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THE COVERAGE/PROTECTION DISTINCTION IN THE LAW OF FREEDOM OF SPEECH—AN ESSAY ON META-DOCTRINE IN CONSTITUTIONAL LAW

Mark Tushnet*

INTRODUCTION

An airline executive calls his counterpart at another airline and says that next week he will send over the plans his company has to raise prices over the next several months. The recipient of the call says, “That’s great. When I get them I’ll send you our plans.”¹ If the relevant market has few firms, the executives have likely committed a violation of the antitrust laws by agreeing to exchange that information, and their companies may be subject to civil and criminal liability for an offense that consists of words alone.² And, as should be obvious, the liability rests on these very words and almost certainly would not attach if some other words had been exchanged, for example, “I just want to let you know that we’ll have the booth next to yours at the upcoming trade show.”³ That is, liability attaches based on the content of the speech.

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¹ Cf. Diane Bartz, *Airlines’ Undisciplined Talk May Have Led to Antitrust Probe: Experts*, REUTERS (July 2, 2015, 4:17 PM), <http://www.reuters.com/article/us-usa-airlines-collusion-idUSKCN0PC2HT20150702> [<https://perma.cc/HS5E-DW32>] (reporting that airlines’ executives’ discussions of maintaining “discipline” provoked an inquiry by the Department of Justice).

² See Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981, 1007–08 (2016) (“[A]greement stems from *communicated* intentions. . . . It is the communication that itself creates the agreement.”). The Supreme Court has repeatedly said that the First Amendment does not protect speech that is integral to criminal activity, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), but the context of those statements makes it clear that the speech the Court had in mind was ancillary to some *other* criminal activity. So, for example, the implicit reference in *Giboney* was to violence sometimes accompanying otherwise constitutionally protected picketing. *Id.* at 491–92. In the example, in contrast, the antitrust crime consists entirely in the words manifesting agreement. For a general discussion of the *Giboney* exception, see *Volokh, supra*, and for additional discussion, see *infra* notes 93, 224–31 and accompanying text (discussing *R. A. V. v. City of St. Paul* and *Cohen v. California*).

³ The qualification here is that a court might infer an agreement to fix prices from a regular practice of exchanging information.

Similar examples pervade the law. If the airline executives deny under oath that they had the conversation, they have committed perjury.⁴ A person can find herself liable for breach of contract if she responded to an offer to enter into a contract with words that a court concludes objectively indicated assent to a reasonable person even if the court believes she did not subjectively intend to assent.⁵ In the casebook favorite *Lucy v. Zehmer*,⁶ for example, Zehmer wrote on a restaurant check words saying that he would sell his farm to Lucy for \$50,000.⁷ After Zehmer refused to go through with the sale, claiming that the offer was merely a joke made while he was intoxicated, the Virginia Supreme Court held that Lucy was entitled to specific performance because, whatever Zehmer's subjective intent, the words he wrote would lead a reasonable person to conclude that an offer was being made and could be accepted in the usual way.⁸

Both these situations, and many others, involve the imposition of legal liability for speech because of its content.⁹ Yet, hornbook law holds that content-based regulations of speech are constitutionally permissible only if they are narrowly tailored in the service of a compelling governmental interest (a requirement sometimes referred to as one placing content-based regulations under strict scrutiny).¹⁰ Further, it is the conventional wisdom that satisfying strict scrutiny is quite difficult.¹¹

Does this mean that imposing liability in the antitrust and contract cases violates the First Amendment? Until recently, conventional free speech doctrine would have

⁴ For a discussion of why standard perjury statutes might not survive strict First Amendment review, see *infra* notes 157–71 and accompanying text.

⁵ See *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954).

⁶ 84 S.E.2d 516 (Va. 1954).

⁷ *Id.* at 518; see Barak Richman & Dennis Schmelzer, *When Money Grew on Trees: Lucy v. Zehmer and Contracting in a Boom Market*, 61 DUKE L.J. 1511, 1513 n.2 (2012) (listing casebooks in which *Lucy v. Zehmer* appears).

⁸ *Lucy*, 84 S.E.2d at 521–22.

⁹ See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (“Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers’ threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).”).

¹⁰ For the Court’s most recent pronouncement to this effect, see *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” (citations omitted)).

¹¹ See Adam Liptak, *Consequences Ripple After Court Expands Free Speech*, N.Y. TIMES, Aug. 18, 2015, at A15 (quoting Floyd Abrams: “When a court applies strict scrutiny in determining whether a law is consistent with the First Amendment, . . . only the rarest statute survives the examination.”).

answered, of course not. That doctrine placed these problem cases in a separate category to which the requirement of strict scrutiny did not apply. Frederick Schauer has developed the most extended analysis of that category, which he describes as one in which communicative activity (presumptively, “speech”)¹² is not even “covered” by the First Amendment.¹³ The agreement to exchange price information would not be covered by the First Amendment because it was commercial speech, for example.¹⁴ Recent cases, including *United States v. Stevens*,¹⁵ *Holder v. Humanitarian Law*

¹² Although there are of course problem cases around the edges, an activity is communicative, according to the Court, if it is both intended by the “speaker” to communicate and is likely, under the circumstances, to be understood by the “listener” as communicating something. *See* *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam) (“An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”).

Communicative activity not covered by the First Amendment is of course subject to constitutional examination, but *qua* communicative activity its regulation is permissible if the government has a rational basis for doing so. In *Reed v. Town of Gilbert*, Justice Kagan described this requirement as “the laugh test[.]” and would have invalidated the ordinance at issue there because it failed even that test. 135 S. Ct. at 2239 (Kagan, J., concurring). In addition, regulation of uncovered speech might sometimes violate constitutional provisions other than the First Amendment, such as the Takings Clause.

¹³ For Schauer’s definition, see Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 905 n.33 (1979) [hereinafter Schauer, *Speech and “Speech”*] (“If an activity is covered by the first amendment, regulation of that activity is evaluated in light of the heightened standard of review required by the first amendment. If the state cannot meet the burden of showing a very strong governmental interest in regulating covered activity, that activity is protected as well. But if the state can put forth a justification that withstands strict scrutiny, the activity is not protected even though it is covered.”). *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) [hereinafter Schauer, *Boundaries*]; Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346 (2015) [hereinafter Schauer, *Out of Range*] (more recent statements of Schauer’s position).

Alternative formulations of the same thought are that some expressive acts are “outside the scope” or “outside the reach” of the First Amendment. Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1361 (2015) (arguing that “[a] lack of First Amendment coverage works very differently from a categorical exclusion[.]” because categorical exclusions “require the Court to chart the excluded category and to give legislatures firm guidance about which speech does and does not fit within the category[.]” while “legislatures decide what to do about uncovered speech with little, if any, judicial oversight”). With respect, this distinction seems mistaken, because identifying speech as “uncovered” requires the same “chart[ing]” of the uncovered speech’s boundaries.

¹⁴ For catalogues of examples in which content-based regulations appear to occur, in contexts ordinarily thought uncontroversial, see Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614–16 nn.1–16 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 138 n.9.

¹⁵ 559 U.S. 460 (2010).

Project,¹⁶ and a series of commercial speech cases threaten to destabilize the distinction and thereby unsettle seemingly obvious and obviously correct results. First Amendment doctrine using the coverage/protection distinction identifies three categories of communicative activity and subjects regulation of each category to a different standard of review: regulations of communicative activity that is not covered by the First Amendment are constitutionally permissible if they satisfy a standard of minimal rationality; regulations of communicative activity that *is* covered by the First Amendment are sometimes not protected by that amendment if the regulations are justified by a strong governmental interest and are well-designed to advance that interest; finally, regulations of covered communicative activity are otherwise not constitutionally permissible.¹⁷

This Essay examines the pressure recent cases place on the coverage/protection distinction. The examination shows that contemporary doctrine preserves the obvious and traditional results in the antitrust and contract cases, but only by doctrinal moves that require what I call “too much work.”¹⁸ Doctrines that require ordinary judges do too much work to reach obvious results ought to be avoided because too often ordinary judges will make mistakes—from the point of view of a higher court—as they try to implement the complex doctrines step by step. This Essay then uses the analysis it develops to explore some aspects of what I call “meta-doctrine.” Meta-doctrine comes in two forms, both illustrated in the First Amendment doctrines examined in this Essay. First, meta-doctrines include concepts that provide the structure or architecture within which more specific doctrines are located; the coverage/protection distinction is this type of meta-doctrine. Second, meta-doctrines include general prescriptions about what the structure of doctrine should look like. To extend the metaphor, this type of meta-doctrine deals with the use of wood or steel in constructing doctrine. The “too much work” principle is this type of meta-doctrine.

This Essay begins in Part I by describing the distinction between coverage and protection as it was articulated until recently. Part II continues by fleshing out the distinction and introduces some of the problems associated with eliminating it. Part III extends the treatment of recent cases by examining *United States v. Stevens* and *United States v. Alvarez*¹⁹—cases that raise substantial questions about the distinction’s continuing viability, noting as well some of the analytical difficulties with the Court’s opinions in both cases. Part IV then describes in more detail why something like the coverage/protection distinction may be necessary if we are to understand and preserve some intuitively obvious outcomes such as the fact that aspects of

¹⁶ 561 U.S. 1 (2010).

¹⁷ See *Reed*, 135 S. Ct. at 2226, 2228; *Stevens*, 559 U.S. at 470; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

¹⁸ The examination also shows that other traditional results cannot be salvaged even with a great effort.

¹⁹ 132 S. Ct. 2537 (2012) (plurality opinion).

contract law and the crime of perjury, standardly defined, should not raise First Amendment questions that require extended analysis to support the conclusion that the regulations are constitutionally permissible. Part V deals with some of the ways First Amendment doctrine could be restructured were the coverage/protection distinction to be abandoned, for example, by treating all communicative activity as covered but applying differentiated standards of review to different categories of content-based regulations. Part VI offers a modest suggestion about how to draw the line between material that is covered by the First Amendment and material that is not.²⁰ The Conclusion uses the coverage/protection distinction to sketch the role of meta-doctrines in constitutional law.

I. THE COVERAGE/PROTECTION DISTINCTION AS ARTICULATED IN THE 1940S AND ASPECTS OF ITS LATER DEVELOPMENT

The coverage/protection distinction was first articulated in two cases in the 1940s, cases the Court at the time treated as routine.²¹ *Chaplinsky v. New Hampshire*²² offered the (until recently) conventional account of categories of uncovered speech.²³ *Chaplinsky* upheld a conviction for addressing “derisive or annoying word[s]” to another person where the words directly tended to cause a breach of the peace by provoking the target to respond with violence.²⁴ Justice Frank Murphy explained,

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.²⁵

²⁰ Schauer, *Boundaries*, *supra* note 13, offers a sociological and historical account of the reasons for the distinction’s creation and persistence. My aim in the Conclusion is somewhat more normative.

²¹ *Chaplinsky*, 315 U.S. at 568–74 (occupying seven pages in the U.S. Reports); *Valentine v. Chrestensen*, 316 U.S. 52, 52–55 (1942) (occupying four pages in the U.S. Reports). There were no dissents in either case.

²² 315 U.S. 568 (1942).

²³ *Id.* at 571–72.

²⁴ *Id.* at 569.

²⁵ *Id.* at 571–72 (footnotes omitted) (citing ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 149–50 (1941)). For more extensive discussion of *Chaplinsky*, see *infra* notes 28–34 and accompanying text.

This formulation contains two themes, a historical one—“have never been thought to raise any Constitutional problem”—and a functional one, “no essential part of any exposition of ideas” and “slight social value . . . clearly outweighed by the social interest[.]”²⁶ These two themes might be related in several ways. They might be independent but contingently convergent reasons for the fact that regulation does not raise constitutional problems. If so, there might be additional categories of speech as to which the same conclusion could be drawn—categories other than the enumerated ones that either have historically never been thought to raise constitutional problems (think here of perjury and contract enforcement),²⁷ or that include expressions that are no essential part of the exposition of ideas and are of slight social value, clearly outweighed by some public interest. Alternatively, the themes might be related in an explanatory mode: The categories have never been thought to raise constitutional problems *because* expressions in the categories have such slight social value . . . , etc. On this view, the historical analysis has analytic priority; we could not identify other categories similar to the lewd, and the like, simply by doing functional analysis.

The Court in *Chaplinsky* did not have to choose between these alternatives.²⁸ Later developments, though, push the question of the relation between the two themes to the fore, and in ways that highlight the coverage/protection distinction. “The obscene” is an example of communicative material whose regulation is best understood as resting on the proposition that obscene materials are not covered by the First Amendment.²⁹ Assume that we are dealing with materials that are unquestionably obscene according to the definition in *Miller v. California*.³⁰ The Court explained why

²⁶ *Chaplinsky*, 315 U.S. at 572.

²⁷ Notably, many—perhaps all—such cases might not generate litigation precisely because the idea that they raised First Amendment issues would be almost literally unthinkable. This point is one of the main themes in Schauer, *Boundaries*, *supra* note 13. For a discussion of the implications of historical silence, see *supra* notes 15–17 and accompanying text.

²⁸ In an important article, Genevieve Lakier shows that *Chaplinsky* must have applied a low standard of review, not a stringent one, because when *Chaplinsky* was decided the Court had only recently begun to distinguish between what we would now call high-value (at its core, political) speech and low-value speech such as speech in the categories *Chaplinsky* listed. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2173 (2015). For a critical response, see generally Schauer, *Out of Range*, *supra* note 13. Before that time, Lakier argues, all regulations of speech were subject to assessment by a lax, not a stringent, standard. Lakier, *supra*, at 2179. The then-recent innovation was to carve out some categories of speech and subject regulation of those categories to stringent review. *Id.* at 2171. The “residual” categories—everything else, including the categories in *Chaplinsky*—received low-level review. *Id.* at 2173–74. As the innovation settled in, it was natural to begin to think in terms of coverage versus protection: Materials whose regulation received stringent review were covered by the First Amendment, and the residual categories were not.

²⁹ Lakier, *supra* note 28, at 2171.

³⁰ 413 U.S. 15 (1973).

regulation of such material was constitutionally permissible: “[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.”³¹ Even putting to one side the likelihood that those interests would not be considered compelling in other contexts, the Court itself describes them as “legitimate,” not “compelling” or something similar.³² The Court also said that “there is at least an arguable correlation between obscene material and crime[,]” and that, though “there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist.”³³ I believe that these formulations cannot reasonably be read as asserting that bans on the dissemination of obscene materials satisfy a stringent standard of review, that is, that obscene materials are covered by the First Amendment but not protected by it. Rather, they say, almost in terms, that obscene materials are not covered by the First Amendment. The obscenity cases are consistent with the view that nothing in *Chaplinsky* suggests that the obscene is covered but unprotected because regulation satisfies a stringent standard of review, and its functional theme is stated in terms that suggest that the standard of review is not stringent.³⁴

*Valentine v. Chrestensen*³⁵ was what we would now call a commercial speech case (or an environmental law case). New York City prohibited the distribution of “commercial and business advertising” handbills.³⁶ The prohibition was applied to Chrestensen’s handbills advertising on one side a submarine that he operated as a tourist attraction, and on the other protesting the city’s refusal to allow him to moor the submarine at the docks the city owned.³⁷ The Supreme Court rejected Chrestensen’s First Amendment challenge.³⁸ Justice Owen Roberts’s opinion agreed that city streets “are proper places for the exercise of the freedom of communicating information and disseminating opinion and that [cities] . . . may not unduly burden or proscribe its employment in these public thoroughfares.”³⁹ But, he continued,

[T]he Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what

³¹ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–58 (1973).

³² *Id.* at 69.

³³ *Id.* at 58, 60–61.

³⁴ The formulation in *Chaplinsky* is only suggestive, though, because it is possible to read “clearly outweighed” as indicating that a stringent standard is indeed satisfied.

³⁵ 316 U.S. 52 (1942).

³⁶ *Id.* at 53.

³⁷ *Id.* at 52–53.

³⁸ *Id.* at 54–55.

³⁹ *Id.* at 54.

extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.⁴⁰

Valentine thereby held that commercial advertising was not covered by the First Amendment, its regulation being subject entirely to legislative discretion.⁴¹

Thirty years later the Court gave some commercial advertising a degree of constitutional protection, ultimately settling on the test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*⁴² for determining the constitutionality of regulation of truthful non-misleading commercial speech.⁴³ For present purposes the details of the *Central Hudson* test are unimportant; what matters is that the test is not the stringent one applied to material at the heart of the First Amendment's coverage.

The Court has continued to apply the *Central Hudson* test, at least nominally.⁴⁴ But, its presence in the structure of constitutional doctrine has created some awkwardness. As Rebecca Brown has recently pointed out, Justice Thurgood Marshall's statement in *Police Department of Chicago v. Mosley*⁴⁵ that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" has become the touchstone of contemporary First Amendment law.⁴⁶ Applying the less stringent *Central Hudson* test to truthful non-misleading commercial speech, though, does "restrict" expression because of its (commercial) subject matter, relative to speech, the regulation of which is tested by a more stringent standard.⁴⁷ That doctrinal anomaly may be one reason for a perceptible shift in the Court's tone when dealing with truthful non-misleading commercial speech.⁴⁸ Three of the Court's sitting Justices have expressed disagreement with the proposition that such speech should be tested by a less-than-stringent

⁴⁰ *Id.* The Court treated Chrestensen's placement [on the handbill of the protest against the city's action] as an intentional attempt to evade the ban, and refused to allow such an evasion because otherwise "every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Id.* at 55.

⁴¹ *Id.* at 54.

⁴² 447 U.S. 557 (1980).

⁴³ *Id.* at 566.

⁴⁴ *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002).

⁴⁵ 408 U.S. 92 (1972).

⁴⁶ *Police Dep't of Chi.*, 408 U.S. at 95 (emphasis added). See generally Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953 (2016).

⁴⁷ There may be an additional anomaly associated with the assumed impermissibility of regulation based upon a speaker's identity: I think it unlikely that courts that allow some regulation of speech by commercial entities would allow the same regulation when applied to exactly the same speech when made by an entity like *Consumer Reports*.

⁴⁸ See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

standard, though they have not done so all at the same time.⁴⁹ Further, most of the recent cases do something akin to arguing in the alternative: The opinions express skepticism about the continuing viability of *Central Hudson* and note that the regulation at issue would not survive stringent review, but conclude that the regulation does not even satisfy the *Central Hudson* test.⁵⁰

Eliminating the distinction between coverage and protection while retaining the rule that content-based regulations must satisfy a stringent standard of review places some intuitively appealing results—such as that perjury prosecutions raise no serious First Amendment issues—under substantial pressure.⁵¹ *United States v. Stevens* appears to have sharply restricted the category of uncovered speech.⁵² There the Court considered the constitutionality of a statute making it a crime to make and disseminate depictions of extreme forms of animal cruelty (“crush videos”).⁵³ The government relied on *Chaplinsky* in defending the statute.⁵⁴ The Court agreed that some categories of speech lay outside the First Amendment, but those categories were to be identified (mostly) with reference to history.⁵⁵ Retaining the coverage/protection distinction through a narrowly defined historical test preserves some of those results, but at the cost of introducing uncertainty about whether other intuitively appealing results can be preserved through historical analysis.⁵⁶

In the problem cases, what if the escape hatch that allows regulation of speech because it is not covered by the First Amendment is closed or left open only a slight bit? The remaining escape hatch under current doctrine is the strict scrutiny requirement.⁵⁷ That is, problem cases that might previously have been dealt with as involving uncovered speech might be handled by saying that the regulations at issue were narrowly tailored to serve compelling interests. As I argue in Part IV, often that conclusion would be difficult to support were the conventional understanding of the strict scrutiny requirement to be applied.⁵⁸

Again, though, a recent decision suggests the possibility that the conventional understanding should be revised. *Holder v. Humanitarian Law Project* upheld the

⁴⁹ *Thompson*, 535 U.S. at 367 (listing Justices Kennedy, Scalia, Thomas, and Ginsburg as “hav[ing] expressed doubts about the *Central Hudson* analysis”). I suspect that Chief Justice Roberts and Justice Alito would join this group, making a majority, were they to be faced with a case involving a regulation about which they were skeptical but that might survive scrutiny under the *Central Hudson* test.

⁵⁰ *See, e.g., id.* at 367–68 (noting that though “several Members of the Court have expressed doubts about the *Central Hudson* analysis, . . . there is no need in this case to break new ground”).

⁵¹ *See infra* Part III.

⁵² 559 U.S. 460, 468–73 (2010).

⁵³ *Id.* at 464.

⁵⁴ *Id.* at 468–69.

⁵⁵ *Id.* at 470.

⁵⁶ *See infra* Part III.

⁵⁷ *See infra* Part IV.

⁵⁸ *See infra* Part IV.

constitutionality of a statute making it a crime to provide material support to designated terrorist organizations, as applied to a group that gave advice to such organizations about how to use international law to resolve disputes peacefully.⁵⁹ The Court applied what it described as strict scrutiny, but on the face of it, the Court's opinion does not apply strict scrutiny in the manner suggested by the conventional understanding.⁶⁰ In particular, Chief Justice Roberts's opinion for the Court deferred to legislative and executive judgments that providing advice to terrorist groups implicates the compelling interest in combating terrorism, because the advice "frees up other resources within the organization that may be put to violent ends[.]" "helps lend legitimacy" to the groups, and "strain[s] the United States' relationships with its allies."⁶¹ The Chief Justice acknowledged that the Court ordinarily does not defer to legislative and executive judgments about the relationship between regulations and harm when it uses strict scrutiny.⁶²

Holder suggests the possibility that the "strict scrutiny" escape hatch might be somewhat more open than the conventional understanding suggests. If *Holder* has implications beyond the national security context, a question the Court has yet to address, its somewhat relaxed application of strict scrutiny might be a way of dealing with the problem cases. Yet, relaxing the stringency of the strict scrutiny test creates a tension with the Court's rationale for adopting the historical approach to uncovered speech. In adopting that approach, the Court's rationale was that alternative ways of identifying uncovered categories of speech placed too much discretion in the courts.⁶³ Part V identifies several ways of relaxing the stringency of the strict-scrutiny test and argues that each introduces precisely the discretion that the Court sought to avoid.⁶⁴

These decisions place heavy pressure on the coverage/protection distinction. As with any doctrine, abandoning the distinction is conceptually possible, but doing so requires significant doctrinal reconstruction to explain outcomes that follow straightforwardly from the coverage/protection distinction.⁶⁵ Some aspects of that reconstruction are not entirely plausible, but perhaps the more important difficulty is that the reconstruction requires that we do substantial analytic work to reach intuitively obvious conclusions. The fact that a doctrinal structure requires a great deal of work on easy questions is an argument against adopting that doctrine—in this context, an

⁵⁹ 561 U.S. 1, 7, 39 (2010).

⁶⁰ *See id.* at 28.

⁶¹ *Id.* at 30, 32.

⁶² *Id.* at 34 ("We do not defer to the Government's reading of the First Amendment, even when [national security] interests are at stake. . . . But when it comes to collecting evidence and drawing factual inferences in this area, . . . respect for the Government's conclusions is appropriate."). The Chief Justice alluded to the case's circumstances, which counseled the Court to rely on "informed judgment rather than concrete evidence." *Id.* at 34–35.

⁶³ *See infra* notes 247–51 and accompanying text.

⁶⁴ *See infra* Part V.

⁶⁵ I discuss examples such as the law of obscenity and perjury below.

argument against abandoning the coverage/protection distinction. This Essay argues that the distinction, or something very much like it, probably is close to necessary if we are to have a reasonably coherent doctrinal structure for the First Amendment.⁶⁶

II. ELABORATING THE DISTINCTION'S SIGNIFICANCE

Consider these scenarios: (1) A dapper young man spends an afternoon poisoning pigeons in the park;⁶⁷ (2) A dapper young man hands out leaflets to park-goers with the printed message, “Unless the government does something about those damned pigeons that are making the park unvisitable because of their droppings, we’ll have to take some revengeance on the pigeons by poisoning them”;⁶⁸ (3) A dapper young man shouts to an angry crowd enraged by pigeon droppings in the park, “Let’s go right now to poison the pigeons in the park.”

What does the First Amendment have to say about possible defenses to government charges of poisoning the pigeons, or attempting or conspiring to do so? *Brandenburg v. Ohio*⁶⁹ tells us that the First Amendment has some bearing on scenarios two and three. Using the distinction between coverage and protection: In scenario one, the First Amendment has no bearing at all; as Schauer puts it, the First Amendment simply does not show up in the legal analysis.⁷⁰ In contrast, in scenario two the speaker’s activity is both covered by the First Amendment and protected by it, whereas in scenario three, the speaker’s activity is covered by the First Amendment but not protected by

⁶⁶ I am aware that this formulation is full of qualifiers.

⁶⁷ See Tom Lehrer, *Poisoning Pigeons in the Park*, YOUTUBE (Oct. 1, 2007), <https://www.youtube.com/watch?v=yhuMLpdnOjY>.

⁶⁸ I take the word “revengeance” from *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (per curiam) (quoting the speech there held constitutionally protected).

⁶⁹ 395 U.S. 444 (1969).

⁷⁰ Schauer, *Boundaries*, *supra* note 13, at 1767. In one sense, of course, the First Amendment does “show up”: One must look into such things as whether the activity in question implicates the interests the First Amendment seeks to protect to determine whether one is dealing with speech or, for example, “mere” exercises of human autonomy (to be gross, like picking one’s nose). But, having determined that the interests are not implicated, one then engages in no First Amendment analysis—applies no First Amendment level of review, for example, whatsoever.

This does not mean that the *Constitution* has no bearing on the case. The regulation might be completely irrational, for example, or it might be too vague to survive due process review. See, e.g., *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 595–96 (W.D. Pa. 2005) (holding a federal obscenity statute unconstitutional as a violation of the substantive due process rights recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003)). The important point here is that the First Amendment does not say anything relevant to the actor’s criminal liability. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2239 (2015) (Kagan, J., concurring) (applying the “laugh” test); Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 182 (2012) (discussing the application of a rational-basis standard to regulations of uncovered material).

it.⁷¹ The difference between scenarios two and three lies in the standard of review applied to the activity: A lawyer advising the dapper young man might tell him that he's much more likely to get away with the statement in scenario two than with the one in scenario three, and that advice might affect the choices the young man makes.

Suppose, though, that the dapper young man does something other than speech but with communicative content? A recent case involved California's ban on selling foie gras at restaurants.⁷² A well-known chef in Napa Valley opposed the ban, and to protest it he included foie gras as a "gift" from the host on his restaurant's most expensive tasting menu, accompanying the course with a "protest card" explaining his opposition to the ban on selling foie gras.⁷³ In ensuing litigation, the chef submitted a declaration stating,

In the exercise of my constitutionally protected right of petition and free speech, my restaurant . . . is protesting the law, not breaking it, by giving away foie gras to customers I choose to give it to. . . . [W]hat I . . . give away to customers is my way of dumping tea in the harbor, so to speak.⁷⁴

Is the chef's activity both covered and protected by the First Amendment, covered but not protected, or not covered at all? Note that if the activity is covered, to find it unprotected we would have to say that imposing liability on the chef satisfied a stringent standard of review (subject to qualifications discussed below about the commercial speech doctrine and *United States v. O'Brien*⁷⁵). And, for present purposes I want to stipulate that finding a stringent standard satisfied would be quite difficult. For example, is acting to protect the well-being of geese a compelling governmental interest? (Geese!, the omnivore skeptic might exclaim.) Is a complete ban a narrowly tailored method of advancing that interest? (Perhaps a system of inspecting goose-raising facilities would be as effective in protecting the geese's well-being.)⁷⁶

⁷¹ See *Brandenburg*, 395 U.S. at 447.

⁷² See *Animal Legal Def. Fund v. LT Napa Partners LLC*, 184 Cal. Rptr. 3d 759, 761–62 (Cal. Ct. App. 2015).

⁷³ See *id.* at 762 & n.4.

⁷⁴ *Id.* at 769.

⁷⁵ 391 U.S. 367 (1968).

⁷⁶ For a recent example applying strict scrutiny in this manner, see *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015). There the court of appeals held unconstitutional a state statute that prohibited robo-calling for consumer or political purposes, with exceptions for, among other things, robo-calls to those with whom the caller had a previous business relationship (that is, to those who had previously bought something from the caller). *Id.* at 402, 404. The court of appeals held that the state's interest in protecting privacy could have been satisfied by narrower regulations such as requiring compliance with a do-not-call list or prohibiting robo-calls only during specified hours such as typical mealtimes. *Id.* at 405–06.

The example—and others that can be developed⁷⁷—strongly suggest that a coherent First Amendment doctrine *requires* that some regulations of communicative activity (some communicative activity, of course, not all such activity) be constitutionally permissible even though the communicative activity does not satisfy a stringent standard of review.⁷⁸ That is, the only alternative First Amendment doctrine would appear to be one applying a stringent standard to all communicative activities, and that seems to generate results that seem wrong even after sustained reflection. The issue finally surfaced in the Supreme Court’s consideration of a municipal ordinance regulating signs.⁷⁹

Outdoor signs serve many functions. Some advertise businesses, others promote civic or political causes, and others direct people to events like yard sales, neighborhood block parties, and church services. All such signs add to the visual clutter in communities, sometimes distracting motorists and nearly always altering the aesthetic experience of moving around the community. Cities and towns regulate outdoor signs to deal with these problems. The town of Gilbert, Arizona, had a sign ordinance that applied different rules to different types of signs, making the judgment that different types of signs have different trade-offs between the information and other speech-related values associated with signs and the signs’ aesthetic costs.⁸⁰ So, for example, “ideological” signs could be relatively large and could be placed outdoors permanently, while “political” signs had to be smaller and could be displayed for two months before an election and had to be removed within fifteen days after it.⁸¹ Another category of signs involved temporary directional ones, such as those used for yard sales and, as it turned out, for the religious services held by a local church.⁸² Rather clearly having yard sales and the like in mind, the town required that signs directing people to these events be relatively small, and specified that such signs could be placed outdoors no more than twelve hours before the event, to be removed within one hour after its conclusion.⁸³

⁷⁷ One example sometimes used is politically motivated murder (“assassination”). The difficulty with the example is that it is relatively easy to find that a ban on assassination does satisfy a stringent standard of review, so that assassination becomes another example of covered but not protected activity.

⁷⁸ For the moment, I will treat the term “stringent standard of review” to refer to a test that requires a compelling governmental interest and includes a “least restrictive means” or “narrow tailoring” requirement. Later I will discuss doctrines that are stringent but not quite as stringent as that, and examine why we might have misgivings about developing such standards. *See infra* Part V.

⁷⁹ *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

⁸⁰ *Id.* at 2224.

⁸¹ *Id.* at 2224–25.

⁸² *Id.*

⁸³ *Id.* (describing the ordinance’s provisions). For a discussion of the decision’s implications for sign ordinances generally, see Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty*, 47 URBAN LAW 569 (2015).

A church that lacked a permanent home and therefore held services at varying locations in town challenged the ordinance's treatment of temporary directional signs, on the sensible ground that the tight temporal limits on posting signs telling people where to go to find the services substantially limited its ability to reach potential worshipers.⁸⁴ The Court, in an opinion by Justice Thomas, held that the sign ordinance differentiated among different types of speech based on their content, as it obviously did because political signs and signs directing people to church services were treated differently, and then held that the ordinance failed to survive the stringent requirements imposed on content-based regulations.⁸⁵ Temporary directional signs were no more aesthetically unappealing than ideological ones, for example, and yet the former were more tightly regulated than the latter. The Court accurately noted that content-neutral regulations might accomplish many of the town's aesthetic and other goals,⁸⁶ but did not address the town's implicit claim that its differentiated system embodied defensible judgments about trade-offs between aesthetics and the kinds of social value to which the First Amendment responds.⁸⁷ The implication, I think, is that the rule requiring strong justifications for content-based regulations rests on the Court's determination that legislatures must treat all communicative activities as having equal social value—and on its determination that, because some communicative activities clearly have substantial social value, content-based regulations of all communicative activities must meet the standards appropriately invoked with respect to communicative activities with substantial social value.

Justice Breyer concurred in the judgment.⁸⁸ His opinion contained a long paragraph enumerating “speech regulated by government that inevitably involve[s] content discrimination, but where a strong presumption against constitutionality has no place.”⁸⁹ He listed securities regulations requiring specific content in registration statements, energy conservation labeling-practices, requirements that prescription medications display specific labels, information disclosures required by the income tax laws, the familiar “fasten your seatbelt” briefings required on commercial airplanes, and “signs at [privately operated] petting zoos” advising visitors to wash their hands on leaving.⁹⁰

⁸⁴ *Reed*, 135 S. Ct. at 2225. Church services were held on Sunday mornings, which meant that the directional signs could be placed outdoors no earlier than late on Saturday nights.

⁸⁵ *See id.* at 2232.

⁸⁶ *Id.* Justice Alito made the same point more extensively in a concurring opinion. *Id.* at 2233–34 (Alito, J., concurring).

⁸⁷ I use this awkward formulation because, as Frederick Schauer reminded me, many things (food, good public transportation) have social value but not “First Amendment value.”

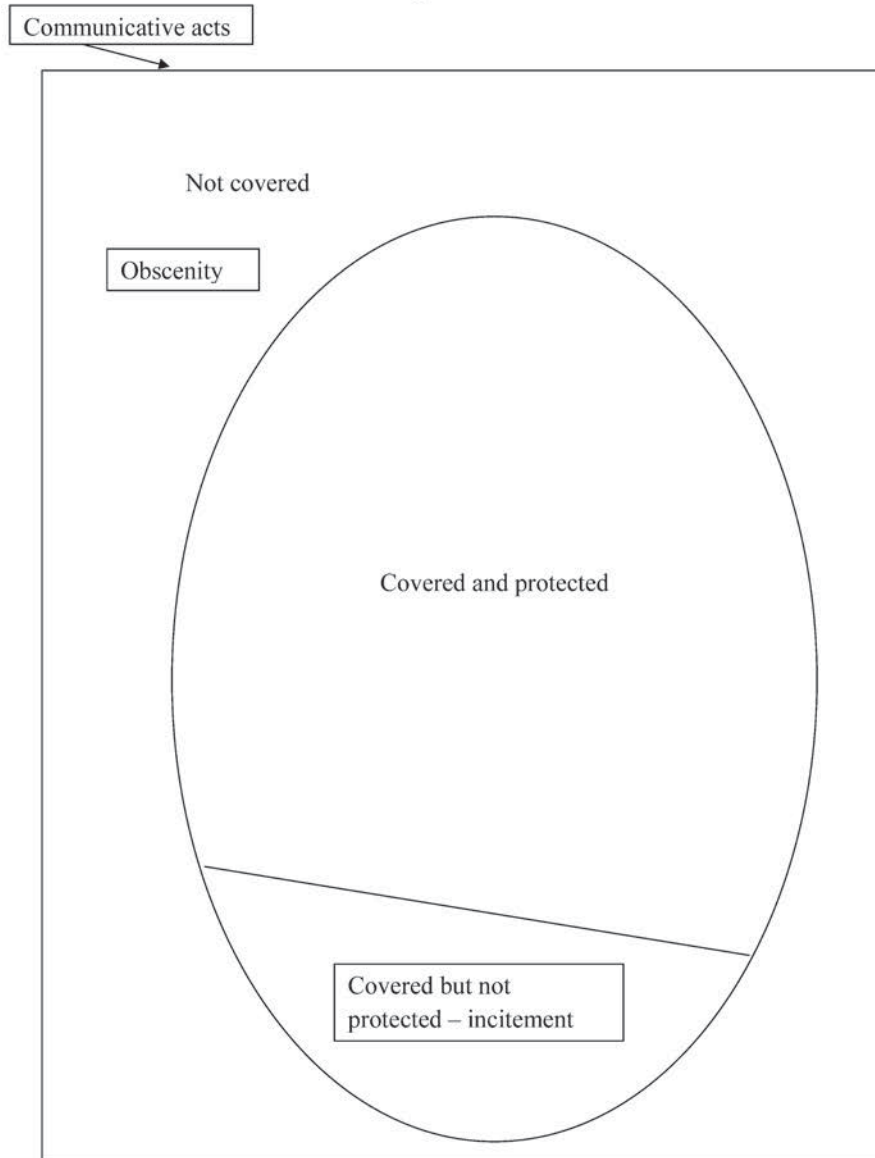
⁸⁸ *Reed*, 135 S. Ct. at 2234–36 (Breyer, J., concurring).

⁸⁹ *Id.* at 2234–35.

⁹⁰ *Id.* Most of Justice Breyer's examples involve government mandated disclosures rather than government prohibitions on statements by regulated entities. *Id.* Perhaps one could respond to his examples by applying a less stringent standard of review to mandated disclosures than to direct prohibitions. *See, e.g.*, *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (drawing such a distinction).

Justice Breyer's examples in *Reed v. Town of Gilbert*⁹¹ show why the distinction between coverage and protection is an important one. In Schauer's terms, the regulations Justice Breyer lists might be treated as ones dealing with communicative activities that are not covered by the First Amendment.⁹²

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Coverage and Protection



⁹¹ 135 S. Ct. 2218 (2015).

⁹² Other ways of dealing with the examples, including Justice Breyer's preferred method, are discussed at *infra* Section V.C.

Consider how we should analyze Justice Breyer's example of the requirement that prescription medications have the specific label "Rx only" after *Reed v. Town of Gilbert*. I think it would be difficult to conclude that the regulation serves a compelling governmental interest in a narrowly tailored way (or is the least restrictive means of advancing a compelling interest). The government interest appears to be something like, "keep prescription medications out of the hands of people who don't need them or who might abuse them," but that interest is served already by the requirement that one have a prescription in the first place; the labeling requirement makes at most a small contribution on the margin to advancing the government's interest, for example, by cautioning people who happen to find a discarded bottle in the grass from using the medication. And yet, I suspect that most readers are likely to have an intuition that the labeling requirement is either innocuous or beneficial enough to be constitutionally permissible.

Reed v. Town of Gilbert is only the latest in an accumulating set of cases that, taken together, erode the foundations of the coverage/protection distinction. Part III turns to other cases in that set.

III. ABANDONING THE DISTINCTION?: *STEVENS, ALVAREZ, AND COMMERCIAL SPEECH*

The first challenge to the coverage/protection distinction may have come in *R. A. V. v. City of St. Paul*.⁹³ As the case came to the Court, it involved the constitutionality of a municipal regulation of fighting words, a category expressly defined in *Chaplinsky* as not covered by the First Amendment.⁹⁴ Saying that fighting words were not covered, though, did not make them "invisible to the Constitution."⁹⁵ As construed by the majority, the ordinance imposed liability on a subset of fighting words identified with reference to the viewpoint they expressed.⁹⁶ The First Amendment's rule against viewpoint-discrimination was fully applicable to fighting words.⁹⁷ Justice Scalia's opinion offered a cogent example: It would be unconstitutional to prohibit "only those legally obscene works that contain criticism of the city government."⁹⁸ That observation cast a cloud over the coverage/protection distinction itself

⁹³ 505 U.S. 377 (1992).

⁹⁴ *Id.* at 380–81.

⁹⁵ *Id.* at 383.

⁹⁶ Whether that is an accurate characterization of the ordinance is contestable, but that question is not of concern here.

⁹⁷ *Id.* at 391–92.

⁹⁸ *Id.* at 384. The example works because under *Miller v. California*, 413 U.S. 15, 24 (1973), obscenity is determined with reference to the work taken as a whole; something that is, taken as a whole, legally obscene might indeed contain parts conveying criticism of the government. This analysis requires that we be able to disaggregate the expression into a component conveying a message and a component not conveying a message. So, in Justice

because it showed that First Amendment rules did indeed apply to material previously thought uncovered.

The next step came in *United States v. Stevens*. Defending the constitutionality of a statute making it a crime to make and disseminate “depictions of [extreme forms of] animal cruelty” (“crush videos”), the government relied on *Chaplinsky*’s functional theme to support the proposition that such depictions were not covered by the First Amendment.⁹⁹ Chief Justice Roberts described the government’s position—actually, the position described in *Chaplinsky*’s functional theme—as “startling and dangerous.”¹⁰⁰ The Court agreed that some categories of speech lay outside the First Amendment, but those categories were to be identified (mostly) with reference to history.¹⁰¹ On the Court’s analysis, the functional theme in *Chaplinsky* explained why the enumerated categories of speech had historically been regarded as outside the First Amendment’s scope, but did not provide an independent ground for identifying other such categories.¹⁰² The Court did not have “a freewheeling authority to declare *new* categories of speech outside the scope of the First Amendment.”¹⁰³ Rather, the categories were to be identified through a historical inquiry.

The list in *Chaplinsky* of categories outside the First Amendment’s coverage might not be definitive, because there might be “some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”¹⁰⁴ Genevieve Lakier’s historical work identifies a deep problem with the Court’s assumptions.¹⁰⁵ As the Court saw things, the First Amendment covered almost all communicative activities defined with reference to their content, with some modest residual categories such as those listed in *Chaplinsky*.¹⁰⁶ And, importantly, for the *Stevens* Court, describing a communicative activity as covered by the First Amendment implies that “our existing doctrine” applies¹⁰⁷: The regulations must satisfy a stringent standard of review. Lakier shows that this picture is almost exactly backwards. Historically, regulation of *every* form of expression

Scalia’s example, a sign saying “all ‘anti-Catholic bigots’ are misbegotten,” *R. A. V.*, 505 U.S. at 391–92, has as its “fighting words” component the word for which Justice Scalia wrote “misbegotten,” and has “anti-Catholic bigots” as its message-conveying component.

⁹⁹ See *United States v. Stevens*, 559 U.S. 460, 469 (2010) (quoting Brief of the United States). As the Court described the government’s position, it was that the depictions were “outside the reach of [the First] Amendment altogether,” which is to say that they are not covered by the First Amendment. *Id.*

¹⁰⁰ *Id.* at 470.

¹⁰¹ *Id.* at 468–70.

¹⁰² See *id.* at 471 (“But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter . . .”).

¹⁰³ *Id.* at 472 (emphasis added).

¹⁰⁴ *Id.*

¹⁰⁵ See Lakier, *supra* note 28.

¹⁰⁶ *Stevens*, 559 U.S. at 468–69.

¹⁰⁷ *Id.* at 472.

that came to judicial attention was subject to a weak standard of review.¹⁰⁸ The residual category was what we might now call core political speech, or as *Valentine v. Chrestensen* put it, “civic appeal[s], or . . . moral platitude[s].”¹⁰⁹

A truly historical approach, then, might put the burden on the person producing the regulated speech to show that the expression fell within a category that historically received the protection afforded by a stringent standard of review. Alternatively, the very fact that there are few, if any, cases raising First Amendment questions about a category—perjury, contractual agreements—might be taken to demonstrate that those subjects had “never been thought to raise any Constitutional problem[,]”¹¹⁰ and so could still be treated as outside the First Amendment’s coverage even after *Stevens*. One difficulty with that course, though, is temporal: How long-standing does the regulation have to be for it to satisfy the “never been thought” criterion? The relevant antitrust law dates to the early twentieth century. Is that long enough to satisfy the criterion? Should we ask whether some communicative activities, even if not actually regulated prior to the development of modern First Amendment law in the 1920s and 1930s, would have been thought to be freely regulable—that is, regulable without satisfying a stringent standard of review?¹¹¹ After all, the absence of regulation might reflect not a judgment that regulation was constitutionally impermissible, but instead a judgment that regulation was not a matter of public importance—yet. As Justice Scalia once observed, in connection with harms previously unrecognized as public nuisances, legislatures can “make the implication[s] of . . . background principles . . . explicit.”¹¹² That would seem to be true as well of previously unrecognized forms of uncovered speech.

Even as limited in this way, the *Stevens* approach might place pressure on some aspects of contemporary securities and labor law. Notably, a dissent in one of the initial cases upholding the constitutionality of the National Labor Relations Act focused on the First Amendment.¹¹³ In 1940, the United States Court of Appeals for the Sixth Circuit held unconstitutional an NLRB order prohibiting the Ford Motor Company from making anti-union statements during a labor organizing campaign.¹¹⁴ Rather than regulations of speech in connection with labor organizing having “never

¹⁰⁸ See Lakier, *supra* note 28, at 2171.

¹⁰⁹ 316 U.S. 52, 55 (1942).

¹¹⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹¹¹ An example might be modern disclosure mandates, which for present purposes I think can be dated to the early 1930s, precisely when modern First Amendment law began to take shape.

¹¹² *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

¹¹³ *Associated Press v. NLRB*, 301 U.S. 103, 133–41 (1937) (Sutherland, J., dissenting). The majority rejected the First Amendment challenge. *Id.* at 130–33 (majority opinion).

¹¹⁴ *NLRB v. Ford Motor Co.*, 114 F.2d 905, 913, 915 (6th Cir. 1940). For a discussion of contemporary First Amendment challenges to aspects of labor law, see Thomas M. Johnson Jr., *Ambushing Employers’ Speech Rights*, WALL ST. J., Apr. 17, 2015, at A19 (arguing that regulations restricting employers’ ability to oppose organizing efforts through speech against unions are unconstitutional).

been thought to raise any Constitutional problem,”¹¹⁵ such regulations have been subject to constitutional challenge from the very beginning.¹¹⁶

The Court’s discussion in *Stevens* and *New York v. Ferber*¹¹⁷ raises another difficulty—the introduction of apparently ad hoc exceptions to a structure whose primary defense lies in its resistance to making exceptions beyond those historically recognized.¹¹⁸ *Ferber* upheld the constitutionality of a statute criminalizing making and disseminating child pornography, a category defined in a way that included within it material that would not satisfy the *Miller* test for obscenity.¹¹⁹ For the Court in *Stevens*, *Ferber*’s rationale was that “[t]he market for child pornography was ‘intrinsically related’ to . . . underlying [acts of child] abuse, and was therefore ‘an integral part of the production of such materials, an activity illegal throughout the Nation.’”¹²⁰ Because speech that is “an integral part of conduct in violation of a valid criminal statute” is freely regulable, *Ferber* was “grounded . . . in a previously recognized, long-established category of unprotected speech.”¹²¹ By suppressing the market for child pornography, the government diminishes the amount of child abuse (that which occurs for the purpose of creating material to be disseminated).¹²²

All this may be true, but as Justice Alito pointed out in his dissent in *Stevens*, the substance of the analysis seems applicable to “crush videos” as well: The market for such material is “intrinsically related” to animal abuse, which appears to be illegal “throughout the Nation.”¹²³ There are acts of animal abuse that would not occur but for the fact that videos of them find a market, so, just as in *Ferber*, suppressing the market reduces the incidence of animal abuse. Chief Justice Roberts did not directly address this argument.¹²⁴ He said, instead, that “*Ferber* presented a

¹¹⁵ *Chaplinsky*, 315 U.S. at 571–72.

¹¹⁶ Employer anti-union speech might be characterized as “commercial speech,” though it is not at the core of such speech—it does not propose a commercial transaction. Rather, it seems more like issue advertising, speech aimed at increasing the speaker’s commercial prospects, by avoiding unionization through anti-union speech and by gaining public support for business-friendly policies through issue advertising.

¹¹⁷ 458 U.S. 747 (1982).

¹¹⁸ *Id.* at 767–69, 774. Though the problem discussed in the text is not directly tied to the coverage/protection distinction, the way the Court handled it does have some implications for thinking about that distinction.

¹¹⁹ *Id.* at 750, 761, 774.

¹²⁰ *United States v. Stevens*, 559 U.S. 460, 471 (2010) (internal citations omitted).

¹²¹ *Id.* (citations omitted).

¹²² *Id.*

¹²³ *See id.* at 500–05 (Alito, J., dissenting) (quoting *id.* at 471 (majority opinion)) (appendix listing state animal cruelty statutes).

¹²⁴ His opinion offers an indirect implicit response. The Court held that the “crush video” statute was unconstitutional because it was overbroad, meaning that its terms clearly applied to a substantial number of expressive acts that were constitutionally protected—depictions of animals being wounded or killed, which are not necessarily acts of animal cruelty. *Id.* at

special case.”¹²⁵ On this view, *Ferber* is an ad hoc exception within an otherwise general doctrinal structure.¹²⁶ Yet, allowing ad hoc exceptions contradicts the very purpose of tying the recognition of categorical exceptions to historical tradition, which is to avoid the prospect of judicial decisions guided by a balancing test derived from *Chaplinsky*’s functional formulation.

United States v. Alvarez, invalidating the Stolen Valor Act making it a crime for a person to claim falsely that he or she had been awarded a military honor, followed *Stevens*’s analytical approach, elaborating a bit by explaining why only some false statements were not covered by the First Amendment.¹²⁷ Writing for four Justices, Justice Kennedy offered a more comprehensive list of the uncovered categories:

[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few “historic and traditional categories [of expression] long familiar to the bar,” . . . [including] advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called “fighting words”; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent.¹²⁸

Without providing detail, Justice Kennedy wrote that “[t]hese categories have a historical foundation in the Court’s free speech tradition.”¹²⁹

Justice Kennedy’s list rather strongly suggests that the Court no longer distinguishes between coverage and protection. The clearest indication comes from the final item on the list, “speech creating some grave and imminent threat the Government has the power to prevent.” Terms like “gravity” and “imminence” are what one would associate with an analysis applying a stringent standard of review: Because

482 (majority opinion). The *Ferber* opinion might have involved a statute that was not substantially overbroad: Nearly every act defined as child pornography involved underlying acts of child abuse.

¹²⁵ *Id.* at 471.

¹²⁶ For additional discussion of ad hoc exceptions, see *infra* notes 236–39 and accompanying text.

¹²⁷ 132 S. Ct. 2537, 2551 (2012) (plurality opinion). For my earlier analysis of the problem presented in *Alvarez*, published before the Court’s decision, see Mark Tushnet, “*Telling Me Lies*”: *The Constitutionality of Regulating False Statements of Fact* (Harvard Law Sch. Pub. Law Working Paper Series, Paper No. 11-02, 2011), <http://ssrn.com/abstract=1737930> [<https://perma.cc/7L4V-8AF8>].

¹²⁸ *Alvarez*, 132 S. Ct. at 2544 (internal citations omitted).

¹²⁹ *Id.* I cannot refrain from the observation that the offhandedness of this statement suggests to me that treating *Stevens* as creating or invoking a real historical test would be a mistake, and that at least some of the Justices use the historical test as a shorthand reference to something else.

the threat is grave the government has a compelling interest in preventing its realization, and because it is imminent there is no less restrictive alternative to suppression.¹³⁰ Speech of that sort is covered but not protected. In contrast, the categories listed in *Chaplinsky* and repeated in *Alvarez* were, when initially enumerated by the Court, not covered by the First Amendment, and some probably cannot reasonably be understood even today as covered. As discussed earlier, for example, we can understand the permissibility of banning obscene materials only by assuming that laws doing so need not satisfy a stringent standard of review.

Justice Kennedy's discussion of falsity also suggests a downplaying of the coverage/protection distinction because it appears to assume that the *Mosley* rule against content-based regulations means that the Court may not distinguish among categories of expression based on an assessment of whether, or the degree to which, the speech in each category has what Justice Powell called "constitutional value."¹³¹

Justice Kennedy's opinion imposed heavy qualifications on Justice Powell's observation, repeated in later cases by others, that "there is no constitutional value in false statements of fact."¹³² For Justice Kennedy, statements to that effect had to be taken in their "proper context."¹³³ The context for each such assertion was one in which falsity was accompanied by some "legally cognizable harm" such as injury to reputation or fraud.¹³⁴ Justice Kennedy's requirement that harm accompany falsity suggests that, to him, either the Court is not in a position to assess whether falsity—or expression more generally—has First Amendment value or that falsity as such does have First Amendment value. The former view suggests in turn that the First Amendment covers all communicative acts. The latter does so as well, at least if one thinks that false statements are a paradigmatic example of nearly worthless expressions.¹³⁵

These considerations suggest that the Court is moving in the direction of abandoning the coverage/protection distinction. What might be additional consequences of doing so? Suppose that the Court were to abandon *Central Hudson* and insist that all regulation of truthful non-misleading commercial speech be subject to

¹³⁰ See also *infra* notes 195–96 and accompanying text (discussing why statements that incite imminent lawless action should be understood as covered but not protected, rather than as not covered).

¹³¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

¹³² *Id.*

¹³³ See *Alvarez*, 132 S. Ct. at 2545.

¹³⁴ *Id.*

¹³⁵ Justice Kennedy's imposition of a requirement that falsity be accompanied by material harm raises a more general question about First Amendment theory, which I simply flag here. Congress's enactment of a statute imposing liability for falsity as such can be taken to reflect a judgment that the First Amendment, properly interpreted, authorizes regulation of falsity as such. The Court needs a reason to displace that understanding of the First Amendment's meaning. Justice Kennedy alluded to a "slippery slope" reason for doing so. *Id.* at 2547–48. For a discussion of the "slippery slope" argument, see *infra* notes 188–94 and accompanying text.

a stringent standard of review. Such speech would then be fully covered by the First Amendment. The foie gras distributor would win his First Amendment claims (subject to questions about the application of *United States v. O'Brien*).¹³⁶ What, though, of false or misleading commercial speech? All of the Court's formulations are to the effect that states have wide freedom to regulate such speech. Or put another way, false or misleading commercial speech remains subject to the rule of *Valentine v. Chrestensen*¹³⁷: it is not covered by the First Amendment.

Bringing false or misleading commercial speech within the First Amendment's coverage while according government significant power to regulate it would be at least as doctrinally awkward as *Central Hudson* is. Reasoning backward: That a regulation of false or misleading speech is constitutionally permissible (that the speech is covered but not protected) means that the regulation satisfies a stringent standard of review. But, in many settings the latter claim would be difficult to sustain.

There are difficulties even as to falsehoods, but the principal problems arise in connection with regulation of commercial advertising said to be misleading. First, falsehoods: As I will discuss in more detail below, *United States v. Alvarez* holds that the government cannot regulate falsehood as such ("mere" falsehood).¹³⁸ Rather, it must connect the falsehood to some material harm.¹³⁹ Of course, often the dissemination of a false commercial statement will cause material harm, as by inducing a consumer to purchase an item because false advertising led him to believe, mistakenly, that the product would do something he wanted done. Suppose, though, the seller asserts that no one really believed what the advertisement said, or at least offers to prove that this particular purchaser did not believe it. At that point, the regulation might penalize the seller for mere falsehood. A flat ban on false advertising would be more restrictive than necessary to avoid the dissemination of falsehoods that cause material harm; a ban coupled with a "no harm, no foul" defense would be better.¹⁴⁰ That would leave us with classic common law fraud, stripping away much of modern consumer protection law. In addition, in competitive markets we might expect competitors to challenge false assertions about at least some of a

¹³⁶ As to the latter, see *infra* notes 220–23 and accompanying text.

¹³⁷ See 316 U.S. 52, 54–55 (1942).

¹³⁸ *Alvarez*, 132 S. Ct. at 2545.

¹³⁹ See *id.* (discussing the presence of a legally cognizable harm in the false statement cases). The term "material" is important here, because it limits the government's ability to treat harms to sensibility and the like as justifications for regulation.

¹⁴⁰ For additional discussion of the "no harm, no foul" principle, see *infra* notes 151–55 and accompanying text. I have termed the principle a defense for ease of exposition, but the analysis would not be significantly different were the cause of action or criminal offense defined to treat proof of lack of harm or the risk thereof as an element of the cause of action or criminal offense. In the criminal context there might be an (in my view insubstantial) argument that allocating the burden of proof to the defendant would violate the Due Process Clause. Compare *Mullaney v. Wilbur*, 421 U.S. 684 (1975), with *Patterson v. New York*, 432 U.S. 197 (1977).

product's characteristics.¹⁴¹ Finally, counter-advertising produced by the government is an obvious less restrictive alternative: Instead of devoting resources to enforcing the regulatory ban on false advertising, the government could spend the money on advertising saying that the commercial advertisements that consumers have been reading are false.¹⁴²

Whether a ban on misleading commercial advertisements could satisfy a stringent standard of review is even less clear.¹⁴³ The Supreme Court's more recent cases suggest a degree of suspicion about "categorical" bans on statements as misleading, that is, bans that assume that all assertions of a specific sort are misleading.¹⁴⁴ The Food and Drug Administration (FDA) categorically prohibits advertising that certain regulated pharmaceutical products have been shown to be effective in treating medical conditions unless the product's effectiveness has been established by two random controlled trials (RCTs), referred to as the "gold standard" or "blue ribbon" requirement.¹⁴⁵ These regulations prohibit advertising that a medication approved for some uses, because the gold standard requirement has been satisfied as to those uses, has been shown to be effective in *one* randomly controlled trial for treating another condition even if that assertion is true.¹⁴⁶ A recent decision by the Court of Appeals for the District of Columbia Circuit casts some doubt on the FDA's practice.¹⁴⁷ The Federal Trade Commission (FTC) found that POM Wonderful had used an extensive advertising campaign containing many misleading statements about the medical benefits that had been shown to flow from regular use of pomegranate juice.¹⁴⁸

¹⁴¹ The qualification is needed because some characteristics might be inherent in the product category: One would not expect to see counteradvertising of the form, "They said that their product is completely safe, but it isn't. Their product has a fatality rate of 15%; ours is much better, with a fatality rate of only 7%."

¹⁴² Presumably the government could also ban sale of the product entirely, if the problems of consumer deception were severe enough.

¹⁴³ Although the Court has not addressed the question in detail, I assume that "misleadingness" is an objective concept: A statement about a commercial product is misleading if a reasonable consumer (or perhaps a consumer with moderately impaired evaluative capacities) would mistakenly infer something about the product from the advertisement.

¹⁴⁴ See, e.g., *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 148–49 (1994) (invalidating a ban on a lawyer advertising that she is also a certified public accountant); *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 111 (1990) (invalidating a prohibition on lawyers describing themselves as "specialists" in specific areas). *But see* *Friedman v. Rogers*, 440 U.S. 1, 19 (1979) (upholding as regulating misleading advertising a ban on practicing optometry under a trade name).

¹⁴⁵ See Suzanne White Junod, *FDA and Clinical Drug Trials: A Short History*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/WhatWeDo/History/Overviews/ucm304485.htm> [<https://perma.cc/5272-43KJ>].

¹⁴⁶ This is referred to as advertising for "off label" uses. See *Understanding Unapproved Use of Approved Drugs "Off Label"*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForPatients/Other/OffLabel/ucm20041767.htm> [<https://perma.cc/6JVS-GTL2>] (last updated Apr. 11, 2016).

¹⁴⁷ *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015).

¹⁴⁸ *Id.* at 484.

Among the remedies the FTC ordered was a requirement that POM Wonderful advertisements contain only statements supported by the FDA's "gold standard" requirement of two RCTs.¹⁴⁹ The Court of Appeals affirmed the finding that the advertising campaign had been misleading, but it invalidated that portion of the remedial order as violating the First Amendment.¹⁵⁰ Judge Srinivasan's opinion pointed out that under the "categorical bar . . . consumers may be denied useful, truthful information about products with a demonstrated capacity to treat or prevent serious disease."¹⁵¹

Consider, for instance, a situation in which the results of a large-scale, perfectly designed and conducted RCT show that a dietary supplement significantly reduces the risk of a particular disease, with the results demonstrated to a very high degree of statistical certainty (i.e., a very low *p*-value)—so much so that experts in the relevant field universally regard the study as conclusively establishing clinical proof of the supplement's benefits for disease prevention. Perhaps, moreover, a wealth of medical research and evidence apart from RCTs—e.g., observational studies—reinforces the results of the blue-ribbon RCT. In that situation, there would be a substantial interest in assuring that consumers gain awareness of the dietary supplement's benefits and the supporting medical research.¹⁵²

I take this to be something akin to a "no harm, no foul" rule in reverse: The First Amendment requires that the advertiser be given an opportunity to show that the advertisement was not in fact objectively misleading. As I have suggested, an approach of that sort shows that banning a category of statements as misleading cannot satisfy a stringent standard of review.

What about regulation targeted at individual statements for example, imposing a fine on an advertiser who disseminates a statement shown according to some stipulated method, to some stipulated level of confidence (rather than assumed) to be misleading? As with false statements, here too there may be less restrictive methods available. Counter-advertising, of course, remains available. But, more significant, so does mandated disclosure. Consider a variant on the example Judge Srinivasan offered: The advertiser has one RCT supporting its assertions, but the trial is not large-scale enough to lead experts in the field to consider it conclusive,

¹⁴⁹ *Id.* at 500–01.

¹⁵⁰ *Id.* at 484.

¹⁵¹ *Id.* at 502.

¹⁵² *Id.*

and the regulator concludes that, under the circumstances, the advertisement is objectively misleading. A disclosure that the assertion is supported by only one RCT, perhaps elaborated somewhat, might well be a less restrictive means of combating misleadingness than a complete ban.¹⁵³

The foregoing analysis suggests that the coverage/protection distinction remains important to First Amendment doctrine regarding commercial advertising despite the Court's abandonment of the broad rule in *Valentine v. Chrestensen* that commercial speech is not covered by the First Amendment. The distinction explains the Court's assumption that false or misleading commercial advertisements are readily regulable: Such advertisements are not covered by the First Amendment, whereas after *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁵⁴ truthful advertisements are both covered and protected.¹⁵⁵

The Supreme Court appears to have backed up to the edge of abandoning the coverage/protection distinction, without fully appreciating how the accumulation of cases and doctrines it was developing would unsettle First Amendment law rather substantially. Part IV presents reasons for the Court to move away from the edge.

¹⁵³ Several qualifications or observations about the analysis in the text: (a) Perhaps the government could show that the specific disclosure would be ineffective. For a general discussion of limits on disclosures' effectiveness, see Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011); (b) The Court of Appeals said in *POM Wonderful* that, were the advertiser to have one study of the quality it described, the First Amendment would preclude the regulator from insisting on a disclosure that the study was "inconclusive." 777 F.3d at 502. I take this to be tied tightly to the quality of the imagined study, and not a general statement about the impermissibility of requiring a disclosure or disclaimer; (c) First Amendment objections have been raised against compelled disclosures/disclaimers. See, e.g., *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 655 (1985) (upholding a compelled disclosure that an attorney who promised that clients who lost their cases would not have to pay attorney's fees would have to pay court costs). The Court of Appeals for the District of Columbia Circuit has dealt with compelled disclosures in a number of not entirely consistent decisions. Compare *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), with *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20, 27 (D.C. Cir. 2014) (en banc) (upholding against a First Amendment challenge a requirement that meat sold at retail disclose the meat's country of origin).

¹⁵⁴ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

¹⁵⁵ Writing in *United States v. Alvarez*, Justice Kennedy endorsed *Virginia State Board of Pharmacy*'s observation that "fraudulent speech generally falls outside the protections of the First Amendment." *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion). This is ambiguous on the coverage/protection question; it might be read to assert that fraudulent statements—those "made to effect a fraud or secure moneys or other valuable considerations," *id.*—are covered but that regulation of fraud satisfies a stringent standard of review. Even with respect to fraud, questions about whether a regulatory ban is the least restrictive alternative could be raised; government sponsored counteradvertising might be available in some contexts, and here too a "no harm, no foul" defense might be made available.

IV. SOME PROBLEMS SUGGESTING THE NEED FOR THE DISTINCTION

Continue with the assumption made in Part III that we have eliminated the coverage/protection distinction: Every communicative act is covered by the First Amendment and regulation of covered expression is unconstitutional (the expression is protected) unless the government can show that the regulation satisfies a stringent standard of review—a standard incorporating elements like these: The regulation serves a compelling (or very important) public interest,¹⁵⁶ and is the least restrictive means for doing so (or at least that there are not some obvious available alternatives that restrict expression less). Put more affirmatively but omitting some nuance, expression is covered but not protected when the government has compelling reasons for regulating it. This describes a doctrinal structure that has eliminated the coverage/protection distinction, leaving us with only the distinction between protected and unprotected speech, the line between them being drawn by the application of a stringent standard of review.

What problems might there be with such a structure? Begin with a simple example of a criminal act that consists solely of communicative acts—perjury.¹⁵⁷ I assume that perjury generally is unlawful because it interferes with the course of justice, for example by forcing the opponent to investigate and disprove the false assertion and by posing a risk that the court will enter a judgment “not resting on truth,”¹⁵⁸ and that avoiding interferences with the course of justice is a compelling interest.¹⁵⁹ Yet, the perjury offense as conventionally defined might not be (almost certainly is not) the least restrictive means of advancing that interest. Consider a bald-faced lie, that is, a lie made in circumstances where no listener would believe it to be true.¹⁶⁰ Bald-faced lies do not interfere with the course of justice because no

¹⁵⁶ The usual terminology is “governmental” interest. I use the term “public interest” because it allows for the possibility that there might be a public interest in ensuring that private parties’ lives are not unduly affected by expressive acts.

¹⁵⁷ Schauer, *Speech and “Speech,”* *supra* note 13, at 905 (introducing the perjury example). An analysis similar to the one presented in the text can be developed for the crime of making false statements to government agents. 18 U.S.C. § 1001 (2012) (“[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title, [or] imprisoned not more than 5 years . . .”).

¹⁵⁸ *Alvarez*, 132 S. Ct. at 2546 (quoting *In re Michael*, 326 U.S. 224, 227 (1945)). Justice Kennedy introduces this proposition with the words “can cause,” which I take to mean, “poses a risk of causing.” *Id.*

¹⁵⁹ *Id.* at 2545 (capturing this thought as an interest in avoiding “the costs of vexatious litigation”).

¹⁶⁰ *Cf.* W. S. GILBERT & ARTHUR SULLIVAN, *THE MIKADO* 197 (New York, Edwin F. Kalmus 1885) (“Merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative.”).

one believes them and no one spends any effort to investigate and refute them. So, the interest in protecting the administration of justice could be advanced by allowing a “no harm, no foul” defense to perjury charges, that is, by allowing the defendant to prevail if she shows that the (acknowledged) lie posed no risk whatever to the administration of justice.¹⁶¹ The fact that no such defense is available, nor is it widely supported as something flowing from the First Amendment, strongly suggests that perjurious statements should be understood as not covered by the First Amendment.¹⁶²

The category of perjury demonstrates the value of holding on to the coverage/protection distinction: Eliminate the distinction and we will have difficulty explaining why it is constitutionally permissible to punish perjurers. Of course one could resolve the problem by eliminating the distinction *and* accepting the conclusion that the First Amendment requires that those charged with perjury have the opportunity to present a “no harm, no foul” defense. Current doctrine has not done so, nor are there serious indications that it will change in those ways. The historical approach accommodates this conclusion—imposing punishment for perjurious statements “ha[s] never been thought to raise any Constitutional problem”—which is itself an indication that the distinction between coverage and protection does some important work.¹⁶³

Here I think it useful to return to the “material harm” requirement of *Alvarez*. Consider an analysis of the Stolen Valor Act that focuses on the fact, as it appears to be, that a substantial number of false statements about military honors occur in contexts where the person making the statement does so for the purpose of *gain*.¹⁶⁴ Sometimes that gain is material, as when the person hopes that it will elicit sympathy from a jury at a criminal trial or a judge in sentencing, or when it is made in connection with a solicitation for a charity that the person runs.¹⁶⁵ I see no good

¹⁶¹ The defense might not be easy to prove, of course, particularly if it were available only to those who could show that their lies posed no risk whatsoever; that is, it would not be enough to show that lies did not in fact interfere with the course of justice.

¹⁶² I note that one could explain the absence of a “no harm” defense by referring to problems of administration and the cost-saving advantages of denying that defense, and then by treating those interests as compelling. The more standard view, I think, is that saving costs, at least where those costs are likely to be low, is not a compelling interest. I discuss some implications of rejecting that (and related) views below, see *infra* text accompanying notes 163–96.

¹⁶³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹⁶⁴ The analysis that follows was developed in Tushnet, *supra* note 127.

¹⁶⁵ The latter case is *United States v. Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010), *rev'd*, 667 F.3d 1146 (10th Cir. 2012). Sometimes the gain is reputational, as appears to have been the case in *Alvarez*, where the defendant made the statement while introducing himself as a new member of a California water district board; one could reasonably think that he made the statement for the purpose of inducing his listeners to accord his views a degree of respect that they might not otherwise have had. Justice Kennedy’s analysis in *Alvarez* clearly precludes one from treating that sort of gain as sufficiently wrongful as to justify regulation of the falsity that induces it. 132 S. Ct. 2537, 2542 (2012) (plurality opinion). Justice Kennedy wrote, “For all the record shows, respondent’s statements were but a pathetic attempt to gain respect that eluded him.” *Id.*

reason for distinguishing this sort of gain from the harms associated with false statements made to induce others to hand over money. If so, on Justice Kennedy's analysis, legislatures could penalize false statements accompanied by material harm or material gain of this sort. Suppose, though, that a legislature also concluded that it would impose an unnecessary burden on the trial process to require that prosecution show that the statement was either made for the purpose of, or had the effect of, inflicting material loss or achieving material gain of the right sort. That *is* the Stolen Valor Act, defended with reference to a legislative concern about saving litigation costs. It is also the ordinary perjury statute.

Perhaps making perjury a crime could be defended as advancing the interest in preserving the integrity of judicial proceedings, or as penalizing insults to the legal system.¹⁶⁶ *Alvarez* characterizes these as compelling interests, as it also characterizes the interest in preserving the integrity of the government's system of military honors.¹⁶⁷ But, with respect to the Stolen Valor Act the Court saw no "direct causal link between the restriction imposed and the injury to be prevented."¹⁶⁸ It is not clear to me how one could prove a causal link between an utterance and a harm as generalized as impairing the "integrity" of a system.¹⁶⁹ Discussing the required causal connection, Justice Kennedy wrote, "The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez."¹⁷⁰ Justice Kennedy did not discuss the existence or not of such evidence when he dealt with the way perjury "threatens the integrity of judgments that are the basis of the legal system[,]"¹⁷¹ and as far as I can tell none of the cases discussing the relation between perjury and the First Amendment offers such evidence.

The problem of "impairing the integrity of a system" arose again in *Williams-Yulee v. Florida Bar*,¹⁷² where a closely divided Court upheld the constitutionality of a Florida regulation prohibiting candidates for elected judicial office from personally soliciting funds for their candidacies.¹⁷³ For a plurality of the Court, Chief

¹⁶⁶ As an analytic matter, one could contend that the litigation-cost argument is somehow more substantial with respect to perjury than it is with respect to the Stolen Valor Act. (Rebecca Tushnet suggested this possibility to me.) Given the fuzziness of the empirical evidence one might proffer with respect to both statutes, I find it difficult to conclude that the litigation-cost argument is stronger with respect to perjury, but others may have a different sense of things.

¹⁶⁷ *Alvarez*, 132 S. Ct. at 2548–49.

¹⁶⁸ *Id.* at 2549.

¹⁶⁹ *Id.* Perhaps lies and perjury manifest a kind of disrespect, for the listener and for the legal system respectively. Seeking evidence of a "causal link" between the false statements and that kind of disrespect seems to me to invoke something akin to a category mistake.

¹⁷⁰ *Id.* (citation omitted).

¹⁷¹ *Id.* at 2546 (citation omitted).

¹⁷² 135 S. Ct. 1656 (2015) (plurality opinion).

¹⁷³ *Id.* at 1673.

Justice Roberts applied “exacting scrutiny,” which required that “the restriction [be] narrowly tailored to serve a compelling interest.”¹⁷⁴ According to the Chief Justice, the regulation was narrowly tailored to “advance[] the State’s compelling interest in preserving public confidence in the integrity of the judiciary.”¹⁷⁵ Then, after several paragraphs on the general importance of public perception of judicial independence, the opinion noted, “The concept of public confidence in judicial integrity does not easily reduce to precise definition, *nor does it lend itself to proof by documentary record.*”¹⁷⁶ The Court did not demand proof, instead endorsing the judgment of the Florida Supreme Court and other rule-makers that the interest in public confidence in the judiciary was compelling.¹⁷⁷ Further, in its analysis of the narrow tailoring requirement, the Chief Justice’s opinion resonated with *Holder* in being “mindful” of the “considered judgments” made by states in regulating judicial campaigns.¹⁷⁸ Notably, the Chief Justice’s opinion made no mention of *Alvarez*.¹⁷⁹

It is difficult to know what to make of the differing treatments of the interest in preserving a system’s integrity—the system of military honors in *Alvarez*, the judicial system’s in the perjury case and *Williams-Yulee*. Undoubtedly, a Court composed of judges is likely to be quite sensitive to, and perhaps accurate in its judgments about, claims that certain actions impair the judicial system’s integrity. *Holder* indicates the Court’s awareness that executive officials might have a better ability to evaluate non-measurable aspects of national security than judges do. So, the Court is not self-confident across the board about its evaluative capacity. Then, though, we might wonder why the Court’s ability to assess the degree to which lies about having received military honors impair the integrity of the system is greater than Congress’s.

In short, it seems to me difficult to see how the causal link in the context of perjury and judicial solicitation of campaign funds is different in kind from the causal links in the context of *Holder* and the Stolen Valor Act. In *Williams-Yulee* the Justices may have believed that because they were judges they could directly evaluate the claims about how solicitation of campaign funds impaired the integrity of the judicial system. In *Holder*, the Court deferred to the executive’s judgment

¹⁷⁴ *Id.* at 1664, 1665. Justice Ginsburg concurred in the result, but disagreed that “exacting” scrutiny was the appropriate test. *Id.* at 1673 (Ginsburg, J., concurring in part and concurring in the judgment).

¹⁷⁵ *Id.* at 1666 (plurality opinion). Justice Ginsburg joined this portion of the Chief Justice’s opinion, which was therefore the opinion of the Court. *Id.* at 1673 (Ginsburg, J., concurring in part and concurring in the judgment) (“I join the Court’s opinion save for Part II.”).

¹⁷⁶ *Id.* at 1667 (plurality opinion) (emphasis added).

¹⁷⁷ *See id.* at 1666.

¹⁷⁸ *Id.* at 1671. The opinion earlier cited *Holder* as showing that some regulations could survive stringent scrutiny. *Id.* at 1665–66.

¹⁷⁹ Justice Breyer’s separate opinion cited his separate opinion in *Alvarez* as exemplifying what he thought the proper mode of analysis was, *id.* at 1673 (Breyer, J., concurring), and Justice Scalia’s dissent cited the majority opinion in *Alvarez* for rhetorical purposes in its peroration, *id.* at 1682 (Scalia, J., dissenting).

about national security because the Justices apparently believed that they were not in as good a position to evaluate the executive's claims.¹⁸⁰

I believe that similar deference would have been appropriate in *Alvarez*. But, having framed the problem as one with respect to which the Court had to evaluate the claimed impairment of the system of military honors, Justice Kennedy would have been better off had he simply stated that perjury was one of those categories of speech, referred to in *Stevens*, that historically have been treated as outside the First Amendment's coverage (and that the Court now recognizes that perjury should be on *Chaplinsky's* historically justified list). Perhaps a similar historical claim could have been made about the regulation at issue in *Williams-Yulee*.¹⁸¹

At this point returning to the topic of obscenity is helpful. Materials not covered by the First Amendment are outside its scope. The Court's struggles with the law of obscenity before *Miller* showed that a doctrine that distinguishes between what is inside and what is outside the First Amendment's scope requires careful attention to where the line between the inside and the outside is drawn. Later developments in the First Amendment law dealing with sexually explicit expression suggest, though perhaps do not definitively confirm, that the Court divides sexually explicit material between that which is outside the First Amendment's scope, or, equivalently, as not covered by the First Amendment, and that which is inside its scope. So, in upholding a regulation that prohibited public nudity as applied to "strip clubs" that present nude dancing as entertainment, Chief Justice Rehnquist wrote, "nude dancing of the kind sought to be performed here is expressive conduct *within the outer perimeters of the First Amendment*, though we view it as only marginally so."¹⁸² *New York v. Ferber* described child pornography as "a category of material *outside the protection of the First Amendment*."¹⁸³

Concerns about the boundary between the covered and the not-covered motivate the Court's treatment of libel law as a First Amendment problem. Here we can begin with what the Court told us Justice Powell meant in *Gertz v. Robert Welch, Inc.*¹⁸⁴

¹⁸⁰ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010) (drawing on an affidavit from the executive branch).

¹⁸¹ The fact that the Florida rule had been adopted only in 2014, see *Williams-Yulee*, 135 S. Ct. at 1664 (recounting the circumstances of the rule's adoption), would weigh against such a conclusion. For additional discussion of the historical approach, see *supra* text accompanying notes 101–10.

¹⁸² *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (emphasis added). Seven Justices agreed with this point. See *id.* at 587 (White, J., dissenting).

¹⁸³ 458 U.S. 747, 763 (1982) (emphasis added). The formulation "outside the protection" might suggest that child pornography is covered by the First Amendment but not protected by it, but the inside/outside metaphor that *Ferber* uses is more compatible with the coverage/protection distinction. (The phrase "material not protected by the First Amendment" would be the natural way to express the thought that the material was covered but not protected.)

¹⁸⁴ 418 U.S. 323 (1974).

when he said (as explained by the Court in *United States v. Alvarez*¹⁸⁵) that “there is no constitutional value in false statements of fact” that injure reputation.¹⁸⁶ The First Amendment does not bar states from imposing liability on those who make false statements that injure reputation, when they do so with knowledge of the statements’ falsity or with reckless disregard of whether the statements are true or false.¹⁸⁷ Suppose we eliminate the coverage/protection distinction. We would then have to say that imposing liability for making these statements served a compelling interest in the least restrictive way.

Note that if the interest in protecting reputation is compelling, it is compelling with respect to all false statements of fact that injure reputation, not merely those made recklessly. And, it seems to me, imposing liability for making false statements of fact that injure reputation is indeed the least restrictive means of serving *that* interest. The “knowledge/reckless disregard” standard has to come from somewhere else. Where it comes from is, of course, clear from the Court’s decisions. It is a rule designed to ensure that people are not deterred from making *true* statements of fact that injure reputation by the risk that judges and juries will mistakenly find a (true) fact to be false. The best way to understand this analysis is through the coverage/protection distinction: False statements of fact that injure reputation are outside the First Amendment’s scope/are not covered by the First Amendment. Those who make *some* such false statements cannot be held liable for the reputational injury they cause, but not because what they said has First Amendment value. Rather, they receive an immunity from liability for strategic reasons, to ensure that true statements of fact are uttered without fear of liability on the part of those making them.

Could such a strategic argument be available for false statements as such? I begin with the observation that the state of mind required for punishing *lies* is almost exactly the same as that required for imposing liability for false statements that injure reputation—knowledge of falsity. Consider then a statute like the Stolen Valor Act that singles out a specific category of lies for punishment. If imposing liability for knowingly making false statements that injure reputation does not raise constitutional concerns about deterring people from making similar false statements with a different state of mind, it is difficult to see how imposing liability for knowingly making false statements within the statutory category could raise such concerns. And, indeed, in *Alvarez*, Justice Kennedy did not discuss deterrence with respect to statements about military honors. Rather, as noted earlier, he relied on a *different* deterrence argument, expressing a slippery-slope concern:

Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that

¹⁸⁵ *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (*Gertz* and similar cases deal with “legally cognizable harm[s] associated with a false statement.”)

¹⁸⁶ *Gertz*, 418 U.S. at 340.

¹⁸⁷ *Alvarez*, 132 S. Ct. at 2560–61 (Alito, J., dissenting).

the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.¹⁸⁸

That is, allowing the government to impose liability for knowingly false statements about the receipt of military honors gives the government the power to impose liability for knowingly false statements falling in other categories, and the mere knowledge that the government has that power will deter—"chill"—people from knowingly making false statements with respect to everything (because the government has the power to identify any category as one where it will impose liability for knowingly making false statements).¹⁸⁹

There are at least two responses to this slippery-slope concern. First, recall that in the libel context the Court's strategic concern is with deterrence of the making of *true* statements, an obviously significant concern. In contrast, it is hardly obvious that deterring people from knowingly making false statements is a bad thing—or, more precisely, that a legislative decision to deter people from lying is constitutionally acceptable *only* if the legislature has a compelling reason for doing so and the regulatory measure is the least restrictive means of doing so.¹⁹⁰ Justice Breyer's

¹⁸⁸ *Id.* at 2547–48 (plurality opinion).

¹⁸⁹ *See id.* at 2553 (Breyer, J., concurring) (discussing the “*mens rea* requirement” to prevent the chilling of speech by honest speakers).

¹⁹⁰ *But see* Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1482–83 (2015) (identifying a category of high-value lies that include those told by investigative reporters to get access to politically significant information). Other examples offered by Chen and Marceau are lies told by police undercover agents and those told by civil rights testers. *Id.* at 1462–65. It is far from clear to me that it would be unconstitutional for a legislature to prohibit such lies even if doing so was not the least restrictive means of deterring deception in those contexts. Chen and Marceau's strongest case involves “Ag Gag” laws prohibiting the use of deception to get access to agricultural production facilities. *Id.* at 1484–85. They point out that such laws “go beyond generally applicable trespass laws . . . [and] laws prohibiting fraud [and] invasions of privacy,” *id.* at 1469, and so may be more restrictive than necessary to advance the public interest in protecting private property and privacy.

In response, one might think that penalizing liars is the least restrictive means for advancing a strong public interest in deterring lies. Further, perhaps on analogy to *R. A. V.*, suppressing one form of lying for the very purpose of suppressing the type of information often revealed as a result of that type of lie should be held to violate a First Amendment principle against intentional efforts to suppress speech of a particular sort (here, the information revealed by the investigations that occurred because of the lies). *Cf. id.* at 1484 (describing Ag Gag laws as twice content-based); *id.* at 1487–88 (discussing *R. A. V.*). Or, perhaps the Ag Gag laws might violate a non-First Amendment right. Finally, perhaps we should draw an analogy between the regulation of commercial speech and the regulation of lies and say that high-value lies are covered by

concurring opinion in *Alvarez* alluded to situations in which lies might be socially valuable:

False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.¹⁹¹

Justice Breyer's observation may well be true, but the "chilling effect" argument works only if liars might be concerned with the possibility that the government might outlaw lies of the sort they are uttering. And, even then, at the moment of telling the lie, there would be no deterrence if no statute on the books makes it an offense to tell a lie of the relevant sort ("shielding the person from prejudice," for example). Acknowledging a power in the government to punish lies as such then raises basic questions of constitutional theory: Justice Breyer thinks (as do many of us, perhaps) that some lies are socially valuable.¹⁹² The relevant question, though, is whether a legislature should be precluded from concluding otherwise, that is, from concluding that lies within some categories are *not* socially valuable. Nothing in *Alvarez* addresses that question.

The second problem with Justice Kennedy's slippery-slope argument is that, like all such arguments, it works only if we can identify some reason why a legislature, knowing that it has the power to punish lies as such, would do so with respect to lies that many people believe to be socially valuable or at least inoffensive.¹⁹³ The most plausible reason is something like this: Once having exercised the power to punish some lies, representative legislatures might begin to think more generally that lies in other categories are not as socially valuable (or inoffensive) as people previously thought.¹⁹⁴ It is not clear to me that this is so as a matter of empirical reality. But, even were it so, it is not clear why we should be bothered. Slippery-slope arguments

the First Amendment (as is truthful commercial speech), while low-value lies are outside its coverage (as are misleading commercial statements). My views on these questions are unsettled.

¹⁹¹ *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring).

¹⁹² *Id.*

¹⁹³ See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 380 (1985) (describing the general problems associated with slippery-slope arguments); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1026–27 (2003) (describing the circumstances under which slippery-slope arguments can have bite).

¹⁹⁴ The fact that the legislature is representative is important here, because its members would not adopt the posited statute unless they believed that enough of their constituents thought prohibiting the specific class of lies was good policy.

work because we are concerned that when we reach the bottom of the slope we will find ourselves doing things that we would have thought normatively undesirable when we were at the top of the slope. In the present context, though, it is not clear what is wrong with sliding down the slope. Norm change is a common phenomenon, and the fact that at the bottom of the slope we find ourselves normatively approving things (punishing some lies) that we disapproved of earlier does not seem categorically different from the outcome of other processes of norm change. Moreover, in the specific context of lies, it is not clear that even at the top of the slope we think that lying is socially valuable. My own view, for what it is worth, is that many people regard the lies Justice Breyer describes as understandable but regrettable, not normatively desirable in themselves.

I have argued that the best interpretation of existing Supreme Court doctrine is that perjurious statements, obscenity, and false statements of fact that injure reputation are not covered by the First Amendment, though some of the latter receive constitutional protection for strategic reasons derived from the First Amendment.¹⁹⁵ I conclude this Part with the question of statements that incite imminent lawless action. *Brandenburg* tells us that the First Amendment allows governments to punish those who make such statements.¹⁹⁶ Is the best explanation for that result that such statements are not covered by the First Amendment, or that they are covered but not protected? If the latter, the analysis would be that such statements have First Amendment value (unlike false statements of fact or obscenity), and that punishing those who make them serves a compelling public interest in avoiding law-breaking by the least restrictive means available, intervening only at the point where words are highly likely to trigger (incite, by bypassing the listeners' deliberative processes) unlawful action (where the law-breaking is imminent). In contrast, if inciting statements are not covered by the First Amendment, the analysis is that punishing those who make such statements is a reasonable way of ensuring public order. The relevant cases do not indicate definitively which analysis is the correct one, but, in my ears, the opinions' tones incline toward the first (covered but not protected) position rather than the second (not covered).

V. ALTERNATIVES TO THE DISTINCTION, AND PROBLEMS WITH THEM

This Part examines some alternatives to the coverage/protection distinction.¹⁹⁷ The Court could treat all communicative activity as covered by the First Amendment, but instead of subjecting regulation of all communicative activities to a stringent standard

¹⁹⁵ See Eugene Volokh, *Knowingly False Statements of Fact and the First Amendment*, VOLOKH CONSPIRACY (Oct. 17, 2011, 3:15 PM), <http://www.volokh.com/2011/10/17/knowingly-false-statements-of-fact-and-the-first-amendment/> [<https://perma.cc/3NVX-9LFY>] (describing when knowingly false statements may receive constitutional protection).

¹⁹⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam).

¹⁹⁷ For Schauer's discussion of a related topic, see Frederick Schauer, *Codifying the First Amendment*: *New York v. Ferber*, 1982 SUP. CT. REV. 285, 299–308 ("The Paths to Non-protection").

of review it would accord different degrees of protection to different categories of communicative activities; it could come up with an eclectic (which is to say, unauthorized) list of exceptions to the application of a stringent standard of review; it could apply a uniform standard of review to all forms of speech, with the effect of sometimes making it easier to justify regulation (“leveling down”), sometimes making doing so more difficult (“leveling up”). I argue that all these alternatives have substantial drawbacks.

A. The Possibility of Intermediate Categories and Standards of Review

Central Hudson illustrates the possibility of treating some material covered by the First Amendment as regulable by rules that satisfy something less than a stringent standard of review.¹⁹⁸ Having abandoned *Valentine v. Chrestensen*, the Court seemed to understand that some seemingly defensible forms of regulating commercial advertising could not survive stringent review.¹⁹⁹ Its solution was *Central Hudson*, a four-part test that required a “substantial” interest, not a compelling one.²⁰⁰ As we have seen, though, the Court has moved strongly in the direction of converting *Central Hudson* into a stringent standard of review by applying its rule that regulations of truthful and non-misleading commercial speech are impermissible “if the governmental interest could be served as well by a more limited restriction.”²⁰¹

As I have suggested, one reason for the Court’s direction appears to be that an analysis that subjects some speech regulations to a stringent standard of review and others to a less stringent one is inconsistent with the *Mosley* principle that regulations that distinguish on the basis of subject matter are impermissible. That difficulty would of course attend any effort to create intermediate categories and standards of review.

In addition, the basis upon which the Court could rest differentiating among subject matters is questionable. One could convert *Stevens*’s historical criterion from one identifying material outside the First Amendment’s scope into one identifying categories of speech that receive differentiated degrees of protection. Yet, the purely historical approach suffers from a historical problem, as Lakier’s study shows,²⁰² and that problem would be even worse were the object of inquiry to be categories of speech receiving differentiated review: If there is little evidence that the Court had a coherent concept of low value speech as a residual category, there is essentially none that it had a concept of categories of speech receiving differentiated review.

¹⁹⁸ Cf. Schauer, *Speech and “Speech,” supra* note 13, at 907 (“A second alternative would be to maintain . . . that some categories of utterances are protected to a lesser degree than others.”).

¹⁹⁹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n.*, 447 U.S. 557, 564 (1980); see also *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942).

²⁰⁰ *Cent. Hudson*, 447 U.S. at 566.

²⁰¹ *Id.* at 564.

²⁰² Lakier, *supra* note 28, at 2168.

Chaplinsky's functional strand, in contrast, is well-designed for identifying categories of speech that would receive different degrees of protection. That is indeed how the government used *Chaplinsky* in *Stevens*. But, according to the Court, such an approach "is startling and dangerous."²⁰³ The opinion continued, "[T]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."²⁰⁴ That sentence might only mean that such a balancing is impermissible to determine whether speech is covered by the First Amendment, leaving open the possibility that balancing would be allowed to determine the degree of scrutiny regulations of specific classes of speech might receive. That reading is undermined by Chief Justice Roberts's observation that "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."²⁰⁵ It is undermined as well by *Stevens*'s substantive analysis. Having brought "crush videos" within the First Amendment's coverage, the Court did not next ask whether it should develop some intermediate standard of review; rather, it invoked "our existing doctrine," calling for stringent review.²⁰⁶

Justice Breyer's approach in *Alvarez* suggests another approach to differentiating among categories of speech within the First Amendment's coverage. Consistent with his general approach to adjudication, Justice Breyer's analysis in *Alvarez* is compatible with an analysis requiring proportionality between restrictions on expression and a legislature's goals.²⁰⁷ Proportionality analysis is an invitation to judges to replace a legislature's judgment about what is proportionate with their own judgment on the same question, and so (as noted earlier in connection with other approaches) brings us to the deepest questions of constitutional theory.²⁰⁸

A final difficulty with taking a differentiated approach is this: Such an approach treats the First Amendment as something like an onion.²⁰⁹ The onion consists of

²⁰³ *United States v. Stevens*, 559 U.S. 460, 469–70 (2010).

²⁰⁴ *Id.* at 468.

²⁰⁵ *Id.* at 470.

²⁰⁶ *Id.* at 472.

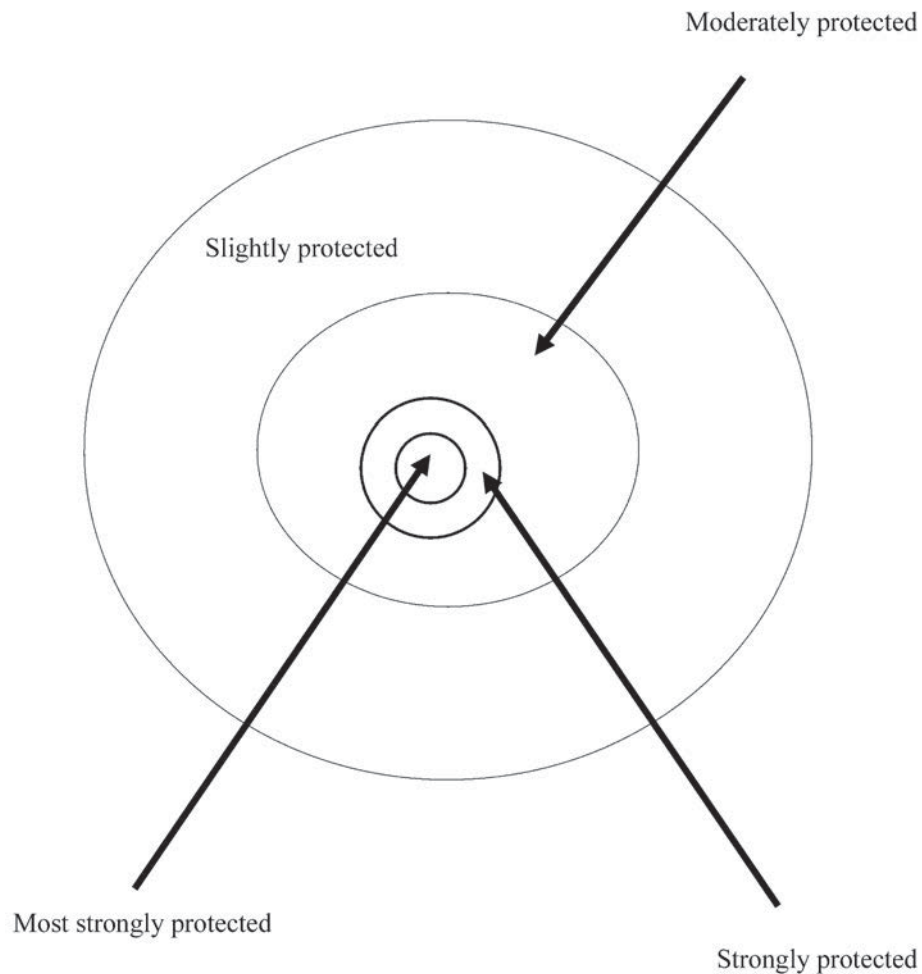
²⁰⁷ See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3096–97 (2015); Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 *HARV. L. REV.* 508, 511–12 (2014) (discussing Justice Breyer's "proportionality review").

²⁰⁸ Proportionality analysis is well-designed for purposes of judicial decision-making, but it does less well in providing guidance to legislators, except perhaps as a caution against doing foolish things. See MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 74–83 (2014) (describing the merits of, and drawbacks to, proportionality analysis).

²⁰⁹ For an earlier brief discussion of the onion model, see Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 *LOY. U. CHI. L.J.* 71, 78–79 & nn.30–36 (2001).

everything covered by the First Amendment.²¹⁰ The onion's layers are the categories, and regulations of speech within each layer receive their own differentiated standard of review. Of course, onions have many layers, and the prospect of proliferating standards of review is not attractive. Yet, nothing in the differentiating approach suggests standards for determining how thick each layer should be, that is, how large the category should be.

DIAGRAM TWO
The Onion Model



²¹⁰ Cf. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (“[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as *only marginally so*.” (emphasis added)). The phrase “only marginally so” suggests the onion model.

Particularly worrisome is a possibility that arises as we reach the First Amendment's core protections of political speech: The Court might devise a category of speech that is "nearly-but-not-quite" political and use something less than stringent review to uphold regulations of speech in that category.²¹¹ *Holder v. Humanitarian Law Project* illustrates the problem.²¹² The Court upheld the constitutionality of a statute making it a crime to provide material support to designated terrorist organizations, as applied to a group that gave advice to such organizations about how to use international law to resolve disputes peacefully.²¹³ The Court applied what it described as the usual standard of review applied to content-based restraints.²¹⁴ Chief Justice Roberts's opinion for the Court deferred to legislative and executive judgments in deciding that providing advice to terrorist groups harms the compelling interest in combating terrorism, because the advice "frees up other resources within the organization that may be put to violent ends[,] "helps lend legitimacy" to the groups, and "strain[s] the United States' relationships with its allies."²¹⁵ Acknowledging that the Court ordinarily does not defer to legislative and executive judgments about the relationship between regulations and harm—as indeed all the other cases reviewed so far in this Essay show—the Chief Justice alluded to the case's circumstances, which counseled the Court to rely on "informed judgment rather than concrete evidence."²¹⁶

On the face of it, the Court's opinion does not apply a stringent standard of review in the manner it does in other cases.²¹⁷ The Chief Justice's opinion limited the statute's application to advice given in "coordination" with a terrorist group, strongly suggesting that it would be unconstitutional to penalize the Humanitarian Law Project for broadcasting advice targeted to a terrorist group without coordinating its efforts with the group.²¹⁸ That limitation seems arbitrary: Uncoordinated advice, if taken by the group, can free up resources and build legitimacy no less than coordinated advice can.²¹⁹ The onion model suggests an explanation for the Court's approach: Uncoordinated advice remains in the core of political speech, protected by a stringent standard of review, while coordinated advice lies somewhere outside the core, in another layer that receives less stringent protection.

²¹¹ Cf. Schauer, *Speech and "Speech," supra* note 13, at 908 ("At the heart of a definitional approach . . . is the idea that decreased pressure at the level of coverage is reflected in increased pressure at the level of protection.").

²¹² 561 U.S. 1 (2010).

²¹³ *Id.* at 36, 40.

²¹⁴ *Id.* at 28.

²¹⁵ *Id.* at 30, 32.

²¹⁶ *Id.* at 34–35.

²¹⁷ Compare *id.* at 40, with *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942) (showing the court's evolving standard of scrutiny).

²¹⁸ See *Holder*, 561 U.S. at 40.

²¹⁹ See, e.g., Catherine A. Hardee, *The Coordination Conundrum*, 49 WILLAMETTE L. REV. 189 (2012).

The Court *has* used a differentiated approach with respect to the category of communicative *conduct*. Such conduct is covered by the First Amendment and is assessed pursuant to the standard set out in *United States v. O'Brien*.²²⁰ That standard resembles *Central Hudson*. It requires that the governmental interest be “important or substantial,” and that “the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest.”²²¹ If *Central Hudson* has been transformed in the direction of increasing stringency, *O'Brien* has been transformed in the other direction: The Court has not applied the requirement that the restriction be “no greater than essential” with anything like the stringency with which it has applied *Central Hudson*’s requirement that the restriction “be no more broad or no more expansive than ‘necessary.’”²²² In practice, legislatures can impose reasonable regulations on communicative conduct if their reasons for doing so are unrelated to the communicative conduct’s content.²²³

R. A. V. provides another example of difficulties associated with developing a differentiated set of standards of review. There Justice Scalia addressed the claim that treating hate speech taking the form of fighting words as viewpoint based would place laws against workplace sexual harassment under a constitutional cloud.²²⁴ He responded that sometimes words could “violate laws directed not against speech but against conduct . . . , a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.”²²⁵ The utterance of “sexually derogatory ‘fighting words’” could violate the ban on gender discrimination in the workplace.²²⁶ Justice Scalia noted that “other words” might similarly be “swept up incidentally.”²²⁷ *O'Brien* is such a case. So might be the antitrust case described at the outset of this Essay: Antitrust law is aimed at anti-competitive *conduct*, but words of agreement not to compete might be swept up within the statute. And, again, what seemed a possibly differentiated set of categories appears to be reduced to a requirement of rationality.

That shows the difficulty of sustaining a differentiated set of categories, but there is an additional wrinkle. *Cohen v. California*²²⁸ invalidated the application of a statutory prohibition of disorderly *conduct* to someone who had worn a jacket with

²²⁰ 391 U.S. 367, 377 (1968) (laying out the *O'Brien* test).

²²¹ *Id.*

²²² *Bd. of Trs. of SUNY v. Fox*, 492 U.S. 469, 467, 480 (1989) (citation omitted) (explaining *Central Hudson* as requiring only that the regulation be “reasonable” and proportionate). As discussed earlier, this view of *Central Hudson* has come under increasing attack in recent years.

²²³ This is sufficient to deal with the foie gras case, *Animal Legal Defense Fund v. LT Napa Partners LLC*, 184 Cal. Rptr. 3d 759 (Cal. Ct. App. 2015), even putting aside the commercial setting in which that problem arises.

²²⁴ *R. A. V. v. City of St. Paul*, 505 U.S. 377, 389–90 (1992).

²²⁵ *Id.*

²²⁶ *Id.* (citations omitted).

²²⁷ *Id.* at 389.

²²⁸ 403 U.S. 15 (1971).

“Fuck the Draft” written on its back.²²⁹ Of course, one can engage in disorderly conduct in many ways that do not involve words. Why then is *Cohen* not a case in which words other than those independently proscribable are “swept up incidentally within the reach of a statute directed at conduct”?²³⁰ Because, apparently, there “the government . . . target[ed] conduct on the basis of its expressive content.”²³¹

The result of all this is that the Court has developed a set of doctrines that preserves some well-established and seemingly correct results: Perjury statutes survive because of *Stevens*’s historical test; antitrust liability survives because it regulates conduct and only incidentally sweeps up some words. The doctrines, though, unsettle other well-established results: Bans on misleading (and perhaps even false) advertising are constitutionally vulnerable, as are regulations of speech associated with labor organizing. Developing a set of categories of content-based regulations subject to differentiated standards of review might deal with some of these latter cases. But it is not the path the Court has followed, and is attended by a number of difficulties that the Court has itself described.

B. An Eclectic Set of Exceptions

Another possibility is to treat the results that seem worth preserving as ad hoc exceptions to the overarching doctrinal structure. Justice Kennedy’s opinion in *Alvarez* provided a laundry list of exceptions from protection (understood to mean exceptions from the general rule that content-based speech regulations are constitutionally permissible only if they satisfy a stringent standard of review).²³² Eugene Volokh adopts a similar strategy in organizing the presentation of First Amendment doctrine: Full protection (again, a stringent standard of review) is the default, with a list of “exceptions” labeled as such: incitement, false statements of fact, obscenity, “‘integral part’ of criminal conduct,” offensive speech, threats, and “speech owned by others.”²³³

These lists do not seem to be compiled according to any single approach to the First Amendment. Some, such as incitement and true threats, can be handled by applying a stringent standard of review. I have suggested that the best reading of the Court’s incitement doctrine is that regulations of incitement satisfy a stringent standard of review because inciting speech bypasses the listeners’ ordinary methods of

²²⁹ *Id.* at 16, 26.

²³⁰ *R. A. V.*, 505 U.S. at 389 (citations omitted).

²³¹ *Id.* at 390.

²³² *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion).

²³³ EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* xiii–xiv (4th ed. 2011). Volokh, *supra* note 2, at 1015–51, offers what he characterizes as a generalized account of exceptions—attempting to subsume most of them under the exception for speech integral to criminal conduct—but, at least as I read the argument, he gives such varying content to the term “integral” with respect to specific exceptions as to reintroduce the ad hoc approach.

making judgments and because the immediacy of its impact makes intervention against the speech the least restrictive means of dealing with the compelling interest in avoiding criminal disorder.²³⁴ A similar analysis applies to true threats: They inflict injury upon their receipt by their targets, who immediately are put in fear,²³⁵ and intervention against the threats is the least restrictive means of forestalling the fear.

Other items on the lists cannot be dealt with in the same way, as the earlier discussion of obscenity indicates.²³⁶ For present purposes, the most interesting category is speech that is said to be an integral part of criminal conduct.²³⁷ The key feature of such speech is that the regulations penalize the speech itself, independent of the speech's contribution to the criminal conduct. Incitements cause criminal conduct, but punishing incitement survives the stringent standard of review. The point of having a category of "speech integral to criminal conduct" as an exception to protection is to allow the government to penalize such speech without satisfying such a standard. *Ferber* offers a good example. It is constitutionally permissible to prohibit the dissemination of child pornography, according to the Court, because *making* child pornography necessarily involves abusing children, and prohibiting the dissemination of such material reduces the demand for them and thereby reduces the incidence of child abuse.²³⁸ Yet, if one were to apply the "less restrictive alternative" test as the Court applies it in cases involving commercial speech, for example, it is far from evident that a ban on possessing child pornography is the least restrictive means: Prosecuting those who make the pornography, and who thereby engage in child abuse, would seem a less restrictive means.²³⁹

Much, of course, turns on what counts as being "integral" to the otherwise-defined criminal conduct. Still, the motivation for the category's existence seems clear, and revealing: Sometimes it is very difficult to punish actions that legislatures both can (constitutionally) make criminal and have made criminal. For example, in the child pornography cases, it might be quite difficult to locate the person who abuses a child in the process of producing the material. Or, it might be relatively easy to identify the speaker and thwart the realization of the crime. The motivation for the exception is

²³⁴ See *supra* text accompanying notes 195–96.

²³⁵ The targets may also begin to take precautions against the threats' realization, but those steps do not follow immediately, in the temporal sense, on the threats' receipt.

²³⁶ See *supra* text accompanying notes 181–83.

²³⁷ For a comprehensive overview of First Amendment issues associated with crime, see generally KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989).

²³⁸ See *New York v. Ferber*, 458 U.S. 747, 753, 759–62, 774 (1982).

²³⁹ The means would be less restrictive, but of course there would also be some loss in the prevention or punishment of child abuse. As has been known for quite a while, "less restrictive means" analysis almost inevitably is a form of *sub rosa* evaluation of the relative importance of competing substantive interests. The classic statement is Robert Nagel, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 *YALE L.J.* 123, 151 (1972). The suggestion made in the text is therefore one about how the Court's use of the implicit balancing test in child pornography cases compares with its use in commercial speech cases.

that going after the speech simply makes sense from a crime-prevention point of view even if doing so cannot fairly be said to satisfy a stringent standard review. We (and the courts) want to go after the speech for good reasons that are not quite good enough to satisfy a stringent standard of review, and the courts allow us to do so by creating the exception. Reasoning backward from results to doctrine is entirely appropriate, and forms the basis for my suggestion about how the courts should reconstruct the coverage/protection distinction.

C. Applying a Uniform Standard of Review to All Covered Communicative Activity

Finally, without the coverage/protection distinction the Court could apply a uniform standard of review to all communicative activity.²⁴⁰ This might take one of three forms: (1) leveling downward by applying a single standard of review weaker than the current stringent standard; (2) leveling upward by applying the current standard in all cases; or (3) applying a requirement that all regulations be proportional to the interests they purport to serve. Here too all the approaches have drawbacks.

1. Leveling Down

The difficulty of showing that perjury statutes satisfy the current stringent standard shows why there might be pressure to level downward. In Justice Breyer's words, "the Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it."²⁴¹ As Professor Schauer has shown, there are large swathes of regulatory law that pose the same problem that perjury statutes do.²⁴² As he points out, many provisions of federal securities law impose liability on stock issuers for statements that are presumed to be misleading despite the fact that in other contexts First Amendment law seems to be developing in a direction that makes it questionable to have categorical presumptions of misleadingness.²⁴³ Some contracts—agreements manifested in words—are per se violations of the antitrust laws, which means that those challenging the agreements need not show that the agreements actually caused harm.²⁴⁴ The

²⁴⁰ Subject to the possibility, discussed *supra* text accompanying notes 220–23, that a different standard of review could be used in cases involving regulations of expressive conduct.

²⁴¹ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring); *see also id.* at 2237 (Kagan, J., concurring) (using the metaphor of "watering down").

²⁴² Schauer, *Boundaries*, *supra* note 13, at 1768 (including in the "vast universe of widely accepted content-based restrictions on communication" the Securities Act of 1933, the Sherman Antitrust Act, the National Labor Relations Act, and the Uniform Commercial Code); *id.* at 1778–83 (examining speech-regulating aspects of the securities, antitrust, and labor laws); Schauer, *supra* note 197, at 302–03 (listing price fixing and contract law as "outside the First Amendment").

²⁴³ *See supra* text accompanying notes 138–39.

²⁴⁴ *See* Schauer, *Boundaries*, *supra* note 13, at 1770 (describing the application of the

National Labor Relations Act requires that elections to select a collective bargaining agent be conducted in a “laboratory” setting, that is, without the interjection by means of speech and pamphlets of expression that would tilt the election field away from encouraging workers to make their decisions “on the merits.”²⁴⁵ As Schauer observes, these regulations are exceedingly difficult to justify under the current stringent standard of review.²⁴⁶ Were the Court to say that regulations of all communicative activities had to satisfy a stringent standard of review, *and* were it to seek to preserve the results under the securities, antitrust, and labor laws, it would have to weaken the current standard of review—level down, in short.

Holder v. Humanitarian Law Project illustrates the dynamic: Perhaps the Court believed that the regulation there had to be constitutionally permissible, and adjusted the standard of review accordingly. Notice, though, the structure of that analysis. Some results, such as upholding the securities, antitrust, and labor laws against a First Amendment challenge, seem or are assumed to be obviously correct.²⁴⁷ So, to preserve the results, the Court adjusts the content of the standard of review.²⁴⁸ This recreates the patchwork that the elimination of the coverage/protection distinction was supposed to destroy.

Stevens might be thought to offer an escape hatch. The Court there acknowledged the possibility that there might be categories of speech the regulation of which had historically not been thought to raise First Amendment problems.²⁴⁹ As discussed earlier, much here depends on the content of this historical test.²⁵⁰ The securities, antitrust, and labor law rules go back to the 1930s and a bit earlier. Is that long enough to satisfy the historical test?²⁵¹

antitrust laws to “corporate executives [who] . . . exchange accurate information about proposed prices with their competitors”).

²⁴⁵ See *In re General Shoe Corp.*, 77 N.L.R.B. 124, 127, 189 (1948).

²⁴⁶ See Schauer, *Boundaries*, *supra* note 13, at 1782–83.

²⁴⁷ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

²⁴⁸ In the philosophy of science, an analogous process is described as “saving the phenomena.” See, e.g., PIERRE DUHEM, *TO SAVE THE PHENOMENA: AN ESSAY ON THE IDEA OF PHYSICAL THEORY FROM PLATO TO GALILEO* 116–17 (Edmund Doland & Chaninah Maschler trans., Univ. Chi. Press 1969) (1908). When a scientist observes a result that seems incompatible with prevailing theory, he or she tweaks the theory to accommodate the new observation. *Id.*

²⁴⁹ *United States v. Stevens*, 559 U.S. 460, 472 (2010).

²⁵⁰ See *supra* Part III.

²⁵¹ All three areas involve the regulation of speech made in connection with commercial activities, and the basic statutes were adopted at a time when commercial speech was outside the First Amendment’s coverage. So, in some sense, it is obviously true that *those* regulations were not thought to raise First Amendment concerns. Lakier’s analysis is relevant here as well, because—to overstate for effect—until the 1930s *nothing* was thought to raise First Amendment concerns, in the sense that no regulations of speech were tested by a stringent standard of review. Lakier, *supra* note 28, at 217–19.

A different, more originalist approach seems more compatible with the general thrust of the Roberts Court's jurisprudence. That approach would ask whether the type of regulation at issue was thought to be freely regulable in 1791, when the First Amendment was adopted (or, with respect to state legislation, in 1868, when the Fourteenth Amendment was adopted). Not having done the historical research and not knowing of anyone who has, I cannot be sure what it would show. I suspect that one could find scattered weak analogues to some contemporary regulations of securities or labor relations. Were one inclined to, one could rely on them or dismiss them as isolated examples. The more important point, of course, is that there was nothing in the founding era at all similar to the comprehensive regulatory schemes we now have for pharmaceuticals, antitrust, securities, and labor relations. One of the common complaints about originalism, that it cannot accommodate truly substantial changes in social, economic, and political circumstances, has real bite here.

The bottom line is that a Court that both used a uniform standard of review and sought to preserve some seemingly obvious results would face pressure to level the standard downward.

2. Leveling Up

The direction that the law of commercial speech has taken illustrates the possibility of leveling upward, that is, of applying the current stringent standard of review, in all its stringency, to all communicative activity. Leveling upward would place substantial clouds over many areas of labor and securities law. The *POM Wonderful* case, for example, casts doubt on the FDA's "gold standard" requirement for advertising about off-label uses.²⁵²

Leveling upward does require that we bite the bullet and accept the possibility that many features of the existing regulatory state are unconstitutional under the First Amendment. The bullet is quite a large one, though. According to Schauer, for example, it includes "virtually the entirety of the law of evidence" and "large segments of tort law."²⁵³ Abandoning the coverage/protection distinction and leveling upward

²⁵² See *supra* text accompanying note 150; see also *United States v. Caronia*, 703 F.3d 149, 168–69 (2d Cir. 2012) (finding unconstitutional the prosecution of a pharmaceutical sales person who had promoted off-label uses that had not gone through the "gold standard" process). The FDA chose not to seek Supreme Court review of the *Caronia* decision. See Alison Frankel, *Why U.S. Is Forgoing Appeal of Landmark 2nd Circuit Off-Label Ruling*, REUTERS (Jan. 24, 2013), <http://blogs.reuters.com/alison-frankel/2013/01/24/why-u-s-is-forgoing-appeal-of-landmark-2nd-circuit-off-label-ruling/> [<https://perma.cc/7WLY-UC8F>].

²⁵³ Schauer, *Boundaries*, *supra* note 13, at 1784 (citing, inter alia, Christopher J. Peters, *Adjudicatory Speech and the First Amendment*, 51 UCLA L. REV. 705 (2004)); see also Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L. REV. 161, 161 (1990). Schauer provides this tort law example: "whether a chainsaw manufacturer may be held liable in a products liability action for injuries caused by mistakes in the written instructions accompanying the tool." Schauer, *Boundaries*, *supra* note 13, at 1770.

would be consistent with the strand in contemporary constitutional law in which the First Amendment replaces the Due Process Clause and *Lochner v. New York*²⁵⁴ as the locus in the constitution for resistance to the modern regulatory state.²⁵⁵ There is, I think, little more that can be said about leveling upward: it would require substantial rethinking of how the modern regulatory state operates. Perhaps that would be a good thing.

3. Proportionality and Robust Reasonableness

Justice Breyer has forcefully advocated for the adoption of a unified approach to the problems this Essay deals with. He would “ask[] whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives.”²⁵⁶ He suggests giving the proportionality analysis some structure: “Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so.”²⁵⁷

I can deal with this proposal quite briefly. The reasons the Court had in *Stevens* for rejecting balancing apply to proportionality as well: Both give judges too much discretion. Adopting Justice Breyer’s proposal would require substantial rethinking of the structure of First Amendment law. Perhaps that too would be a good thing.

VI. A POSSIBLE SOLUTION? THE “TOO MUCH WORK” PRINCIPLE

The diagrams I have offered sketch alternative visions of the structure of First Amendment doctrine. In that sense they offer alternative meta-doctrines of the First Amendment. Other types of meta-doctrine offer guidance on the question of choosing among alternative doctrinal structures—that is, on choosing among a structure with the coverage/protection distinction, the onion model, or generalized balancing (and whatever other overall doctrinal structures we could come up with).

²⁵⁴ 198 U.S. 45 (1905).

²⁵⁵ The earliest work making this point is Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979). For recent summaries of the accumulating literature to this effect, see generally Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165 (2015); Shanor, *supra* note 14.

²⁵⁶ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235–36; *see also* *United States v. Alvarez*, 132 S. Ct. 2537, 2551–53 (2012) (Breyer, J., concurring).

²⁵⁷ *Reed*, 135 S. Ct. at 2236 (Breyer, J., concurring) (citations omitted). For him, content-discrimination would remain relevant as “a helpful . . . tool” in conducting the “more basic” proportionality analysis, probably by signaling that one or another of the elements of the proportionality analysis should receive greater or lesser weight. *Id.* at 2235.

To illustrate: The First Amendment's doctrinal structure could be coherent if the Court completely abandoned the coverage/protection distinction, but preserving both coherence and results that seem reasonably defensible requires a fair amount of conceptual work. The "too much work" principle offers a reason for maintaining the distinction. The principle holds that we should be skeptical about doctrines that require us to engage in a great deal of analytic work to reach results that we were reasonably confident of, before we engaged in substantial analysis.²⁵⁸ So, for example, we should hold on to the coverage/protection distinction if it takes a great deal of analytical work without invoking that distinction to explain why it is permissible for California to prevent the distribution of foie gras as a protest against the state's ban on selling foie gras.

What justifies the "too much work" principle? I am reasonably confident that it, or something much like it, should be, and probably already is, part of what we can think of as the meta-doctrine of the First Amendment. But I am quite tentative in offering a justification. My present thinking is that it is a strategic meta-doctrine akin to the meta-doctrine preferring categorical rules to case-specific and categorical balancing.²⁵⁹

The "too much work" principle might be thought of as a doctrinalized form of standard error-cost and decision-cost analysis. Such an analysis begins with the observation that the decisional capacities of judges and other decision-makers, measured by time and competence, are limited. Sometimes judges' decisions are "mistakes" when measured by stated legal rules or deep principles, but the legal system puts up with the errors because applying the stated rules would take too much time, as when the rules would require the judge to investigate a large number of factual predicates, or would be too difficult for a judge of ordinary intellectual capacity to apply correctly, as when the rules are extremely complex. The "too much work" principle crystallizes one form of error-cost and decision-cost analysis into a legal meta-doctrine: The legal system should avoid rules that require ordinary judges to do too much work to reach the correct result.²⁶⁰ The saving of decision-costs offsets the losses associated with error-costs.²⁶¹

²⁵⁸ For my earlier discussion of the "too much work" principle, see Tushnet, *supra* note 70, at 186.

²⁵⁹ See TUSHNET, *supra* note 208, at 79–80.

²⁶⁰ It should be noted that it sometimes takes a fair amount of "work" to come up with the appropriate categorization of some activity as not covered by the First Amendment. But, once that work is done, application of the doctrine is straightforward. In contrast, applying the rules regarding levels of scrutiny takes a fair amount of work in every case. (I note that this argument is vulnerable to the counterargument that, in every case where the government asserts that some activity fits into an already defined category of uncovered activity, the claimant can urge that the category should be redefined to exclude the activity at issue, and resolving that claim will itself take a fair amount of work.)

²⁶¹ For an application of this sort of analysis for the legal system as a whole, see RICHARD EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995). That book's title offers an articulation of the kind of second-order analysis that I argue justifies a simple coverage/protection distinction.

Meta-doctrines of this sort are system-oriented rather than case- or outcome-oriented. So, for example, the stringent standard of review is a (regular or substantive) doctrine, identifying the test the Court should use when assessing the constitutionality of statutes regulating speech on the basis of its content. Meta-doctrines of this sort deal with the form or structure of substantive doctrine.²⁶² The Supreme Court uses meta-doctrines to develop a structure of substantive doctrine that, when administered by a large number of other decision-makers (both judges and legislators), produces the outcomes that the Court itself would reach were it to address every case, knowing that it cannot in fact address every case.²⁶³ The more work the doctrine demands of those other decision-makers, the more likely are divergences between the results they actually reach and the results the Court would reach but cannot because of its limited decisional capacity.²⁶⁴

On this view the coverage/protection distinction works like this: Without the distinction, a lower court asks whether some regulated speech is protected or unprotected. With limited decisional capacity,²⁶⁵ and for that reason doing relatively little work, the judge concludes that the speech is protected because the regulation cannot survive a stringent standard of review, and invalidates the regulation. Were the Supreme Court to consider the case, using its greater decisional capacity it would do a fair amount of work to show that the speech is not protected. The Court can use the coverage/protection distinction to communicate to lower courts and other decision-makers that regulations of speech in the relevant category are unprotected, thereby allowing the lower courts to reach the result the Supreme Court would reach without doing extensive work.²⁶⁶

²⁶² Other meta-doctrines deal with the choice between rules and standards, and the use of constitutional decision rules in place of operative provisions. (The latter terminology is due to Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).) For a recent treatment of meta-rules, see Brannon P. Denning & Michael B. Kent, Jr., *Judicial Doctrine as Risk Regulation*, 82 TENN. L. REV. 405 (2015).

²⁶³ I will sometimes use the shorthand “correct results” to refer to the outcomes the Court would reach; it does not imply anything about my own agreement with those results. Those so inclined could restate the problems I identify as implicating the choice of rules with the characteristic that, according to some metric that takes case-importance into account, minimize the sum of what the higher court regards as Type I and Type II errors by lower courts not all of whose decisions can be reviewed by the higher court.

²⁶⁴ *Cf.* *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (“[A] clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem ‘entirely reasonable’ will sometimes be ‘struck down’” (citation omitted)). This passage is an implicit response to Justice Kagan’s argument that “[w]e apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales [for subjecting content-based speech regulations to the most exacting standard of review].” *Id.* at 2237 (Kagan, J., concurring in the judgment).

²⁶⁵ The limits on capacity can be temporal or intellectual.

²⁶⁶ Note that restoring the coverage/protection distinction does not help—but does not harm either—in cases where the lower court finds the material unprotected, but the Supreme

As noted, the “too much work” principle is a meta-doctrine and as such does not identify which categories should be uncovered. What it does say is conditional: That it takes a lot of work to explain why some subject matter is freely regulable by the legislature is a reason for treating the subject matter as not covered by the First Amendment.

CONCLUSION

Meta-doctrines have an important characteristic. They *ensure* that lower courts will make unreversed errors from the Court’s point of view. So, for example, treating fighting words as invisible to the First Amendment would mean that the Court would not deploy the analysis it actually used in reviewing the state court’s decision in *R. A. V.*²⁶⁷ The reason for such restraint would be to preserve the coverage/protection distinction in a form that lower courts could easily use in the much larger run of cases where the distinction produces the correct result without requiring those courts to do too much work.

As with all meta-doctrines, in adopting or reconstructing the coverage/protection distinction, the Court must make a complex, seemingly empirical judgment: How many unreversed errors will occur if we direct the lower courts to use the crude coverage/protection distinction, in light of the limitations on the decisional capacities of the Supreme Court and of the lower courts, compared to the number and importance of unreversed errors if the Court directs lower courts to use a more complex “too much work” form of analysis. Not knowing what the Court regards as error, I have no way of assessing whether the Court’s current view, that the coverage/protection distinction should be abandoned or substantially weakened, is correct. What my analysis has done, I hope, is to bring into view the real questions about the distinction’s role in First Amendment theory.

Court would find it protected. Important as well is the observation that restoring the distinction does not guarantee that lower courts will always reach correct results from the Supreme Court’s point of view, nor that the Court will have the capacity to reverse all such errors, but restoring the distinction is designed to reduce the amount of divergence between lower courts and the Supreme Court.

²⁶⁷ I use the awkward phrase “not deploy the analysis it actually used” to indicate that other modes of First Amendment analysis, such as that used by Justice White in dissent, might allow the Court to reverse the lower court. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 587–96 (1991) (White, J., dissenting).