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THE ARCHITECTURE OF FIRST AMENDMENT FREE SPEECH

Edward J. Eberle*

2011 MICH. ST. L. REV. 1191

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INTRODUCTION

Free speech has evolved into a highly complicated body of law. At the advent of the Supreme Court's entry into Free Speech jurisprudence, starting in the early twentieth century,¹ speech was measured according to a two-level theory: speech was either protected (attaining status as a free speech right) or not protected (not meriting status as a free speech right).² Under the two-level theory articulated prominently in *Chaplinsky v. New Hampshire*, speech was protected unless it fell within one of those "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."³ These exceptions included "the lewd and obscene, the profane, the libelous, and

* Professor of Law, Roger Williams University School of Law. Copyright Edward J. Eberle, 2011. All rights reserved. I would like to thank Kim Baker, Dan Berman, Courtney Cahill, Brian Foley, Jared Goldstein, Keith Hylton, Gary Lawson, Abby Moncrieff, Colleen Murphy, David Nersesian, and Keith Outterson, all of whom participated in the Roger Williams workshop and the Boston University workshop, for their valuable comments on this Article and Jon Entin and Ron Krotoszynski.

1. Compare *Schenck v. United States*, 249 U.S. 47, 51-52 (1919), with *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

3. *Id.* at 571-72; see also Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10 (articulating two-level theory).

the insulting or 'fighting' words."⁴ With the Court's reevaluation of Free Speech jurisprudence in the second half of the twentieth century, however, most of the exceptions noted in *Chaplinsky* have been reconfigured, with most now meriting some constitutional protection.⁵ Of the exceptions mentioned in *Chaplinsky*, only obscenity⁶ and fighting words⁷ remain wholly unprotected categories of speech, subject to the Court's narrowing of their definitions.

The explanation for this change in the state of law is the Court's recognition of Free Speech as a fundamental right (Free Speech being the vanguard of the twentieth century fundamental rights project),⁸ and its prioritization of Free Speech as the most prized of these rights.⁹ With its prioritization of Free Speech, the Court has reevaluated how it views acts of communication, concentrating fundamentally on whether the act possesses communicative qualities. Consideration of the value of the communication is the first priority. Upon assessing the value of the communicative act, the next topic for consideration is the form and type of conduct at issue: does it present clear and concrete harm—speech that has a likelihood of gestating into conduct that can present danger to a person, the social order, or the

4. *Chaplinsky*, 315 U.S. at 572.

5. For reevaluation of "the lewd and obscene," see *Roth v. United States*, 354 U.S. 476, 484, 489 (1957) (holding obscenity unprotected and specifying the test to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"); *Miller v. California*, 413 U.S. 15, 24 (1973) (rejecting the *Roth* standard and imposing a narrower, three-part test). For reconsideration of "the profane," see *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975) (holding ordinance prohibiting outdoor exhibition of films containing nudity overinclusive); *Cohen v. California*, 403 U.S. 15, 26 (1971) (reversing disturbing the peace conviction based on defendant's wearing a jacket emblazoned with the words "Fuck the Draft" because doing so was "speech" rather than "offensive conduct"). For an illustration of change with respect to "the libelous," see *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). For reevaluation of "insulting or 'fighting' words," see *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam); *Cohen*, 403 U.S. at 16, 20.

6. Under *Miller*, obscenity must meet these guidelines:

(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.

413 U.S. at 24 (citations omitted).

7. Under *Cohen*, 403 U.S. at 20, fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."

8. Free Speech was the first civil right to be incorporated into the Fourteenth Amendment and made applicable to the states. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

9. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (Free Speech trumps Equal Protection).

society? I will refer to this as the baggage associated with the act. Stated a different way, if the act contains communicative qualities, it constitutes Free Speech, and then the Court can move to the next question as to how to balance the value of speech against the baggage implicated by nonspeech components. The baggage might be characterized as the social cost to society.

The ever expanding range of communicative matter grouped within the circumference of the First Amendment carries with it its own "innate tensions, contradictions, and ambiguities"—matters arising from the relationship of the communicative matter to social reality that must be assessed and then sorted out.¹⁰ These tensions "pose great challenges to the substance and stability of the First Amendment."¹¹ How is fringe speech—speech barely within the zone of constitutional protection, like pornography or securities speech—to be treated in relation to core speech (such as political, religious, artistic, or scientific speech)? Can these different categories of speech be adequately defined and their range delineated? Assuming the difficult, if not quixotic, task of precise definition of categories can be accomplished, can the varying levels of protection accorded different categories of speech be distinguished from one another so that the First Amendment has coherence and stability? One danger is that of doctrinal "dilution . . . by a leveling process, of the force of the Amendment's guarantee."¹² Under doctrinal dilution, core areas of speech might be judged by levels of protection afforded intermediate or low-ranked categories of speech. An example would be where the rule of intermediate scrutiny applicable to commercial speech would then be applied to political speech, which merits strict scrutiny. The process can also work the other way: lower valued categories of speech could be leveled up to rules of protection appropriate to higher-valued categories. An example would be in *R.A.V. v. St. Paul*, where the Court applied the rule of strict scrutiny to an unprotected category of speech: fighting words.¹³

These are problems in the architecture of First Amendment Free Speech jurisprudence. There is a need for a coherent structure to Free Speech law that can provide a sound foundation to judge and settle the issues of Free Speech. An important part of the foundation is the articulation of clear definitions of the types of speech and the applicable rules that can demarcate the differently valued categories of speech and, then, assign them the appropriate level of protection. The two-level protection (protected and unprotected) theory of speech articulated in *Chaplinsky* has been replaced by what is now a four-level theory of speech: high, intermediate, low (all of

10. Edward J. Eberle, *Hate Speech, Offensive Speech and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1151 (1994) [hereinafter Eberle, *WF*].

11. *Id.*

12. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

13. 505 U.S. 377.

which are considered protected speech), and minimally valued speech (which is characterized as unprotected speech). This is an inevitable consequence of the Court's expansion of the range of communicative matter included within the First Amendment. But with expansion of the Amendment comes the need for coherence in the structure and methodology of Free Speech. And that states the purpose of this Article: assessing, fashioning, and stabilizing the architecture of the First Amendment in order to lend coherence to Free Speech jurisprudence.¹⁴

This Article proceeds as follows: Part I describes the methodology of Free Speech analysis. Free Speech is presumptively protected absent clear demonstration of concrete harm independent from the speech. This is so as a matter of constitutional text and prioritization of liberty, which structurally operates as the default rule, empowering people so that they may influence the tenor of the democracy and the culture. Part II describes why we must bring coherence to Free Speech law in order to protect it from the onslaught of the inevitable tensions that arise in the contest between the value of speech and the value of the legal measure. Part III sets forth the rules that should comprise the architecture of the First Amendment. We must determine how to value and order speech once it is determined it merits protection under the First Amendment. The value of speech must be justified, first, by its intrinsic or instrumental worth and, second, by its relation to conduct or harm as measured by a speech/conduct dichotomy.

Free Speech should then be ordered as follows. High valued or core speech should be accorded the highest level of protection under the most exacting scrutiny, conventionally phrased as strict scrutiny analysis. Under strict scrutiny analysis, government must justify its regulation as "necessary to serve a compelling state interest [that] is narrowly drawn to achieve that end."¹⁵ The existing structure of strict scrutiny analysis remains effective in safeguarding the core of freedom of expression. Intermediate valued speech should be accorded heightened scrutiny as well, but less probing than strict scrutiny; intermediate scrutiny is appropriate. Under intermediate scrutiny, government must prove that the end is substantial and the means are substantially related to the end.¹⁶ The existing intermediate scrutiny standard must be revised so that the application of substantiality is tightened so that the proportionality of ends to means is a much closer fit (that is, substantial or important) and not a loose connection (such as rational or plausible). Low

14. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 393 (2009) ("First Amendment doctrine is a complicated and occasionally illegible map of sometimes-overlapping categories, which are joined and in many areas simply painted over by balancing approaches.").

15. *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

16. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

valued speech should be reconfigured to be judged on a new test, a general balancing of interest test. Under a general balancing of interest test, it is necessary to judge the value of the speech versus the value of the governmental interest in order to determine which is weightier. And minimally valued speech, which lies outside the First Amendment, should merit minimal level rational basis review. Under this test of rational basis review, government must at least demonstrate a plausible, rational reason for the regulation of speech.¹⁷ Short of government proving a rational basis for regulating the speech, the speech should be protected. While the speech at issue in the fourth level possesses communicative quality, it will almost always be outweighed by the concrete harm the speech presents.

These three levels of protection (high, intermediate, and low value speech) function as safe harbors for speech. But since determination of what is speech or not speech can be difficult and confusing, it is also necessary to have a default rule in place. As a default rule, I propose that the expression should be protected as speech unless government can show that the value of the legal measure outweighs the value of the speech. Speech is critical to individual self-fulfillment and democratic self-government. Of all rights, freedom of speech is most crucial to the American society because expression is critical to the development of human personality and human society. Thus, speech should be protected unless there is a clear demonstration of concrete harm; specifically imminent, serious, and clear action likely to incite violence.¹⁸

Reassessing, revising, establishing, and maintaining the architecture of the First Amendment is crucial to the Free Speech project in order to bring coherence and predictability to this fundamental right. But, of course, we must also recognize that the strength of the architecture depends on the sta-

17. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955):

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that the point has been reached here. (citations omitted).

The key case for standards of review is *United States v. Carolene Prods. Co.*:

Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis. . . . [T]he question is at least debatable whether commerce in filled milk should be left unregulated.

304 U.S. 144, 152, 154 (1938).

18. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

bility of the foundation; the foundation must be solid and able to deal with the fluidity of changing socio-economic dynamics. This architecture, as any architecture, must be situated to withstand the pressures of social forces and be able to adjust to the times—just as a house must depend on the stability of its foundation in order to weather the forces of nature.

I. FREE SPEECH AS A PREFERRED VALUE

Free Speech is properly one of the seminal values of the American constitutional order. This is so as a matter of constitutional text, the autonomy of the individual, and the promotion of democracy, among other reasons. “The textual mandate of the Free Speech Clause, providing that ‘Congress shall make no law . . . abridging the freedom of speech,’¹⁹ reasonably yields an absolutist orientation.”²⁰ No textual limitation of speech is present in the Constitution. The absolutist orientation of the Free Speech Clause contrasts with the circumscription of communication freedoms typical of European constitutions.²¹ Text matters; especially given the sparsely worded

19. U.S. CONST. amend. I. In this Article, I only consider the Free Speech Clause.

20. Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 958 (2004) (quoting U.S. CONST. amend. I) [hereinafter Eberle, *ASU*]. Justice Black captured the sense of the amendment about right: “The phrase ‘Congress shall make no law’ is composed of plain words, easily understood. . . . [T]he language . . . [is] absolute.” Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960). Justice Black generally wants an absolutist approach to interpretation of free speech. But he is not totally an absolutist. For example, in his dissent in *Cohen v. California*, he determined that wearing a jacket with the words, “Fuck the Draft,” was conduct, and only minor speech. 403 U.S. 15, 27, 28 (1971).

21. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, June 1, 2010:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

See also GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. V (Ger.):

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

U.S. Constitution,²² which contrasts with the greater length of most European constitutions.²³ The placement of speech as an enumerated right without limitation in the Constitution structurally suggests that protection of speech is presumptively favored.

It is also true, of course, that Free Speech has never been interpreted to protect absolutely all expression, with justification.²⁴ In certain instances, speech must be regulated in order to prevent clear, present, serious, and imminent harm to people or society or when it violates the rights of others.²⁵ Still, Free Speech is one of the essential natural rights on which the U.S. constitutional order is founded.²⁶ In this respect, the Free Speech Clause preserves the autonomy of a person as it protects and preserves the capacity of a person to control her thought process and engage in expression according to her motivations.²⁷ Free Speech is also fundamental because free thought and dissemination of ideas is crucial to the formation and facilitation of democracy and the culture.²⁸

Given its place as a preferred fundamental right, we must turn to the question of determining the scope of Free Speech rights. To do this, we must define speech. The definition of speech turns on whether the act under review possesses communicative qualities. Speech is expression, the communication of information about something, such as ideas, commercial products, defamation, political or religious views.²⁹ To be protected constitutionally, the act must possess sufficient communicative qualities.³⁰ Inevitably, what quantum of communicative material must be present to merit constitutional protection is an exercise of judgment.³¹ Relevant to a determi-

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.

(3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

22. *Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect. . .").

23. For example, the German Constitution (*Grundgesetz*) is eighty-three pages long in its 1991 official version pocket book form.

24. Eberle, *ASU*, *supra* note 20, at 959.

25. *Id.*

26. *See id.* at 961.

27. *Id.* at 959.

28. For extended discussion of this, see *id.* at 959-61.

29. *Id.* at 964.

30. *Id.*

31. Judicial decision making is, at bottom, a process of "reasoned judgment," as the Court explained in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (plurality).

At its best, judicial reasoning is a form of pragmatic reasoning, entailing careful deduction from general standards to specific cases; paying attention to history, tradition and context, being skeptical of rigid dichotomies; exhibiting faith in dia-

nation of constitutional protection is whether the communicative qualities present are related to the principles that justify treatment of speech as protected under the First Amendment—justifications like pursuit of knowledge, self-expression, or self-government.³²

One way in which the Court has framed the relevant inquiry is: “In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether ‘[a]n 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.’”³³ The Court’s focus on the communicative act, both from the standpoint of the speaker and the listener, is a sound way to frame the inquiry into speech. Perhaps a better way to judge whether the act at issue merits free speech protection is to ask simply whether it merits sufficient communicative qualities, regardless of content. For example, while intellectual, artistic, or entertainment qualities can be important, emotional, irrational, or internal thought processes are also noteworthy. What is relevant for the inquiry should be whether the act possesses sufficient “communicative qualities.” The speaker and the listener will themselves determine what are relevant communicative qualities for their purposes. The role of the courts is simply to judge, as a matter of law, whether the communicative qualities, of whatever sort, are adequate for First Amendment purposes to merit protection.

The qualities of communication satisfactory for First Amendment purposes should be considered broad, as broad as speakers and listeners determine. After all, Free Speech is a protected zone of freedom, and it is up to people to determine the domain of Free Speech, not government. Free Speech can partake of rational components of the human condition, such as over politics, science, literature, or academics. Free speech can as well partake of irrational domains of human existence, such as over religion, art, emotion, sense, or feelings. Since Free Speech is, at bottom, a reflection of the human condition in all of its dimensions, it is as varied as the human condition and should be protected in accordance with its variety. Justice Harlan well spoke to this element of the First Amendment:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inex-

logue and deliberation; and appreciating the human component of decision-making.

Edward J. Eberle, *The Right to Information Self-Determination*, 2001 UTAH L. REV. 965, 1011 (2001) (citing Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 425-28 (1992)).

32. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 276, 290-91 (1981) [hereinafter Schauer, *Categories*].

33. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

pressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.³⁴

Likewise, the medium of communication can be varied—consisting of standard forms of communication, like speaking, writing, or reading. But communication can consist of more unorthodox mediums too, like conduct, symbols, pictures, or silence. Or communication can be external (such as speaking, singing, writing, or painting) or internal (such as thought, sense, silence, or reading).³⁵ Again, what is relevant, simply, is that the behavior in question possesses sufficient communicative qualities.³⁶ The speaker and the listener will determine the nature and form of expression.

Here too, the Court, appropriately, has demonstrated how to meticulously evaluate behavior so that all possible communicative value may be gleaned. *R.A.V. v. City of St. Paul*³⁷ is a good example of this approach. Here, the Court evaluated actions involving the erection and placement of a cross assembled from the parts of a broken chair and then carried into a neighbor's yard and set aflame to determine what was speech and what was conduct.³⁸ The Court scrutinized the actions element by element, and not as undifferentiated wholes, to determine whether and which elements merited First Amendment protection and which did not.³⁹ The focus of the Court's inquiry was whether the element under review possessed sufficient communicative qualities.⁴⁰ The Court determined that the burning of the constructed cross possessed sufficient communicative qualities as a message of hate.⁴¹ Constitutionality hinged on the motives of government: did government act based on speech (which is presumptively unconstitutional) or conduct (which is the proper domain of government).⁴² In *R.A.V.*, there were both speech elements (hate speech) and conduct elements (trespass, arson,

34. *Cohen v. California*, 403 U.S. 15, 25-26 (1971); see also *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) ("[W]ritten and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. . . . Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished.").

35. Judge Posner has spoken to music as a free speech component. See *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1093 (7th Cir. 1990) (Posner, J., concurring) ("[E]ven if 'thought,' 'concept,' 'idea,' and 'opinion' are broadly defined, these are not what most music conveys; and even if music is regarded as a language, it is not a language for encoding ideas and opinions.").

36. Eberle, *ASU*, *supra* note 20, at 964.

37. 505 U.S. 377 (1992).

38. *Id.* at 379.

39. *Id.* at 386.

40. *Id.* at 393-94.

41. *Id.* at 393.

42. *Id.* at 382-84.

and threat). In *R.A.V.*, the Court determined that the City of St. Paul acted on speech motives in applying a content-discriminatory fighting words ordinance, which the Court found unconstitutional.⁴³ The Court's approach of micro-evaluating actions element by element for sufficient expressive properties is a sound methodology for approaching Free Speech questions. Speech qualities must be assessed quite carefully to squeeze out whatever value can be obtained so that people can have at their disposal as much information as possible to help assist them in self-determining the course of their lives to the greatest extent possible. Such a broad approach will presumptively favor speech, which is a core ingredient to the complexion of human personality and society.

R.A.V. is illustrative of the Court's quest over the last fifty years to broaden the domain of protected speech under the First Amendment. *R.A.V.* is one of the more extreme examples of this broadening enterprise of the Court. After all, the speech under review (fighting words) has been an unprotected category of speech since its inception in *Chaplinsky v. New Hampshire*.⁴⁴ Nevertheless, the Court applied an exacting form of strict scrutiny to the fighting words under review because it found the fighting words ordinance to be content-based and, worse, viewpoint-based.⁴⁵ *R.A.V.* is also illustrative of a second major enterprise of the Court with respect to the Free Speech project initiated by the Warren Court in the 1960s: "narrow[ing] [of] the scope of the traditional categorical exceptions,"⁴⁶ as measured against the baseline of the 1942 world of *Chaplinsky*.

In broadening the scope of protected Free Speech, the Court has accorded constitutional protection to these previously unprotected categories of speech: commercial speech,⁴⁷ lewd or profane speech,⁴⁸ and offensive speech.⁴⁹ The Court has also reconsidered the range of previously unprotected categories of speech and accorded certain constitutional protection to

43. *Id.* at 396. For extended discussion of this view of *R.A.V.*, see Eberle, *WF*, *supra* note 10, at 1152-54. The St. Paul Bias-Motivated Crime Ordinance provided:

"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."

R.A.V., 505 U.S. at 380 (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

44. 315 U.S. 568, 572 (1942).

45. *R.A.V.*, 505 U.S. at 393-96. For evaluation of these aspects of *R.A.V.*, see Eberle, *WF*, *supra* note 10, at 1142-43, 1154-58.

46. *R.A.V.*, 505 U.S. at 383.

47. *Compare* Va. State Bd. of Pharm. v. Virginia, 425 U.S. 748, 770 (1976) (holding commercial speech protected), *with* Valentine v. Chrestensen, 316 U.S. 52, 55 (1942) (holding commercial speech unprotected).

48. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 205-06 (1975).

49. *Cohen v. California*, 403 U.S. 15, 26 (1971).

them, including pornography,⁵⁰ libel,⁵¹ and incitement to violence.⁵² The Court has also recognized new forms of protected speech, including flag burning,⁵³ internet speech,⁵⁴ nude dancing,⁵⁵ and, most recently, videos of dog fighting.⁵⁶ The enterprise of broadening the reach of the First Amendment reflects a commitment to enlarging the channels of communication as much as possible so that people may have as much information as possible to self-govern their lives.⁵⁷ This is in line with the constitutional commitment to limitation of government as a structural way to empower personal liberty. In the area of Free Speech, this is a matter of fundamental rights.

In keeping with its mission to enlarge the scope of the First Amendment, the Court has also actively narrowed the range of traditional categories of unprotected speech. Notable topics of this narrowing exercise include fighting words,⁵⁸ libel,⁵⁹ and obscenity.⁶⁰ With *Virginia v. Black*, the Court clarified the unprotected category of threats by labeling it true threats.⁶¹ The apex of this movement, in recent time, is *R.A.V.*, where the Court reconceived the idea of unprotected categories of speech.

[S]tatements [concerning unprotected categories] must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand char-

50. *Miller v. California*, 413 U.S. 15, 36 (1973); *Roth v. United States*, 354 U.S. 476, 492-93 (1957) (holding adult speech is protected unless meets definition of obscenity).

51. *NY Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (determining that defamatory speech directed against public people was protected unless it meets the definition of actual malice).

52. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding all advocacy protected “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

53. *United States v. Eichman*, 496 U.S. 310, 319 (1990); *Texas v. Johnson*, 491 U.S. 397, 420 (1989); *Street v. New York*, 394 U.S. 576, 594 (1969).

54. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

55. *Barnes v. Glenn Theater, Inc.*, 501 U.S. 560, 565-66 (1991).

56. *United States v. Stevens*, 130 S. Ct. 1577, 1584, 1592 (2010).

57. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (“Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”).

58. *Cohen v. California*, 403 U.S. 15, 20 (1971) (“‘[F]ighting words’ [are] those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”) (redefining test for fighting words set out in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1941)).

59. *NY Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (redrawing notions of libel and defamatory speech that are unprotected; for public people, libel directed against them is protected unless it meets the definition of actual malice).

60. *Miller v. California*, 413 U.S. 15, 23-25 (1973); *Roth v. United States*, 354 U.S. 476, 487-88 (1957) (narrowing definition of proscribable obscenity).

61. *Virginia v. Black*, 538 U.S. 343, 359 (2003). Threats were first recognized in *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (per curiam) and then later clarified constitutionally by the Court in *Black*, 538 U.S. at 358-60 (citations omitted).

acterizing obscenity “as not being speech at all.” What [the Court] mean[s] 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. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government. . . . 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.⁶²

Relevant to an action, simply, is whether it possesses communicative qualities. If it does in sufficient quantity, the act should be protected under the First Amendment. A separate inquiry is whether the act also contains proscribable content. If there is sufficient illegal or harmful conduct, the speech can be regulated. Under this methodology, acts must be viewed microscopically, element by element, so that protected speech can be separated from legitimate harms. The broad dichotomy between speech (protected) and conduct (unprotected) is a useful guide to make this distinction, as discussed further later.

A final movement toward enlarging the scope of the First Amendment has been the Court’s reluctance to recognize new categories of unprotected speech. The Court has rejected these candidates of unprotected speech: flag burning,⁶³ outrageous and intentional infliction of emotional distress,⁶⁴ vice and temperance,⁶⁵ virtual child pornography,⁶⁶ and, most recently, dog fighting videos.⁶⁷ The only category of unprotected speech recognized in recent times is that of child pornography.⁶⁸ Child pornography constitutes a category of unprotected speech because “use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child,” and because “distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children”⁶⁹ Child pornography is unprotected speech because there is a clear demonstration of serious harm that is independent of the speech.

Together, these three movements—broadening the reach of protected speech, narrowing the categories of unprotected speech, and presumptively

62. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-85 (citations omitted).

63. *United States v. Eichman*, 496 U.S. 310, 315-17 (1990); *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989); *Street v. New York*, 394 U.S. 576, 592-93 (1969).

64. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216-17 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56-57 (1988).

65. *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484, 513-14 (1996) (plurality).

66. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 257-58 (2002).

67. *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010).

68. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982).

69. *Id.* at 758-59.

rejecting new candidates of unprotected speech—are of a like purpose. They are all part of the modern Free Speech project of enlarging the scope of the First Amendment so that members of society have as much information available as is possible to direct their lives; however, more needs to be done here. A crucial next project is further enlarging the circumference of the Amendment. The frontier of this enterprise is likely to lie with respect to fringe speech—speech that merits protection but is treated as of minimal value—like pornography and obscenity; workplace speech; video games; expanded professional communications; and business, corporate, and securities speech that might fit within the definition of commercial speech.⁷⁰ Now with the Supreme Court's recent decision in *Citizens United v. FEC*, corporate speech committed to political campaigns is treated the same as individual persons engaging in politics, and accorded high protection.⁷¹ *Citizens United* illustrates the Court's approach of broadening the circumference of speech. Consideration of speech at the fringe will, no doubt, push the inquiry further into resolving the tensions inherent in the interaction of communication with social reality.⁷² This project will inevitably present challenges to the coherence of Free Speech law and to our reasoning capabilities.⁷³

For our purposes, the result of the Court's handiwork is that the general rule of Free Speech jurisprudence is that Free Speech is presumptively protected unless government can persuasively prove the presence of a clear and present harm independent of the speech, as in the case of *Ferber's* recognition of child pornography as unprotected speech. Governmental targeting of harm that is purely communicative is presumptively constitutional. The harm government targets must be noncommunicative harm, such as child pornography. Identification and isolation of harm from speech is another central focus of the Free Speech project. This approach is the default rule: speech is protected unless there is clear demonstration of harm.

Many actions contain both communicative and noncommunicative content. A good example is, again, *R.A.V.* Cross burning can be communicative (hate) and behavioral (arson, assault, and battery). Resolution of such mixed speech/conduct acts is not easy and calls for quite careful consideration of the values at issue. A useful rubric to measure acts of asserted communication is the speech (protected)/conduct (unprotected) dichotomy. Does the action contain sufficient communicative content? For example, physical behavior like handing out materials on the street, wearing a jacket

70. Eberle, *WF*, *supra* note 10, at 1150-51; Eberle, *ASU*, *supra* note 20, at 969-71. Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1183-85, 1201 n.78 (1988).

71. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010).

72. Eberle, *ASU*, *supra* note 20, at 970.

73. Eberle, *WF*, *supra* note 10, at 1151.

with a picture or a word, or burning an object could be protected as speech if there is a sufficient quantum of communicative content. On the other hand, walking down the street and wearing a jacket with no message would be conduct, not speech.⁷⁴ These determinations will depend on a careful, pragmatic assessment of the act under the speech/conduct dichotomy. Constitutionally, of course, speech is presumptively off limits to government. We might consider the guarantee of Free Speech to be an end point of government, that is, a limitation on government power. Free Speech lies in the hands of the people, whereas regulation of conduct is the proper domain of government.⁷⁵

With these modern rules of Free Speech in place, we are left with another challenge: making sense of the complexity of the modern First Amendment. The Court's expansion of the scope of the Amendment has brought in more and more communicative content to the domain of Free Speech, which has raised its own set of problems. How do you value speech? Is one category of speech to be valued as another? Alternatively, should varieties of speech be valued differently? If so, how and on what basis? What rules of law should apply to different ordered speech? These are just some of the questions that comprise our next topic.

II. THE NEED FOR COHERENCE IN FIRST AMENDMENT LAW

Enlarging the scope of Free Speech protected within the First Amendment is a noteworthy enterprise, and a major accomplishment of the twentieth century Court. But expansion of the Amendment brings its own set of problems. It is one thing to apply the simple 1942 two-level rule of *Chaplinsky*, in which speech is either protected or not. It is quite a bit more complicated to, first, determine if speech is protected and, second, determine what level of protection it merits. This is one of the problems we now face in constructing and stabilizing the architecture of the First Amendment.

Speech, of course, is multivarious. Different forms of speech address different dimensions of human thought. Political speech speaks to our desire to affect public policy and the character of the society we live in.⁷⁶ Religious speech speaks to the transcendental yearning we experience (or do not experience) beyond the here-and-now of ordinary existence.⁷⁷ Academic or scientific speech speaks to our search for pure truth, trying to understand, de-

74. For detailed evaluation of this issue, see Eberle, *ASU*, *supra* note 20; Eberle, *WF*, *supra* note 10.

75. Of course, the speech/conduct dichotomy is a largely pragmatic distinction, a guide to make hard decisions. For consideration of this, see Eberle, *ASU*, *supra* note 20, at 964-65; Eberle, *WF*, *supra* note 10, at 1193-94.

76. *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-31 (1987).

77. Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1, 6 (2007-08).

wise, or reformulate the facts or rules that constitute the paradigms that comprise the world we live in.⁷⁸ Commercial speech speaks to basic product and service information we need to navigate our consumer society.⁷⁹ And so on.

All of these forms of speech, and more, justifiably merit protection under the First Amendment based upon Free Speech justifications, such as self-government, self-realization, autonomy, or pursuit of truth, to name some of the panoply of Free Speech rationales. The more complicated questions posed by the Court's expansion of the First Amendment is how to value different forms of speech, how to differentiate one form of speech from another, what rules of law apply to them, and how to make sense of what is now a complicated First Amendment jurisprudence. These are the questions at issue in the architecture of the First Amendment. A solid architectural foundation is critical to lending coherence and stability to the difficult issue of free speech. If we do not have a solid foundation, then we are left with a medley, potluck of divergent case law, which will be stirred into the pot and result in a blended mix of speech issues melding into one another, thereby creating confusion in the law.

We should think of the First Amendment as consisting of clusters of communicative content. The clusters are entwined around specific subjects, such as politics, religion, or commerce. Technically, we can characterize the clusters as categories of speech. A category demarcates a particular species of speech, which helps order thinking. Each of the categories consists of communication of a certain variety. And because speech is of different varieties, it may be valued differently, placed in a series of concentric circles. We might think of four levels of valuation. First-order speech consists of the central core of the First Amendment. Core or first-order speech consists of political, religious, academic, scientific, and artistic speech. *New York Times Co. v. Sullivan*, identified the very center of the First Amendment as a subspecies of political speech: the ability to engage in "criticism of official conduct . . . [is] the central meaning of the First Amendment."⁸⁰ Second-order speech consists of commercial speech, labor speech,⁸¹ and offen-

78. *Id.*

79. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757-61 (1976).

80. 376 U.S. 254, 273 (1964).

81. *Hughes v. Superior Court of Cal.*, 339 U.S. 460, 464-65 (1950) ("But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'") (citations omitted); *id.* at 468 ("compulsive features inherent in picketing"); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Speech on labor matters is important even if motivated by economic concerns. Nevertheless, one could conclude, as Justice Brennan, that "speech about commercial or econom-

sive speech, especially of the kind that might violate substantial privacy interests.⁸² Second-order speech can be characterized as the circle moving to the left of the core; a second concentric circle. Third-level speech includes private speech, including private defamatory speech,⁸³ pornography or adult-oriented speech,⁸⁴ libel directed against private people,⁸⁵ speech publicizing actions of private citizens implicating privacy interests,⁸⁶ offensive speech in restrictive forums,⁸⁷ and nude dancing.⁸⁸ Third-level speech can be

ic matters, even if not directly implicating ‘the central meaning of the First Amendment,’ is an important part of our public discourse.” *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 787 (1984) (Brennan, J., dissenting) (citations omitted).

82. The leading case here is *Cohen v. California*, 403 U.S. 15, 21 (1971), where the Court framed the rule: “The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.” This rule of *Cohen* is context, or a time, place, manner restriction, not content-based regulation. If the regulation is content-based, as the facts in *Cohen*, then strict scrutiny seemingly applies. “It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.” *Id.* at 26. In *Cohen*, of course, the speaker expressed his disgust with the Vietnam War by wearing a jacket that displayed “Fuck the Draft” on the back. *Id.* at 16. Thus, this communicative act was politically motivated and plausibly, therefore, constituted core political speech. Under this analysis, the content of speech was political. What was at issue was the mode of communication—that is, the use of an epithet to convey the message. *Id.* at 24. *Accord* *Erznoznick v. Jacksonville*, 422 U.S. 205, 217 (1975) (“We hold only that the present ordinance [regulating films that display nudity] does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression.”). Of course, speech that merely offends, without more, might be hard to value as core speech. Second-level speech would seem a more appropriate category.

83. *Dun & Bradstreet*, 472 U.S. at 759-60 (“In contrast, speech on matters of purely private concern is of less First Amendment concern. . . . While such speech is not totally unprotected by the First Amendment its protections are less stringent.”) (citations omitted).

84. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976) (plurality opinion) (social interest in nonobscene erotic films of lesser importance than interest in political debate).

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate. . . .

Id. at 70.

85. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325-26 (1974).

86. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578-79 (1977) (First Amendment media right to publicity may have to yield to privacy interest in securing ability to earn a living); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975).

87. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (radio as restricted medium justifies greater regulation).

88. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (“As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment’s protection.”); *Barnes v. Glenn Theater Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion). In *Erie*, the Court

characterized as the third concentric circle, moving two places to the left of the core. Fourth-level (unprotected speech) includes categories like obscenity,⁸⁹ actual malice defamation,⁹⁰ fighting words,⁹¹ incitement to violence,⁹² false facts,⁹³ and child pornography.⁹⁴ Fourth-level speech can be characterized as outside the circle of free speech protection.

Each of these levels of speech is not fixed. New species of communication can be valued as meeting any one of the four levels or, even, a new level. Existing categories of speech can be revalued, higher or lower. The process of valuation proceeds in conjunction with the flow of social reality. This is a living, organic process, not a fixed end point. The framework for Free Speech must be anchored securely, and yet, flexibly, to adapt to the changes brought about through the dynamics of social-reality.

The problem now posed is how to differentiate these four levels of speech from one another. Differentiating levels of speech from one another is crucial to the Free Speech project in order to assure that there is integrity and coherence to the First Amendment. We do not want the First Amendment to be compromised by random judicial judgments or ad hoc discretionary reasoning. A particular problem to be on guard for is a blending of differently valued species of speech that might occur by blurring the lines between differently-valued categories of speech. For example, is money spent to promote a certain good or service political or social speech or commercial speech? Merging of categories of differently valued speech might occur in two ways. One, the rules of lower-valued speech might be applied to speech that is higher valued. This is the critical problem of doctrinal dilution, by which higher valued speech is diminished by the misapplication of norms appropriate to lower valued speech.⁹⁵ We need to guard against this problem by forming a secure foundation for speech and adhering to the process of stabilizing the foundation.

The process could also go the other way: lower-ranked speech might be judged by the rules applicable to higher-ranked speech. *R.A.V.* is an example of this: judging fighting words, an unprotected category of speech, by

extended the "secondary effects" analysis applicable to zoning of adult entertainment facilities, as in *Young*, to nude dancing. 529 U.S. at 289. In essence, the Court applied the less stringent content-neutral test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), to nude dancing. The Court's analysis demonstrates the difficulty of making judgments about qualities, varieties, and treatment of species of speech. In fact, the Court's choice to apply the more lenient standard of *O'Brien* may have been its way of recognizing the lesser value of adult speech and nude dancing.

89. *Miller v. California*, 413 U.S. 15, 23 (1973).

90. *NY Times Co. v. Sullivan*, 376 U.S. 254, 283-88 (1964).

91. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942).

92. *Brandenburg v. Ohio*, 395 U.S. 444, 445, 447-49 (1969).

93. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 384 (1974).

94. *New York v. Ferber*, 458 U.S. 747, 750 (1982).

95. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

the rules of strict scrutiny applicable to core speech. We might think of the *R.A.V.* example as posing two choices. Does attaching high level scrutiny to unprotected categories of speech enhance speech protection? Thus, does this bestow even greater sovereignty in the people to determine their fate? Or, alternatively, does enhancing the protection of unprotected categories carry greater dangers to people and society? These are the critical questions of architecture that need to be worked out in order to preserve the integrity of the First Amendment.

Several rubrics are central to establishing and preserving a strong architectural foundation. First, there is a need for clear definition as to what constitutes a category of speech. Second, the speech must be evaluated according to central justifications of free speech (such as self-government, self-realization, or the pursuit of truth, to name a few) in order to assign the proper level of valuation of the speech. Justifications, like self-government, self-realization, or the pursuit of truth, would provide the underlying basis for first-order, core categories of speech. Once this is done, a third rubric is the employment of lexicographical reasoning, which calls for a lexical or serial ordering of values.⁹⁶ Under lexicographical reasoning, the value of a category of speech will be assigned the relevant level of judicial scrutiny. For example, core, high-valued speech will be judged under strict scrutiny; minimal, unprotected speech will be assigned rational basis review. The methodology of lexical reasoning will be quite helpful in lending coherence to Free Speech. Fourth, and finally, rules of judicial scrutiny must be clarified and assigned to the differently-valued levels of speech so that differently-valued speech can be demarcated from each other under appropriate rules of law. In this way, we can establish and maintain a certain coherence to Free Speech law.

III. THE ARCHITECTURE OF THE FIRST AMENDMENT

A. Defining Categories of Speech

The first question critical to the architecture of Free Speech is defining with precision a category of speech. When faced with a question of what to do with a species of protected speech, we must determine what kind of speech it is. Much rides on this initial value judgment. Is the speech in question protected or unprotected? If protected, what form of protected speech is it? Is the protected speech first-order or core speech? Likewise, if unprotected, what form of unprotected speech is it: obscenity, fighting words, or threat? Is the communicative conduct susceptible to multiple interpreta-

96. W.D. ROSS, *THE RIGHT AND THE GOOD* 43 (1930), discussed in Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 434-35 (1992) [hereinafter Eberle, *CW*].

tions? Could the communicative behavior exhibit more than one form of protected or unprotected forms of speech? For example, could the speech be political, but also commercial or an incitement to violence? If so, parts of the cluster of communicative activity may be protected speech. Protected speech could consist of communication involving protected categories of multiple types. Still other parts of the communicative activity might be unprotected. All of these judgments turn on the core question of how to value the communication at issue and judge it according to reliable speech criterion. For this, precise definition of the category of speech is essential, at least as is reasonably possible. We must all acknowledge that our thinking capabilities are not perfect, and this applies to fixing categories too.⁹⁷ We can only do the best we can.

Definition of core categories of protected speech is especially crucial because core speech is the very essence of what the First Amendment protects. For example, political speech partakes of our desire to speak out and affect public policy and the tenor of the society we live in. In *Hustler Magazine v. Falwell*, the Court framed the definition of political speech as concerning discussion of “ideas and opinions on matters of public interest and opinion.”⁹⁸ In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court articulated the definition of political speech more simply: “It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’”⁹⁹ The definition set forth in *Hustler Magazine* captures the important domain of public discourse, but it also serves as a ready definition of political speech more broadly. Under the definition, any discussion of an idea or opinion on a matter of public interest or opinion should be considered political speech, as engagement in political speech is essential to the lifeblood of democracy.

Religious speech, as I describe, is that which concerns people’s discussion of God or other transcendental yearning of what is beyond the experience of normal, ordinary existence. Settling the concept of what is religious in a legal, not theological sense, is a necessary but difficult determination. A look at Free Exercise law can be a useful starting point.

There are at least two approaches. In *Wisconsin v. Yoder*, the Court took a more conventional, established approach to defining religion. Amish belief was religious because it entailed a theocratic view “of deep religious conviction, shared by an organized group, and intimately related to daily living.”¹⁰⁰ The *Yoder* definition works well for conventional conceptions of religion, but it excludes the wide range of unconventional practitioners of

97. Schauer, *Categories*, *supra* note 32, at 280-81.

98. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

99. 472 U.S. 749, 758-59 (1985) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940))).

100. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

religion present in the United States. A more accommodating definition of religion can be gleaned from *United States v. Seeger*, where the Court fixed the standard for judging Congressional exemption from military service as “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God.”¹⁰¹ Synthesizing both of these definitions may provide a more realistic, and workable, definition of religious speech. For example, perhaps religious speech can be defined as speech concerning: a sincere and meaningful belief in a God, spirit, or transcendental force which occupies in the life of its possessor a crucial place intimately related to daily living. There might be other ways of defining religious speech. This question, as so many in Free Speech law, calls for careful working out through the hard crucibles of common law decision making.

Scientific or academic speech is that which involves the pursuit of knowledge. More precisely, we can think of scientific speech as that which advances the pursuit of knowledge through use of the scientific method in proposing a proposition that helps comprise the paradigms that organize the world we live in. More compactly, we might say scientific speech is speech that sets forth a scientific proposition.¹⁰² The Court has not yet settled on a precise definition of scientific speech, and so my definition can stand as a working definition for scrutiny and comment as we work to settle on a precise definition.

The same can be said for artistic speech, where the Court has also yet to provide a workable definition. I offer this definition of artistic speech in the interim: “Art speech is the autonomous use of the artist’s creative process to make and fashion form, color, symbol, image, movement or other communication of meaning that is made manifest in a tangible medium.”¹⁰³

More work must be done to frame and tighten these definitions of core categories of speech. The work of scholars or the hard facts of cases will provide ample opportunity to flesh out workable definitions of categories of speech, and then test them through experience in order to delineate more precisely their boundaries. However this is done, safeguarding the central core of Free Speech is the most urgent matter in Free Speech law because core speech is most central to our daily lives and the functioning of the democracy.

The same process of definition applies to species of speech that are not core or first-order categories. There are a range of types of speech that fit within second-order, third-order, and lastly, fourth-order or unprotected categories of speech that also call for precise definition. Rather than consid-

101. *United States v. Seeger*, 380 U.S. 163, 176 (1965).

102. Christopher P. Guzelian, *Scientific Speech*, 93 IOWA L. REV. 881, 899, 906 (2008). Of course, whether a scientific proposition is true or not will depend on the results of it being put to the test. Science is not always a predictable subject.

103. Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1, 7 (2007-08).

ering all of these possible categories, we will consider a few examples of defining a species of speech that comprises a category to illustrate the process. The process of definition is even more important for categories of speech that are not first-order or core speech because of the need to differentiate with clarity a lower-ranked category from that of core speech and, thereby, safeguard core speech.

Let us start with second-order speech because that presents all the crucial questions central to the architecture of the First Amendment: protecting speech that is valued, but valued less highly than core speech. Precision in definition is crucial in order to avoid the danger of doctrinal confusion—of valuing a category of speech either too highly or too lowly and thus assigning it too much or too little constitutional protection. Such doctrinal confusion can seep into other categories of speech, upsetting settled expectations, and undermining the cohesion of the First Amendment.

The Court was first presented with this dilemma when it reconsidered the status of commercial speech in 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁰⁴ Prior to *Virginia Pharmacy Board*, commercial speech was unprotected speech.¹⁰⁵

Determining that commercial speech should now be protected speech because, under conventional Free Speech justifications, commercial speech is an exposition of an idea, facilitates speaker and listener interests, and provides information, the Court was now faced with the question of exactly what is commercial speech.¹⁰⁶ The Court came up with this simple definition of commercial speech: “[S]peech which does ‘no more than propose a commercial transaction.’”¹⁰⁷ Conventionally understood, commercial speech is commercial advertising. As Justice Blackmun wrote for the Court,

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.”¹⁰⁸

The Court’s definition of commercial speech effectively specifies that commercial speech is and can only be commercial advertising—the selling of a product or service at a certain price—and not political speech, speech that editorializes, reports, or opines on matters germane to the world, in-

104. 425 U.S. 748 (1976).

105. The seminal cases establishing the unprotected status of commercial speech were *Valentine v. Chrestensen*, 316 U.S. 52 (1942) and *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980).

106. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-65 (1976).

107. *Id.* at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

108. *Id.* at 761.

cluding commerce. This process of definition demonstrates the precision in word choice and content that is necessary to delineate different categories of speech.

Likewise, the Court has done a good job of delineating unprotected categories of speech. The process of defining unprotected categories of speech is especially important because it “usefully channels official attention away from regulating speech and toward regulation of those narrow categories of speech so imbued or closely linked with serious harm. . . . The narrow definitions of these unprotected categories are designed to tailor closely governmental regulation to the underlying harm.”¹⁰⁹

For example, under *Brandenburg v. Ohio*, incitement can only be proscribed when the speaker intends to cause imminent unlawfulness and such unlawfulness is imminently likely to occur.¹¹⁰ Fighting words are only “those personally abusive epithets which, when addressed to the ordinary citizen, are . . . inherently likely to provoke violent reaction;”¹¹¹ actual malice public defamation is statements made “with knowledge that it was false or with reckless disregard of whether it was false or not;”¹¹² and obscenity is

(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.¹¹³

Precise definition of categories of speech is an important first step in establishing the architecture of the First Amendment.

Especially important to the architecture of the First Amendment is clarity in constituting unprotected categories of speech. In these cases, the

109. Eberle, *ASU*, *supra* note 20, at 962.

110. 395 U.S. 444, 447 (1969). The Court framed the incitement test as follows: [T]he 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.

Id. at 447..

111. *Cohen v. California*, 403 U.S. 15, 20 (1971) (redefining test set out in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

112. *NY Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

113. *Miller v. California*, 413 U.S. 15, 24 (1973) (citation omitted). The best arguments for treatment of obscenity as unprotected speech are: (1) it appeals to the sexual instinct and, thus, is more like conduct than speech, and (2) even if obscenity is speech, it is speech that is noncognitive. See Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922, 925-29 (1979); Frederick Schauer, *Reflections on “Contemporary Community Standards”: The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. REV. 1, 14-17 (1978). Thus, one might argue that such noncognitive speech has no relation to the First Amendment. *Id.*

burden is on government to show clearly that the behavior at issue meets the burden of proof set forth in the tests for unprotected categories of speech. This directs official attention to proving the elements that comprise harm, separate and apart from the speech. If government cannot make its case, the speech in question is protected. Unprotected categories of speech operate, in essence, as default rules: prove your case or the speech is protected under the First Amendment.

Directing governmental attention to the harm in question has the added benefit of shifting the battle away from speech. Directing the battle over the meaning of speech to the outside of the circumference of the First Amendment helps protect speech because the gales and flurries can pummel the edge of protection instead of the central cores of communication. Fighting battles at the core must be guarded against at all costs, lest we erode our fundamental freedoms. In this manner, speech may be insulated, to a degree, from the motives and proclivities of authority. In effect, the role of government is cabined: prove harm independent of speech. Speech itself is for citizens to determine. We can see how these are crucial elements to the architecture of the First Amendment.

B. Establishing the Criterion for Justifying Speech

A second matter critical to establishing the architecture of the First Amendment is determining the proper valuation of the numerous varieties of protected speech. This assumes, of course, the first question in Free Speech analysis: is the speech protected or not? In assessing the value of speech for this question, our assumption is that it has already been determined that the speech is protected under the First Amendment. Being protected under the First Amendment, we must determine what level of protection the speech in question merits.

To determine valuation of speech, we must establish a criterion that provides a sound and reasoned way of establishing the value of speech. I suggest this criterion. First, we must assess the value of speech: is it of sufficient value to be protected? Second, we must measure the speech action in question to determine how much conduct elements it has. We must then assess the communicative conduct against the speech/conduct dichotomy to determine whether it merits protection as speech or nonprotection as conduct. Of course, no criterion is perfect and is subject to interpretation, reassessment, and refinement. Perhaps other criterion might work as well. But the value of a criterion is that it provides a measure by which to assess speech and provide a basis on which to make a judgment thereby lending a certain structure and coherence to the First Amendment.¹¹⁴ Let me explain

114. JOHN RAWLS, *A THEORY OF JUSTICE* 39 (1971).

the rubrics of the criterion and then illustrate how they might be used to order the different valuations of speech.

1. *Value of Speech*

In providing content to the rubric of valuing speech, we must explain the value of speech. I suggest the key criterion in fixing a definition of value is the relevance of communicative activity to the human condition. Admittedly, this itself can be an obtuse and lengthy discourse on matters like meaning, existence, or knowledge—topics well covered through the ages of philosophy. But I am looking for a more pragmatic rubric, one that can aid in the organization of different categories of speech.

One key criterion in establishing the value of speech is its relation to a person's capacity to develop his or her mental faculties and personality and to aid a person in the living of his or her life. After all, Free Speech is a preserve of personal freedom, shielded from government absent exigent circumstance, and participation in Free Speech is the central way people can develop their capacities and achieve personal identity so they can live as they like. In the mind, a person thinks, deliberates, forms ideas and plans of action, and then voices and acts on those thoughts. We might think of the mind as the inner citadel of freedom, and that is why it is so essential to the human condition.

Certainly there might be other ways of framing this rubric. Development of mental capacities and personality has a certain resonance with theories of free speech famously articulated as ideas of "self-fulfillment,"¹¹⁵ "self-realization,"¹¹⁶ "liberty,"¹¹⁷ or "autonomous self-determination."¹¹⁸ All of these speak to the central concern of Free Speech: providing people with as much information as possible to make sense of themselves, their world, and human existence. Simply stated, speech is intricately related to the human condition in all of its dimensions. We ordinarily refer to these justifications of speech as deontological or nonconsequential because these justifications are valuable per se and do not depend on justification based on another value.

Free Speech also has an important role to play in addressing the human condition for the value it offers to purposes related to daily life. Most

115. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

116. MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 30 (1984); Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 679-80 (1982).

117. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47 (1989); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 658 (1982).

118. David Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

notably, Free Speech promotes the formation and structuring of the political will, a justification of speech resting on the idea of self-government or democracy.¹¹⁹ Or speech may be instrumentally valuable for the pursuit of truth, knowledge, or a better understanding of reality.¹²⁰ This variety of values is consequential or instrumental because its value lies in the furthering of other ends. In sum, the value of speech can be measured both for its ability to aid the human condition (nonconsequential) and to further improvement of daily life (consequential).

Demonstration of how the first rubric of value, based on, first, development of human capacity and personality (nonconsequential) and, second, aid in living (consequential), can be provided through illustration. Again, we resort to the core categories of speech, which are centrally related to development of human capacity and personality. For example, political speech is crucial to the ability of a person to be heard and valued as he or she thereby can affect the tenor of public policies and the character of the society we live in or hope to live in. These topics have a central impact on the human person and daily life. Religious speech addresses the transcendent, spiritual element of human personality. Scientific speech involves the search for pure truth and is crucial to human existence because it helps develop the thinking capacities central to human existence and autonomy. Art speech partakes of the creative process central and unique to human existence. All of these core categories of speech are central components in the development of human capacities, such as thought, personality, awareness, or identity.

Likewise, the core categories are centrally linked to promoting purposes crucial to daily life. For example, political speech furthers the marketplace of ideas critical to the fixing of public policies; religious speech is central to the acquisition of meaning in life; scientific speech helps form the data that comprises the paradigms we structure our world around; and artistic speech can be valuable in illustrating creativity, originality, and emotions integral to human personality.

We can see that all of these core categories of protected speech are central to human existence in the twenty-first century and thereby provide easy justification for their status as first-order, core categories. The more important question is how other, less highly-valued categories of speech come out under this rubric. A starting point, of course, is how a particular category measures up against a core category in relation to its importance to human personality. In a sense, this question calls for an examination of the Free Speech justifications of the category of speech in question, and examining how these justifications compare to the intrinsically and instrumental-

119. The classic work is ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

120. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

ly valuable justifications present in core speech categories. We will need to take up this question later, as first we must turn to explanation of the second rubric of justification.

2. *Speech/Conduct*

A second rubric useful to sorting out the value of speech is application of the speech/conduct dichotomy. To be protected constitutionally, behavior must possess communicative qualities; therefore, behavior devoid of communicative qualities is not protected speech.¹²¹ Instead, pure behavior directs official attention to the personal or social behavioral interests that should be secured in order to protect public health, safety, and welfare. These are the easy questions of Free Speech. The difficult questions of Free Speech involve behavior with elements of both communicative and noncommunicative qualities. An example is the burning of a cross in cases like *R.A.V.*¹²² or *Virginia v. Black*.¹²³ Burning a cross is a clear expression of hate, a vile truth the speaker is expressing. But burning a cross on someone's property could also be arson, trespass, or assault—all noncommunicative behavior.

The value of the speech/conduct dichotomy is as an organizing principle of Free Speech. Behavior can be of at least three types as measured on the speech/conduct dichotomy. First, behavior may be pure speech, devoid of conduct. Examples of this would be talking, writing, raising your finger to say "fuck you," burning a flag, or communication of a threat. Even with pure speech, we must determine if the pure speech is protected or unprotected. If the speech is considered protected, like political or religious speech, then it is constitutional. However, even if the action is pure speech it may be unprotected. Examples would be a threat, false speech, actual malice defamation, or obscenity. Second, behavior may contain a mix of speech and conduct, as in *R. A. V.* and *Black*. In this case, some of the behavior may be protected speech, and some of it will be unprotected speech. Third, behavior can be pure behavior, devoid of speech and, therefore, unprotected speech. An example of this would be driving a car.

Application of the speech/conduct rubric provides a measure by which to assess a category of speech's position on the speech/conduct rubric. The closer the speech stands in relation to speech, the greater justification for its higher valuation. The closer the speech stands in relation to conduct, the lesser justification for its higher valuation. Use of the speech/conduct dichotomy is critical to preserving the integrity of the First Amendment. Crucial here is protecting the core of Free Speech. Whatever battles are to be

121. See *Spence v. Washington*, 418 U.S. 405, 409-10 (1974).

122. 505 U.S. 377, 379 (1992).

123. 538 U.S. 343, 343 (2003).

fought over Free Speech, they should occur at the fringe of the Amendment, not its core. Speech/conduct helps direct the placement of these battles.

Before applying the rubric of speech/conduct, we need to be clear what speech and conduct mean. The speech/conduct dichotomy is largely a pragmatic distinction. All speech activity is behavior; for example, reading and writing, speaking and listening, or picketing. What distinguishes it as speech are its communicative qualities. Behavior devoid of noncommunicative qualities constitutes conduct, which is a legitimate interest addressed by the police powers of government. Thus, the only relevant inquiry for Free Speech is: how much and how valuable are the communicative qualities present in the behavior at issue? Restating the measure: the greater the presence of communicative qualities, the stronger the argument for speech protection; the greater the presence of noncommunicative qualities, the stronger the argument for treatment as conduct.

Use of speech/conduct understood in this way can be a helpful tool to sort out the varied valuations of speech. A good example involves commercial speech. Commercial speech is, of course, speech because it constitutes the communication of an offer of a service or product for a stated price—essentially a commercial advertisement. But the quality of the communication also relies upon underlying conduct components. Commercial advertising is really the offer of a contract: buy this product or service at this price. “[T]he commercial speaker not only talks about a product, but also sells it.”¹²⁴ There is a close nexus between “the speech proposing a commercial transaction and the subsequent transactions in which sellers and buyers engage.”¹²⁵ The subsequent transaction is handled by contract law, which regulates the behavior of contracting parties; contract law speaks to conduct, not speech. Thus, in measuring commercial speech, we can see that it has a close relationship to conduct. Its closer relationship to conduct can be useful

124. Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 386 (1979) [hereinafter Farber, *Commercial Speech*]; see Daniel Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 935-36 (2009) [hereinafter Farber, *Categorical Approach*] (observing how commercial speech and pornography are based on profits, more akin to conduct than speech).

125. Eberle, *CW*, *supra* note 96, at 462. For careful explication of commercial speech’s proximity to contract law, see Farber, *Commercial Speech*, *supra* note 124, at 387-89. The contractual function of commercial speech helps

explain[] the intuitive belief that commercial speech is somehow more akin to conduct than . . . other forms of speech. The unique aspect of commercial speech is that it is a prelude to, and therefore becomes integrated into, a contract, the essence of which is the presence of a promise. Because a promise is an undertaking to ensure that a certain state of affairs take place, promises obviously have a closer connection with conduct than with self-expression. Second, this approach focuses on the distinctive and powerful state interests implicated by the process of contract formation.

Id. at 389.

in assigning a proper valuation to commercial speech under the First Amendment. Because commercial speech stands in a close relationship to conduct through contract law, it should merit less valuation as speech than speech that stands in a more distant relationship to conduct, such as most political or religious speech.

Evaluation of commercial speech with the speech/conduct dichotomy also serves other important values of the architecture of the First Amendment. The contractual purpose of commercial speech provides a basis for identifying commercial speech, a basis captured in its definition as “speech which does ‘no more than propose a commercial transaction.’”¹²⁶ A key distinguishing trait of commercial speech is its close nexus between speech and the ensuing commercial transaction. By so crystallizing the definition of commercial speech, its content and treatment can be demarcated from other elements of speech, thereby forming an important component of precise categorization.¹²⁷

126. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)). The Court also distinguished commercial speech as possessing lesser value than core speech on account of its easier verifiability and greater durability than other types of speech, convincing rationales for assigning a species of speech a lesser protected status. *Id.* at 771 n.24. Measuring speech based on its relationship to verifiability and durability is an additional sound way to order the value of speech. By this measure, the more verifiable or durable speech is, the tendency would be to value it lower because its dissemination will ordinarily be robust on account of its nature and therefore less in need of enhanced protection from the human tendency to control, through censorship in the case of speech. For example, commercial speech is verifiable because it is an offer of a product or service that represents an underlying real contractual relation. Measuring the commercial speech as contract offer against the actual commercial transaction, the speech either mirrors the actual commercial transaction and is, therefore, true, or the speech is misleading or false. *Id.* Likewise, commercial speech is more durable than other forms of speech because money is spent to promote it. At the root of commercial speech lies the profit-motive. Commercial advertising thrived in the world before *Virginia Pharmacy* in 1976. For elaboration of this rationale, see Eberle, *CW*, *supra* note 96, at 469-76. Labor speech and political campaign donations are also likely to be more verifiable and more durable species of speech for the reasons described above with respect to commercial speech. See, e.g., *Dun & Bradstreet, Inc., v. Greenmoss Builders*, 472 U.S. 749, 787-89 (1985) (Brennan, J., dissenting). Compare “In evaluating the subject matter of expression, this Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience,” with “Speech about commercial or economic matters, even if not directly implicating ‘the central meaning of the First Amendment,’ is an important part of our public discourse.” *Id.* at 787 (quoting *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964)). Most critical to a system of free speech, speech that is more verifiable and more durable is less likely to involve unpopular or dissenting views and, instead, is more likely to entail popular views. Given the configuration of majoritarian views with majoritarian power, there is likely to be a much lesser danger of overregulation or censorship. These make for sound reasons why species of speech that are more verifiable and more durable are less deserving of a status of core speech.

127. Eberle, *CW*, *supra* note 96, at 463.

Further, the contractual function of commercial speech brings into focus the important state interests that underlie commercial speech. These state interests include contract doctrines of falsity, fraud, misrepresentation, coercion, overreaching, harassment, duress, and unconscionability. Identification of state interests like these uncovers a legitimate concern of government—consumer protection—apart from speech. Government can have a legitimate interest in regulating speech that does not implicate First Amendment values, thus providing a basis for regulation apart from suppression of speech. Identifying a basis for governmental regulation apart from speech better protects speech from suppression.¹²⁸ We can thus see how use of a speech/conduct dichotomy can be helpful to sorting out the issues involved in protecting Free Speech.

Assessment of categories of speech against the two rubrics of value and speech/conduct will call upon our reasoning abilities and sound judgment. We will need to employ the skill of practical reasoning—reasoning through the problem in a sound analytical manner so that “reasonably reliable”¹²⁹ solutions can be reached. Part of this will involve use of intuitionism—identifying first principles and then assessing categories of speech against them. This would be the approach of nonconsequentialist thinking, and it has especial importance in determining first order forms of speech, which then can serve, in turn, as a measure for other, lower-ordered forms of speech. And part of this will entail practical reason—assessing the values and interests presented by a category of speech, understanding them in their context, and comparing them to other forms of speech to see where they sit in the world of Free Speech. The results of real life scenarios decided in cases will be particularly instructive.

Still, we must be quite careful here. The older two-level theory of *Chaplinsky* had certain advantages. Most importantly, the methodology of speech was quite simple: speech was either protected or not. This had the great advantage of making Free Speech doctrine coherent, especially for those on the front-line of the Free Speech battles: prosecutors, authorities, and judges. The modern reconception of Free Speech, however, has effectively undermined the technical applicability of the *Chaplinsky* approach.

Yet, we need to recognize certain guideposts. First, the two-level theory suggested by *Chaplinsky* still applies, analogously, in the modern methodology of determining whether speech is protected or not. Consider again the categorical approach: government must prove the elements that comprise an unprotected category of speech. If government cannot make its case, the speech is protected. This helps direct the Free Speech battles to

128. *Id.*

129. RAWLS, *supra* note 114, at 44.

where it most matters: at the fringe of the Amendment, which has the important benefit of safeguarding the core.

Second, given the complexity of social reality and how it has been reevaluated through the First Amendment prism—resulting in protection for many more types of speech that are of different value—the levels of Free Speech protection have been expanded from two to four. This is an inevitable consequence of the broadening of the Amendment. Still, we must be careful here. We should be reluctant to create secondary categories of speech, at levels of two or three, in order to present as simple and coherent a theory of Free Speech as we can. This is especially significant for those on the frontlines of the Free Speech battles (again, prosecutors, authorities, and judges) so that mistakes in application of law will be less likely.¹³⁰ The process described in this Part suggests one reasoned way to accomplish this objective; that is applying a species of speech against the criterion for fixing valuation.

C. Ordering Speech

Given that the modern First Amendment contains a variety of differently-valued speech, it is quite likely to present new candidates for inclusion or noninclusion in the Amendment (such as, for example, videos of dog fights, just recently decided by the Supreme Court as protected speech¹³¹) that themselves will involve communicative value of different orders. It is important we sort out the different levels of speech. Quite helpful to the ordering of levels of speech are insights derived from moral philosophy. The tools of moral philosophy call for use of reason and logic to sort out the principles that comprise knowledge and help resolve conflicts among contending moral principles. When faced with this dilemma, a way must be found to resolve the conflict. Essentially, this calls for use of judgment; we need to critically analyze the situation, considering all of its components, so that it may be resolved in an ethically satisfying manner.¹³²

John Rawls characterized this approach as “intuitionism.”¹³³ By intuitionism, Rawls meant a doctrine containing “an irreducible family of first principles which have to be weighed against one another by asking ourselves which balance, in our considered judgment, is the most just.”¹³⁴ Intuitionism relies on our powers of reasoning and judgment. We identify principles we consider “most just” or “most nearly right.”¹³⁵ Intuitionist theories

130. Schauer, *Categories*, *supra* note 32, at 294-96, 306-07.

131. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

132. Eberle, *CW*, *supra* note 96, at 433; *see generally id.* at 433-40.

133. RAWLS, *supra* note 114, at 34.

134. *Id.*

135. *Id.*

can be deontological or instrumental, but most commonly, they are deontological.¹³⁶

An example of a deontological intuitionist theory is that of W.D. Ross. Ross viewed the problem of moral philosophy as one of distributive justice, calling for the distribution of goods according to moral worth. But “while the principle to produce the most good ranks as a first principle, it is but one such principle which must be balanced against the claims of the other *prima facie* principles.”¹³⁷ Thus, when presented with a justice conflict between competing moral claims, one must try to find a “constructive answer . . . to the problem of assigning weights to competing principles of justice.”¹³⁸ This is referred to as the “priority problem” in moral philosophy.

We can see the ready analogy to Free Speech law. Like moral philosophy, Free Speech contains a number of values that vie for dominance. Seminal Free Speech values include pursuit of truth and knowledge, self-government, self-realization, personal autonomy, and the like. Each of these values stands in a close relationship to underlying purposes of speech: proximity to human existence and to human daily life. The importance of communication is generally judged insofar as it furthers seminal values like these. The closer relation the communication has to core Free Speech values—implicating matters central to human existence—the greater its value; conversely, the lesser relation the communication has to core Free Speech values, the lesser the value. We need a rubric to sort out the possible ways of judging speech, a problem shared with moral philosophy.

Here, too, we can resort to moral philosophy for some useful guidance. A major tool to employ is lexicographical reasoning, which calls for a serial or lexical ordering of values. It “requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on.”¹³⁹ In this manner, Ross ranked moral worth as lexically superior to nonmoral values. Kant placed the priority of rights as the first rank.¹⁴⁰ These are clear orderings: moral values should outweigh nonmoral values; rights or *prima facie* duties should outweigh other considerations. A more difficult problem is a conflict between moral values of equal weight. In such situations, the conflict must be evaluated and resolved in an ethically satisfying manner.¹⁴¹ Here, we must rely on our reasoning capabilities; we must critically evaluate the situation, sifting through and considering carefully all of the possibilities, consequences, and the respective weights of the interests through use of sound practical judg-

136. *Id.* at 40.

137. *Id.* (citing ROSS, *supra* note 96, at 21-27).

138. *Id.*

139. *Id.* at 43.

140. *Id.* at 42-43 n.23.

141. ROSS, *supra* note 96, at 149-54.

ment.¹⁴² This task is one “of reducing and not of eliminating entirely the reliance on intuitive judgments.”¹⁴³ The goal is to reach a “reasonably reliable agreement.”¹⁴⁴

Serial or lexical reasoning has ready application to Free Speech law. First, serial reasoning can be quite useful in ordering the various categories of speech. As with moral philosophy, we must rank the speech according to its value. Highly-valued core speech, such as political, religious, scientific, or artistic, will be assigned the greatest value. Such core speech will be presumptively protected unless there is some clear demonstration of a concrete harm to a person or society. Second, serial reasoning can also be quite useful in ordering socio-economic concerns that government is addressing as valid state interests. Here, different levels of legal analysis will apply to the significance of the state interests. If the state interest is of an overriding concern, then a very strict line of analysis will be applied to the speech to determine which of the speech or the governmental interest is weightier. If the state interest is basic, then a loose line of analysis will be applied to the speech, almost always resulting in the speech trumping the state interest.

Applying serial reasoning to categories of speech, we can come up with the ordering of speech according to the four levels discussed above. First-order speech is the most prized because it has the closest relationship to the seminal values of expression, such as understanding and furthering control of the human condition through values of personal autonomy or self-realization, or through understanding or influencing the world around us through values like self-government or the pursuit of truth. Because of their close relationship to these seminal nonconsequential and consequential values, we group first-order, core speech as political, religious, scientific, and artistic speech. Second-order speech has important communicative properties but has a less close nexus to the seminal values of speech and, also, may have a closer relationship to conduct as measured by the speech/conduct dichotomy. Our discussion of commercial speech illustrates why this is so. Thus, we might say second-order speech comprises commercial speech, labor speech, and offensive speech, to name some species. Third-level speech has an even further distance from the seminal values of speech and may have an even closer connection to conduct. For example, in the case of nude dancing, dancing, even in the nude, certainly conveys a message. The message here is adult entertainment, as if you were watching live entertain-

142. Aristotle would have referred to this as “practical judgment” or “practical wisdom.” ARISTOTLE, *NICHOMACHEAN ETHICS*, BOOK VI (Martin Ostwald trans., 1962). Kant termed it “universal practical reasoning.” IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 32-33 (Robert Paul Wolff ed., Lewis W. Beck trans., 1976) (all moral concepts have their origin in practical, rational reasoning).

143. RAWLS, *supra* note 114, at 44.

144. *Id.*

ment, like a play or a dance. However, to the extent that nude dancing is for adult entertainment, it is somewhat remote from seminal Free Speech values like self-realization or pursuit of truth, even remoter than that of commercial speech. Because the adult-oriented nude dancing is ordinarily done in exchange for money and arousal of the sexual function, it also has a closer nexus to conduct.¹⁴⁵ Conventional third-level speech would be nude dancing, pornography, defamation against private parties, and private speech. Finally, fourth-level or unprotected speech has the most remote connection to core speech values and the closest proximity to conduct. For example, a threat is quite far removed from seminal speech values and, instead, quite closely related to conduct; in fact, it is a communication about ready to gestate into conduct. Standard fourth-level speech is obscenity, actual malice defamation, incitements to violence, threats or fighting words, among others. Of course, each of the four categories of speech is open for both new candidates and for reassessment of the status of existing candidates. The dynamics of social reality are such that change is always afoot.

We might likewise use serial reasoning to order social interests that are juxtaposed against speech. For example, first-order or “compelling” governmental interests would include clear, present, imminent, and serious dangers to individuals; the state order; or public health, safety, or welfare. Here, we might include interests like threats, incitements to violence, or serious threats to national security, such as “publication of the sailing dates of transports or the number and location of troops,” especially during wartime.¹⁴⁶ Second-order or “substantial” state interests would include speech that is deceptive, misleading, or violative of certain human interests, such as privacy concerns.¹⁴⁷ Third-order or “rational” interests would include the traditional concerns of things like maintaining the streets and public facilities in a sanitary and workable fashion.

Use of serial reasoning can thus offer a certain structure and coherence to Free Speech law. But, of course, serial reasoning, as with any reasoning, can only go so far, providing aid, but not a complete solution. The essence of Free Speech decision making, like all legal decision making, is solving the concrete problem. For this, we must, once again, rely upon our reasoning capabilities. Here, use of sound, practical judgment can be of great use.

Use of practical judgment, luckily, does not occur in a void with respect to First Amendment law. We have a rich tradition of constitutional decision making, relying on concern for the Constitution’s language, struc-

145. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (“As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment’s protection.”); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion).

146. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

147. *Cohen v. California*, 403 U.S. 15, 21 (1971).

ture, context, and history, and then consideration of the large body of precedent, which usefully illustrates what works and what has not worked. Common law decision making is central here, which entails use of:

reasoned judgment [which is] close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value. . . .

. . . like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse. . . .

. . . Common law method tends to pay respect . . . to detail, seeking to understand old principles afresh by new examples and new counterexamples.¹⁴⁸

Thus, these judgments are not unguided but bounded by identifiable principles and techniques.

Here, too, we can start with serial reasoning, applying it to the context of concrete decision making. For example, first-order speech, like political speech, clearly outweighs third-level interests, like maintaining the street. Such speech will presumptively outweigh second-level interests, like deception or certain privacy concerns; but it may or may not prevail over first-order interests, especially if they are a clear and present danger to a person or the social order. Likewise, third-order speech, like private speech, might outweigh a third-order interest like the sanitation of the streets. But it will not prevail over a second-order interest, like deception; and it will certainly lose in relation to a clear and present danger. Serial reasoning will not answer all questions, but it will lend structure and a certain coherence to Free Speech questions.

In this way, attention can be directed to solving the concrete balance between speech and social interests within the serial order. The judgment to be made is thereby cabined within appropriate limits offered by serial reasoning. After that, the question must be resolved through the standard process of concrete practical reasoning, the optimal form of common law decision making. Taking account of the rich constitutional tradition described above, we must then search for reasonably reliable judgments as to how to make the proper accommodation of speech values in relation to state interests situated in a socio-economic context.¹⁴⁹

D. Levels of Scrutiny

A final rubric crucial to establishing and maintaining the architecture of the First Amendment is assigning appropriate levels of scrutiny to the

148. *Washington v. Glucksberg*, 521 U.S. 702, 769-70 (1997) (Souter, J., concurring) (internal citations omitted) (discussing *Poe v. Ullman*, 367 U.S. 497, 542-44 (1961) (Harlan, J., dissenting and Harlan's elaboration of substantive Due Process judicial decision making).

149. Eberle, *CW*, *supra* note 96, at 439-40.

differently-valued categories of speech. Speech must be ordered according to its value. In a system of law, this calls for development and application of a rule of law in accord with the value of speech. Through the process of valuation and its ordering by serial reasoning, we have seen how communication can be sorted pursuant to four levels of value: high, intermediate, low, and minimal. We must now establish a rule of law appropriate to each of the four levels of speech.

Establishing a system of law concerning speech is critical to delineating the different categories of speech so that their value can be properly assessed for its own worth. Identification of the species of speech is critical to this task. Two means are readily available to accomplish the task of identification. The first is fitting the species of speech into its properly defined category; for example, speech that concerns matters germane to public policy constitutes political speech. The second is the corollary to this process of assigning the proper level of scrutiny to the category of speech under review. By identifying speech by its category and its level of scrutiny, we can establish a sound structure to order speech according to its value. The structure provides a workable way of ordering speech according to its value so that one level of speech is judged properly according to its estimation as compared to it being judged by rules of law more applicable to speech that might be higher or lower valued. This process of separating speech by value allows legal authorities to focus attention on the speech for its own qualities. Most importantly, the ordering structure helps guard against a major concern of modern Free Speech law: doctrinal confusion—caused by judging a species of speech according to levels of scrutiny that are appropriate to either higher- or lower-valued categories. Such misapplication of doctrine carries with it the danger of undermining the structure of First Amendment law. Clarity and cohesion in the law will help rein in the discretion of judges, who play the major role in the development of Free Speech law.

Now we are called upon to develop the rules of law applicable to the categories of speech. The four levels of speech each have their own level of scrutiny. Core or first-order speech is judged pursuant to strict scrutiny; intermediate or second-order speech is judged pursuant to intermediate scrutiny; third-order or low-level speech is judged according a general balancing of interest test comparing the merits of the speech versus the merits of the regulation; and fourth-order or minimal-value speech is judged by the rational basis test, where government simply has to show a rational reason for the law resulting in the speech being unprotected. Each of the four levels of scrutiny can be classified differently.

First-order and fourth-order speech can be labeled as categorical: the speech is classified as a categorical formula involving a prepackaged formu-

la which will lead to relatively predictable outcomes.¹⁵⁰ For example, first-order speech will be evaluated under strict scrutiny. Under strict scrutiny, speech will almost always win unless government can prove a compelling or urgent case—a weighted balancing test that tips the scale heavily in favor of speech. Strict scrutiny is highly predictable. Minimally-protected speech will almost always result in a determination of unprotected speech unless the government fails to show any plausible basis for the legal measure. Here, the weighted balancing test tips the scale in favor of the government.

The categorical formula can be classified as a rule; the rule can act as a safe harbor, guarding first- and fourth-order speech from the vicissitudes of human nature. The rule-based approach lends itself to high predictability in Free Speech law by setting out clear rules of law that provide useful guidance about the permissible scope of regulation to governmental officials, like legislators and judges, and thereby helps significantly limit personal discretion, most notably employed by judges, but could also involve lawyers, speakers, and listeners.¹⁵¹ We can think of rules as cementing the core of First Amendment architecture.

By contrast, second- and third-order speech involve a balancing approach. Under the balancing approach, the importance of the value of speech must be measured against the importance of the governmental interests.¹⁵² The balancing is more akin to an act of judicial judgment. The balancing approach can be classified as a standard, not a rule. Balancing is

150. Farber, *Categorical Approach*, *supra* note 124, at 919, 920-21; see also Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293 (1992) [hereinafter Sullivan, *Post-Liberal Judging*].

Categorization is the taxonomist's style—a job of classification and labeling. 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. [In contrast] [b]alancing is more like grocer's work (of Justice's)—the judge's job is to place competing rights and interests on a scale and weigh them against each other. Here the outcome is not determined at the outset, but depends on the relative strength of a multitude of factors.

Id. at 293-94. As Kathleen Sullivan observes, "Categorization corresponds to rules, balancing to standards." Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59 (1992) [hereinafter Sullivan, *Supreme Court*]. Categoricalism "promote[s] economies for the judicial decisionmaker by minimizing the elaborate, time-consuming, and repetitive application of background principles to facts." *Id.* at 63. "[O]nce the categories are established, further ad hoc balancing is cut off . . ." Sullivan, *Post-Liberal Judging*, *supra* at 295 n.6. "Rules, once formulated, afford decisionmakers less discretion than do standards." Sullivan, *Supreme Court*, *supra* at 57.

151. Farber, *Categorical Approach*, *supra* note 124, at 932. ("[W]e have particular reason to want to avoid having the judges' ideological biases enter into the decision, lest those biases then have a distorting effect on public discourse.").

152. *Id.* at 919.

more open ended as compared to the close-ended, categorical approach. “Balancing suggested a particularistic, case-by-case, common law approach that accommodated gradual change and rejected absolutes.”¹⁵³ Only through case-by-case determinations will the standard approach become somewhat clearer, perhaps resulting in some form of concrete guidance. Still, given the discretionary approach of balancing, it will be far less predictable than a categorical approach.

Comparing categoricism against balancing, categoricism puts the case “inside certain predetermined, outcome-determinative lines,” leading to high predictability and clarity in the law.¹⁵⁴ Balancing involves a weighing of the right against the governmental interest. Thus, categoricism “binds a decision-maker to respond in a determinative way to the presence of delimited triggering facts,” whereas “[b]alancing . . . ‘tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.’”¹⁵⁵ This is the difference between rules (categories) and standards (balancing).

The genesis of this approach likely originated in the debate between Justices Black and Frankfurter. Justice Black wanted to confine judicial discretion, whereas Justice Frankfurter wanted to exercise judicial discretion. Justice Black asserted an approach of categoricism:

[T]he very object of adopting . . . the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to “balance” the Bill of Rights out of existence.¹⁵⁶

By contrast, Justice Frankfurter believed in a balancing approach:

Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country. . . . If adjudication is to be a rational process, we cannot

153. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 961 (1987).

154. Joseph Blocher, *Categoricism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381 (2009).

155. *Id.*

156. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting). To apply the Court’s balancing test . . . is to read the First Amendment to say “Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.”

Barenblatt v. United States, 360 U.S. 109, 143 (1959) (Black, J., dissenting). “[U]nless we once again accept the notion that the Bill of Rights means what it says and that this Court must enforce that meaning, I am of the opinion that our great charter of liberty will be more honored in the breach than in the observance.” *Id.* at 143-44.

escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title deeds.¹⁵⁷

Let me now speak briefly to each of the four levels of scrutiny. Core or first-order speech is judged pursuant to the most exacting scrutiny. This is appropriate because core speech possesses the most communicative value, either on account of its intrinsic worth to the human condition or its value in furthering ends crucial to daily life. The Court has framed its genre of most exacting scrutiny as strict scrutiny, analysis that requires government to justify its regulation as “necessary to serve a compelling state interest and [] narrowly drawn to achieve that end.”¹⁵⁸ Strict scrutiny normally attaches when fundamental rights are implicated or when government targets people based on traits comprising justifications for a suspect class or similar discriminatory treatment under equal protection review.¹⁵⁹ Core speech, by definition, is considered to be the very essence of the fundamental right of Free Speech, thereby meriting its incursion only upon justification by the most exacting, strict scrutiny.

Strict scrutiny analysis is well worked out and highly predictable. Gerald Gunther’s famous description of strict scrutiny as “‘strict’ in theory, and fatal in fact”¹⁶⁰ still largely applies with respect to core speech determinations, and this is appropriate. The Court has toyed with the definition and application in recent times. But this effort, at least concerning Free Speech, has been directed to heightening the degree of review associated with strict scrutiny. *R.A.V.* is the best example of this phenomenon. In *R.A.V.*, the Court developed and applied a two-level approach to strict scrutiny when content regulation was at hand. Content regulation can be either subject matter discrimination or viewpoint discrimination. Subject-matter discrimi-

157. *Dennis v. United States*, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring). Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.

Id. at 524-25 (Frankfurter, J., concurring).

158. *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

159. *Compare Korematsu v. United States*, 323 U.S. 214, 216 (1944) (discriminating against discrete and insular minorities constitutes suspect class triggering strict scrutiny), with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 219-24 (1995) (under color-blind approach applicable to affirmative action, preference of race triggers strict scrutiny).

160. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The Court has reduced the strength of Gunther’s classic formulation of strict scrutiny in equal protection affirmative action cases. *Adarand Constructors, Inc.*, 515 U.S. at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”). No such reduction of strict scrutiny analysis is discernible in Free Speech law.

nation is justifiable only upon satisfaction of traditional strict scrutiny analysis. When viewpoint discrimination is afoot, however, as in *R.A.V.*, then the Court applies a more exacting standard to judge the means chosen by government to pursue the compelling end. In *R.A.V.*, the viewpoint discrimination in singling out only politically incorrect forms of fighting words could be justified only if it were “*necessary* to serve the asserted [compelling] interest,” even though the Court conceded that the city had met its burden in showing that it had a compelling reason to act.¹⁶¹ I have referred to this form of analysis as “strict scrutiny plus necessity,”¹⁶² and it shows how there is room to work out even more precise formulations of law through the process of concrete decision making.

Second-order or intermediate categories of speech merit intermediate scrutiny, originated in *Virginia Pharmacy*, and still applicable today as framed by the Court in *Central Hudson Gas v. Public Service Commission*:

For commercial speech to come within . . . [the First Amendment], 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 government interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁶³

Applicable to commercial speech, this test states the core elements of intermediate scrutiny: that the governmental interest be substantial or im-

161. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (citations omitted) (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion)). For fuller discussion of this point, see Eberle, *WF*, *supra* note 10, at 1170-78.

162. Eberle, *WF*, *supra* note 10, at 1178. Perhaps the Court may, at some point, be headed for even more enhanced protection of speech than employment of conventional strict scrutiny. Justice Kennedy has even argued for a *per se* rule of unconstitutionality in cases of pure censorship, in place of strict scrutiny:

The case before us presents the opportunity to adhere to a surer test for content-based cases and to avoid using an unnecessary formulation [strict scrutiny], one with the capacity to weaken central protections of the First Amendment. I would recognize this opportunity to confirm our past holdings and to rule that the New York statute amounts to raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press. That ought to end the matter.

Simon & Schuster v. N.Y. Crime Victims Bd., 502 U.S. 105, 128 (1991) (Kennedy, J., concurring). By contrast, in race-targeting equal protection law, the Court has lowered the level of strict scrutiny. “[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” *Adarand Constructors*, 515 U.S. at 237.

163. *Central Hudson Gas & Electric Co. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980). A plurality of the Court has recently argued that truthful commercial speech should be accorded the highest level of protection, strict scrutiny. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion). This makes sense, as truthful speech is valuable for both speakers and listeners and presents no harm. Eberle, *CW*, *supra* note 96, at 485-91.

portant and that government employ means substantially related to the substantial governmental interest. The *Central Hudson* test for speech is in need of refinement. The first two elements of the *Central Hudson* test seem legitimate. Commercial speech cannot be protected as speech unless, one, the activity is lawful and, two, the speech is not misleading. If these two elements are satisfied, then the speech is protected and government can only win if it can establish that its legal measure “serve[s] important governmental objectives and must be substantially related to achievement of those objectives.”¹⁶⁴ This simpler and more predictable statement of intermediate scrutiny can be gleaned from equal protection law: “To withstand constitutional challenge, . . . [government must establish that its legal measure] serve[s] important governmental objectives and must be substantially related to achievement of those objectives.”¹⁶⁵ Refining the intermediate scrutiny test applicable to second-order speech along the lines of conventional intermediate scrutiny—judging ends and means to see if they are substantial—would provide for an easier and more predictable test. Moreover, the relationship between ends and means should now be tightened so that there is a closer nexus between the two, and not looser, so as to protect the integrity of the First Amendment.

There is also an argument that commercial speech is truthful; thus, it should be accorded high-level protection under strict scrutiny. Perhaps any truthful speech should be accorded high protection, as truth is critical to free speech and the development of our personalities. If commercial speech is misleading, it should most likely be judged under a general balancing-of-interest test. If commercial speech is false, it should be judged under the rational basis test, as all other areas of unprotected speech. Unprotected speech has minimal or no value.

Intermediate scrutiny is appropriate for second-order speech for the same reasons it is appropriate for quasi-suspect classes in equal protection law: the value of the constitutional activity is important, but less important than constitutional activities of a higher order. In the case of speech, commercial speech is simply less valuable than core speech, like political or religious speech. Accordingly, it should have high value, but lesser value than speech critical to a person or the body politic. A word choice of “important” or “substantial” conveys adequately the notion that the speech is valued as significant, but not as great magnitude, as is conveyed by a justification of regulation by a “compelling” interest.¹⁶⁶

164. Craig v. Boren, 429 U.S. 190, 197 (1976).

165. *Id.*

166. With the advent of intermediate scrutiny, in 1976, in both commercial speech and gender discrimination, the scrutiny has had a mixed history. In the immediate aftermath of *Virginia Pharmacy*, intermediate scrutiny was applied to commercial speech with rigor. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363-66 (1977). But later, members of the

Third-order or low-level speech should be judged according to a general balancing-of-interest test that calls for judgments to be made by weighing the merits of the speech as compared to the merits of the governmental interests. If the speech has more worth than the governmental interest, then the speech should remain protected and impervious to regulation. If the governmental interest outweighs the value of the speech, government can regulate the speech. This process will, by definition, call for the exercise of judgment to settle the exigencies of the case. Over time, the law will sort itself out according to the normal process of common law decision making.

A general balancing-of-interest test seems appropriate to third-order speech because while this level of speech has value and is, accordingly, protected under the First Amendment, it does not have the stature of first- or second-order speech. Lacking the greater worth of those types of speech, there is no reason to apply a form of heightened scrutiny to assess the degree of constitutional regulation. Instead, a simple assessment of the value of the speech compared to that of the governmental interest seems appropriate.

There are ready analogies to employment of a general balancing-of-interest test. One is Justice Frankfurter's approach to Free Speech questions:

The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.¹⁶⁷

Court battled over what intermediate scrutiny meant in application, resulting in a diminished level of review, more akin in respects to rational basis review. See, e.g., *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 340-44 (1986). In 1996, the Court restored intermediate scrutiny to the rigor it had under the regime of *Virginia Pharmacy* in *44 Liquormart*, 517 U.S. at 510-12. The path of intermediate scrutiny in gender discrimination paralleled that of commercial speech. Compare *Michael M. v. Sonoma Court*, 450 U.S. 464 (1981) (reduced scrutiny), with *United States v. Virginia*, 518 U.S. 515, 531-39 (1996) (heightening scrutiny). For our purposes, we will define intermediate scrutiny applicable to second order speech in the rigorous manner established in cases like *Virginia Pharmacy* or *Craig v. Boren*.

167. *Dennis v. United States*, 341 U.S. 494, 524-25, 542 (1951) (Frankfurter, J., concurring) ("A survey of the relevant decisions indicates that the results which we have reached are on the whole those that would ensue from careful weighing of conflicting interests."). Of course, when faced with free speech questions, Justice Frankfurter adverted to the legislature to strike the balance of interests under his theory of judicial restraint. Different variants of a general balancing of interest test can be found in earlier cases. In *American Communications Ass'n v. Douds*, 339 U.S. 382, 399 (1950), for example, the Court stated the approach this way: "When particular conduct is regulated in the interest of the public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." The origin of a general balancing of interest test in free speech may lie in *Schneider v. State*, 308 U.S. 147, 161 (1939), where the Court observed: "[T]he delicate and difficult task falls upon the courts to weigh the cir-

A second is the *Pike* balancing test used in Dormant Commerce Clause cases, which seems somewhat akin to a general balancing-of-interest test. When a state does not discriminate in commerce between in-state and out-of-state interests, *Pike* balancing calls for a weighing of the “burden imposed on . . . commerce . . . in relation to the putative local benefits.”¹⁶⁸ In short, a general balancing-of-interest test calls for the assessment of two items on an equal, unweighted scale: speech versus the governmental interest. General balancing differs from weighted balancing in that weighted balancing evaluates the two items on an uneven, weighted scale; one item is presumptively preferred over the other. Weighted balancing is the process used in heightened scrutiny. For strict scrutiny, the rule of law is that core speech is presumptively determined to be constitutional and immune from regulation unless the state interest is of overwhelming importance. For intermediate scrutiny, the rule of law is that second-order speech will merit strong constitutional protection and will often survive attempts at regulation, unless the legal measure substantially outweighs the value of the speech and is substantially related to the end the measure pursues. For a general balancing-of-interest test, the rule of law is simply weighing the value of the speech versus the value of the governmental interest; whichever is weightier wins. There is obviously less predictability to evaluation of third-order speech as compared to higher-ranked speech. We will need to rely on the practical judgments made through case law to bring order and cohesion to third-level forms of speech.

The final form of speech to be evaluated is fourth-level or unprotected speech. Appropriate to fourth-level speech is rational basis review, which calls on government to justify its policy choice by demonstrating it is pursuing a rational end that it is rationally related to the pursuit of that end. Rational basis review is a low, deferential standard of review as seems appropriate for unprotected speech. After all, unprotected speech has communicative value, but carries with it the baggage of clear and present dangers.

Because there is harm connected with unprotected speech, government must prove the elements of harm that make up the definition of the unpro-

cumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.”

For careful consideration of balancing approaches to the First Amendment, see Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

168. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The full statement of the test is:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.

Id. (citations omitted).

tected category of speech. This is the essence of the categorical approach—proving why wholesale regulation is merited on account of the presence of elements that comprise the definition of speech. For example, to prove sanction of fighting words, government must prove that the communications under review are “those personally abusive epithets which, when addressed to the ordinary citizens, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”¹⁶⁹ If government makes out its case, then it has met its burden of proof and the speech may be regulated. There is great benefit to this categorical approach—government attention is focused on the properties of the speech that cause or proximately cause the harm and not the speech itself. It is akin to the criminal justice system; that is, government must prove the elements of the unprotected category of speech like it must prove the elements of a crime. The speech is presumptively protected unless government can make out its case for regulation. The official focus on harm insulates substantially the fundamental right of speech.

Having laid out these four levels of speech protection in order to bring coherence to Free Speech, we must also be aware that often times it will be quite difficult to determine whether speech is protected or not protected and, if protected, what level of protection it merits—high, medium, low, or minimal? For example, is corporate speech used for a political message political, commercial, or something else? Now, we would say corporate speech used for political purposes is protected as core political speech. Is corporate speech used to promote goods commercial or noncommercial? Is a work of art, such as a film, painting, poem or book, that depicts sexuality in the context of politics or religion first-order, third-order, or fourth-order speech? Is it protected or nonprotected? These are just examples of the muddle that can arise over free speech questions. These questions will be hard to work out. Thus, I suggest we have a default rule in place to sort out the messiness of the judgments to be made. The default rule should be: speech should be protected unless government can make a sufficient case that the activity at issue does not merit protection as speech. This default rule will essentially apply the process of a general balancing-of-interest test: weigh the value of the speech versus the value of the governmental interest, and whichever is weightier wins. The messiness of these types of cases will have to be sorted out through case law. Over time, the case law can point the way toward what level of protection should apply to the category of speech under review.

169. *Cohen v. California*, 403 U.S. 15, 20 (1971).

CONCLUSION

To establish and maintain coherence in Free Speech law, it is crucial that we attend to the architecture of the First Amendment. A focus on structure and ordering can provide a solid foundation to the complicated nature of expression law so that it can avoid the dangers of doctrinal confusion and put in place a ready methodology to solve the inevitable tests brought about through new social developments. The First Amendment must be equipped to deal with the changing technologies, mores, and developments of the 21st century.

We have seen how critical to the task of maintaining the architecture are the goals of defining with precision the different categories of speech; justifying the value of speech according to solid rubrics, such as valuation of speech and measurement according to the speech/conduct dichotomy; ordering speech by categories; and assigning levels of scrutiny appropriate to the valuation of the expression. These principles can establish a certain predictability and coherence to Free Speech law, thereby forming a foundation that solidifies the Amendment and establishes a base on which to judge future free speech questions. An architecture of this nature will not, of course, solve all issues of Free Speech law. None of us possess the prescience or analytical skill to accomplish that quixotic task; but a solid architecture will establish a certain coherence to the law, and coherence is needed to provide predictability to the law.

Most importantly, coherence in the law will solidify the core of protected speech, the area most fundamental to our expressive freedoms, by establishing what is core speech and how it is to be protected. The center is to be protected at all costs. Whatever future battles are to take place in the Free Speech wars, we want them to take place at the fringes of the First Amendment, not at its center.