Court should have recognized “flag desecration” as a category of speech unprotected by the First Amendment.

* * *

Thus, these flag-burning and draft card-burning cases, particularly *Johnson*, provide a useful snapshot of the Supreme Court’s struggle to apply its longstanding doctrine that “speech integral to criminal conduct” falls into the “First Amendment Free Zone” that is outside the “freedom of speech” protected by the Constitution. In that way, they illuminate the outer boundaries of the Doctrine of Categorical Exclusion. For the *Johnson* majority, the burning of the American flag was a powerful symbol of protest, the expressive elements of which far outweighed any governmental interest in enforcing a restriction. The facts of this case, in their view, did not support the notion that Mr. Johnson’s conduct constituted proscribable “incitement” or “fighting words.” The fact that the statute under which Mr. Johnson was prosecuted specifically and narrowly prohibited flag desecration was a critical factor in the majority’s reasoning, and indeed it is unclear how they might have viewed this case had Mr. Johnson instead been prosecuted under more generally applicable laws forbidding theft of property, knowingly accepting stolen property, causing criminal damage to the property of another, or even breach of the peace.

For the dissent, however, the very fact that the Texas statute was narrowly targeted to prohibit flag desecration is precisely *why* it should have been saved. The long history of government prohibitions on flag desecration, the widespread acceptance of such proscriptions,

¹¹⁶² *Id.* at 431 (alterations in original).

and the very nature of flag burning, in their view, renders flag burning a “well-defined and narrowly limited class[] of speech”¹¹⁶³ that the government may proscribe through a narrowly targeted prohibition. Prohibitions on flag desecration are historically justified by the long history of

uniquely deep awe and respect for our flag [T]he government has not established this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.¹¹⁶⁴

That is the sort of language the Supreme Court employs when it recognizes a category of speech that has a tradition of proscription but that has not previously been recognized. Because that language was deployed here by only three Justices, flag desecration is not governed by the Doctrine of Categorical Exclusion and instead falls within the protection of the First Amendment.

In modern application, the Supreme Court has often recognized the general *Giboney-Pittsburgh Press* principle that speech integral to criminal conduct is categorically excluded from the protection of the First Amendment. The various acts of applying, or declining to apply, that general principle to specific, modern circumstances has resulted in the Supreme Court developing what might be considered “sub-doctrines” of how this category is to be applied in certain circumstances. That is why it can be said with certainty that “child pornography” and “true threats” fall within the *Giboney-Pittsburgh Press* line of cases and are unprotected while “flag desecration” falls without and must be analyzed under the First Amendment.

Have all of the specific applications of the *Giboney-Pittsburgh Press* principle been recognized by the Supreme Court? Or, to put the question differently, might there be other “sub-

¹¹⁶³ *Chaplinsky*, 315 U.S. at 571-72.

¹¹⁶⁴ *Johnson*, 491 U.S. at 434 (internal quotation marks omitted).

doctrines” or “subcategories” that later will be recognized? Perhaps, or perhaps not. It is, of course, impossible to know the future. But it may be useful to consider, in Part F, several other circumstances in which the Supreme Court has at least contemplated or signaled that a specific application of *Giboney-Pittsburgh Press* might be considered.

Part F: Other *Giboney* applications not fully developed?

The specific examples discussed above—fraud, visual depictions of child pornography, and true threats—are the most-clearly articulated applications of the general *Giboney-Pittsburgh Press* principle that the Constitution does not protect speech integral to unlawful conduct.¹¹⁶⁵ There are, of course, other examples of that principle in concept and application, both in the academic literature¹¹⁶⁶ and in the case law. This Part F mentions four of them that have drawn the Supreme Court’s attention over the years. On the whole, it cannot be said with certainty that the Supreme Court has declared these examples to fall within the “First Amendment Free Zone” that is beyond the “freedom of speech” protected by the Constitution, but the courts have hinted as much.

It is of course possible these examples may be further developed in the future as appropriate cases present themselves. Needless to say, the examples in this Part F are illustrative and are not represented to be an exhaustive list of possible applications of the *Giboney-Pittsburgh Press* principle.

Lying to the government, perjury and false impersonation

Even while rejecting the Government’s invitation to establish a new unprotected category for lies told about receiving military honors, the Supreme Court in *United States v. Alvarez*¹¹⁶⁷

¹¹⁶⁵ For a general discussion of the interaction of the First Amendment with speech integral to criminal conduct, see generally Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

¹¹⁶⁶ See, e.g., Chelsea Norell, Note, *Criminal Cookbooks: Proposing a New Categorical Exclusion for the First Amendment*, 84 S. CAL. L. REV. 933 (2011) (proposing a “crime plans exclusion” “for speech that specifically details how to commit a crime and, as a whole, lacks serious literary, artistic, political, or scientific value” (internal quotation marks omitted)); see also Samantha H. Scheller, Comment, *A Picture is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551 (2015) (exploring whether First Amendment permits government regulation of the public posting of sexually explicit images of former intimate partner); David Crump, *Desecration: Is it Protected Speech?*, 46 WAKE FOREST L. REV. 1021 (2011) (proposing that speech constituting “desecration” be categorically unprotected).

¹¹⁶⁷ 132 S. Ct. 2537 (2012).

described three additional categories of lies that traditionally could subject the speaker to punishment by the government without First Amendment concerns.

First, the First Amendment does not shield from liability a person who provides false information to a government official. The government may punish such lies because of the legitimate interest in preventing falsehood in “communications concerning official matters” even though that conclusion “does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context.”¹¹⁶⁸

Second, the statutes prohibiting and punishing perjury are of “unquestioned constitutionality”¹¹⁶⁹ because perjured testimony “is at war with justice” since it can result in a legal “judgment not resting on truth.”¹¹⁷⁰ Thus, “[t]o uphold the integrity of our trial system . . . the constitutionality of perjury statutes is unquestioned.”¹¹⁷¹

Third, the First Amendment does not prohibit government from proscribing “false representation that one is speaking as a Government official or on behalf of the government.”¹¹⁷² Such proscriptions are permitted because of the important interest in “maintain[ing] the general good repute and dignity of . . . government . . . service itself.”¹¹⁷³ “The same can be said for prohibitions on the unauthorized use of the names of federal agencies such as the Federal Bureau of Investigation in a manner calculated to convey that the communication is approved or using words such as ‘Federal’ or ‘United States’ in the collection of private debts in order to convey that the communication has official authorization.”¹¹⁷⁴

¹¹⁶⁸ *Alvarez*, 132 S. Ct. at 2545-46 (plurality opinion).

¹¹⁶⁹ *Id.* at 2546 (quoting *United States v. Grayson*, 438 U.S. 41, 54 (1978)).

¹¹⁷⁰ *Id.* (quoting *In re Michael*, 326 U.S. 224, 227 (1945)).

¹¹⁷¹ *Id.* (quoting *United States v. Dunnigan*, 507 U.S. 87, 97 (2012)).

¹¹⁷² *Id.* at 2545.

¹¹⁷³ *Id.* at 2546 (quoting *United States v. Lepowitch*, 318 U.S. 702, 704 (1943)) (alteration in original) (internal quotation marks omitted).

¹¹⁷⁴ *Id.* (citations omitted).

As Justice Kennedy explained, each of these examples of permissible proscription on speech differed from the lies told about military honors in *Alvarez* and “to the extent that they implicate fraud or speech integral to criminal conduct, [they] are inapplicable here.”¹¹⁷⁵

Similarly, while not limited solely to speech impeding government activities, “[m]any long-established criminal proscriptions - such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities.”¹¹⁷⁶ The Supreme Court long has acknowledged, without squarely addressing, that speech constituting “perjury, . . . solicitation of crime, complicity by encouragement, conspiracy, and the like”¹¹⁷⁷ is constitutionally unprotected.

The clear implication of these analyses is that these examples are established applications of the *Giboney-Pittsburgh Press* principle that speech integral to criminal conduct, as well as fraud, are unprotected by the First Amendment.

Speech uttered with criminal intent

Courts long have recognized that the First Amendment does not operate as a bar to the prosecution of otherwise generally applicable criminal laws merely because part of the crime, or evidence thereof, is verbal in nature. As one federal circuit court neatly put the principle:

The reasons of ordinary penal policy for covering communicative efforts to carry out ordinary crimes are obvious, and the criminal law sensibly draws no distinction between communicative and other acts. Although assertions of fact generally fall within a principle of freedom of speech, what these sorts of factual statements contribute to the general understanding of listeners is minimal, and *the justifications for free speech that apply to speakers do not reach communications that are simply means to get a crime successfully committed.*¹¹⁷⁸

¹¹⁷⁵ *Id.*

¹¹⁷⁶ *Williams*, 553 U.S. at 298.

¹¹⁷⁷ *Konigsburg*, 366 U.S. at 49 n.10.

¹¹⁷⁸ *Rice v. Paladin Enterprise, Inc.*, 128 F.3d 233 (4th Cir. 1997) (quoting KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE*, 85 (1989)) (emphasis added).

Thus, the Supreme Court has held that “solicitation to enter into an [illegal] agreement . . . remains in essence an invitation to engage in an illegal exchange for private profit, and may be properly prohibited.”¹¹⁷⁹ Similarly, “aiding and abetting” an illegal act is not protected by the First Amendment.¹¹⁸⁰ The key to distinguishing protected speech about criminal acts from unprotected speech that is punishable as part of a criminal act often is the intent of the speaker:

[T]he First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.¹¹⁸¹

This is because “speech is not protected by the First Amendment when it is the very vehicle of the crime itself.”¹¹⁸² Thus, the “First Amendment poses no bar to the imposition of civil (or criminal) liability for speech acts which the plaintiff (or the prosecution) can establish were undertaken with specific, if not criminal, intent.”¹¹⁸³

False threats

While a “true threat” to inflict harm is unprotected by the First Amendment, what about a false threat? For example, federal law prohibits false statements about threats to aircraft or aircraft facilities.¹¹⁸⁴ When George Rutherford falsely (and foolishly) stated to a flight attendant,

¹¹⁷⁹ *Brown v. Hartlage*, 456 U.S. 45, 55 (1982).

¹¹⁸⁰ *See Rice*, 128 F.3d 233; *National Organization for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) (“That ‘aiding and abetting’ of an illegal act may be carried out through speech is no bar to its illegality.”); *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982) (“The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction.”).

¹¹⁸¹ *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1986). Then Circuit Judge Kennedy was the author of this decision.

¹¹⁸² *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970).

¹¹⁸³ *Rice*, 128 F.3d at 248.

¹¹⁸⁴ *United States v. Rutherford*, 332 F.2d 444, 445 n.1 (1964) (“§ 35. Imparting or conveying false information. (a) Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title shall be fined not more than \$1,000, or imprisoned not more than one year, or both. (b) Whoever willfully and maliciously, or with reckless disregard for the safety of human life, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which

“I have to sit near the back [of the airplane] because I have a bomb,” he was prosecuted under that federal statute.¹¹⁸⁵ The Second Circuit Court of Appeals upheld that conviction because “there could be little doubt that the giving of the false information would be beyond the protection of the First Amendment.”¹¹⁸⁶

Lawyer professional misconduct

The application of the First Amendment to lawyer misconduct is an oft-decided issue at the Supreme Court. In general, perhaps because of the Supreme Court’s sensitivity to the necessity in the legal system of veracity by members of the bar, the Supreme Court has had a lower tolerance for false or misleading representations by lawyers than it has for falsehood or misleading speech generally.¹¹⁸⁷

For example, the Supreme Court has denied a claim that the First Amendment prohibits a state bar association from demanding applicants disclose prior affiliation with a political organization such as the Communist Party as part of the bar’s investigation of “character qualifications.” While the decision in *Konigsburg v. State Bar of California*¹¹⁸⁸ rested on analysis *within* the First Amendment’s protection of free speech, the *Konigsburg* Court did consider, but did not decide, whether categorical analysis should be applied in the case of bar applicants.¹¹⁸⁹ Obviously mindful of the Doctrine of Categorical Exclusion, the *Konigsburg* Court listed as examples of unprotected speech “libel, slander, misrepresentation, obscenity,

would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title—shall be fined not more than \$5,000, or imprisoned not more than five years, or both.” (*quoting* 18 U.S.C. § 35)).

¹¹⁸⁵ *Id.* at 445.

¹¹⁸⁶ *Id.* at 446. *But see* *Elonis*, 135 S. Ct. 2001 (concluding that threatening statements not actually intended to threaten harm were not actionable).

¹¹⁸⁷ *See generally* *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (demonstrating the unusual conclusion that a speech-burdening Florida Bar regulation of the legal profession satisfied strict scrutiny).

¹¹⁸⁸ *Konigsburg*, 366 U.S. 36.

¹¹⁸⁹ *Id.* at 49-51.

perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like”¹¹⁹⁰

The Supreme Court long has acknowledged that the “unique features” of certain methods of lawyer advertising, such as in-person solicitation of clients, may be proscribed because such advertising is “a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud,”¹¹⁹¹ an assessment it has applied in evaluating disciplinary actions *within* the First Amendment. However, the Supreme Court also has suggested, without deciding, that the underlying interest of distinguishing false or deceptive lawyer advertising, which is proscribable regardless of its form, from lawyer advertising that is neither false nor deceptive, may properly subjected lawyer advertising to a “prophylactic rule . . . [to prevent advertising] statements that are at best ambiguous and at worst outright false.”¹¹⁹² In effect, such a “prophylactic rule”—if recognized by the Supreme Court—would operate as a *de facto* categorical exclusion from First Amendment review of the speech falling within it.

Even while acknowledging that some application of the Doctrine of Categorical Exclusion may lurk in the regulatory world applied to lawyer advertising, in actual application the Supreme Court has continued to regulate lawyer solicitation within First Amendment doctrines, not as categorically excluded.¹¹⁹³ It has, however, at least considered the notion that some sort of categorical exclusion relying upon the reasoning of *Pittsburgh Press* may exist:

[T]here would be no impediment to a rule forbidding attorneys to use advertisements soliciting clients for nuisance suits—meritless claims filed solely to harass a defendant or coerce a settlement. Because a client has no legal right to

¹¹⁹⁰ *Id.* at 49 n.10.

¹¹⁹¹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985).

¹¹⁹² *Id.* at 644.

¹¹⁹³ *Compare, e.g., Bates v. State Bar*, 433 U.S. 350 (1977) (general public advertising to solicit legal clients protected by the First Amendment), *with Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (lawyer may, consistent with First Amendment commercial speech doctrine, be subject to discipline for in-person solicitation of clients for compensated representation), *and In re Primus*, 436 U.S. 412 (1978) (lawyer’s personal solicitation by letter of client for non-profit organization is protected political speech not subject to discipline).

file such a claim knowingly, advertisements designed to stir up such litigation may be forbidden because they propose an “illegal transaction.”¹¹⁹⁴

Thus, one is left to wonder how the Supreme Court might address a circumstance in which the client’s payment for legal services is *itself* in violation of law. Consider, for example, a hypothetical case presenting a lawyer who is disciplined for soliciting a client to pay and retain a non-profit organization to provide otherwise lawful legal representation if that non-profit organization were one properly identified by the government as providing material support for a terrorist organization—*itself* a crime.¹¹⁹⁵

* * *

The principle that speech so integrated with criminal conduct, which the government may lawfully prohibit or punish, may itself be constitutionally proscribed is well-established. Overall, it may be fairly said that this principle applies when the proscribed speech is incidental to the crime, not the other way around.

In some circumstances, such as allowing the government to prosecute and punish perjury, solicitation or conspiracy, the principle is so widely accepted that it has never been directly and successfully challenged and, thus, the Supreme Court has lacked occasion to squarely address its status. In other circumstances, such as those involving true threats or fraud, there is long acceptance of the principle allowing government proscription of the integrated speech, and the Supreme Court has expressly recognized that specific application of the categorical exclusion. In still other circumstances, so far limited to the unique matter of child pornography, there is no deep historical tradition of proscription, but the Supreme Court has nonetheless expressly

¹¹⁹⁴ *Zauderer*, 471 U.S. at 645 n.12.

¹¹⁹⁵ See generally *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (government may, consistent with the First Amendment, prohibit or punish the speech of those who provide financial contributions and other material support to terrorist organizations). *But see Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (restrictions on judicial fundraising solicitations satisfy strict scrutiny *within* First Amendment).

acknowledged that application of this principle means the First Amendment affords no protection to the possession or trade in visual depictions of the underlying crime of child abuse.

In light of the relative frequency of litigation in this area since *Chaplinsky*, it seems likely that other specific applications of this general principle allowing government to proscribe speech integrated with criminal conduct will in the future be recognized by the Supreme Court.¹¹⁹⁶ But against that relative willingness to recognize the unprotected nature of speech integrated with criminal conduct, one must consider the competing tension—the Supreme Court’s general reluctance to acknowledge new categories of unprotected speech and the overall trend toward narrowing existing categories. Chapter 7 will consider that countervailing tension.

¹¹⁹⁶ Another category of speech that some suggest might be excluded from First Amendment protection is harassing speech that contributes to a hostile work environment. As one writer has argued, “at least some expression in all workplaces lies beyond the First Amendment, because the expression accomplishes some end that does not implicate First Amendment values.” Miranda Oshige McGowan, *Certain Illusions about Speech: Why the Free-Speech Critique of Hostile Work Environment Harassment Is Wrong*, 19 CONST. COMMENT. 391, 397 (2002); accord, e.g., In re Stonegate Sec. Servs., Ltd., 56 B.R. 1014, 1018 (N.D. Ill. 1986) (“It is not unconstitutional to prohibit harassing conduct, even if that conduct involves verbal components. . . . It is constitutional to prohibit such conduct, even though it involves speech, because (1) the speech is not highly protected; (2) the speech is ‘speech-plus,’ that is, it involves action beyond speech; and (3) countervailing interests, such as an individual’s right to privacy, are involved.”); *Curry v. Dep’t of Navy*, 11 M.S.P.B. 573, 576 (1982) (“[D]ismissal for certain speech, not constitutionally protected, may be in accordance with law in the employment context and may promote the efficiency of the service.”). *But see Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001) (“We simply note that we have found no categorical rule that divests ‘harassing’ speech, as defined by federal anti-discrimination statutes, of First Amendment protection.”).

CHAPTER 7: Patrolling the boundaries of the Doctrine of Categorical Exclusion

Since *Chaplinsky*, the Supreme Court has characterized the categories of unprotected speech as “well-defined and narrowly limited.”¹¹⁹⁷ The Supreme Court has acknowledged it has on occasion “narrowed the scope of the traditional categorical exceptions” but reaffirmed that “a limited categorical approach has remained an important part of our First Amendment jurisprudence.”¹¹⁹⁸ Chapters 3 through 6, *supra*, have discussed the Supreme Court’s voluminous work from *Chaplinsky* in 1942 until *Stevens* in 2010 to ensure that recognized categories of unprotected speech are “well-defined,” and Chapters 8 (*United States v. Stevens*) and 9 (*United States v. Alvarez*) will describe the Supreme Court’s most recent approaches to that task.

But that leaves open the omnipresent question, upon application of the Doctrine of Categorical Exclusion to a given set of facts, whether the challenged government regulation “has gone beyond the categorical exception.”¹¹⁹⁹ One author has aptly described this “categorization paradox”:

On the one hand, it is important that courts maintain categorization as a tool for discerning those rare categories of speech that can be deemed unprotected. If this tool is to mean anything, it is important that legislatures have substantial leeway to regulate within these categories. Such categories can be legislated against in their entirety. In addition, reasonable leeway should exist for legislatures to legislate within subcategories of these categories. On the other hand, the categorization paradox tells us that we have to expect misjudgments, even abuse in the definition and regulation of these speech categories. Misjudgments by courts are inevitable, both as to which speech categories should be unprotected and also as to whether and when speech falls within such categories. Abuse by legislatures and law enforcement personnel who use such categories to chill or prosecute protected speech also are inevitable. Thus, some limits on the use of unprotected speech categories are called for. The limits should be geared toward minimizing the impact of categorization doctrine on free speech value in two sets

¹¹⁹⁷ *Chaplinsky*, 315 U.S. at 571.

¹¹⁹⁸ *R.A.V.*, 505 U.S. at 383 (citations omitted).

¹¹⁹⁹ *Williams*, 553 U.S. at 299.

of cases: first, in cases where speech is unprotected but has significant value and thus reflects a flaw with the unprotected speech category itself; and second, in cases where categorization serves as a vehicle to infringe on protected speech.¹²⁰⁰

This chapter discusses four of the principal methods employed by the Supreme Court to ensure that the unprotected categories remain “narrowly limited” and that the “First Amendment Free Zone” remains tightly contained.

¹²⁰⁰ Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 874 (2005).

Part A: Most proposed new categories are rejected

The Supreme Court’s first, and most direct, method of keeping the unprotected categories “narrowly limited” is to decline invitations to recognize additional unprotected categories.¹²⁰¹

The Supreme Court has acknowledged that it may from time to time “adjust the boundaries of an existing category of unprotected speech,”¹²⁰² and that is observable from the evolution of the four *Chaplinsky* categories in Chapters 3 through 6. But recognizing *new* categories is disfavored.¹²⁰³ The Supreme Court has articulated the showing necessary for it to consider recognizing a new category as requiring “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription”¹²⁰⁴ It has rejected adoption of a “free-floating test for First Amendment coverage” in evaluating proposed new unprotected categories because “[t]he Constitution is not a document ‘prescribing limits, and declaring that those limits may be passed at pleasure.’”¹²⁰⁵

The disfavored status of new categories was evident from the experiment with categorical exclusion of commercial speech.¹²⁰⁶ Similarly, the Supreme Court took a step toward

¹²⁰¹ This Part will discuss and illustrate its analysis through reference to judicial decisions. However, a larger universe of proposed new categorical exclusions has been advocated by litigants in various cases but has not caught the Court’s attention even sufficiently to justify judicial rejection of the proposed new category. *See, e.g.*, Brief of Family Research Council et. al. as Amici Curiae in Support of Petitioners, *United States of America v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (No. 98-1682), 1999 WL 592027 (advocating judicial recognition that “nuisance speech” is categorically without First Amendment protection). Of course, advocates usually draw upon some precedent when urging the Supreme Court to recognize a new category of excluded speech; the Family Research Council brief drew its proposed “nuisance” speech phrase from a passage in *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (loud noises from sound truck could be regulated because it “is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance”).

¹²⁰² *EMA*, 131 S. Ct. at 2735.

¹²⁰³ Moreover, in some cases the Supreme Court has appeared to lay the groundwork for recognizing a new category of unprotected speech but then stopped short of formally doing so. An illustrative example is the speech of public employees on matters within the scope of their employment, which the Supreme Court in 2006 determined regulable by the government but stopped short of identifying it as an unprotected category. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006); *see also* Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008).

¹²⁰⁴ *EMA*, 131 S. Ct. at 2734.

¹²⁰⁵ *Stevens*, 559 U.S. at 470 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

¹²⁰⁶ *See* Chapter 5, *supra*.

recognizing flag-burning as unprotected conduct but then stopped short of recognizing such a category.¹²⁰⁷ More frequently, however, the Supreme Court has just said ‘no’ when presented with an invitation to recognize an additional category of speech as unprotected. A list of proposed additional categories the post-*Chaplinsky* Court has considered but rejected over the years includes:

Racially charged speech

In 1965, Julian Bond, an African American, was elected to a seat in the Georgia House of Representatives. Before being seated, he made public comments sharply criticizing the Vietnam War and expressing solidarity with the anti-war statements of a group called the Student Nonviolent Coordinating Committee. Some of the anti-war statements he endorsed were characterized as racially charged, such as:

“We recoil with horror at the inconsistency of a supposedly ‘free’ society where responsibility to freedom is equated with the responsibility to lend oneself to military aggression. We take note of the fact that 16 per cent of the draftees from this country are Negroes called on to stifle the liberation of Viet Nam, to preserve a ‘democracy’ which does not exist for them at home.

“We ask, where is the draft for the freedom fight in the United States?”¹²⁰⁸

Mr. Bond’s numerous critics accused him of holding views that rendered him incapable of fulfilling his oath to support the United States Constitution. As evidence, they pointed to his extensive anti-war comments. After legislative investigation, a majority of members of the Georgia House of Representatives voted not to seat Mr. Bond as a member.¹²⁰⁹ They claimed authority under the qualifications clause of the Georgia state constitution. Mr. Bond filed suit in federal court alleging that his disqualification was impermissibly based upon his statements, which were protected by the First Amendment.

¹²⁰⁷ See Chapter 6, Part E, *supra*.

¹²⁰⁸ *Bond v. Floyd*, 385 U.S. 116, 120 (1966).

¹²⁰⁹ The vote was 184-12. See *Bond*, 385 U.S. at 125.

Upon review, the Supreme Court held that although legislators could be compelled to swear the oath required by the United States Constitution, “this requirement does not authorize a majority of state legislators to test the *sincerity* with which another duly elected legislator can swear to uphold the Constitution.”¹²¹⁰ The Supreme Court then considered “whether Bond’s disqualification because of his statements violated the free speech provisions of the First Amendment as applied to the States through the Fourteenth Amendment.”¹²¹¹ The answer: Yes. In its analysis, the Supreme Court quickly concluded that Mr. Bond’s statements did not qualify as unprotected incitement and were instead protected by the First Amendment; the *Bond* Court then noted that the fact Mr. Bond’s statement may “have racial overtones [does not] constitute a reason for holding it outside the protection of the First Amendment.”¹²¹²

Thus, the *Bond* Court rejected an invitation to place speech with “racial overtones” that falls short of incitement into the “First Amendment Free Zone” that falls outside the “freedom of speech” protected by the Constitution.

Privacy of a rape victim

In 1983, B.J.F. was raped in Florida. Her full name was listed on a police report, which subsequently was inadvertently released to the news media. The Florida Star, a newspaper, obtained the name and, because of poor training of junior staff members, published it in violation of company policy in a routine “police reports” column. B.J.F. sued the newspaper for tortious invasion of her privacy, and judgment was awarded to her and affirmed by the state appellate court. The United States Supreme Court granted certiorari.¹²¹³

¹²¹⁰ *Id.* at 132 (emphasis added).

¹²¹¹ *Id.* at 131-32.

¹²¹² *Id.* at 134-35.

¹²¹³ *Florida Star v. B.J.F.*, 491 U.S. at 526-29 (1989).

The Supreme Court set aside the judgment against *The Florida Star* as a violation of the First Amendment. The *Florida Star v. B.J.F.*¹²¹⁴ Court’s analysis was conducted within the First Amendment, but the *Florida Star* majority considered—and declined—an invitation from B.J.F. to establish “a categorical rule that publication of the name of a rape victim never enjoys constitutional protection.”¹²¹⁵ The three Justices in dissent, led by Justice White, would have established such a “categorical” rule that such publication “constitutes an unwarranted invasion of privacy” and falls outside the protection of the First Amendment.¹²¹⁶

Thus, the *Florida Star* Court rejected an invitation to place speech that publicizes the name of a rape victim without consent into the “First Amendment Free Zone” that falls outside the “freedom of speech” protected by the Constitution.

Speech generating financial profits from crime

In the 1980s, New York enacted a “Son of Sam” law, named after the notorious serial killer, intended to secure for use in victim compensation any proceeds from the sale of criminals’ memoirs or similar publications. Mr. Henry Hill was a notorious criminal who turned state’s evidence and, while in the federal witness protection program, wrote a book titled “Wiseguy” about his criminal endeavors. It sold more than one million copies, and eventually the award-winning movie “Goodfellas” was based upon it.¹²¹⁷

Pursuant to New York’s Son of Sam law, the state Crime Victims Compensation Board demanded that proceeds from sales of the book be turned over to it. Simon & Schuster brought suit challenging that demand on First Amendment grounds.

¹²¹⁴ 491 U.S. 526.

¹²¹⁵ *Id.* at 531-32.

¹²¹⁶ *Id.* at 552 (White, J., dissenting) (internal quotation marks).

¹²¹⁷ *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108-15 (1991).

The Supreme Court unanimously held that the Son of Sam law violated the First Amendment as a content-based restriction on speech. While the analysis was conducted within the First Amendment, the Court implicitly rejected an invitation to categorically exclude speech such as that at issue from First Amendment protection. The majority in *Simon & Schuster v. Members of the New York State Crime Victims Board*¹²¹⁸ noted approvingly a lower court’s conclusion that the government could not justify “content-based discrimination . . . by simply observing that the state is anxious to regulate the designated category of speech”¹²¹⁹—a construction implying that no such unprotected category operated to permit the regulation in this case. Justice Kennedy, writing separately, would have resolved the case solely through categorical analysis and concluded that no unprotected category applied here.¹²²⁰

Thus, the *Simon & Schuster* Court rejected an invitation to place speech generating financial profits from crime into the “First Amendment Free Zone” that lies outside the “freedom of speech” protected by the Constitution.

Virtual child pornography

As discussed in Chapter 6, Part C, *supra*, depictions of virtual child pornography—those which have not captured any actual act of child abuse—are protected by the First Amendment. The *Free Speech Coalition* Court declined to recognize a new unprotected category for virtual child pornography.

¹²¹⁸ 502 U.S. 105 (1991).

¹²¹⁹ *Id.* at 120.

¹²²⁰ *Id.* at 127 (Kennedy, J., concurring) (“There are a few legal categories in which content-based regulation has been permitted or at least contemplated. These include obscenity, defamation, incitement, or situations presenting some grave and imminent danger the government has the power to prevent. These are, however, historic and traditional categories long familiar to the bar, although with respect to the last category it is most difficult for the government to prevail. While it cannot be said with certainty that the foregoing types of expression are or will remain the only ones that are without First Amendment protection, as evidenced by the proscription of some visual depictions of sexual conduct by children, the use of these traditional legal categories is preferable to the sort of *ad hoc* balancing that the Court henceforth must perform in every case if the analysis here used becomes our standard test.” (citations omitted)).

Flag burning

As discussed in Chapter 6, Part E, *supra*, the *Johnson* Court declined to recognize a new unprotected category for protesting by means of the expressive conduct of burning the American flag.

Depictions of animal cruelty

As discussed at length in Chapter 8, *infra*, images of acts of cruelty to animals are protected by the First Amendment. The *Stevens*¹²²¹ Court declined to recognize a new unprotected category for images of animal cruelty.

Violent video games

The Supreme Court held unconstitutional a California statute intended to restrict the marketing of violent video games to minors. The *Brown v. Entertainment Merchants Association*¹²²² (“*EMA*”) majority rejected efforts to characterize the California restrictions on video games with violent content as an outgrowth of the categorical exclusion of obscenity from First Amendment protection¹²²³ and then correctly characterized what the law truthfully sought: “[I]t wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.”¹²²⁴ The Supreme Court declined to do so. Noting the violent content of many traditional children’s stories—from *Snow White* to *Hansel and Gretel* to Homer’s *Odysseus* to *Lord of the Flies*¹²²⁵—the *EMA* majority found no “longstanding tradition in this country of specially restricting children’s access to depictions of violence”¹²²⁶ Concurring in the judgment, Justice Alito agreed that “[t]here is no similar history [of

¹²²¹ *Stevens*, 559 U.S. 460.

¹²²² 131 S. Ct. 2729 (2010).

¹²²³ *Id.* at 2735 (“[V]iolence is not part of the obscenity that the Constitution permits to be regulated.”)

¹²²⁴ *Id.* at 2735.

¹²²⁵ *Id.* at 2736-37.

¹²²⁶ *Id.* at 2736.

government proscription] regarding expression related to violence.”¹²²⁷ Therefore, the *EMA* majority declined to recognize a new category that would permit the California regulation.

Notably, Justice Thomas would have recognized a new unprotected category in this case precisely because, in his view, it had long historical precedent. The category would not have excluded violent speech but instead would have excluded from First Amendment protection all “speech to minor children bypassing their parents.”¹²²⁸ After an extensive tracing of the Founding Generation’s understanding that the First Amendment did not convey a right to speak to another’s children with the parent or guardian’s permission,¹²²⁹ Justice Thomas concluded:

In light of this history, the Framers could not possibly have understood ‘the freedom of speech’ to include an unqualified right to speak to minors. Specifically, I am sure that the founding generation would not have understood ‘the freedom of speech’ to include a right to speak to children without going through their parents.¹²³⁰

Therefore, in Justice Thomas’s view, the *EMA* Court should have sustained the California regulation by recognizing a new unprotected category of speech with long historical roots:

We have recently noted that this Court does not have ‘freewheeling authority to declare new categories of speech outside the scope of the First Amendment.’ But we also recognized that there may be ‘some categories of speech that have been historically unprotected [and] have not yet been specifically identified or discussed as such in our case law.’ In my opinion, the historical evidence here plainly reveals one such category.¹²³¹

The *EMA* decision is notable as the only case in which members of the Supreme Court *agreed* that a “tradition of proscription” is necessary to support recognition of a “heretofore unrecognized” category of unprotected speech but *disagreed* on the existence of that history.

The difference in this case principally involved the terms in which the proposed new category

¹²²⁷ *Id.* at 2746 (Alito, J., concurring in judgment).

¹²²⁸ *Id.* at 2752 (Thomas, J., dissenting).

¹²²⁹ *Id.* at 2752-59.

¹²³⁰ *Id.* at 2759.

¹²³¹ *Id.* (citations omitted); *see also* Erick D. Reitz, *Children and Categorization: Maintaining a Standard for Recognizing Speech Categories in Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011), 91 NEB. L. REV. 998 (2013) (arguing for recognizing as an unprotected category speech that harms children).

was presented: No member of the *EMA* Court disagreed with the majority's conclusion that no history supported declaring messages of violence directed toward children as an unprotected category, but Justice Thomas conveyed extensive history that, in his view, supported the conclusion that the First Amendment does not reach the category of speech to minor children bypassing their parents.

In any event, the majority prevails. Thus, the *EMA* Court rejected an invitation to place the speech contained in violent video games into the "First Amendment Free Zone" that lies outside the "freedom of speech" protected by the Constitution.

Lies about military service

As discussed at length in Chapter 8, *infra*, lies about an individual's military service, unless told for financial or other concrete gain, are protected by the First Amendment. The *Alvarez* Court declined to recognize a new unprotected category for lies about military service.

* * *

The post-*Chaplinsky* Supreme Court has declined more invitations to recognize additional unprotected categories than it has accepted. This reluctance is one tool the Supreme Court has used to ensure the universe of unprotected categories remains "limited." There exist other tools used by the Supreme Court to ensure further that each individual category remains *narrowly* limited. Part B will focus on one of these tools: First Amendment overbreadth analysis.

Part B: Overbreadth: Regulation must stay “substantially” within the excluded category

Assuming an unprotected category exists and the speech subject to regulation is alleged to fall within it, how does the Supreme Court ensure that the regulation itself stays within the boundary of the unprotected category? How does the Supreme Court ensure the statute regulating unprotected speech remains “narrowly drawn and limited”?¹²³²

The Supreme Court long has recognized the problem of regulating speech that straddles a constitutional line, partially proscribable and partially not. As long ago as 1904, the Supreme Court rejected what was in effect an early challenge to the overbreadth of a federal statute, alleging that a particular statute impermissibly allowed the Postmaster General to seize not only letters containing material related to an illegal lottery but *all* letters sent to or from a particular addressee.¹²³³ In 1931, the Supreme Court held that a statute punishing speech for any of three alternate reasons is unconstitutional if any one of the reasons violates the Constitution and it is impossible to determine which of the reasons for liability was relied upon by the jury;¹²³⁴ that

¹²³² *Karlan v. City of Cincinnati*, 416 U.S. 924, 926 n.3 (1974) (Douglas, J., dissenting) (quoting *Cantwell*, 310 U.S. at 311). Dissenting from the remand of four cases for reconsideration in light of *Lewis v. New Orleans*, 415 U.S. 130 (1974), Justice Douglas expressed frustration that state courts often ignored the First Amendment’s requirements as articulated by the United States Supreme Court, thereby allowing overbroad regulation of protected speech to stand: “The decisions of this Court are to guide state courts in the exercise of this duty. But experience has shown that such guidance is often unheeded. The duty of the States in this area has long been clear. After *Chaplinsky*, federal intervention in *Terminiello* should have been unnecessary. After *Chaplinsky* and *Terminiello*, *Gooding* should have been unnecessary. Yet after them all, the State Supreme Court in *Lewis*, o[n] reconsideration in light of *Gooding*, again failed to narrow the ordinance and affirmed a conviction which we found necessary to reverse. The principle in *Lewis* was not new; it was not new in *Gooding*, nor in *Terminiello*, nor even in *Chaplinsky* [citing *Cantwell*]. State courts, however, have consistently shown either inability or unwillingness to apply its teaching. I thus see nothing to be gained by state court reconsideration in light of *Lewis*. I would reverse these judgments out of hand.” *Id.* at 928 (footnote omitted).

¹²³³ *Public Clearing House v. Coyne*, 194 U.S. 497, 510 (1904) (“It is true [the Postmaster General’s fraud order] may occasionally happen that he would detain a letter having no relation to the prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day, containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, prima facie at least, all such letters are identified with such business. A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annulment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts.”).

¹²³⁴ *Stromberg v. California*, 283 U.S. 359 (1931), *narrowed by Griffin v. United States*, 502 U.S. 46, 53 (1991) (“[T]he holding of *Stromberg* [] do[es] not necessarily stand for anything more than the principle that, where a

same reasoning has carried through to more modern times.¹²³⁵ In modern application, the Supreme Court often relies on what has come to be called the First Amendment overbreadth doctrine¹²³⁶ for the purpose of ensuring that government regulation of speech remains substantially within the unprotected category. “The purpose of the overbreadth doctrine is to excise statutes which have a deterrent effect on the exercise of protected speech.”¹²³⁷ The Supreme Court has succinctly summarized the doctrine:

According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute’s overbreadth be substantial, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep. Invalidation for overbreadth is strong medicine that is not casually employed.¹²³⁸

The Supreme Court has expressly recognized the overbreadth doctrine as a tool used to police the boundaries of the categories of speech excluded from First Amendment protection:

The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within ‘narrowly limited classes of speech.’¹²³⁹ Even as to such a class, however, because ‘the line between speech

provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.”).

¹²³⁵ See *Bachellar v. Maryland*, 397 U.S. 564, 571 (1970) (“[S]ince petitioners’ convictions may have rested on an unconstitutional ground, they must be set aside.”).

¹²³⁶ See generally *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

¹²³⁷ *Rosenfeld v. New Jersey*, 408 U.S. 901, 908 (1972) (Powell, J., dissenting) (footnote omitted); see also *id.* at 907 (“[The overbreadth doctrine] results often in the wholesale invalidation of the legislature’s handiwork, creating a judicial-legislative confrontation. In the end, this departure from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme.” (quoting Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970))).

¹²³⁸ *Williams*, 553 U.S. at 292-93 (citations and internal quotation marks omitted); see also *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (“[A] law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” (internal quotation marks omitted)).

¹²³⁹ *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (quoting *Chaplinsky*, 315 U.S. at 571).

unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn,¹²⁴⁰ ‘(i)n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.’¹²⁴¹ In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”¹²⁴²

For the purpose of illustrating the First Amendment overbreadth doctrine in operation to enforce the boundaries of categorically unprotected speech, this Part B will consider how the Supreme Court has handled application of the First Amendment to state efforts to prevent fraudulent charitable solicitations by enacting various regulations on telemarketers. The Court has consistently held that fraudulent speech falls within the “First Amendment Free Zone” and thus may be proscribed by the government. To illustrate the role of overbreadth analysis in the Doctrine of Categorical Exclusion, consider how the Supreme Court has interpreted the First Amendment’s “freedom of speech” to apply to state regulation of telemarketers that is aimed at combating fraud but that also burdens a substantial amount of constitutionally protected non-fraudulent speech by telemarketers.

Village of Schaumburg v. Citizens for a Better Environment (1980):¹²⁴³ To “protect[] the public from fraud, crime and undue annoyance,”¹²⁴⁴ the Village of Schaumburg, Illinois, a northern suburb of Chicago, enforced an ordinance barring door-to-door charitable solicitation by any organization that used less than 75 percent of its collections for the underlying charitable purpose. The Citizens for a Better Environment, an organization engaged in charitable solicitation, challenged the ordinance as facially invalid because it proscribed lawful solicitations

¹²⁴⁰ *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

¹²⁴¹ *Id.* (quoting *Cantwell*, 310 U.S. at 304).

¹²⁴² *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

¹²⁴³ 444 U.S. 620.

¹²⁴⁴ *Id.* at 636.

as well as fraudulent ones. The Supreme Court agreed, and in so doing articulated two aspects of its First Amendment overbreadth doctrine.

First, the doctrine permits standing to challenge a government regulation as overbroad even by a person who could be properly regulated within an application of the regulation that is constitutionally permissible. The Supreme Court described the reason for this permissive standing rule as follows:

In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.¹²⁴⁵

In other words, because the very existence of a facially overbroad regulation may chill constitutionally protected speech, the Supreme Court has opened wider the courthouse door to allow more plaintiffs to bring overbreadth challenges.

Second, the overbreadth doctrine requires that government regulations of speech be “narrowly drawn . . . [and] designed to serve those [important governmental] interests without unnecessarily interfering with First Amendment freedoms.”¹²⁴⁶ In this case, the Supreme Court concluded, that meant “[t]he Village’s legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation.”¹²⁴⁷ The prevention of fraud is “only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests.”¹²⁴⁸ “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.”¹²⁴⁹

¹²⁴⁵ *Id.* at 634.

¹²⁴⁶ *Id.* at 637.

¹²⁴⁷ *Id.*

¹²⁴⁸ *Id.* at 636.

¹²⁴⁹ *Id.* at 637 (quoting *Button*, 371 U.S. at 438).

Thus, the Supreme Court struck down the Village of Schaumburg’s 75-percent requirement as “unconstitutionally overbroad.”¹²⁵⁰

Secretary of State of Maryland v. Munson (1984):¹²⁵¹ For the stated purpose of preventing fraud, the State of Maryland enforced a law that, similar to the ordinance in *Schaumburg*, limited fundraising expenses in charitable solicitations to not more than 25 percent of the contributions raised. Maryland’s statute, and the key facts in this case, differed from *Schaumburg* and its unconstitutional ordinance in three important regards: First, the challenge here was brought by a for-profit fundraising company, not by any charity itself. Second, the Maryland law applied to *all* charitable solicitations, not just door-to-door solicitations. Third, the Maryland law contained a provision by which the government could waive the percentage limitation upon a proper showing. “The issue in the present case is whether a Maryland statute with a like percentage limitation, but with provisions that render it more ‘flexible’ than the *Schaumburg* ordinance, can withstand constitutional attack.”¹²⁵²

The answer was no. The Munson Company was a professional for-profit fundraising company based in Indiana, which was hired to raise money on behalf of various Maryland charities, including the Fraternal Order of Police. It brought suit in Maryland state court challenging the state law that included the 25 percent limitation. On appeal, the United States Supreme Court struck down the Maryland law and addressed the three issues set forth above.

First, the Supreme Court reiterated that for purposes of the First Amendment overbreadth doctrine, rules for standing were sufficiently permissive to allow a for-profit fundraising company to bring the suit regardless of “whether or not its own First Amendment rights are at

¹²⁵⁰ *Id.* at 639.

¹²⁵¹ 467 U.S. 947.

¹²⁵² *Id.* at 949-50.

stake.”¹²⁵³ The *Munson* Court explained in greater detail than had the *Schaumburg* Court the reason for the more-permissive standing rule in overbreadth cases:

Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society’s interest in having the statute challenged.¹²⁵⁴

Second, the broader application of the Maryland statute—applying to all charitable solicitations and not just door-to-door sales—was of no First Amendment significance.

The distinction made in *Schaumburg* was between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process. The [Maryland] statute’s aim is not improved by the fact that it fires at a number of targets.¹²⁵⁵

Third, the waiver provision in the Maryland law could not save it from constitutional infirmity. In analyzing this point, the *Munson* Court went beyond *Schaumburg* and injected the concept that any overbreadth of a statute must be “substantial” in order for a First Amendment violation to attach:

“Substantial overbreadth” is a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner. It is appropriate in cases where, despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct.¹²⁵⁶

The “substantial overbreadth” requirement is an important aspect of the First Amendment overbreadth doctrine. Unfortunately for Maryland, it did not operate in this case to save the state’s 25 percent requirement even when the waiver was taken into account:

¹²⁵³ *Id.* at 958.

¹²⁵⁴ *Id.* at 956.

¹²⁵⁵ *Id.* at 969-70.

¹²⁵⁶ *Id.* at 964-65 (ellipses and internal quotation marks omitted).

Here there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits. . . . The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. That the statute in some of its applications actually prevents the misdirection of funds from the organization’s purported charitable goal is little more than fortuitous.¹²⁵⁷

The important contribution of *Munson* to the understanding of the First Amendment overbreadth doctrine is its detailed articulation of the connection the Constitution requires between the speech or conduct actually proscribed by the government and that which is categorically proscribable under the Doctrine of Categorical Exclusion. The correlation need not be exact, but any “substantial” spillover of the regulation from categorically proscribable speech into speech that is constitutionally protected will render the government regulation, like the Maryland law challenged in *Munson*, “unconstitutionally overbroad.”¹²⁵⁸

Riley v. National Federation of the Blind (1988):¹²⁵⁹ Presumably mindful of both *Schaumburg* and *Munson*, the North Carolina legislature took a somewhat different approach to regulating charitable solicitations. The novel provision of its law required that charitable solicitors affirmatively disclose during the course of the solicitation what portion of any money contributed would go to fundraising and administrative expenses. While not expressly invoking its First Amendment overbreadth doctrine, the Supreme Court found this requirement “unduly burdensome and not narrowly tailored.”¹²⁶⁰

In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available. For example, as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. . . . Alternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by

¹²⁵⁷ *Id.* at 966 (footnotes omitted).

¹²⁵⁸ *Id.* at 970.

¹²⁵⁹ 487 U.S. 781.

¹²⁶⁰ *Id.* at 798.

making false statements. These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored.¹²⁶¹

The constitutional concern underlying the *Riley* Court was, once again, that in an attempt to prohibit categorically proscribable speech—specifically, fraudulent solicitations—the State of North Carolina had enacted a statute that burdened a significant amount of protected speech. “This chill and uncertainty might well drive professional fundraisers out of North Carolina [or at least] ultimately reduce the quantity of expression. . . . [T]he restriction is undoubtedly one on [protected] speech, and cannot be countenanced here.”¹²⁶²

Thus, the North Carolina statute was overbroad and could not survive a First Amendment challenge.

Madigan v. Telemarketing Associates, Inc. (2003):¹²⁶³ The States’ quest to identify how far they could go in efforts to prohibit charitable solicitation fraud without running afoul of the First Amendment ended where it began—with an Illinois regulation challenged before the United States Supreme Court.¹²⁶⁴ The Illinois attorney general brought a fraud action against a charitable solicitor based on specific misrepresentations made during solicitations for money. In upholding the state’s authority to do so without violating the First Amendment, the Supreme Court stated:

The Court has not previously addressed the First Amendment’s application to individual fraud actions of the kind at issue here. It has, however, three times considered prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level. Each time, the Court held the prophylactic measures unconstitutional.¹²⁶⁵

¹²⁶¹ *Id.* at 800.

¹²⁶² *Id.* at 794.

¹²⁶³ 538 U.S. 600.

¹²⁶⁴ Compare *Schaumburg*, 444 U.S. 620, with *Madigan*.

¹²⁶⁵ *Madigan*, 538 U.S. at 612.

As the Supreme Court acknowledged, this case was different from *Schaumburg, Munson* and *Riley*. Here, the state’s enforcement action did *not* target charitable solicitation generally—instead, it targeted fraudulent solicitations specifically. This more narrowly targeted approach “need not impermissibly chill protected speech.”¹²⁶⁶ In contrast to the state statutes invalidated in *Schaumburg, Munson* and *Riley*, the *Madigan* Court was confronted with “a properly tailored fraud action targeting fraudulent representations themselves”¹²⁶⁷ That targeted approach was constitutionally permissible because “[l]ike other forms of public deception, fraudulent charitable solicitation is unprotected speech.”¹²⁶⁸

Thus, the Illinois anti-fraud statute and prosecution were upheld in *Madigan* because, unlike those charitable solicitation statutes invalidated in the three previous cases, they were not overbroad.

* * *

The four cases in this Part B, read together, effectively illustrate the Supreme Court’s approach to First Amendment overbreadth and how it applies that doctrine to police the boundaries of unprotected categories of speech within the Doctrine of Categorical Exclusion. In *Schaumburg, Munson* and *Riley*, government regulations on speech were invalidated because, although they did suppress fraudulent speech as was constitutionally permissible, they also applied to a substantially broader body of speech than that within the unprotected category of fraud; thus, they proscribed, or at least burdened, a significant amount of *protected* speech. By contrast, the statute upheld in *Madigan* specifically targeted fraudulent solicitations and did not burden speech except that which fell within the proscribable category of fraud.

¹²⁶⁶ *Id.* at 619.

¹²⁶⁷ *Id.*

¹²⁶⁸ *Id.* at 612.

The government shoulders a heavy burden when its regulations on speech straddle the line between the the “freedom of speech” protected by the Constitution and the unprotected “First Amendment Free Zone.” Regulations on speech that encroach too far on the former will be stricken on their face even though they may operate permissibly when applied to the latter.

To be sure, it is indeed “strong medicine”¹²⁶⁹ to facially invalidate a statute, despite its undoubted constitutional validity in some applications, on the basis that its overbreadth chills a substantial amount of protected speech.

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is “strong medicine” and have employed it with hesitation, and then “only as a last resort.” We have, in consequence, insisted that the overbreadth involved be “substantial” before the statute involved will be invalidated on its face.¹²⁷⁰

For those reasons, the Supreme Court also employs other tools to patrol the boundaries of the unprotected categories—tools that are, themselves, more narrowly tailored than is the First Amendment overbreadth doctrine. The next Part C will discuss one of those precision tools: Placing the burden of proof always on the government.

¹²⁶⁹ *Williams*, 553 U.S. at 293.

¹²⁷⁰ *Ferber*, 458 U.S. at 769 (citation omitted) (quoting *Broadrick*, 413 U.S. at 613).

Part C: Burden of proof: Government must prove challenged speech is unprotected

The Supreme Court requires that the government bear the burden of proving the speech it wishes to proscribe fits within a categorical exclusion from First Amendment protection. “[T]he Constitution ‘demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.’”¹²⁷¹ The Supreme Court long has recognized:

[T]he duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.¹²⁷²

Unlike overbreadth analysis, the Supreme Court employs this tool for patrolling the categorical boundaries in *every* case in which a categorical exclusion is alleged. Overbreadth is a tool for facially invalidating a statute; the Supreme Court’s burden of proof doctrine, in this context, is a *process* that ensures the government, not any speaker, carries the load of proving the validity of the restrictive regulation. Thus, the burden of proof doctrine in this context is simultaneously both a more widely applicable and a more precise tool than the overbreadth doctrine.

The burden of proof doctrine is simple and clear: “The Court has long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected.”¹²⁷³ In other words, if the government claims that the Constitution allows it to proscribe speech, it must affirmatively demonstrate that the speech it

¹²⁷¹ *Alvarez*, 132 S. Ct. at 2544 (quoting *Ashcroft v. ACLU*, 542 U.S. at 660) (ellipses in original).

¹²⁷² *Collins*, 323 U.S. at 529-30 (citations omitted).

¹²⁷³ *Madigan*, 538 U.S. at 620 n.9.

seeks to regulate fits within one of the proscribable categories and thus lies within the “First Amendment Free Zone” and outside the “freedom of speech” protected by the Constitution.

“When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. Content-based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption.”¹²⁷⁴ That rule is *opposite* the ordinary approach of presuming a statute’s constitutionality, and it is required because:

[W]ere we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas. When First Amendment compliance is the point to be proved, the risk of nonpersuasion—operative in all trials—must rest with the Government, not with the citizen.¹²⁷⁵

Of course, any attempt to preserve a government regulation on the basis that the proscribed speech falls within one of the unprotected categories necessarily involves an assessment of the *content* of the speech so it may be categorized. Therefore, in every case involving application of the doctrine of categorical exclusion, the government regulation is “presumptively invalid”¹²⁷⁶ and the “government must bear the burden of proving” the regulated speech is “unprotected.”¹²⁷⁷ To do otherwise—that is, to place the burden of proof on the defendant to show that his regulated speech was not within an unprotected category—would “raise[] serious constitutional difficulties.”¹²⁷⁸

¹²⁷⁴ *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 817 (2000) (citation and internal quotation marks omitted); *see also Stevens*, 559 U.S. at 468.

¹²⁷⁵ *Playboy Entm’t Group*, 529 U.S. at 818 (citation omitted).

¹²⁷⁶ *Id.* at 817.

¹²⁷⁷ *Madigan*, 538 U.S. at 620 n.9.

¹²⁷⁸ *Free Speech Coalition*, 535 U.S. at 255.

Thus, the Supreme Court employs this shifting of the traditional burden of proof onto the government in every case involving First Amendment categorical analysis as a means of patrolling the boundaries of the categories to ensure they remain “narrowly limited.”

Part D: Categories of proscribable speech are not really “First Amendment Free Zones”

Chief Justice Roberts’ famous reference to the unprotected categories of speech as “First Amendment Free Zone[s]”¹²⁷⁹ is perhaps the most stark exposition of the concept in the Supreme Court’s jurisprudence. But is that really what the unprotected categories are?

The Supreme Court long has suggested that even speech falling within one of the unprotected categories may be subject to some amount of protection under the First Amendment. This may be true even if the government regulation affects only speech *wholly* within one of the proscribable categories and, thus, cannot be overbroad: “Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face.”¹²⁸⁰

While the absolutist “First Amendment-Free Zone” analysis finds much support in the Supreme Court’s precedent, there also exist examples of the Supreme Court viewing the categories as less absolute.

For example, in *Cox v. Louisiana*,¹²⁸¹ the Supreme Court rejected a facial challenge to a Louisiana statute barring picketing “in or near”¹²⁸² a courthouse. Relying on *Giboney*, the *Cox* Court found that in this case the “conduct mixed with speech may be regulated or prohibited.”¹²⁸³ This was true because of the Doctrine of Categorical Exclusion for speech integral to criminal

¹²⁷⁹ *Stevens*, 559 U.S. at 469.

¹²⁸⁰ *Ferber*, 458 U.S. at 768 n. 21. In this footnote, the Supreme Court cited to *Terminiello*, 337 U.S. at 5, and, in this context, appears to mean that within an analysis of speech integral to criminal conduct it is possible to challenge the regulation affecting speech by arguing that the underlying definition of criminal conduct, while proscribable overall, is too broad to coexist with the First Amendment when used to suppress speech. However, the point the Court is making has broader applicability.

¹²⁸¹ 379 U.S. 559 (1965).

¹²⁸² *Id.* at 560. The statute read: ‘Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or nearer a building housing a court of the State of Louisiana . . . shall be fined not more than five thousand dollars or imprisoned not more than one year, or both.’” *Id.* (quoting L.S.A. Rev. Stat. § 14:401 (Cum. Supp. 1962)).

¹²⁸³ *Id.* at 563.

conduct as established by *Giboney*. But the *Cox* Court did not stop there. It proceeded to analyze the challenged statute as being “narrowly drawn to punish specific conduct that infringes a substantial state interest in protecting the judicial process,”¹²⁸⁴ an analysis that sounds remarkably similar to the modern strict scrutiny test applied in First Amendment cases. One might view the dual analysis of the *Cox* Court—the first as speech without the First Amendment, the second as speech within—as having been applied merely out of an abundance of caution (a sort of belt-*and*-suspenders approach). But one might also view it as an early indication that the Supreme Court, in some circumstances, chooses to apply First Amendment analysis even to speech it has concluded fits squarely within one of the “unprotected” categories.

Perhaps the high-water mark for the notion that “categorically excluded” does not *really* mean either “excluded” or cast into a “First Amendment-Free Zone” came in *R.A.V.* In that case, the Supreme Court held that even a government regulation constituting “fighting words” would be subject to First Amendment scrutiny to determine whether it impermissibly discriminated among *types* of fighting words based on content. Even if the ordinance regulating racially motivated cross-burning “is proscribable under the ‘fighting words’ doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”¹²⁸⁵ The *R.A.V.* Court proceeded to explain that the doctrine of categorical exclusion did not *really* mean that speech in the unprotected categories was *excluded* from review under the First Amendment:

We have sometimes said that these categories of expression are “not within the area of constitutionally protected speech” or that the “protection of the First Amendment does not extend” to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity “as not being speech at all.” What they mean is that these areas of speech can, consistently with the First Amendment, be

¹²⁸⁴ *Id.* at 564.

¹²⁸⁵ *R.A.V.*, 505 U.S. at 383.

regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.¹²⁸⁶

The *R.A.V.* majority found this new approach of applying the First Amendment even within an excluded category to be consistent with the original *Chaplinsky* formulation:

It is not true that “fighting words” have at most a “*de minimis*” expressive content or that their content is *in all respects* “worthless and undeserving of constitutional protection”; sometimes they are quite expressive indeed. We have not said that they constitute “*no part of the expression of ideas,*” but only that they constitute “*no essential part of any exposition of ideas.*”¹²⁸⁷

The *R.A.V.* dissent found the majority’s new approach to categorical doctrine illogical and baffling:

Today . . . the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are not within the area of constitutionally protected speech. The present Court submits that such clear statements “must be taken in context” and are not “literally true.”

To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence.¹²⁸⁸

The *R.A.V.* dissent continued unrelentingly:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.¹²⁸⁹

Whatever its intellectual peculiarities, *R.A.V.* remains operable precedent. Even within a proscribable category, there are some sorts of government regulation that the Supreme Court will not permit. “The point of the First Amendment is that majority preferences must be expressed in

¹²⁸⁶ *Id.* at 383-84 (citations and emphasis omitted).

¹²⁸⁷ *Id.* at 384-85 (citation omitted) (quoting *Chaplinsky*, 315 U.S. at 572).

¹²⁸⁸ *Id.* at 400 (White, J., dissenting) (citations and internal quotation marks omitted).

¹²⁸⁹ *Id.* at 401 (citation omitted).

some fashion other than silencing speech on the basis of its content.”¹²⁹⁰ Thus, “[t]he politicians of St. Paul are entitled to express . . . hostility [toward racial bias]—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.”¹²⁹¹ After *R.A.V.*, Justice Thomas dabbled with describing the categories as having “*reduced* constitutional protection” and asserting that the Supreme Court has “never held that the government may regulate speech within those categories in any way that it wishes.”¹²⁹²

If the holding in *R.A.V.* were literally true, then *Chaplinsky* would have been effectively (though not expressly) overruled, and the graphic depiction of the Doctrine of Categorical Exclusion would look like this:

¹²⁹⁰ *Id.* at 392 (majority opinion).

¹²⁹¹ *Id.* at 396.

¹²⁹² *Lorillard v. Reilly*, 533 U.S. 525, 576 (2001) (Thomas, J., concurring in part and concurring in judgment).

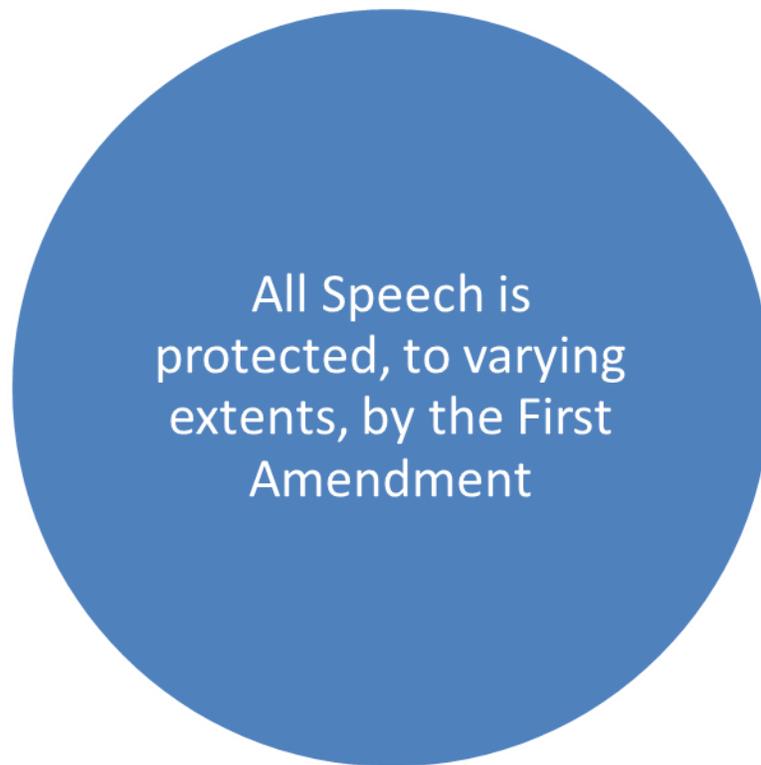


Figure 3: If *R.A.V.v. City of St. Paul* were literally interpreted, the protected "Freedom of Speech" would expand to wholly overtake the "First Amendment Free Zone," which would cease to exist.

However, further reflection on Justice Scalia’s analysis for the *R.A.V.* majority suggests something rather less stark, in constitutional terms, was afoot. The distinction in *R.A.V.* between speech categories containing “constitutionally proscribable content” and the notion that certain speech categories are “entirely invisible to the First Amendment” makes greater logical sense when considered in light of the sharp and nearly dismissive disagreements of the majority and dissent in the much more recent case upholding the Florida Supreme Court’s prohibition on judicial candidates personally soliciting campaign contributions. In that recent case, the majority led by Chief Justice Roberts dismissed Justice Scalia’s dissent as wholly off the mark, stating:

The principal dissent observes that bans on judicial candidate solicitation lack a lengthy historical pedigree. We do not dispute that fact, but it has no relevance here. As the precedent cited by the principal dissent demonstrates, a history and tradition of regulation are important factors in determining whether to recognize

“new categories of unprotected speech.” But nobody argues that solicitation of campaign funds by judicial candidates is a category of unprotected speech.¹²⁹³

However, in dissent, Justice Scalia took the majority’s upholding of the state ban on judicial candidates soliciting campaign funds to task for “purport[ing] to reach this destination by applying strict scrutiny, but it would be more accurate to say that it does so by applying the appearance of strict scrutiny.”¹²⁹⁴ Justice Scalia began his analysis by citing to *Brown v.*

Entertainment Merchants Association for this proposition:

The first axiom of the First Amendment is this: As a general rule, the state has no power to ban speech on the basis of its content. . . . Our cases hold that speech enjoys the full protection of the First Amendment unless a widespread and longstanding tradition ratifies its regulation.¹²⁹⁵

Thus, the contrast in the Justices’ competing verbage in describing the Doctrine of Categorical Exclusion was starkly expressed. For Chief Justice Roberts, the author who applied the “First Amendment Free Zone” description to the Doctrine of Categorical Exclusion, *Brown v.*

Entertainment Merchants Association was a case about “whether to recognize new categories of unprotected speech” and, therefore, was of “no relevance here.”¹²⁹⁶ But for Justice Scalia, the author who in *R.A.V.* had insisted the excluded categories could “be regulated because of their constitutionally proscribable content” but are not “categories of speech entirely invisible to the Constitution,”¹²⁹⁷ *EMA* was a case requiring “that speech enjoys the full protection of the First Amendment unless a widespread and longstanding tradition ratifies its regulation.”¹²⁹⁸ For Chief Justice Roberts, unprotected speech was excluded from the First Amendment entirely; for Justice Scalia, unprotected speech was subject to “regulation” and to “relaxing the rules that normally

¹²⁹³ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666-67 (2015) (citation omitted).

¹²⁹⁴ *Id.* at 1677 (Scalia, J., dissenting).

¹²⁹⁵ *Id.* at 1676.

¹²⁹⁶ *Id.* at 1667 (majority opinion).

¹²⁹⁷ *R.A.V.*, 505 U.S. at 383 (emphasis omitted).

¹²⁹⁸ *Williams-Yulee*, 135 S.Ct. at 1676 (Scalia, J., dissenting).

apply to laws that suppress speech because of content.”¹²⁹⁹ The language used reflects the two Justices’ approaches but is in fact more similar than it may at first blush appear. “Regulation” of speech is not the same as “proscription;” “relaxing” the constitutional rules is not the same as establishing a “First Amendment Free Zone.” Yet, the two concepts are structurally similar. For Justice Scalia, as for Justice Roberts, there is a core of speech for which the constitutionally protected freedom of speech requires that “the state has no power to ban . . . on the basis of its content.”¹³⁰⁰ Beyond that, there is an area of speech for which greater “regulation” may be permissible because the constitutional rules are “relax[ed].”¹³⁰¹ Under Justice Scalia’s view, the difference between the two areas can be determined by applying strict scrutiny, not “the appearance of strict scrutiny.” Thus, the excluded categories are a sort of “prepackaged strict scrutiny” or “shortcut application[n] of strict scrutiny,”¹³⁰² and from Justice Scalia’s vantage point, the post-*R.A.V.* framework of the Doctrine of Categorical Exclusion would look like this:

¹²⁹⁹ *Id.*

¹³⁰⁰ *Id.*

¹³⁰¹ *Id.*

¹³⁰² Farber, *supra* note 32, at 919-20; *see generally* Chapter 1, *supra*.

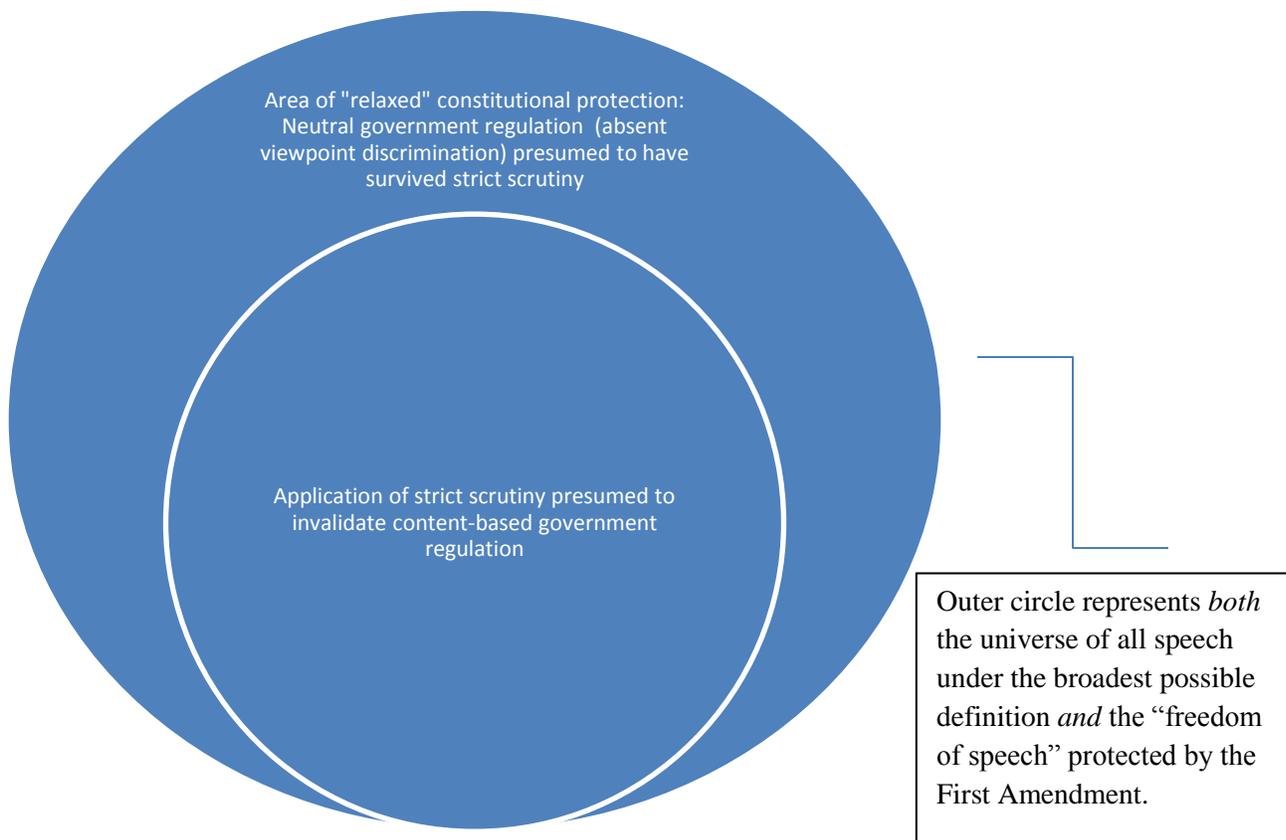


Figure 4: Post-R.A.V. v. City of St. Paul distinction from the standpoint of Justice Scalia. There is no “First Amendment Free Zone,” but there is a zone of “relaxed” constitutional protection.

As is apparent, it is remarkably similar to the Doctrine’s view from where Chief Justice Roberts sits. The material difference between the Chief Justice’s “First Amendment Free Zone” and Justice Scalia’s area of “relaxed rules” governing content-based laws is one of mere verbage, or perhaps one of degree, but not one of nature.

* * *

Thus, the Supreme Court employs a variety of tools to ensure that the categories of speech within the Doctrine of Categorical Exclusion remain narrow. It disfavors attempts to recognize new categories of unprotected speech. It facially invalidates statutes that sweep too

much protected speech within its proscription, even if the statute in some applications properly affects proscribable speech. It shifts the traditional presumption and requires the *government* to prove a regulatory statute is constitutional because it applies to categorically excluded speech, not the other way around. And, as a final saving measure, it reserves the authority to extend constitutional protections even to speech otherwise within an “unprotected” category.

Thus, the original formulation of *Chaplinsky* remains valid. These categories are, indeed, “narrowly tailored.”

CHAPTER 8: Lessons from *United States v. Stevens*: Six categories as of 2010

For almost seven decades after deciding *Chaplinsky* in 1942, the Supreme Court grappled with specific discrete aspects of the Doctrine of Categorical Exclusion. From time to time, the Supreme Court would reference the Doctrine in a more general sense and occasionally would articulate lists of categories in a manner clearly not intended to be a comprehensive list.¹³⁰³ By 2010, on the eve of the Supreme Court's consideration of *United States v. Stevens*, the continued viability of the Doctrine of Categorical Exclusion was in doubt. After all if the Supreme Court meant what it said in *R.A.V.*, that the unprotected categories were not really "invisible to the First Amendment,"¹³⁰⁴ then nothing really remained of the "First Amendment Free Zone."

Even if one did not accept that the Doctrine of Categorical Exclusion had been effectively dismantled by 2010, its framework was in doubt. Disregarding the *R.A.V.* analysis, the best effort to graphically depict the Doctrine of Categorical Exclusion by assembling the Supreme Court's various pronouncements since *Chaplinsky* would have looked something like this:

¹³⁰³ See, e.g., *R.A.V.*, 505 U.S. at 383 (listing only obscenity, defamation and fighting words).

¹³⁰⁴ *Id.*



Figure 5: Uncertain relationship between protected "Freedom of Speech" and unprotected "First Amendment Free Zone" on the eve of *United States v. Stevens* (2010). This figure assumes that the "First Amendment Free Zone" continues to exist after *R.A.V.*

However, even this depiction is somewhat dissatisfying because the Supreme Court's articulation of the categories in the "First Amendment Free Zone" had been less than entirely precise during the 68 years between *Chaplinsky* and *Stevens*. For example, it was clear that the Supreme Court considered "incitement," "child pornography," "fraud" and "true threats" to be speech unprotected by the First Amendment, but it was unclear how those "categories" related to each other or to the broader concept of "speech integral to unlawful conduct." Thus, by 2010, the Doctrine of Categorical Exclusion was in need of clarity: Would the Supreme Court reaffirm the

Doctrine's existence, or confirm its demise? If the Doctrine continued to exist, what were its boundaries, and what categories of speech were relegated to the "First Amendment Free Zone"?

In 2010, the Supreme Court was presented with a case that gave it occasion to attempt a comprehensive articulation of the excluded categories for the first time since *Chaplinsky*. It accepted that opportunity and opened a five-year period of unprecedented attention to the Doctrine of Categorical Exclusion.

Abhorred by the phenomenon of "animal crush videos,"¹³⁰⁵ Congress had enacted a criminal statute essentially prohibiting certain depictions of animal cruelty in interstate commerce.¹³⁰⁶ Robert Stevens, of Pennsylvania, operated a business called "Dogs of Velvet and Steel" selling various dogfighting videos.¹³⁰⁷ Mr. Stevens ran afoul of the law when in the course of his business he sold videos of dogfights that the government concluded violated the prohibition on depictions of animal cruelty in interstate commerce. While Mr. Stevens did not engage in any conduct involving "animal crush videos," the government nonetheless indicted

¹³⁰⁵ *Stevens*, 559 U.S. at 465-66 (drawing upon the legislative history of the statute at issue, 18 U.S.C. § 48, the Supreme Court described this type of video as follows: "[S]uch videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. Crush videos often depict women slowly crushing animals to death with their bare feet or while wearing high heeled shoes, sometimes while talking to the animals in a kind of dominatrix patter over the cries and squeals of the animals, obviously in great pain. Apparently these depictions appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting. The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. But crush videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct." (citations and internal quotation marks omitted)).

¹³⁰⁶ *Id.* at 464-66. The statute read: "Sec. 48. Depiction of animal cruelty. (a) CREATION, SALE, OR POSSESSION. 'Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both. (b) EXCEPTION.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value. (c) DEFINITIONS.—In this section—(1) the term 'depiction of animal cruelty' means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and (2) the term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States." *Id.* at 465 n.1 (quoting 18 U.S.C. § 48).

¹³⁰⁷ *Id.* at 466.

him for violating the statute by selling his dogfighting videos. Mr. Stevens moved to dismiss the indictment on the ground that the statute was facially invalid as a violation of the First Amendment’s protection of the freedom of speech.

In denying the motion to dismiss, the federal district court held that the depictions of animal cruelty regulated by the statute “like obscenity or child pornography, are categorically unprotected by the First Amendment.”¹³⁰⁸ The trial proceeded, and the jury convicted Mr. Stevens. In considering Mr. Stevens’ appeal, the Third Circuit Court of Appeals “rejected the Government’s analogy between animal cruelty depictions and child pornography” and “declined to recognize a new category of unprotected speech for depictions of animal cruelty”¹³⁰⁹ Thus, at the point the Supreme Court granted certiorari, the case squarely presented the question “whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment.”¹³¹⁰

At the Supreme Court, the government argued that the statute should survive facial attack because the depictions of animal cruelty subject to its regulation constituted speech outside the scope of the First Amendment.¹³¹¹ The Supreme Court rejected that position,¹³¹² and in so doing

¹³⁰⁸ *Id.* at 467.

¹³⁰⁹ *Id.*

¹³¹⁰ *Id.* at 464.

¹³¹¹ *Id.* at 468 (“The Government’s primary submission is that § 48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment.”); *id.* at 1585 (“The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a ‘First Amendment Free Zone.’” (quoting *Jews for Jesus*, 482 U.S. at 574)).

¹³¹² The eight-member majority declined the government’s invitation to establish a new category of unprotected speech and then proceeded to apply a traditional First Amendment analysis to the statute, ultimately concluding that it was overbroad and thus unconstitutional. In dissent, Justice Alito criticized the majority for allowing a facial challenge to the statute to succeed, arguing instead that the regulation should be found constitutionally sound in some applications though perhaps not in others. Justice Alito does not reach the question whether it would be proper for the Supreme Court to recognize a new category of unprotected speech regarding depictions of animal cruelty; thus, it is not clear that even a single Justice would accept the Government’s invitation to recognize a new category of unprotected speech.

framed its doctrine related to categories of speech excluded from First Amendment protection as follows:

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 included a freedom to disregard these traditional limitations. These historic and traditional categories long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.¹³¹³

The *Stevens* Court then characterized these categories of speech as “fully outside the protection of the First Amendment” and went on to acknowledge that the Supreme Court also has “classified child pornography as such a category.”¹³¹⁴

Taken together, the *Stevens* passages cited immediately above articulate six categories of speech—obscenity, defamation, fraud, incitement, speech integral to criminal conduct, and child pornography—that, as identified by the Supreme Court’s own nomenclature, were recognized as falling into a “First Amendment Free Zone”¹³¹⁵ that is “fully outside the protection of the First Amendment”¹³¹⁶ as of 2010. This marked the Supreme Court’s first attempt since *Chaplinsky* to articulate in a comprehensive manner the categories of speech recognized as categorically excluded from First Amendment protection. This articulation proved sufficient for the Court to decide the dispute before it in *Stevens* (which is, after all, the proper role of the judiciary), but in a more academic sense it leaves the student of the Doctrine of Categorical Exclusion dissatisfied.

¹³¹³ *Id.* at 468 (citations and internal quotation marks omitted).

¹³¹⁴ *Id.* at 471. It is notable, however, that the Supreme Court’s exposition of how child pornography fits as a category is somewhat unclear. On the one hand, the Court characterizes its decision in *Ferber* as having declared child pornography as “such a category.” *Id.* at 471 (citing *Ferber*, 458 U.S. at 763). On the other hand, the *Stevens* Court then immediately proceeds to explain that child pornography really is an outgrowth of the long-recognized category of unprotected speech integral to criminal conduct and that *Ferber* “grounded its analysis in a previously recognized, long-established category of unprotected speech. . . .” *Id.*; see also discussion in Chapter 6, Part C, *supra*.

¹³¹⁵ *Stevens*, 559 U.S. at 469 (quoting *Jews for Jesus*, 482 U.S. at 574).

¹³¹⁶ *Id.* at 471.

For example, the *Chaplinsky* Court articulated four categories of unprotected speech¹³¹⁷ and the *Stevens* Court almost seven decades later articulated either five¹³¹⁸ or six categories, depending on whether one counts child pornography as a category separate and distinct from the category of speech integral to criminal conduct.¹³¹⁹ That simple comparison would suggest at first blush that the Supreme Court had found occasion to discover either one or two previously undiscovered categories during the intervening seven decades and merely added them to the list it had articulated in *Chaplinsky* in 1942.

But that is not what happened. The *Chaplinsky* list from 1942 does not fit neatly within the *Stevens* list from 2010 such that merely adding to the *Chaplinsky* list would result in the *Stevens* list. For example, the two cases use different terms for similar concepts such as *Chaplinsky*'s reference to "lewd and obscene" compared with *Stevens*'s reference only to "obscenity." Each case also asymmetrically includes concepts not found in the other such as *Chaplinsky*'s reference to "the profane" compared with no similar concept existing in *Stevens*, or *Stevens*'s reference to child pornography with no similar concept in *Chaplinsky*. Even the listings within each case itself can seem internally redundant. For example, *Chaplinsky* separates "lewd" and "profane" into separate categories although they seem quite similar concepts, and *Stevens* seems internally redundant including three categories regarding speech that is part of a criminal act and therefore quite similar in concept: "fraud," "speech integral to criminal conduct," and "child pornography."

¹³¹⁷ See *Chaplinsky*, 315 U.S. 572 (listing the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words).

¹³¹⁸ See *Stevens*, 559 U.S. at 468 (listing "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct" (citations omitted)).

¹³¹⁹ The *Stevens* Court states by nomenclature that child pornography is "such a category" but then through analysis explain why it isn't. *Id.* at 471.

The *Stevens* Court expressed a strongly negative reaction to the Government’s ill-fated advocacy for adoption of a balancing test by which new categories of unprotected speech could be identified or discovered¹³²⁰ and to the Government’s suggestion that “historical evidence about the reach of the First Amendment is not a necessary prerequisite for regulation today and that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation.”¹³²¹ Recognizing the open-ended nature of that proposed test, the *Stevens* Court would have none of it. While acknowledging that its own precedents might have invited the Government’s confusion,¹³²² the Supreme Court not only emphatically rejected the invitation to establish a balancing test for identifying new categories untethered to historical roots¹³²³ but did so with stern language resorting to the nation’s Founding principles and seemingly designed to drive a rhetorical stake in the very heart of the “startling and dangerous” notion.¹³²⁴ It made clear that its prior cases

do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an *ad hoc* calculus of costs and benefits tilts in a statute’s favor.

¹³²⁰ *Id.* at 470 (“The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: ‘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.’” (quoting Brief for United States at 8, 2009 WL 1615365)).

¹³²¹ *Id.* at 469 (quotation marks and citation omitted).

¹³²² *Id.* at 470 (“To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often described historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. In [*Ferber*], we noted that within these categories of unprotected speech, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required because the balance of competing interests is clearly struck. The Government derives its proposed test from these descriptions in our precedents.” (citations, quotation marks, and emphasis omitted)).

¹³²³ *Id.* at 472 (“Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”).

¹³²⁴ *Id.* at 470 (“As a free-floating test for First Amendment coverage, that sentence [the Government’s proposed balancing test] 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. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document ‘prescribing limits, and declaring that those limits may be passed at pleasure.’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803))).

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.”¹³²⁵

The *Stevens* Court was careful to leave open the possibility that it might in the future identify additional categories of speech that have historically fallen outside the protection of the First Amendment,¹³²⁶ but in this case it “decline[d] to carve out from the First Amendment any novel exception for [the animal cruelty law at issue].”¹³²⁷

Thus, *Stevens* leaves overall understanding of the Supreme Court’s approach to articulating and applying the Doctrine of Categorical Exclusion little improved. It is quite clear the Supreme Court has little appetite for any approach to categorical exclusion that expands the scope of speech falling outside the First Amendment’s protection, preferring instead to address government power to regulate speech under various other doctrines that fall within the First Amendment’s scope. But it also is clear that even the Supreme Court itself is, at best, imprecise in its articulation of what categories of unprotected speech actually have been recognized and, on an important related matter, how the excluded categories it has articulated interrelate with each other.

Even as it declined to apply a categorical exclusion to decide the case before it, the *Stevens* Court reaffirmed the existence of the Doctrine of Categorical Exclusion. Indeed, the *Stevens* Court implied that categorical exclusions may be an even stronger firewall against First

¹³²⁵ *Id.* at 471.

¹³²⁶ *Id.* (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that ‘depictions of animal cruelty’ is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.”).

¹³²⁷ *Id.* at 472. Having rejected any application of categorical analysis to resolve the *Stevens* case, the Court then proceeded to decide the case under a First Amendment overbreadth analysis. Further discussion of that analysis is unnecessary for purposes of this paper. However, for discussion of how the statute stricken in *Stevens* might be modified to serve its intended purpose while conforming with established First Amendment parameters, see Andrew A. Beerworth, *United States v. Stevens: A Proposal for Criminalizing Crush Videos Under Current Free Speech Doctrine*, 35 VT.L.REV. 901 (2011).

Amendment encroachment on states' police powers than previously suggested because the "First Amendment . . . has never included a freedom to disregard these traditional limitations [on the reach of the First Amendment]." ¹³²⁸

Sixty-eight years elapsed between the Supreme Court's first attempt at comprehensively listing the recognized unprotected categories, in *Chaplinsky* in 1942, and its second attempt, in *Stevens* in 2010. But after *Stevens*, only two more years would elapse before the Supreme Court would try again.

¹³²⁸ *Id.* at 468 (brackets and internal quotation marks omitted).

CHAPTER 9: Lessons from *United States v. Alvarez*: Twelve categories as of 2012

After deciding *Stevens* in 2010, the Supreme Court the next year decided two more cases that once again invoked the Doctrine of Categorical Exclusion: *Snyder v. Phelps* and *Brown v. Entertainment Merchants Association*. So the Doctrine, having been lightly and only episodically used for the sixty-eight years between *Chaplinsky* and *Stevens*, had suddenly returned front-and-center in the Supreme Court's focus. Then along came *Alvarez*. For critics of the Doctrine of Categorical Exclusion, this renewed reliance upon it by the Supreme Court was troubling:

Alvarez is the latest example of why the categorical approach of *Chaplinsky* works so poorly. *Alvarez* is, in my view, a very close and difficult case. Under any plausible doctrinal standard, the outcome would be difficult to predict, because each side had strong arguments, with logical and policy heft, and solid precedential support. In both resolving the actual case before the Court in *Alvarez* and in attempting to puzzle out what *Alvarez* means for future cases involving false statements about military honors, the invocation of a *Chaplinsky*-style categorical approach did more harm than good.¹³²⁹

Of course, the critics don't decide doctrine: The Supreme Court does. So the Doctrine of Categorical Exclusion remains alive and well, which means the essential questions associated with the Doctrine remain pertinent: What speech falls within the "First Amendment Free Zone" that lies outside the "freedom of speech" protected by the Constitution, and how do we know the answer to that question?

After the *Stevens* listing of unprotected categories, neither *Snyder* nor *EMA* attempted anything resembling a comprehensive listing. But the next case did. Against that backdrop of reinvigorated use of the Doctrine, the Supreme Court accepted review of *Alvarez*, a case

¹³²⁹ Rodney A. 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, 503 (2012) (footnote omitted).

presenting for the first time¹³³⁰ the question whether lies told for no purpose except to “puff up” the liar were protected by the First Amendment. The case, challenging the constitutionality of the federal Stolen Valor Act, which made criminal the telling of lies about whether one had received certain military honors, invited the Supreme Court to more fully articulate the Doctrine of Categorical Exclusion as it existed in 2012. Justice Kennedy, writing for a four-justice plurality, accepted that invitation.

In *United States v. Alvarez*, the Supreme Court plurality led its opinion with this attention-catching opening paragraph:

Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005.¹³³¹

The case reached the Supreme Court after Mr. Alvarez became a member of a local California water district board and in 2007 introduced himself for his new position by declaring: “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.”¹³³²

The Supreme Court characterized Mr. Alvarez’s statements as an “intended, undoubted lie,”¹³³³ and noted “[n]one of this was true” but was instead was a “pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.”¹³³⁴

¹³³⁰ *Alvarez*, 132 S. Ct. at 2545 (plurality opinion) (“Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.”).

¹³³¹ *Id.* at 2542.

¹³³² *Id.*

¹³³³ *Id.*

¹³³⁴ *Id.*

For lying about receiving the Congressional Medal of Honor, Mr. Alvarez was indicted by the federal government for violating the Stolen Valor Act.¹³³⁵ He pled guilty in district court, reserving the right to challenge the constitutionality of the Stolen Valor Act, and the Ninth Circuit Court of Appeals concluded the statute violated the First Amendment. The Supreme Court granted certiorari.¹³³⁶

Seven of the nine Justices decided the case based upon application of the Doctrine of Categorical Exclusion, but they divided on how the facts of the case fit within the framework of excluded categories. The four-justice plurality, led by Justice Kennedy, applied categorical analysis but concluded that Mr. Alvarez's lies did not fall into any unprotected category. The three-justice dissent, led by Justice Alito, concluded that the sort of lies told by Mr. Alvarez should have been categorically excluded from First Amendment protection. Only Justices Breyer and Elena Kagan, concurring in the judgment, rejected application of a "strict categorical analysis."¹³³⁷ It is revealing, therefore, to turn attention to contrasting the approaches of the plurality and the dissent.

Plurality view: The plurality led its opinion with an attempt seemingly aimed at comprehensively articulating nine recognized categories as of 2012:

[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar. Among these categories are advocacy intended, and

¹³³⁵ *Id.* at 2543. The Stolen Valor Act, in pertinent part, read as follows: "(b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both. (c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR. (1) IN GENERAL.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both." *Id.* (quoting 18 U.S.C. § 704(b) and (c)).

¹³³⁶ *Alvarez*, 132 S. Ct. at 2542.

¹³³⁷ *Id.* at 2551 (Breyer, J., concurring). The concurrence would have applied a balancing test: "Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications." *Id.*

likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called ‘fighting words’; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent.¹³³⁸

It then rejected the Government’s attempt to analogize Mr. Alvarez’s lies to other proscribable forms of false statements and, in so doing, effectively recognized three other unprotected categories. The *Alvarez* Court acknowledged that perjury had a long historical tradition of proscription and that prohibitions against perjury had been upheld against First Amendment challenge.¹³³⁹ It also implicitly accepted that the Government could constitutionally prohibit and punish “false statement[s] to a Government official” and “false representation that one is speaking as a Government official or on behalf of the Government.”¹³⁴⁰

Thus, the *Alvarez* plurality effectively recognized twelve categories of unprotected speech—the most extensive listing ever presented by the Supreme Court. It then concluded, after analysis, that Mr. Alvarez’s speech fit into none of them, ultimately because of the plurality’s conclusion that Mr. Alvarez’s lies were not “made to secure employment or financial benefits or admission to privileges reserved for those who had earned”¹³⁴¹ military honors but instead were “simply intended to puff up oneself.”¹³⁴² “Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.”¹³⁴³

Having concluded that none of the existing unprotected categories operated to permit the Government to punish Mr. Alvarez’s lies, the plurality then repeatedly rejected establishing an

¹³³⁸ *Id.* at 2544 (plurality opinion) (citations, brackets, and internal quotation marks omitted).

¹³³⁹ *Id.* at 2546 (citing *United States v. Grayson*, 438 U.S. 41, 54 (1978)) (confirming the “unquestioned constitutionality of perjury statutes”) and *United States v. Dunnigan*, 507 U.S. 87, 97 (1993) (“To uphold the integrity of our trial system . . . the constitutionality of perjury statutes is unquestioned.”)).

¹³⁴⁰ *Id.* at 2545-46.

¹³⁴¹ *Id.* at 2542.

¹³⁴² *Id.* at 2546.

¹³⁴³ *Id.* at 2544.

additional unprotected category that would do so: “The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.”¹³⁴⁴ Precedent “rejects the notion that false speech should be in a general category that is presumptively unprotected.”¹³⁴⁵ “The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.”¹³⁴⁶

The plurality was particularly concerned about the breadth of any newly recognized category:

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That government power has no clear limiting principle. . . . Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out.”¹³⁴⁷

Falling back, then, upon a familiar theme, the *Alvarez* plurality suggested that the better response to Mr. Alvarez’s lies was additional, truthful speech to contest them, not a punishment by the government of their utterance:

“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth. . . .

. . . .

. . . Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.”¹³⁴⁸

Dissenting view: The *Alvarez* dissent shared the plurality’s inclination to decide the case based upon the Doctrine of Categorical Exclusion. The fundamental difference between the

¹³⁴⁴ *Id.* at 2545.

¹³⁴⁵ *Id.* at 2546-47.

¹³⁴⁶ *Id.* at 2547.

¹³⁴⁷ *Id.*

¹³⁴⁸ *Id.* at 2550-51.

plurality and the dissent lay in their sharply distinct views of the nature of the statute. For Justice Kennedy’s plurality the Stolen Valor Act was “sweeping, quite unprecedented”:

Here, the lie was made in a public meeting but the statute would apply with equal force to personal whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. . . .

. . . Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.”¹³⁴⁹

By sharp contrast, Justice Alito’s dissent characterized the Stolen Valor Act as “a narrow statute that presents no threat to the freedom of speech. The statute reaches only knowingly false statements about hard facts directly within a speaker’s personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.”¹³⁵⁰

Moreover, for Justice Kennedy’s plurality the constitutional line was to be drawn at whether the false statement was connected to any attempt by the speaker at “material gain.”¹³⁵¹

[A]bsent any evidence that the speech was used to gain a material advantage, [a categorical prohibition on lying] would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought and discourse are to remain a foundation of our freedom.¹³⁵²

But for Justice Alito’s dissent, the “real harm” caused by false statements need not be material so long as it is articulable. The Stolen Valor Act “was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country’s system of military honors and inflicting real harm on actual medal recipients and their families.”¹³⁵³ Justice Alito viewed the Stolen Valor Act as sufficiently narrow¹³⁵⁴ and targeted to

¹³⁴⁹ *Id.* at 2547 (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949) (Centennial ed. 2003)).

¹³⁵⁰ *Id.* at 2556 (Alito, J., dissenting).

¹³⁵¹ *Id.* at 2547 (plurality opinion).

¹³⁵² *Id.* at 2548.

¹³⁵³ *Id.* at 2556 (Alito, J., dissenting).

¹³⁵⁴ *Id.* at 2557 (“Properly construed, this statute is limited in five significant respects. First, the Act applies to only a narrow category of false representations about objective facts that can almost always be proved or disproved with near certainty. Second, the Act concerns facts that are squarely within the speaker’s personal knowledge. Third, as

combating the “epidemic”¹³⁵⁵ of false claims that the Supreme Court could allow its suppression of false speech without opening the floodgates to the Orwellian censorship Justice Kennedy feared. Equally important, the Alito dissenters found in the historical record a “long tradition” dating to General George Washington of efforts to protect the integrity of military honors including through requiring that falsely claiming to have earned them resulted in being “severely punished.”¹³⁵⁶ For the dissenters, this historical “tradition of proscription”¹³⁵⁷ meant that “prevent[ing] and punish[ing]” lies such as Mr. Alvarez’s had “never been thought to raise any Constitutional problem.”¹³⁵⁸ Thus, the *Alvarez* dissenters would have recognized a narrow “heretofore unrecognized”¹³⁵⁹ category of speech unprotected by the First Amendment barring Mr. Alvarez’s lies about military honors because “[t]he lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection”¹³⁶⁰

* * *

the Government maintains, and both the plurality and the concurrence seemingly accept, a conviction under the Act requires proof beyond a reasonable doubt that the speaker actually knew that the representation was false. Fourth, the Act applies only to statements that could reasonably be interpreted as communicating actual facts; it does not reach dramatic performances, satire, parody, hyperbole, or the like. Finally, the Act is strictly viewpoint neutral. The false statements proscribed by the Act are highly unlikely to be tied to any particular political or ideological message. In the rare cases where that is not so, the Act applies equally to all false statements, whether they tend to disparage or commend the Government, the military, or the system of military honors.” (citations and footnotes omitted)).

¹³⁵⁵ *Id.* at 2556, 2558 (“For example, in a single year, more than 600 Virginia residents falsely claimed to have won the Medal of Honor. An investigation of the 333 people listed in the online edition of Who’s Who as having received a top military award revealed that fully a third of the claims could not be substantiated. When the Library of Congress compiled oral histories for its Veterans History Project, 24 of the 49 individuals who identified themselves as Medal of Honor recipients had not actually received that award. The same was true of 32 individuals who claimed to have been awarded the Distinguished Service Cross and 14 who claimed to have won the Navy Cross. Notorious cases brought to Congress’ attention included the case of a judge who falsely claimed to have been awarded two Medals of Honor and displayed counterfeit medals in his courtroom; a television network’s military consultant who falsely claimed that he had received the Silver Star; and a former judge advocate in the Marine Corps who lied about receiving the Bronze Star and a Purple Heart.” (emphasis and footnotes omitted)).

¹³⁵⁶ *Id.* at 2557-58.

¹³⁵⁷ *EMA, supra*, 131 S. Ct. at 2734. Notably, Justice Scalia—who wrote the “tradition of proscription” phrase into the *EMA* majority but found no such “tradition of proscription” for the violent video games at issue in *EMA*, joined Justice Alito in the *Alvarez* dissent arguing that such a “tradition of proscription” allowed the government to punish Mr. Alvarez’s lies about his military honors.

¹³⁵⁸ *Chaplinsky*, 315 U.S. at 571-72.

¹³⁵⁹ *EMA*, 131 S. Ct. at 2734.

¹³⁶⁰ *Alvarez*, 132 S. Ct. at 2563.

While the *Alvarez* plurality and dissent differed over whether Mr. Alvarez’s lies could be proscribed by the government without offending the First Amendment, they were in harmony on the continuing vitality of the Doctrine of Categorical Exclusion. While the plurality acknowledged twelve categories of unprotected speech—ten of which had been properly recognized by the Supreme Court—the dissent expressly acknowledged that fraud, perjury and defamation¹³⁶¹ were categorically unprotected as were certain torts that arise from false speech¹³⁶² and more than 100 federal statutes that “punish false statements made in connection with areas of federal agency concern.”¹³⁶³ Thus, by 2012, the Doctrine of Categorical Exclusion was firmly embedded in the approach of seven of nine Justices in deciding a difficult First Amendment case.

The four Justices in the plurality noted their reasoning that the unprotected categories involving false statements, such as defamation or fraud, have involved speech connected with “some other legally cognizable harm associated with the false statement, such as an invasion of privacy or the costs of vexatious litigation” meaning “the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative.”¹³⁶⁴ For that reason, the plurality declined to categorically exclude speech “that targets falsity and nothing more.”¹³⁶⁵ The three Justices in dissent would not quarrel with the premise of the plurality’s rule, but would slightly enlarge the categories of unprotected speech to include false representations of military honor because of the long, historical tradition of proscription of such speech.

¹³⁶¹ *Id.* at 2561 (Alito, J., dissenting) (“Laws prohibiting fraud, perjury, and defamation, for example, were inexistence when the First Amendment was adopted, and their constitutionality is now beyond question.”).

¹³⁶² *Id.* (“The right to freedom of speech has been held to permit recovery for the intentional infliction of emotional distress by means of a false statement . . . [and] the Court concluded that the free speech right allows recovery for the even more modern tort of false-light invasion of privacy.”).

¹³⁶³ *Id.* at 2562.

¹³⁶⁴ *Id.* at 2545 (plurality opinion).

¹³⁶⁵ *Id.*

Essentially, the difference between the plurality and the dissent is one of degree and is fact-specific. They were in overall agreement that the Doctrine of Categorical Exclusion remains vibrant and applicable in modern jurisprudence.

CHAPTER 10: A proposal for three categories of unprotected speech

Despite ample scholarly and intellectual criticism, the Supreme Court has persisted in its reliance on categorical exclusion to conclude that certain types of speech are not subject to protection under the First Amendment. This is not surprising because for the Justices, like for all observers of Speech Clause jurisprudence, the essential question remains unchanged: What speech (if any) falls within the “First Amendment Free Zone” that lies outside the “freedom of speech” protected by the Constitution, and how do we know the answer to that question?

This chapter argues that the Supreme Court’s bold movement since 2010 toward renewed Speech Clause absolutism calls for a similarly bold effort to formalize and clarify the Doctrine of Categorical Exclusion. This is necessary to promote order in an otherwise increasingly chaotic body of law surrounding the Speech Clause. To harken back to the two-step analysis inherent in all Speech Clause cases, the importance of the binary threshold question (does the Speech Clause protect this speech *at all*) is magnified as the Supreme Court’s tendency toward the variable tertiary question (*how* does the Speech Clause apply to this speech) trends toward more speech-protective outcomes.

The Supreme Court on three occasions—*Chaplinsky*, *Stevens* and *Alvarez*—has attempted what appears to be an intended comprehensive listing, more or less, of the judicially recognized categories of speech unprotected by the First Amendment. On six other occasions, the Supreme Court listed multiple unprotected categories apparently by way of illustrating the point of their existence but not in a manner that appears calculated to set forth something

approximating the entire scope of the unprotected categories that compose the Doctrine of Categorical Exclusion.

To be sure, in each case the Supreme Court made clear that the universe of unprotected categories “included” the list it then offered, acknowledging the possibility that its list might not be a complete exposition of all the unprotected categories its cases had identified. Moreover, the Supreme Court consistently has acknowledged that “[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”¹³⁶⁶

The Supreme Court’s reliance upon excluded categories has gone well beyond mere labels to attach to an otherwise-sought conclusion. As described in Chapter 1, *supra*, the Supreme Court also has articulated characteristics common to the various unprotected categories, thereby embedding in the jurisprudence not only the language of categorical exclusion but its reasoning and analysis as well. The excluded categories themselves are “well-defined and narrowly limited.”¹³⁶⁷ They contain speech “the prevention and punishment of which has never been thought to raise any Constitutional problem.”¹³⁶⁸ They 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.”¹³⁶⁹ Within a category, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”¹³⁷⁰ These are “historic and traditional categories long familiar to the bar.”¹³⁷¹ Before recognizing a category as

¹³⁶⁶ *Stevens*, 559 U.S. at 472.

¹³⁶⁷ *Chaplinsky*, 315 U.S. at 571.

¹³⁶⁸ *Id.*

¹³⁶⁹ *Id.*

¹³⁷⁰ *Ferber*, 458 U.S. at 763-64.

¹³⁷¹ *Simon & Schuster*, 502 U.S. at 127 (Kennedy, J., concurring in the judgment).

unprotected, the Supreme Court requires “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.”¹³⁷² The Supreme Court’s jurisprudence related to excluded categories cannot be construed as “establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”¹³⁷³

Thus, in the Supreme Court’s jurisprudence, it appears the Doctrine of Categorical Exclusion—even if not named and not precisely defined—is here to stay. But it could benefit from some significant structural overhaul and an injection of linguistic and analytical precision. Thus, this chapter will argue in three parts for a synthesizing of the Supreme Court’s use of categorical analysis to exclude speech from Speech Clause protection. Part A will argue that the Supreme Court should “formalize” its case law in this area into a precisely articulated, and named, Doctrine of Categorical Exclusion. Part B will review the wide-ranging terminology the Supreme Court has actually used since *Chaplinsky* to describe the unprotected categories. Part C will propose that the Doctrine of Categorical Exclusion be organized into a rational grouping of three categories that would render it functional, rational and predictable.

¹³⁷² *EMA*, 131 S. Ct. at 2734.

¹³⁷³ *Stevens*, 559 U.S. at 472.

Part A: The Roberts Court's move toward First Amendment absolutism calls for formalizing the Doctrine of Categorical Exclusion

The Supreme Court is accelerating its reliance on, and articulation of, a *de facto* comprehensive Doctrine of Categorical Exclusion. Since 2010, Supreme Court decisions in five cases have drawn upon categorical exclusion, and two of the Supreme Court's three attempts at a comprehensive articulation of the categories have come during this short period of time.¹³⁷⁴ As discussed in Chapter 1, *supra*, this development is a natural outgrowth of the Roberts Court moving in the direction of First Amendment absolutism, at least in relation to the Speech Clause. It also is desirable from a speech-protection standpoint because “[t]he vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.”¹³⁷⁵

While some have argued that the categorical exclusion of certain groupings of speech from First Amendment protection is a “threat to First Amendment values,”¹³⁷⁶ the predicate question that underlies the Roberts Court's movement toward First Amendment absolutism is more fundamental: What values is the Speech Clause of the First Amendment designed to protect?

The academic literature is replete with scholarly analyses of the purpose and meaning of the First Amendment. For example, one scholar has articulated four theories of the First Amendment's Speech Clause, each with deep roots in Western Civilization's liberal tradition, that compete for properly explaining the First Amendment's purpose and meaning.¹³⁷⁷ But these

¹³⁷⁴ The cases in which the Supreme Court attempted what appear to be its most-comprehensive recitations of the excluded categories are *Alvarez* (2012), *Stevens* (2010), and *Chaplinsky* (1942).

¹³⁷⁵ *Alvarez*, 132 S. Ct. at 2544.

¹³⁷⁶ See Caine, *supra* note 241 (arguing that *Chaplinsky* is a threat to First Amendment values and should be overruled).

¹³⁷⁷ See Elizabeth Blanks Hindman, *First Amendment Theories and Press Responsibility: The Work of Zechariah Chafee, Thomas Emerson, Vincent Blasi and Edwin Baker*, 69 *Journalism Q.* 48 (1992). These four theories are

sorts of academic theories, while interesting, are unlikely explanations of what actually motivates the Justices; these theories may help explain to observers what the Supreme Court is seen to *do*, but they do not explain *why* the Justices have moved sharply to develop the excluded categories in the past five years.

The more likely explanation for what has animated the Roberts Court’s reinvigorated First Amendment jurisprudence is the fundamental philosophical bent of the Supreme Court’s current majority. “Conservative constitutional jurisprudence in the United States has an important libertarian dimension. . . . This libertarian streak . . . can be seen in [Supreme Court] decisions on freedom of speech and association. In several leading cases, conservative judges have used the First Amendment in a libertarian manner to invalidate regulations that reflected liberal or progressive values.”¹³⁷⁸

For the Roberts Court, the free-speech values protected by the First Amendment need not—and should not—be listed as articulations in terminology foreign to the Speech Clause itself. Rather, the very fact the Constitution commands government not regulate the freedom of speech is in itself a sufficient value to justify the Doctrine. In that sense, the approach of the conservative majority on the Roberts Court harkens back to the simple but famous declaration of Justice Black, the First Amendment absolutist, that “no law means no law.”¹³⁷⁹

That important understanding of the conservative majority’s Speech Clause philosophy was outlined by one scholar in 2010, soon after the Roberts Court embarked on its extensive recent Speech Clause jurisprudence (and corresponding discussion of the excluded categories)

described as “The Affirmative Theories—Zechariah Chafee and the Hutchins Commission,” “The Affirmative Theories—Thomas Emerson,” “The Checking Value—Vincent Blasi,” and “The Liberty Theory—Edwin Baker.”¹³⁷⁸ Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 233 (2014). This article contains an excellent extended discussion of the philosophical approach of the Roberts Court to interpreting the Speech Clause.

¹³⁷⁹ *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

ushered in by *Citizens United*, and brought into focus by contrasting it with the dissent of Justice Stevens in that case. In describing the *Citizens United* dissent of Justice Stevens, Professor Stanley Fish explained:

The idea that you may have to regulate speech in order to preserve its First Amendment value is called consequentialism. For a consequentialist like [Justice] Stevens, freedom of speech is not a stand-alone value to be cherished for its own sake, but a policy that is adhered to because of the benign consequences it is thought to produce, consequences that are catalogued in the usual answers to the question, what is the First Amendment for?

Answers like the First Amendment facilitates the search for truth, or the First Amendment is essential to the free flow of ideas in a democratic polity, or the First Amendment encourages dissent, or the First Amendment provides the materials necessary for informed choice and individual self-realization. If you think of the First Amendment as a mechanism for achieving goals like these, you have to contemplate the possibility that some forms of speech will be subversive of those goals because, for instance, they impede the search for truth or block the free flow of ideas or crowd out dissent. And if such forms of speech appear along with their attendant dangers, you will be obligated—not in violation of the First Amendment, but in fidelity to it—to move against them, as Stevens advises us to do in his opinion.¹³⁸⁰

On the other hand, Professor Fish explains, the prevailing view on the Roberts Court has become unconcerned with the First Amendment as a protector of underlying values but instead views the Speech Clause as an end in itself:

The opposite view of the First Amendment—the view that leads you to be wary of chilling any speech even if it harbors a potential for corruption—is the principled or libertarian or deontological view. Rather than asking what is the First Amendment for and worrying about the negative effects a form of speech may have on the achievement of its goals, the principled view asks what does the First Amendment say and answers, simply, it says no state abridgement of speech. Not no abridgement of speech unless we dislike it or fear it or think of it as having low or not value, but no abridgement of speech, period, especially if the speech in question is implicated in the political process.

. . . .

In other words, forget about what speech does or does not do in the world; just take care not to restrict it. This makes things relatively easy. All you have to do

¹³⁸⁰ Stanley Fish, *What Is the First Amendment For?*, N.Y. Times (Feb. 1, 2010), <http://opinionator.blogs.nytimes.com/2010/02/01/what-is-the-first-amendment-for/>.

is determine that it's speech and then protect it, as [Justice] Kennedy does when he observes [in the *Citizens United* majority opinion that the challenged law is] “a ban on speech.” That's it. Nothing more need be said, although Kennedy says a lot more, largely in order to explain why nothing more need be said and why everything Stevens says—about corruption, distortion, electoral integrity and undue influence—is beside the doctrinal point.¹³⁸¹

Thus, in this modern era of First Amendment absolutism, like the similar era from Justice Black's time, the use of categorical exclusions is an important tool for the Justices who tend toward free-speech absolutism. As described in Chapter 1, *supra*, in times of First Amendment absolutism, categorical exclusions are vitally important tools that allow the Supreme Court to continue finding limits in the First Amendment. Without these limits, there would be no predictable way—and, perhaps, no principled way—to prevent the First Amendment from invalidating all government actions that could reasonably be claimed to burden speech of any sort—a result rarely asserted to be desirable even by the most ardent free speech absolutist. Moreover, without categorical exclusions, during times of Speech Clause absolutism there would be no distinction between “speech” and the constitutionally protected “freedom of speech,” and the Supreme Court's suggestions that there is would have been meaningless.

Reinvigorating and clarifying the Doctrine of Categorical Exclusion, therefore, would bring greater certainty to the law in this era of absolutism. Clarity begins with a name: Thus, the Supreme Court should adopt the “Doctrine of Categorical Exclusion” to describe this body of its jurisprudence. Knowing with greater certainty what categories of speech fall outside the “freedom of speech” protected by the First Amendment, and thus into a “First Amendment Free Zone,” would tend to help practitioners advise clients, help speakers avoid inadvertent missteps and the chilling effect of self-censorship, and help lower courts apply the First Amendment in a somewhat consistent fashion. In short, greater clarity in the Doctrine of Categorical Exclusion,

¹³⁸¹ *Id.*

including what categories are in fact excluded from First Amendment protection and what their boundaries are, would help lend predictability to the modern law of free speech in a time of jurisprudential change.

* * *

Thus, the Roberts Court should formalize the more than 70 years of *ad hoc* rulings that have implemented categorical exclusions in the post-*Chaplinsky* era. The inconsistencies that have developed during that era, such as the basic notion that excluded categories are indeed “excluded” and the tension brought to that concept by *R.A.V.*’s declaration that even excluded categories are not “invisible to the First Amendment,” should be harmonized. The Supreme Court should give this body of law the respectful recognition of a formal name—the Doctrine of Categorical Exclusion—and within that name should synthesize seven decades of wide-ranging rulings into a coherent whole that can provide certainty and predictability for the law.

But that has not happened. To the contrary, as shown in Part B, the language actually used by the Supreme Court to describe the excluded categories during those seven post-*Chaplinsky* decades is (to put it euphemistically) wide-ranging.

Part B: The Supreme Court's inchoate articulations

This Part B notes and aggregates the terminology the Supreme Court has used in nine key cases to set forth the categories of unprotected speech. These nine cases are selected because they are the nine examples in which the Supreme Court has set forth *multiple* categories of speech that it represents to be excluded from First Amendment protection. This Part will refer to this collection of terms as the “sum-of-all-words approach” to identifying the categories that each case either expressly recognized or implied exist. This is, of course, a literalist approach that strictly assumes the Supreme Court means precisely what it said in each case. While it will not render a definitive list, this approach will generate a complete universe of terms from which patterns may be ascertained, similarities and distinctions noted, and analysis made.

In its three attempts at what appear to be a rather comprehensive articulation, the Supreme Court described the excluded categories as follows:

Chaplinsky (1942): In this foundational case, the Supreme Court described the unprotected categories to include “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words.”¹³⁸² From that quoted passage, it often is said—including in Chapter 3, *supra*, that *Chaplinsky* recognized four categories of unprotected speech. But of course, the *Chaplinsky* Court actually mentioned five words denoting distinct concepts in that quoted phrase because it referenced both the “lewd *and* obscene”; as discussed in Chapter 4, Part A, *supra*, subsequent decisions would make clear that lewdness and obscenity are constitutionally different concepts subject to different treatment by the First Amendment.

In addition, the *Chaplinsky* Court also quoted favorably from New Hampshire state court decisions relied upon by the court below, which stated:

¹³⁸² *Chaplinsky*, 315 U.S. at 572.

The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including ‘classical fighting words’, words in current use less ‘classical’ but equally likely to cause violence, and other disorderly words, including profanity, obscenity and *threats*.¹³⁸³

The *Chaplinsky* Court, therefore, indirectly acknowledged the existence of “threats” as an unprotected category of speech even though that decision’s oft-quoted formulation makes no such mention; as described in Chapter 6, Part D, *supra*, the unprotected nature of “true threats” has remained litigated even to the most recent concluded term of the Supreme Court.

Thus, if one views *Chaplinsky* in the traditional way, it articulates four categories of unprotected speech—the “lewd and obscene,” the “profane,” the “libelous,” and “fighting words.” But if one takes a sum-of-all-words approach to reading *Chaplinsky*, that decision is seen to include six categories of unprotected speech—the “lewd,” the “obscene,” the “profane,” the “libelous,” various “fighting words,” and “threats.”

Stevens (2010): The *Stevens* articulation also describes six categories of unprotected speech, but they are not the same six referenced in *Chaplinsky*. *Stevens* mentions five “historic and traditional categories long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”¹³⁸⁴ *Stevens* also later acknowledges that child pornography also is a category recognized as unprotected.¹³⁸⁵

Thus, the sum-of-all-words approach reveals six categories of unprotected speech set forth in *Stevens*—“obscenity,” “defamation,” “fraud,” incitement,” “speech integral to criminal conduct,” and “child pornography.”

¹³⁸³ *Chaplinsky*, 315 U.S. at 573 (citing *State v. Brown*, 38 A. 731 (N.H. 1895); *State v. McConnell*, 47 A. 267 (N.H. 1900)) (emphasis added).

¹³⁸⁴ *Stevens*, 559 U.S. at 468 (citations and internal quotation marks omitted).

¹³⁸⁵ *Id.* at 471.

Alvarez (2012): By the time 2012 arrived, the Supreme Court was prepared to be more thorough in articulating the established universe of recognized categories. Its principal listing included nine:

Among these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called “fighting words,” child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain.¹³⁸⁶

But the *Alvarez* Court also recognized three other types of speech, potentially separate categories, that enjoy no constitutional protection. For example, statutes prohibiting perjury are of “unquestioned constitutionality”¹³⁸⁷ Prohibitions on making false statements to the government “concerning official matters” may “implicate fraud or speech integral to criminal conduct” and thus be proscribable.¹³⁸⁸ Similarly, “falsely representing that one is speaking on behalf of the Government” or “impersonating a Government officer” can be prohibited because such a prohibition would “protect the integrity of Government processes” and “implicate fraud or speech integral to criminal conduct.”¹³⁸⁹ For the first of these three groupings, perjury, the *Alvarez* Court cited precedent that had held perjured statements unprotected by the First Amendment; for the other two groupings, prohibitions on making false statements to the government and on impersonating the government, the *Alvarez* Court offered dicta reasoning that they would be unprotected and analogizing them to other, established categories, “fraud” and “speech integral to criminal conduct.”

Thus, a sum-of-all-words reading of *Alvarez* reveals a list of twelve categories—“incitement,” “obscenity,” “defamation,” “speech integral to criminal conduct,” “fighting

¹³⁸⁶ *Alvarez*, 132 S. Ct. at 2544 (citations omitted).

¹³⁸⁷ *Id.* at 2546.

¹³⁸⁸ *Id.*

¹³⁸⁹ *Id.*

words,” “child pornography,” “fraud,” “true threats,” “speech presenting some grave and imminent threat the government has the power to prevent,” “perjury,” “making false statements to the government concerning official matters,” and “impersonating a Government officer.”

* * *

In the years since *Chaplinsky*, in addition to the three rather comprehensive articulations described above, the Supreme Court has on six other occasions set forth lists of categories of proscribable speech that give no appearance of being intended as a complete recitation. Rather, they have been mentioned, sometimes off-handedly, apparently for the purpose of illustrating the concept of categorical exclusion for the needs of the particular case. Nonetheless, considering these six additional examples sheds further light on excluded categories the Supreme Court has acknowledged, or at least considered to exist.

Konigsburg (1961): In a footnote, the *Konigsburg* Court implied, but did not expressly state, that the following categories of unprotected speech exist: “libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like”¹³⁹⁰ It subsequently noted favorably that categorical exclusion would “justify punishing persuasion to murder” and that “the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.”¹³⁹¹ The former of these is derived from the prior footnote’s “solicitation of crime,” and the latter, in context, appears intended to reinforce the prior footnote’s references to “complicity by encouragement” or “conspiracy.”

¹³⁹⁰ *Konigsburg*, 366 U.S. at 49 n.10.

¹³⁹¹ *Id.* at 50 n.11.

Thus, a sum-of-all-words reading of *Konigsburg* results in this list of nine categories: “libel,” “slander,” “misrepresentation,” “obscenity,” “perjury,” “false advertising,” “solicitation of crime,” “complicity by encouragement,” and “conspiracy.”

Simon & Schuster (1991): The *Simon & Schuster* Court struck down the New York statute at issue because it did not fit within a proscribable category, and Justice Kennedy explained the reasoning as follows:

Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. *No further inquiry is necessary to reject the State’s argument that the statute should be upheld.*¹³⁹²

Read in the context of the case, that final sentence emphasized above appears to suggest that the list of unprotected categories in that paragraph is exhaustive, not merely illustrative. Thus, if the regulated speech did not fit one of those enumerated categories, it must be protected, which implies no other unprotected categories exist. This cannot, however, be what the Supreme Court intended by that passage, because elsewhere within *Simon & Schuster* Justice Kennedy explained: “There are a few legal categories in which content-based regulation has been permitted or at least contemplated. These include obscenity, defamation, incitement, or situations presenting some grave and imminent danger the government has the power to prevent.”¹³⁹³ In addition, the *Simon & Schuster* Court cited *Ferber* for the proposition that “some visual depictions of sexual conduct by children” have been declared proscribable.¹³⁹⁴

Thus, a sum-of-all-words reading of *Simon & Schuster* results in the following list of seven categories: “obscenity,” “defamation,” “tantamount to an act otherwise criminal,” “an

¹³⁹² *Simon & Schuster*, 502 U.S. at 124 (Kennedy, J., concurring in the judgment) (emphasis added).

¹³⁹³ *Id.* at 127 (citations omitted).

¹³⁹⁴ *Id.*

impairment of some other constitutional right,” “incitement to lawless action,” “calculated or likely to bring about imminent harm the State has the substantive power to prevent,” and “child pornography.”

R.A.V. (1992): The *R.A.V.* Court collected three unprotected categories into an illustrative list parenthetically incorporated into a collection of cases.¹³⁹⁵ Thus, a sum-of-all-words reading of *R.A.V.* results in this list of three categories: “defamation,” “fighting words,” and “obscenity.”

Free Speech Coalition (2002): The *Free Speech Coalition* Court wrote that “[t]he freedom of speech . . . does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”¹³⁹⁶ That Court also wrote that “[t]he government may suppress speech for advocating the use of force or a violation of law only if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”¹³⁹⁷ and it implied, without actually stating, that “attempt, incitement, solicitation, or conspiracy”¹³⁹⁸ for criminal conduct would be proscribable.

Thus, a sum-of-all-words reading of *Free Speech Coalition* produces the following list of seven categories: “defamation,” “incitement,” “obscenity,” “pornography produced with real children,” “attempt,” “solicitation,” and “conspiracy.”

Williams (2008): The *Williams* majority noted that “[m]any long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities,”¹³⁹⁹ implying that speech within those categories is unprotected. In addition, the *Williams* dissent noted that “the

¹³⁹⁵ *R.A.V.*, 505 U.S. at 383.

¹³⁹⁶ *Free Speech Coalition*, 535 U.S. at 245-46.

¹³⁹⁷ *Id.* at 253 (internal quotation marks omitted).

¹³⁹⁸ *Id.*

¹³⁹⁹ *Williams*, 553 U.S. at 298.

First Amendment does not categorically protect offers to engage in illegal transactions” and also recognized the “unprotected status of fraud.”¹⁴⁰⁰

Thus, a sum-of-all-words reading of *Williams* results in the following list of five categories: “conspiracy,” “incitement,” “solicitation,” “offers to engage in illegal transactions,” and “fraud.”

EMA (2011): The *EMA* majority referenced “limited areas” of proscribable speech “such as obscenity, incitement, and fighting words.”¹⁴⁰¹ The *EMA* dissent also acknowledged that “child pornography” is an unprotected category.¹⁴⁰²

Thus, a sum-of-all-words reading of *EMA* produces a list of four categories: “obscenity,” “incitement,” “fighting words,” and “child pornography.”

* * *

If one merely aggregates the categories identified by the Supreme Court in the nine cases above, the resulting sum-of-all-words list contains 25 categories: “lewd,” “obscene,” “profane,” “libelous,” “fighting words,” “threats,” “defamation,” “fraud,” “incitement,” “speech integral to criminal conduct,” “child pornography,” “preventing some grave and imminent threat the government has the power to prevent,” “perjury,” “false statements to the government,” “impersonating a government officer,” “slander,” “misrepresentation,” “false advertising,” “solicitation of a crime,” “complicity by encouragement,” “conspiracy,” “tantamount to an act otherwise criminal,” “impairment of some other constitutional right,” “attempt,” and “offers to engage in illegal transactions.”¹⁴⁰³

¹⁴⁰⁰ *Id.* at 312 (Souter, J., dissenting).

¹⁴⁰¹ *EMA*, 131 S. Ct. at 2733 (citations omitted).

¹⁴⁰² *Id.* at 2763 (Breyer, J., dissenting).

¹⁴⁰³ Even this list of 25 categories reflects the application of a certain amount of judgment. The Supreme Court has not always used identical language to reflect what appear to be identical ideas or concepts for categories.

Table 1: Supreme Court's use of 25 terms in nine cases to describe unprotected categories of speech

	CASE ➔									
	TERM USED ➔	<i>Chaplinsky</i> (1942)	<i>Konigsburg</i> (1961)	<i>Simon & Schuster</i> (1991)	<i>R.A.V.</i> (1992)	<i>Free Speech Coalition</i> (2002)	<i>Williams</i> (2008)	<i>Stevens</i> (2010)	<i>EMA</i> (2011)	<i>Alvarez</i> (2012)
1.	Lewd	X								
2.	obscene/obscenity	X	X	X	X	X		X	X	X
3.	Profane	X								
4.	Libel	X	X							
5.	fighting words	X			X				X	X
6.	threats/true threats	X								X
7.	Slander		X							
8.	Misrepresentation		X							
9.	Perjury		X							X
10.	false advertising		X							
11.	solicitation of crime		X			X	X			
12.	complicity by encouragement		X							
13.	Conspiracy		X			X	X			
14.	Defamation			X	X	X		X		X
15.	tantamount to act otherwise criminal			X						
16.	impairment of some other constitutional right			X						
17.	Incitement			X		X	X	X	X	X
18.	prohibit imminent harm/prevent grave & imminent threat that government has power to prevent ¹⁴⁰⁴			X						X
19.	child pornography/with real children			X		X		X	X	X
20.	Attempt					X				
21.	offers to engage illegal transactions						X			
22.	Fraud						X	X		X
23.	speech integral to criminal conduct							X		X
24.	impersonating a government officer									X
25.	making false statements to the government concerning official matters									X

¹⁴⁰⁴ In *Simon & Schuster*, the Supreme Court used the phrase “calculated or likely to bring about imminent harm the State has the substantive power to prevent,” *Simon & Schuster*, 502 U.S. at 124, but in *Alvarez* it used the phrase “preventing grave and imminent threat the government has the power to prevent,” *Alvarez*, 132 S. Ct. at 2544. Both harken back to the reference in pre-*Chaplinsky* reference to “substantive evils that Congress has a right to prevent.” See *Schenck*, 249 U.S. at 52. For purposes here, they are considered the same.

That long list not only is unwieldy, but it simply cannot be a correct reflection of the Supreme Court’s jurisprudence constituting the Doctrine of Categorical Exclusion, particularly because only “a *limited* categorical approach has remained an important part of our First Amendment jurisprudence.”¹⁴⁰⁵ If there really were 25 categories of speech unprotected by the First Amendment, then why has the Supreme Court never mentioned more than twelve of them together at the same time, as it did in *Alvarez*? Indeed, if this list were presented to the Supreme Court, the likely reaction would be a strong expression of aversion to such a “freewheeling”¹⁴⁰⁶ interpretation of its Doctrine of Categorical Exclusion.

Part C, therefore, offers a proposal to bring these wide-ranging terms into a more coherent whole.

¹⁴⁰⁵ *R.A.V.*, 505 U.S. at 383 (emphasis added).

¹⁴⁰⁶ *Stevens*, 559 U.S. at 472.

Part C: A proposal for a concise Doctrine of Categorical Exclusion with three categories

It is apparent the sum-of-all-words approach above, which yields a cumbersome and imprecise list of 25 unprotected categories, cannot be correct. It also is apparent the list of categories recognized as unprotected may vary depending on the facts of a given case; to borrow an old phrase, some categories may be more excluded from First Amendment protection than others.¹⁴⁰⁷ One can, however, begin to draw conclusions from analyzing the sum-of-all-words list.

First, at least two of those terms—“lewd” and “profane”—have subsequently been rejected or abandoned by the Supreme Court.

Second, “fighting words” as a term appeared to have been abandoned by the time of *Stevens* in 2010 in favor of the narrower “incitement,” but it was resurrected in *Alvarez* in 2012.

Third, “misrepresentation,” without more, does not qualify as unprotected after *Alvarez*.

Fourth, at least one category from this massive list—“preventing some grave and imminent threat the government has the power to prevent”—really never has been considered an excluded category but instead has traditionally been analyzed within the First Amendment. Moreover, this phrase appears more nearly to describe the reasoning that underlies or explains a category, such as speech integral to criminal conduct, not the category itself.

Fifth, an outlier category—“impairment of some other constitutional right”—was mentioned only once by the Supreme Court, without explanation, and does not appear to be sufficiently developed as a concept to enable evaluation.

¹⁴⁰⁷ See generally Chapter 7, Part D, *supra*, demonstrating that the Supreme Court takes into account the individual circumstances of government regulation in each case in determining how much deference to allow even in the government’s regulation of categorically unprotected speech. See also Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991 (2012) (arguing that the Supreme Court does, and should, take into account the severity of the government-imposed sanction in determining whether speech is unprotected).

Sixth, many of these terms are closely related to each other as all being inchoate offenses. For example, “conspiracy,” “solicitation,” “attempt,” “complicity by encouragement,” all are specific examples of inchoate crimes which, in turn, are closely related to the *Giboney-Pittsburgh Press* principle that speech integral to criminal conduct is proscribable.

Seventh, “slander” and “libel” are subsets of “defamation.”

Eighth, “fraud” and “false advertising” really are part and parcel of the same concept. “False advertising” is a form of fraudulent “soliciting” of a person to engage in a transaction.

Ninth, “threats” and “child pornography” really are specific applications of the broader *Giboney-Pittsburgh Press* rule that “speech integral to criminal conduct” is proscribable. So would be “perjury” and “offers to engage in illegal transactions.” “Fraud” is a close cousin, and the statement that speech “tantamount to an act otherwise criminal” is proscribable really merely rephrases the rule that “speech integral to criminal conduct” may be prohibited.

One analyst has argued that the state of the modern law is best described as the Supreme Court having interpreted the First Amendment to exclude only three categories of speech from its protection: Obscenity, child pornography and “fighting words or true threats.”¹⁴⁰⁸ While not prepared to accept those same three categories verbatim, the proposal here also recommends condensing to only three categories.

In light of those nine observations about the interrelationships among the 25 words and phrases the Supreme Court has used to describe categories of unprotected speech, a succinct, simple and more coherent articulation of the categories could look like this:

¹⁴⁰⁸ See Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, 2-3 (Cong. Research Serv., CRS Report for Congress, Sept. 8, 2014).

Category I: Obscenity

The Supreme Court has consistently included “obscenity” in lists of proscribable categories, and the extensive body of case law on the subject makes clear the Supreme Court has seriously considered this excluded category and approves of it. However, the category described as “obscenity” includes, well, only “obscenity.” It does not include speech that is lewd, indecent or profane. Nor does it operate to exclude from the First Amendment depictions, whether verbal or visual, of violence. Rather, to fit within this unprotected category—and, therefore, to be proscribable by the government, “obscene” speech must satisfy a three-pronged test:

The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁴⁰⁹

If and only if speech meets that test, it is obscene and falls within the “First Amendment Free Zone” and outside the “freedom of speech” protected by the Constitution.

Category II: Speech integral to conduct otherwise illegal

This general category includes offers to engage in illegal transactions. It also includes the various inchoate offenses traditionally and widely recognized in the criminal law, including attempts, solicitations and conspiracies.

This general category also has been specifically applied by the Supreme Court to various specific types of speech integral to criminal conduct. One might think of these as “subcategories,” but however one references them, they are circumstances in which the Supreme Court has expressly stated that the general rule that speech integral to criminal conduct applies in these cases: Child pornography, true threats, fraud, and perjury. For these particular *types* of

¹⁴⁰⁹ *Miller*, 413 U.S. at 24 (citations and internal quotation marks omitted).

“speech integral to criminal conduct,” it is unnecessary to analyze or guess to determine whether they are proscribable. They are.

This category also includes whatever remains of the “fighting words” doctrine, specifically including “incitement,” defined as speech that is intended, and likely, to produce imminent lawless action.

The key to this category of excluded speech is the *mens rea* of the speaker. The speaker must have a guilty mind sufficient to establish criminal liability, or at least sufficient to establish the criminal intent to cause or contribute to lawless actions, and if so then the utterance—the speech—may merely be evidence of that guilty mind. Courts are unlikely to allow the punishment of innocent utterances even if they somehow contribute to otherwise unlawful acts. As Justice Thomas asserted in his *Elonis* dissent, “Our default rule in favor of general intent applies with full force to criminal statutes addressing speech,”¹⁴¹⁰ and while the precise *mens rea* constitutionally required for a criminal statute that punishes speech to survive a First Amendment challenge has not been settled,¹⁴¹¹ “[a]t a minimum, there is not historical practice requiring more than general intent when a statute regulates speech.”¹⁴¹²

¹⁴¹⁰ *Elonis*, 135 S. Ct. at 2019 (Thomas, J., dissenting).

¹⁴¹¹ The Supreme Court generally has been reluctant to decide what level of *mens rea* is constitutionally required to defeat a First Amendment challenge to a criminal statute that punishes speech, opting instead to rely on statutory construction to find within the various statutory texts a *mens rea* requirement deemed sufficient to resolve the dispute before the Court without reaching the constitutional question. *See id.* at 2013 (majority opinion) (collecting cases that decline to decide the constitutional question in this context). That reluctance was the subject of Justice Alito’s critique of the majority opinion in his *Elonis* concurrence. *Id.* at 2013-14 (Alito, J., concurring in part and dissenting in part) (“But the Court refuses to explain what type of intent was necessary. Did the jury need to find that *Elonis* had the *purpose* of conveying a true threat? Was it enough if he *knew* that his words conveyed such a threat? Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess.”). It is clear, however, that despite the absence of a controlling pronouncement by the Supreme Court about what the Constitution requires, courts generally do insist on the presence of some proof of a “guilty mind” before permitting criminal liability to attach and will seek it through construction whenever possible. *See discussion id.* at 2009 (majority opinion) (“The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it. This rule of construction reflects the basic principle that wrongdoing must be conscious to be criminal. As Justice Jackson explained, this principle is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. The central thought is that a defendant must be blameworthy in mind before he can

Other similar types of “subcategories,” or specific applications of the general rule, likely would be recognized by the Supreme Court if ever a proper case were presented to it. This is known because the Supreme Court has signaled as much. These include making false statements to the government about official business and impersonating a government official.

Speech that is integral to conduct otherwise unlawful, including criminal conduct, falls within the “First Amendment Free Zone” that lies outside the “freedom of speech” protected by the Constitution. Caution is warranted, however, to ensure this category not be expanded to allow punishment of protected speech or expressive conduct to which associated criminal conduct, such as the burning of an American flag, is a mere incident. To put the concept another way, the government may punish speech that merely enables underlying criminality, but it may not punish criminality that is merely a byproduct of speech.

Category III: Defamation uttered with ‘actual malice’

This category, of course, includes both libel and slander. As the law of defamation has been constitutionalized since the 1960s, the unprotected category of defamation has been significantly narrowed over the years, and it is unclear much remains of the excluded category other than the Supreme Court’s persistent reference to it. The one clear type of defamatory speech that continues to fall outside the First Amendment’s protection is defamation uttered with “actual malice.” If the government can prove the speaker acted with actual malice—knowing the

be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. Although there are exceptions, the general rule is that a guilty mind is a necessary element in the indictment and proof of every crime. We therefore generally interpret criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.” (citations and internal quotation marks omitted); *see also, e.g.*, *United States v. X-citement Video*, 513 U.S. 64, (1994) (interpreting criminal statute punishing possession of child pornography to include a requirement possessor knows the depicted children are minors). Given this general approach and the overall inclination by the judiciary to interpret the First Amendment in a speech-protective manner, it is likely the Supreme Court would—if ever the question were squarely presented and decided—find within the First Amendment a scienter requirement for criminal statutes that punish speech. Justice Thomas already has concluded that a general intent criminal statute is sufficient for a criminal statute punishing speech to survive a First Amendment challenge. *Elonis*, 135 S. Ct. at 2024-28 (Thomas, J., dissenting).

¹⁴¹² *Id.* at 2021.

defamatory speech was false or with reckless disregard for its truth or falsity—then courts continue to allow the government to punish that speech without otherwise satisfying the limits of the First Amendment.

Notably, proof of “actual malice” is closely akin to the sort of *mens rea* the government must demonstrate in order to invoke a categorical exclusion for speech incidental to conduct otherwise criminal. In that sense, what remains of the excluded category of defamation is similar to the excluded category of speech incidental to conduct otherwise criminal—it may be punished without First Amendment limitations only when (and perhaps only because) the speaker *intended* it to cause harm to another. To describe in a phrase the core of any remaining unprotected category of defamatory speech, it is only the “calculated falsehood”¹⁴¹³ that remains wholly unprotected.¹⁴¹⁴

* * *

As demonstrated in Table 2, *infra*, a regrouping in this manner would be true to the principles the Supreme Court appeared to be expressing in the nine cases analyzed in Chapter 10, Part B, *supra*, from a sum-of-all-words perspective:

¹⁴¹³ *Garrison*, 379 U.S. at 75.

¹⁴¹⁴ The “calculated falsehood” is unprotected in all applications. As discussed above, mere “negligent” defamations also may be unprotected if and only if they are directed at private persons and relate to matters not of public concern.

Table 2: Application of proposed three-category Doctrine of Categorical Exclusion to Supreme Court terminology in nine cases

CASE ➔	<i>Chaplinsky</i> (1942)	<i>Konigsburg</i> (1961)	<i>Simon & Schuster</i> (1991)	<i>R.A.V.</i> (1992)	<i>Free Speech Coalition</i> (2002)	<i>Williams</i> (2008)	<i>Stevens</i> (2010)	<i>EMA</i> (2011)	<i>Alvarez</i> (2012)
Obscenity	X	X	X	X	X		X	X	X
Defamation (understood to be limited to situations when “actual malice” has demonstrated the presence of a “calculated falsehood”)	X	X	X	X	X		X		X
Integral to criminal conduct (including the specifically articulated subcategories of fraud, perjury, threats, child pornography, incitement and inchoate offenses)	X	X	X		X	X	X	X	X

Each of these three proposed groupings would have been recognized by eight of the nine cases that have attempted comprehensive, or somewhat comprehensive, listings of the unprotected categories. This suggests a significant correlation between this proposed framework and what the Supreme Court actually was doing in these nine cases, even though no such

framework was articulated by the Supreme Court itself. Under this proposal, the delineation between the constitutionally protected “freedom of speech” and the excluded speech in the “First Amendment free zone” would be depicted as follows:

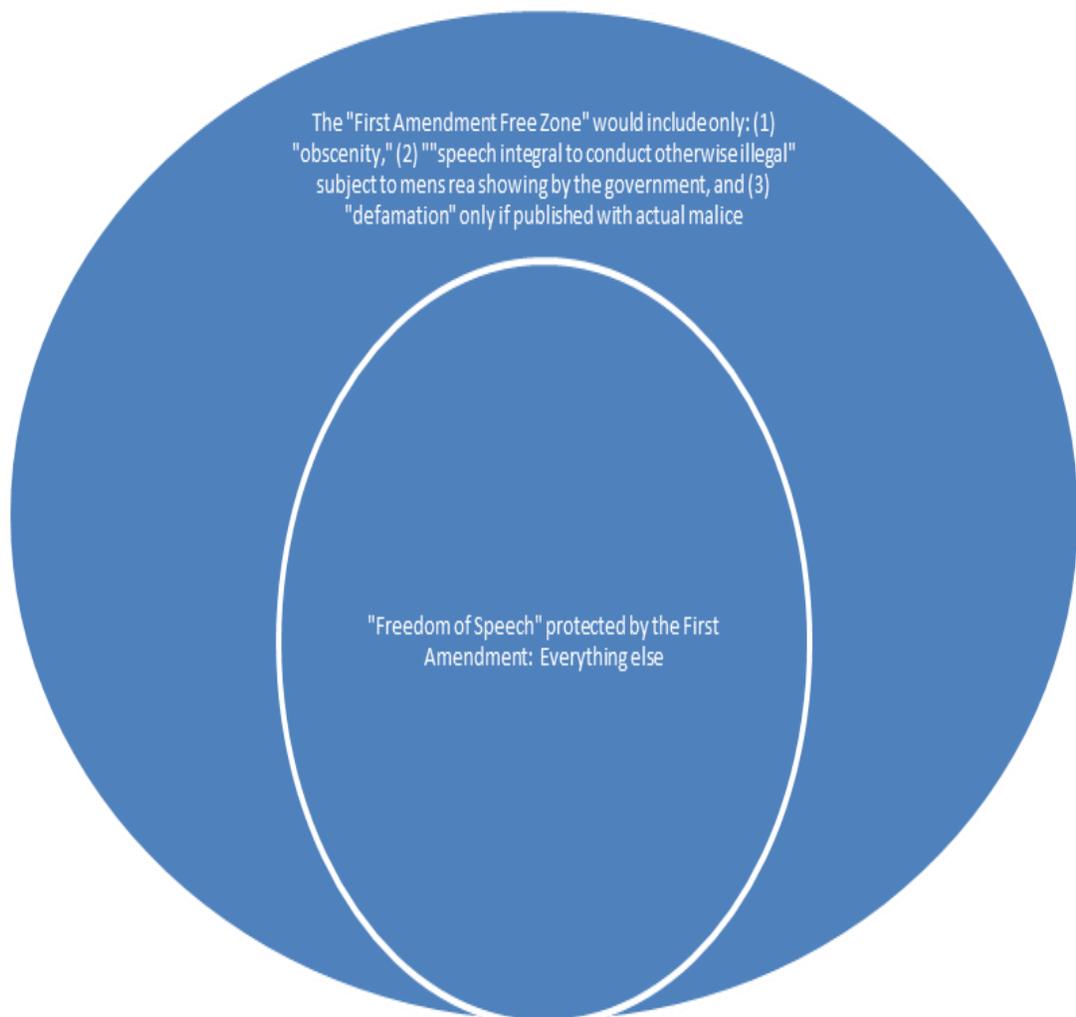


Figure 6: Relationship between constitutionally protected “Freedom of Speech” and unprotected “First Amendment Free Zone” under proposed three-category Doctrine of Categorical Exclusion¹⁴¹⁵

¹⁴¹⁵ This proposal is far more straightforward than the Doctrine ever has been. Compare Figure 6 with each previous figure, *supra*.

This proposal for three categories is rational, understandable, and consistent with the Supreme Court’s actual decisions and articulations over the past 75 years. It provides a framework that can assist judges, practitioners and speakers in understanding both *what* speech is excluded from First Amendment protection and *why* it is excluded. It provides a useful tool for addressing the fundamental and persistent question: What speech falls within the “First Amendment Free Zone” that lies outside the “freedom of speech” protected by the Constitution, and how do we know the answer to that question?

The requirement for the government to prove a speaker’s *mens rea* also is consistent with the broad notion that the First Amendment protects a free exchange in ideas, and only when the speech itself is intended to harm others, or to be part of conduct otherwise criminal or unlawful, might the First Amendment not apply. This is intellectually consistent with the notion that obscenity may be proscribed only if possessed outside the privacy of one’s own home,¹⁴¹⁶ which implies that the exposure of the obscene material to others is a factor in the Supreme Court’s analysis.

For all these reasons, the Supreme Court should adopt this three-part framework for organizing the unprotected categories of speech and should name this framework and its associated considerations the Doctrine of Categorical Exclusion.

¹⁴¹⁶ See *Stanley v. Georgia*, 394 U.S. 557 (1969).

CONCLUSION

This dissertation ends where it began: With the pertinent text of the First Amendment. “Congress shall make no law . . . abridging the freedom of speech”¹⁴¹⁷ The Supreme Court’s jurisprudence long has drawn a proper distinction between the *freedom* of speech protected by the First Amendment and any other speech that is unprotected and thus falls within a “First Amendment Free Zone.” Whether the speech at issue in any particular situation falls within the Speech Clause *at all* is a binary determination—speech is either within or without the First Amendment’s protected freedom; there is no straddling the line.¹⁴¹⁸ Therefore, this binary determination necessarily must be made, either explicitly or implicitly, as a threshold matter in *every* Speech Clause case. If the First Amendment applies to the speech at issue, then and only then is the challenged government regulation subject to variable tertiary analysis under whatever separate, judicially crafted rules for applying the Speech Clause may govern the speech being regulated. If the First Amendment does not apply, then the judicial inquiry typically is at an end after disposition of the threshold question because the speech at issue is excluded from the freedom protected by the Speech Clause and consequently is excluded from judicial protection.¹⁴¹⁹ In that latter circumstance, it follows that the government’s proscription of the speech is permissible without offense to the First Amendment.

The Supreme Court should expressly adopt that two-step analysis in its Speech Clause cases. The necessary and recurring binary threshold determination required by the plain text of

¹⁴¹⁷ U.S. CONST. amend I.

¹⁴¹⁸ Except, of course, under analysis like Justice Scalia’s in *R.A.V.* But that is the exception, not the rule, in the Supreme Court’s cases that apply categorical exclusion.

¹⁴¹⁹ If the speech at issue falls within the “First Amendment Free Zone,” then the judicial inquiry is at an end from a Speech Clause standpoint. Obviously, other limitations, including constitutional limitations, might apply to the government’s challenged regulatory action.

the Speech Clause is this: What speech lies in the “First Amendment Free Zone” that is outside the “freedom of speech” protected by the Constitution?

The essential companion to that threshold question, of course, is, “How do we know the answer to it?” In the almost 75 years since it first attempted in *Chaplinsky* to synthesize a framework to guide that recurring threshold determination, the Supreme Court has developed an increasingly discernible set of rules for that purpose. These various rules have become sufficiently numerous and comprehensive as to properly constitute a “doctrine.” The Supreme Court should expressly recognize that reality by describing its jurisprudence in this regard as the Doctrine of Categorical Exclusion, an apt naming since the purpose of this doctrine is to assist with identifying the *categories* of speech that are *excluded* from the freedom of speech protected by the First Amendment and thus are constitutionally unprotected and subject to proscription by the government.

Coining this new terminology also would lend greater precision to the Supreme Court’s free speech jurisprudence: If a particular judicially determined rule or holding helps guide the threshold determination of whether speech at issue falls within or without First Amendment protection, then it is part of the Doctrine of Categorical Exclusion; by contrast, if the rule or holding directs *how* speech is to be protected by *applying* the First Amendment to the speech at issue, then it does not. This clearer linguistic distinction would tend to ameliorate confusion that arises from the Supreme Court’s enduring tendency to refer generally to a “categorical approach” and discuss “categories of speech” interchangeably when addressing both the binary threshold question in Speech Clause cases (does the Speech Clause apply at all to the speech at issue?) and also to the open-ended, or “variable,” tertiary question (if the Speech Clause does apply, then how so?).

Coupled with the greater linguistic precision of naming the Doctrine of Categorical Exclusion, clarity in this area of the law would be enhanced were the Supreme Court also to bring greater precision to its description of the excluded categories. Greater certainty would promote First Amendment values by tending to diminish self-censorship and the chilling of protected expression; when speakers clearly know the constitutional boundaries, they are less likely to inadvertently transgress them and thus more likely to speak freely when operating near the constitutional limits. The three-category solution advocated in Chapter 10, *supra*, would advance the purpose of clarity and thus serve First Amendment values, but of course other combinations or structures are possible and could suffice as well.

In the law, the natural companion of clarity is certainty. As the Supreme Court has recognized in a different context, an “important value[] of a rational system of law” is “the certainty of legal principles.”¹⁴²⁰ The principle that the Speech Clause of the First Amendment applies to some, but not all, speech is settled law—that much is certain. Nearly three-quarters of a century after *Chaplinsky*—and in light of the renewed focus by the Supreme Court since 2010 on applying principles of categorical exclusion from the Speech Clause in its cases—the time is ripe for the Court to make this area of law more “rational.” The Supreme Court should give practitioners, speakers and others who focus on understanding and applying the ten words of the Speech Clause greater certainty in answering the essential threshold, binary question: Does (or does not) the clause apply at all to the speech at issue? The proposed Doctrine of Categorical Exclusion would advance the “clarity that the First Amendment demands.”¹⁴²¹ The Supreme Court should adopt it.

¹⁴²⁰ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 709 n.6 (1978).

¹⁴²¹ *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 495 (2007) (Scalia, J., concurring).

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¹⁴²² Of the books in this section, only *The Bible*, *Black's Law Dictionary* and the James Stovall book are quoted directly. Other books are cited indirectly through other sources cited in this dissertation.