William & Mary Law Review

Volume 56 | Issue 4 Article 9

The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions

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THE MARROW OF TRADITION:† THE ROBERTS COURT AND CATEGORICAL FIRST AMENDMENT SPEECH EXCLUSIONS

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† I borrow this title from CHARLES W. CHESNUTT, THE MARROW OF TRADITION (1901).

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INTRODUCTION

The Roberts Court has made a lot of First Amendment law. Since Chief Justice John Roberts took the Supreme Court's helm in 2006, the Court has issued decisions on the merits in about thirty-five free speech cases. With greater vigor than the late Rehnquist Court, the present Justices have waded into free speech controversies ranging from violent video games[1] to commercial speech[2] to campaign finance regulation.[3] In all those areas, the Court has handed important victories to First Amendment claimants. Free speech advocates' conventional (not to say universal) view of this Court is adoring. Renowned First Amendment lawyer Floyd Abrams has stated, "It is unpopular speech, distasteful speech, that most requires First Amendment protection, and on that score, no prior Supreme Court has been as protective as this."[4] Burt Neuborne, a leading academic and legendary civil liberties lawyer, concurs: "This court is the strongest First Amendment court in history .... The current majority uses the First Amendment as a powerful tool of deregulation that eliminates virtually all government efforts to regulate anything to do with the flow of information."[5] Former judge and current Baylor University President Kenneth Starr has called the Roberts Court "the most free speech Court in American history."[6]

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1. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (striking down a state ban on the sale of violent video games to children).

2. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (striking down a state restriction on pharmaceutical representatives' use of certain prescriber identifying information in sales talks with doctors).

3. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876 (2010) (striking down the federal ban on corporate and union independent expenditures on behalf of candidates for federal office).

4. Adam Liptak, *Study Challenges Supreme Court's Image as Defender of Free Speech,* N.Y. TIMES (Jan. 8, 2012), at A25 (internal quotation marks omitted).

5. Greg Stohr, *Speech Rights Triumph as U.S. High Court Limits Government Power* BLOOMBERG (June 28, 2011, 12:00 AM), http://www.bloomberg.com/news/2011-06-28/speech-rights-triumph-as-u-s-high-court-limits-government-power.html [http://perma.cc/LUN6-PV3Q] (internal quotation marks omitted).

6. A.E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 82 (2012) (quoting Kenneth W. Starr, Address at the Pepperdine Judicial Law Clerk Institute (Mar. 18, 2011)), http://www.virginialawreview.org/sites/virginialawreview.org/files/Howard_OutofInfancy.pdf [http://perma.cc/6H6T-WCAB].

Investigation of those bold claims must start in what, based on recent history, might seem like an obscure judicial precinct: cases about categories of speech that the First Amendment does not protect, like obscenity and fighting words. For nearly three decades the Supreme Court said very little of note about such categorical speech exclusions.[7] The Roberts Court, however, has given this neglected neighborhood a makeover. Some of this Court's most important, striking First Amendment decisions address proposals for new categorical exclusions or applications of familiar categorical doctrines. The Justices have not just resolved categorical issues. Rather, they have changed the law of categorical exclusions, announcing a new guiding star for assessing categorical First Amendment claims: tradition. According to the Roberts Court, a categorical exclusion can only pass constitutional muster if it reflects a substantial tradition of leaving speech open to regulation. In two prominent decisions, this focus on tradition has led the Court to reject government calls to make a new categorical exclusion for certain violent images.[8] Those decisions serve as exhibit A for commentators who praise the Roberts Court as strongly speech protective.

The decisions that reject new categorical exclusions deserve some of the acclaim they have received. Unfortunately, their speech-protective results carry limited precedential weight. Worse, these decisions actually undermine speech protection in other cases by tying categorical exclusions to the Court's account of what our law has traditionally let governments regulate. That linkage has led the Court to reinforce or fortify nonprotection for pandering nonexistent child pornography, freely using copyrighted material, and making legislative votes. The Court's most recent categorical speech decision, *United States v. Alvarez*, potentially advances expressive freedom by refusing to categorically exclude lies from First Amendment protection.[9] The Justices, however, could not agree on a rationale in that case, robbing it of precedential force.[10] The categorical speech cases, celebrated by the Roberts Court's enthusiasts, provide only limited, very mixed benefits for any robust model of free speech. For

7. *See infra* Part I.
8. *See infra* Part II.
9. 132 S. Ct. 2537 (2012); s*ee infra* Part IV.
10. *See* Alvarez, 132 S. Ct. 2537; *infra* note 217 and accompanying text.

every stand the Roberts Court takes to protect speech, it hands down another decision that restricts speech. These cases, taken together, suggest this Court cares about protecting private speech from blatant censorship, but only within carefully managed limits that ensure speakers will not challenge social or political stability.

I. THE RISE AND DECLINE OF CATEGORICAL SPEECH EXCLUSIONS

The development of categorical speech exclusions stretches back to the beginning of First Amendment law. Decided in the shadow of World War I and the Russian Revolution, the Court's earliest free speech cases fixated on how speech could lead to violence.[11] The Justices repeatedly upheld convictions of communists and anarchists (the great paladins of 1920s First Amendment law) for urging violent overthrow of the government.[12] Fear that speech could spark violence broadened during World War II, as reflected in the pivotal case of *Chaplinsky v. New Hampshire*.[13] *Chaplinsky* involved a member of Jehovah's Witnesses (the great paladins of 1940s First Amendment law) who reportedly called a police officer "a God damned racketeer" and "a damned Fascist," on a public street.[14] The State convicted him of violating a local law that forbade "address[ing] any offensive, derisive, or annoying word to any other person ... [or] call[ing] him by any offensive or derisive name."[15] In affirming the conviction, Justice Frank Murphy famously 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—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of

11. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919) (upholding the Sedition Act of 1918); Schenck v. United States, 249 U.S. 47 (1919) (regarding enforcement of the Espionage Act of 1917 during World War I).

12. *See* Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); *Abrams*, 250 U.S. 616; *Schenck*, 249 U.S. 47.

13. 315 U.S. 568 (1942).

14. *Id.* at 569.

15. *Id.*

> 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.[16]

The justification in *Chaplinsky* for permitting states to ban "fighting words" modeled the categorical approach to setting the First Amendment's boundaries.

The categorical approach has fostered important limitations on First Amendment rights, some of which have stood the test of time. We properly hail *New York Times Co. v. Sullivan* as one of the Court's great speech-protective decisions because it severely limited government officials' power to sue their critics for defamation.[17] But with an evolutionary leap in nuance, *Sullivan* also effectuated the *Chaplinsky* dictum about "libelous" speech.[18] Expression that defames another person got only limited First Amendment protection, even as *Sullivan* provided a safe harbor for criticisms of public officials.[19] Similarly, in a series of decisions culminating in *Miller v. California*, the Court long ago decided that "obscene" speech—another item from the *Chaplinsky* catalog—gets no First Amendment protection.[20] *Miller* defined the legal category of "obscenity":

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work [at issue], taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[21]

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16. *Id.* at 571-72 (footnotes omitted).

17. 376 U.S. 254 (1964).

18. *Id.* at 268.

19. *Sullivan* allowed public officials to recover for defamation only upon a showing of "actual malice," meaning that the defendant knew or acted in reckless disregard of the defamatory statement's falsity. *See id.* at 279-80. The Court extended this requirement, in limited circumstances, to "public figures" as well. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (discussing proper criteria for the public figure category).

20. 413 U.S. 15 (1973).

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

Other post-*Chaplinsky* doctrines deny First Amendment protection to fraudulent speech in a commercial setting[22] and to speech that conveys a "true threat."[23] These categorical doctrines still matter. People rely on defamation law to protect their reputations and fraud law to protect their pocketbooks. The *Miller* allowance for banning obscenity still puts quite a few people behind bars.[24] The true threat doctrine, although somewhat obscure, is crucial when relevant.

As an active method for making law, though, the categorical approach has been declining for almost a half century. The Court has whittled the "advocacy of violence" category of unprotected speech down to a much narrower category of speech that actively and willfully incites someone to imminent violent action.[25] The Court has similarly reined in *Chaplinsky* itself, holding that denial of First Amendment protection to "fighting words" does not remove protection from emotionally charged, deeply offensive statements hurled at an unsuspecting audience but not at a particular person.[26] For decades the Supreme Court said very little in these categorical fields, even in the areas in which categorical limits on First Amendment protection still matter. Only once since the Court handed down *Miller* in 1973 has it announced a new category of unprotected speech—when the *New York v. Ferber* Court denied First Amendment protection to child pornography in 1982.[27] That categorical doctrine, which we will encounter again shortly, comes with an asterisk. The *Ferber* Court denied protection only to actual

22. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976).

23. *See* Watts v. United States, 394 U.S. 705, 707-08 (1969) (per curiam).

24. For example, between October 1, 2008 and September 30, 2009, the federal government made over 1500 arrests for "obscene materials," pursued 23 cases to disposition, and got 16 convictions. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2009—STATISTICAL TABLES (2011), *available at* http://perma.cc/59K9-NK7B. Those prosecution and conviction numbers do not amount to much, but many more obscenity prosecutions happen at the state and local levels. Also, the extremely high arrest-to-conviction ratio suggests, at least at the federal level, the use of arrests to intimidate and deter purveyors of disfavored materials.

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

26. *See* Cohen v. California, 403 U.S. 15, 26 (1971). For an effort to rehabilitate *Chaplinsky*, see Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 294-300 (1990) (attempting to supplement and strengthen the *Chaplinsky* basis for excluding fighting words from First Amendment protection).

27. 458 U.S. 747, 765-66 (1982).

images of actual children engaged in sexual conduct.[28] The First Amendment still protects nonobscene simulated images or written descriptions of children having sex.[29] Unlike other categories of unprotected speech, the *Ferber* child pornography doctrine directly targets not speech but conduct—sexual exploitation of children— that the government obviously has power to regulate.[30]

This musty history matters for our purposes because over the past few years, the Roberts Court has thought harder and done more about categorical First Amendment exclusions than the Court had during the preceding thirty-five years.[31] The present Court has forcefully declared that it will not expand categorical exclusions. At the same time, and based on the same mode of analysis, the Court has more quietly reaffirmed and even strengthened existing categorical limits on the First Amendment's protection.

II. THE SPEECH-PROTECTIVE ROBERTS COURT: REJECTING NEW CATEGORICAL EXCLUSIONS

The Roberts Court has handed down two decisions that reject the categorical approach as a basis for new restrictions on speech. The categorical approach burst back to prominence in *United States v. Stevens*.[32] Stevens, a video dealer, challenged his criminal conviction for violating a federal law that banned making, selling, or possessing certain depictions of animal cruelty.[33] Stevens himself sold videos of pit bulls fighting and attacking other animals, but Congress had really passed the law in question to combat "crush videos."[34] This almost unbelievably odious genre, aimed at a particular sexual fetish, depicts women in high heels torturing and killing small animals by crushing them.[35] No one questions the government's power

28. *Id.* at 765-66.

29. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (striking down ban on virtual child pornography).

30. *Id.* at 249.

31. Ronald Collins, *The Roberts Court and the First Amendment*, SCOTUSBLOG (July 9, 2013, 11:34 AM), http://www.scotusblog.com/2013/07/the-roberts-court-and-the-first-amendment [http://perma.cc/3SNU-EVXY].

32. 130 S. Ct. 1577 (2010).

33. *See* 18 U.S.C. § 48 (2012).

34. *See Stevens*, 130 S. Ct. at 1583.

35. *See id.*

to criminalize actual animal torture. Yet the law at issue in *Stevens* only punished images.[36] The government lawyers in *Stevens* knew they had a big problem because the law banned (probably unwittingly) a wide range of images, potentially including videos and magazines about hunting and certain religious practices.[37] Treating this problem as an opportunity, the government swung for the fences, asking the Court to add "depictions of animal cruelty" to the list of unprotected speech categories.[38] The government argued that, to reach that result, the Court simply needed to do what it had done decades earlier in *Chaplinsky*: declare that as a category of speech, depictions of animal cruelty do more harm than good.[39]

Chief Justice Roberts, writing for an eight-to-one majority, attacked the government's argument like one of Stevens's pit bulls. He called the government's proposed cost-benefit test for unprotected categories of speech "startling and dangerous."[40] Yes, he conceded, the Court in *Chaplinsky* and other cases described categorical exclusions in the language of cost-benefit analysis.[41] Description, however, differs from justification. The Chief Justice explained that in every case of a categorical exclusion, narrowing the scope of First Amendment protection has turned on *tradition*.[42] Every category of speech to which the Court has denied First Amendment protection was simply a "historic and traditional categor[y] long familiar to the bar" as lacking constitutional protection.[43] The Chief Justice used the *Ferber* child pornography decision as his main illustration. Child pornography, according to *Ferber*, was "an integral part" of the underlying, illegal abuse of children.[44] The Court, the Chief Justice asserted, had long treated speech integrally related to unlawful conduct as a category of unprotected speech.[45] Therefore, the tradition analysis explained *Ferber*.[46] In contrast, the Chief Justice

36. *See* 18 U.S.C. § 48.
37. *See Stevens*, 130 S. Ct. at 1588-90.
38. *See id.* at 1584-85.
39. *Id.* at 1585-86; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
40. *Stevens*, 130 S. Ct. at 1585.
41. *See id.* at 1586.
42. *Id.* at 1585.
43. *Id.* at 1584 (internal quotation marks and citation omitted).
44. New York v. Ferber, 458 U.S. 747, 761 (1982).
45. *Id.* at 761-62.
46. *See Stevens*, 130 S. Ct. at 1586.

maintained, we have no tradition of punishing depictions of animal cruelty.[47] Any future addition to the list of categorical exclusions from First Amendment protection would have to track a traditional allowance for restricting the speech in question.[48]

With its categorical argument in shreds, the government in *Stevens* could only lamely argue that the law used to convict Stevens was narrowly drawn to bar certain "extreme" material. The statutory language, however, belied that argument, and the Court struck down the law as unconstitutionally overbroad.[49] Chief Justice Roberts emphasized that even "recreational" speech, like hunting videos, gets First Amendment protection,[50] and he mocked the government's backup assurance that the Court should trust the executive branch to prosecute only extreme speech.[51] The Chief Justice suggested that a narrower law might survive First Amendment review,[52] but not this law. Only Justice Alito dissented from the Court's decision, striking what has become his occasional pose as the Court's defender of moral justifications for restricting deeply offensive speech.[53] He urged a narrow reading of the statute to save it from fatal overbreadth.[54]

The *Stevens* Court's tradition analysis stands out for its novelty in an area of First Amendment law that had not seen any major conceptual innovation for decades. Chief Justice Roberts insisted, as the Court often does when it changes the law, that he was simply describing what the Court has been doing all along.[55] Does that claim hold water? Most of the Court's other major categorical decisions—*Chaplinsky*, *Brandenburg*, *Virginia Pharmacy*, *Ferber*—have said little or nothing about tradition, concentrating almost entirely on substantive justifications for excluding certain speech

47. *See id.* at 1585.

48. *Id.* at 1587

49. *See id.* at 1592.

50. *See id.* at 1590.

51. *See id.* at 1591 ("[T]he First Amendment ... does not leave us at the mercy of *noblesse oblige*.").

52. *See id.* at 1592.

53. *See id.* (Alito, J., dissenting). Justice Alito objected on similar grounds to the Court's reasoning in *Brown v. Entm't Merchs. Ass'n.* 131 S. Ct. 2729, 2742-43 (2011) (Alito, J., concurring in the judgment); *see infra* notes 86-88 and accompanying text; *see also* Snyder v. Phelps, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting).

54. *See Stevens*, 130 S. Ct. at 1593-94 (Alito, J., dissenting).

55. *See id.* at 1584 (majority opinion).

from First Amendment protection. Those decisions provide greater support for the government's "categorical balancing" argument in *Stevens* than for the Court's tradition-bound analysis. *Sullivan* and *Miller* fit better into the Chief Justice's tradition story because they accommodate long-standing common law provisions for the state to punish defamation and obscenity. Even those decisions, however, focused primarily on substantive reasons for the speech restrictions they endorsed. For instance, the *Sullivan* Court did not just declare that the Anglo-American legal tradition allowed recovery for defamation. Rather, the Court worked through why, and to what extent, the First Amendment should limit that allowance.[56]

For the Roberts Court to announce, almost a century into the development of First Amendment law, a new approach to the old problem of categorical exclusions suggests one of two motives. The Court may want to reduce the potency of the categorical approach across the board. That approach, though, has not exactly been gaining traction over the past few decades. The other possibility is that the Court wants to enhance its flexibility for either disapproving or approving categorical exclusions.

In *Brown v. Entertainment Merchants Ass'n,* the Court revisited some of the themes from *Stevens* in a more controversial dispute with broader social consequences.[57] The video game industry challenged a California law that banned the sale or rental of "violent video games" to children under the age of eighteen.[58] The law deliberately tracked the contours of *Miller v. California*[59] and *Ginsberg v. New York*, another Supreme Court decision that allowed states to restrict children's access to sexually oriented material that the First Amendment protects for adults, such as simple nude images.[60] Mimicking those cases, the California law barred minors from buying or renting any video game that a "reasonable person,

56. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268-80 (1964) (conducting an extensive substantive analysis to arrive at the actual malice standard).

57. 131 S. Ct. 2729 (2011).

58. *Id.* at 2732-33.

59. 413 U.S. 15 (1973).

60. *See* 390 U.S. 629, 638 (1968). The *Ginsberg* allowance for restricting minors' access to a broader range of sexual material, which *Miller* left unprotected, is commonly called the "harmful to minors" or "obscene as to minors" doctrine. *See* Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 698 n.11, 706-07 (2007) (discussing the "harmful to minors" doctrine).

considering the game as a whole, would find appeals to a deviant or morbid interest of minors."[61] It relied on "prevailing standards in the community as to what is suitable for minors."[62] Even more pointedly than the federal law struck down in *Stevens*, the California law stood for the idea that the First Amendment should not completely protect violent images under the Constitution while allowing the government to restrict sexual images.[63] As Justice Breyer put the point in his dissent: "What kind of First Amendment would permit the government to protect children by restricting sales of [an] extremely violent video game *only* when [a] woman—bound, gagged, tortured, and killed—is also topless?"[64]

Our kind of First Amendment, responded seven Justices, although only five had their hearts in it. Justice Scalia wrote for an ideologically diverse majority that included Justices Kennedy, Ginsburg, Sotomayor, and Kagan.[65] He first reiterated the *Stevens* Court's premise, which California did not challenge, that the First Amendment protects not just sober political messages but also entertainment.[66] Justice Scalia also emphasized that children have First Amendment rights, important because the California law only restricted speech for children.[67] He set California's law alongside government crusades to "protect" children from "penny dreadfuls" in the 1880s, movies in the early twentieth century, comic books in the 1950s, and song lyrics more recently.[68] All of those efforts, he argued, improperly sought to deny children's right of access to information.[69] Justice Thomas, typically Justice Scalia's ally, contributed an epic dissenting opinion—which no other Justice joined—for the sole purpose of attacking the notion that children have free speech rights.[70] More than anyone else on the Court, Justices Scalia and Thomas usually insist that the Court should

61. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2732 (quoting CAL. CIV. CODE § 1746(d)(1)(A) (West 2009)).

62. *Id.* (quoting CAL. CIV. CODE § 1746(d)(1)(A)).

63. *See id.* at 2735.

64. *Id.* at 2771 (Breyer, J., dissenting).

65. *Id.* at 2732 (majority opinion).

66. *See id.* at 2733.

67. *Id.* at 2735-36 ("[M]inors are entitled to a significant measure of first amendment protection." (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212-13 (1975))).

68. *See id.* at 2735-37.

69. *See id.* at 2736.

70. *See id.* at 2752 (Thomas, J., dissenting).

interpret the Constitution based on history, specifically our best understanding of what people thought a constitutional provision meant at the time it came into effect.[71] In *Entertainment Merchants*, Justice Thomas used this "original public meaning" approach to argue at length that when the Bill of Rights was enacted people never would have thought the First Amendment protected children's free speech rights independent of their parents' wishes.[72]

Justice Scalia, however, hardly abandoned history in *Entertainment Merchants*. The heart of his opinion rejected California's effort to stretch categorical nonprotection for obscenity into categorical nonprotection for violent images, based on the same rationale that drove *Stevens*: tradition.[73] Justice Scalia has long advocated a leading role for tradition in shaping constitutional rights, including First Amendment rights.[74] In *Entertainment Merchants*, Justice Scalia explained that the constitutional difference between sex and violence is that our society has traditionally punished sexually explicit images while giving violent images a pass.[75] Bans on violent content would have to be "part of a long (if heretofore unrecognized) tradition of proscription" to justify the California legislature in restricting violent images simply because they are violent.[76] Justice Scalia dipped into the well of tradition a second time to reject California's narrower argument that, even if the First Amendment protects violent images for adults, it should not protect them for children.[77] Noting the body counts in Grimm's Fairy Tales and high school reading lists, Justice Scalia found no "longstanding tradition

71. This approach to constitutional interpretation has reached its peak in Justice Scalia's majority opinion in *District of Columbia v. Heller*, which used historical analysis to conclude that the Second Amendment guarantees an individual right to keep and bear arms. 554 U.S. 570 (2008).

72. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2751 (Thomas, J., dissenting).

73. *See id.* at 2733-36 (majority opinion).

74. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 573-74 (1991) (Scalia, J., concurring) (arguing based on tradition that a ban on nude dancing did not implicate the First Amendment); Michael H. v. Gerald D., 491 U.S. 110, 122-27 (1989) (plurality opinion) (using a tradition-based analysis to reject a biological father's substantive due process claim for parental rights).

75. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2734.

76. *Id.*

77. *See id.* at 2735.

in this country of specially restricting children's access to depictions of violence."[78]

Lacking a categorical exception to the First Amendment's protections, California needed to satisfy strict First Amendment scrutiny.[79] Justice Scalia found the video game law "underinclusive" as to the state's interest in stopping the spread of violence. The law restricted only video games, not other violent entertainment, and it did not stop adult relatives from giving the games to children.[80] He also found the law "overinclusive" as to the state's interest in helping parents control children because it stopped children from buying or renting violent games even when their parents permitted them to do so.[81] Those failures doomed the law under the First Amendment.

Justice Scalia refused to let violent video games' vivid, interactive imagery justify their suppression. "[A]ll literature is interactive," he declared; indeed, the more interactive the better.[82] To Justice Scalia, censoring video games because of their immersive qualities amounted to punishing a message for its content and effectiveness, exactly the sort of attack on ideas the First Amendment is supposed to prevent.[83] That argument is where he lost Justice Alito (joined by Chief Justice Roberts, the author of *Stevens*, despite Justice Scalia's claim that *Stevens* dictated his reasoning). Justice Alito agreed that California's law was unconstitutional, but not for the majority's reasons. Instead, his separate opinion found the law's definition of "violent video game" unconstitutionally vague, triggering a First Amendment principle that vague terms doom a speech-restrictive law because such vagueness can "chill" protected speech.[84] Justice Alito endorsed Justice Scalia's tradition-based distinction between sexual and violent images, asserting that our society's long history of suppressing obscenity "helped to shape certain generally accepted norms concerning expression related to sex," an experience that he claimed did not extend to violent expression.[85] Justice Alito strongly

78. *Id.* at 2736.
79. *Id.* at 2738.
80. *See id.* at 2739-40.
81. *See id.* at 2740-41.
82. *Id.* at 2738.
83. *Id.*
84. *See id.* at 2742-46 (Alito, J., concurring).
85. *Id.* at 2746.

objected, however, to Justice Scalia's sanguine attitude toward video games' immersive technology.[86] Echoing the moral outrage of his *Stevens* dissent, Justice Alito decried some games' "astounding" level of violence, which leave virtual victims "dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces ... cry[ing] out in agony and beg[ging] for mercy."[87] He viewed the technological sophistication of these violent images as, culturally and legally, a game changer.[88]

Free speech advocates should rightly find much to like in *Stevens* and *Entertainment Merchants*. Most obviously, the Court in these cases rejected aggressive efforts by the federal government and the largest state government to expand categorical limits on the First Amendment's scope. Anyone skeptical of the *Chaplinsky* "slight social value" justification for categorical exclusions will applaud the Court's refusal to ride that justification further. Anyone disturbed by the susceptibility of certain kinds of speech to the government's punitive whims will cheer the Court's decision not to write violent images out of the First Amendment. Of course the material at issue in *Stevens*, and much of the material in *Entertainment Merchants*, would make most people recoil in horror. This is nasty speech. We deplore the speech, however, because it depicts or represents nasty conduct. Distinguishing speech from conduct forms the conceptually infirm but practically essential foundation of First Amendment law.[89] In addition, as both *Stevens* and *Entertainment Merchants* emphasized, our system protects speech against regulations that target particular ideas.[90] The power to regulate conduct lets the political majority restrict behavior it does not like. The First Amendment counters that power by creating a space in which people can at least argue for all sorts of unpopular behavior. In this

86. *Id.* at 2748-51.

87. *Id.* at 2749.

88. *See id.* at 2748-49. Justice Breyer shared many of Justice Alito's concerns, but he saw no vagueness in the California law, leading him to dissent rather than concur in the judgment. *See id.* at 2761 (Breyer, J., dissenting).

89. *See, e.g.*, STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO 105 (1994).

90. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2733 (majority opinion); United States v. Stevens, 130 S. Ct. 1584 (2010).

case, the Roberts Court deserves credit for not conflating violence with speech that describes or even advocates violence.[91]

Beyond shielding the First Amendment from renewed categorical threats, *Stevens* and *Entertainment Merchants* warrant praise for their broad views about the First Amendment's protection. The importance of political speech should not diminish protection for other kinds of speech, even speech as arguably frivolous as hunting videos and violent video games. Justice Scalia may have stated the point too dramatically when he declared in *Entertainment Merchants* that "it is difficult to distinguish politics from entertainment, and dangerous to try,"[92] but he was surely right to reject any such distinction as a First Amendment wedge. Even Alexander Meiklejohn, our most eloquent advocate for the constitutional centrality of political speech, acknowledged that we need art, literature, and other nonpolitical inputs to make democracy work.[93]

In addition, *Entertainment Merchants* deserves credit for validating children's First Amendment rights, especially in the face of Justice Thomas's forceful dissenting attack. Perhaps the greatest free speech case of the past forty years is the Rehnquist Court's 1995 decision in *Reno v. ACLU*, which beat back Congress's ham-handed effort to purge "indecency" from the Internet.[94] That decision strongly affirmed children's expressive freedom.[95] Despite the Roberts Court's dismissive attitude toward children's free speech rights at school,[96] the Justices wisely followed the lead of *Reno* as to video games.[97] *Entertainment Merchants* also tracked *Reno* by

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91. Unfortunately, other Roberts Court decisions have blithely allowed punishment of speech in order to prevent asserted bad consequences. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (holding that the federal government may punish people who advise designated terrorist organizations about peaceful conflict resolution); Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that a school may punish a student for allegedly advocating illegal drug use).

92. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2733.

93. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 117 (1960).

94. 521 U.S. 884 (1997).

95. *See id.* at 864-66 (distinguishing *Ginsberg v. New York*, 390 U.S. 629 (1968)).

96. *See Morse*, 551 U.S. at 403.

97. David Post argues that *Entertainment Merchants* sets speech protection back by "resurrect[ing] a version of *Ginsberg* ... that shields some speech from First Amendment scrutiny altogether." David G. Post, *Sex, Lies, and Videogames:* Brown v. Entertainment Merchants Association, 2010-2011 CATO SUP. CT. REV. 27, 56. Professor Post slightly overstates both how far the *Ginsberg* "harmful to minors" doctrine fell before *Entertainment*

resisting California's plea, and the urging of Chief Justice Roberts and Justice Alito, to suppress new communications technology. The power of interactive software, Justice Scalia suggested, should intrigue rather than frighten us. *Entertainment Merchants* presents the Roberts Court's most expansive thinking about how speech can create meaning and enable change.

III. THE SPEECH-RESTRICTIVE ROBERTS COURT: ENTRENCHING AND DEEPENING OLD CATEGORICAL LIMITS

A. The Narrowness of the Speech-Protective Decisions

Unfortunately, closer examination of the free speech victories in *Stevens* and *Entertainment Merchants* reveals narrow rulings unlikely to make much practical difference in future cases. As statements about the viability of categorical exclusions, these decisions simply preserve a secure status quo. The categorical approach stopped expanding decades ago. As I noted above, the Court has not found a new category of speech to exclude from First Amendment protection since at least the *Ferber* child pornography case in 1982,[98] and the Court strongly undercut the categorical exclusions of fighting words and incitement more than four decades ago.[99] Even in the more robust categorical fields of obscenity and defamation, for the past several decades, the Court has only tinkered around the edges of the law. In *Stevens* and *Entertainment Merchants*, the federal and California governments forced the categorical issue as to depictions of violence, and many people would probably sign on to the core argument that First Amendment law should allow legislatures to treat depictions of violence as harshly as depictions of sex.[100] No legal or political trend, however, even hinted that the

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Merchants, and how serious *Entertainment Merchants* takes that doctrine. Justice Scalia indulged the notion that the *Ginsberg* "harmful to minors" rule shields some speech restrictions from First Amendment scrutiny, but he then shrugged off the rule's relevance. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2735 ("[*Ginsberg*] approved a prohibition on the sale to minors of *sexual* material."). *Entertainment Merchants*, in other words, treated the "harmful to minors" category much like the modern Court treats the "fighting words" and "incitement" categories.

98. 458 U.S. 747 (1982).

99. *See supra* notes 25-26 and accompanying text.

100. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2734; United States v. Stevens, 130 S. Ct. 1577,

Court would scrape the rust off its categorical scissors to cut violent depictions out of First Amendment protection. As Chevy Chase might say, the categorical approach is still dead.[101]

The precise holdings in *Stevens* and *Entertainment Merchants* confirm the decisions' limited impact. The "crush videos" that Congress wanted to suppress in *Stevens* represent, to put the point mildly, a niche market, and the Court left open the possibility that a narrower ban on those videos might be constitutional.[102] *Entertainment Merchants* reaches farther, because many people play violent video games and many other people would love to ban them. Money talks, however, and the size of the video game industry blunts any significance of *Entertainment Merchants* for the kinds of unpopular speakers who most commonly face censorship. Indeed, both *Stevens* and *Entertainment Merchants* protect commercial products, with neither the speakers nor the Court very concerned about what ideas the products convey. We will see shortly that the Court's treatment of speech as an economic commodity becomes more pronounced and troubling.[103]

The Court's emphasis on tradition in *Stevens* and *Entertainment Merchants* presents still a more serious problem. In both decisions, the Court justified its refusal to categorically exclude violent images from First Amendment protection by asserting that only tradition can support a categorical exclusion, and that no tradition of allowing the government to regulate violent images existed.[104] That approach will probably anchor free speech law more predictably than the balancing approach the government advocated in *Stevens*.[105] However, the approach carries hazards of its own.

Most obviously, a notion that seems ripe for manipulation is that some speech categories might "have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[106] Clever judges can manipulate any legal doctrine,

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1585-86 (2010).

101. *See Saturday Night Live* (NBC television broadcast Dec. 13, 1975), transcript *available at* http://perma.cc/H2P6-ZNHS ("Generalissimo Francisco Franco is still dead.").

102. *Stevens*, 130 S. Ct. at 1592.

103. *See infra* notes 151-76 and accompanying text (discussing Golan v. Holder, 132 S. Ct. 873 (2012)).

104. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2731; *Stevens*, 130 S. Ct. at 1585.

105. *Stevens*, 130 S. Ct. at 1585.

106. *Id.* at 1586.

but manipulation works a lot better when it is covert. Appealing to "tradition" as received truth obscures the fact that reasonable people disagree both about what traditions exist and about how, and how much, tradition should matter in legal decisions. Categorical speech exclusions, like First Amendment law in general, ultimately depend on substantive values. The most transparent way for the Court to decide categorical exclusion cases would be for the Justices to talk openly about which values matter and why. By rejecting that substantive analysis in favor of a tradition-bound analysis, the Roberts Court hides the analytic ball.

The tradition approach also presents a problem of institutional competence. Tradition means history, and judges generally do not make good historians.[107] A historian explores questions about the past for their own sake. A judge has to decide present disputes, and that kind of agenda clouds historical inquiry. Some judicial history is just inept. Justice Scalia's assertion in *Entertainment Merchants* that "efforts to convince Congress to restrict comic books [in the 1950s] failed"[108] ignores the fact that those efforts succeeded in gutting comic books' content by forcing the industry to embrace severe self-censorship.[109] Other judicial history skews facts toward a favored outcome. In his *Entertainment Merchants* concurrence, Justice Alito clumsily bootstrapped a controversial legal doctrine onto a biased (if vague) story about social practice, claiming that state obscenity bans led to conservative sexual norms, which in turn justified the Court's exclusion of obscenity from the First Amendment.[110] *Stevens* and *Entertainment Merchants* ran into further trouble when they insisted not only that tradition should determine the First Amendment's categorical boundaries but that tradition always has done so.[111] Chief Justice Roberts in *Stevens* tied himself in knots explaining how tradition caused the *Ferber* Court to

107. Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 385 (1998).

108. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2737.

109. *See generally* DAVID HAJDU, THE TEN-CENT PLAGUE: THE GREAT COMIC-BOOK SCARE AND HOW IT CHANGED AMERICA (2008).

110. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2742-51; *supra* notes 84-88 and accompanying text.

111. *See supra* notes 42-59, 73 and accompanying text.

exclude child pornography from free speech protection,[112] when *Ferber* really focused on the substantive harm of exploiting children.

At a deeper level, using tradition to measure any constitutional right, including First Amendment speech protection, threatens to defeat the whole purpose of constitutional rights. Constitutional rights are supposed to stop the political majority from imposing on minorities certain burdens that we as a society deem wrong as a matter of foundational law. They are supposed to secure our deepest principles against our political whims, just like Odysseus had himself bound to the mast to resist the Sirens' song.[113] If the Supreme Court defines constitutional rights as protecting only what the political majority traditionally has not chosen or bothered to restrict, then constitutional rights secure nothing. The Court's use of tradition to set categorical exclusions from the First Amendment carries obvious dangers for expressive freedom. Even if we believed that historical questions had clear answers, and that the Court could always find those answers and properly render them as law, the Court's reliance on tradition would freeze speech restrictions in place wherever they had traditionally prevailed.

Consider the persistence of the *Miller* obscenity doctrine.[114] The exclusion of "obscenity" from First Amendment protection has never fit with the rest of our free speech law. Obscenity—extremely explicit sexual imagery—does not cause immediate violence like incitement and fighting words. It does not make people fear for their lives or their safety like true threats. It does not destroy reputations like libel. Whatever flaws mar the justifications for those other categorical First Amendment exclusions, each at least requires a linkage between speech and some tangible harm.[115] In contrast, obscenity requires only that speech be "patently offensive" according to "contemporary community standards."[116] In other words, obscenity doctrine lets the government punish speech as long as it concerns sex and offends people. Why sex? Because sex implicates deep moral

112. *See supra* notes 44-48 and accompanying text.

113. *See* HOMER, THE ODYSSEY bk. XII (Barry B. Powell, trans., Oxford Univ. Press 2015).

114. Miller v. California, 413 U.S. 15, 36-37 (1973).

115. I mean only to indict the obscenity doctrine, not to argue that harm should suffice as a basis for restricting speech. For the leading argument against harm-grounded speech restrictions, see C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 979-81 (1997).

116. *Miller*, 413 U.S. at 36-37.

sensibilities. To sum up, the First Amendment protects speech unless that speech offends people's deep moral sensibilities. Framed that way, expressive freedom becomes all but worthless.

The obscenity doctrine's violation of basic free speech norms, along with society's evolution beyond its Puritan roots, might suggest that any renewed judicial offensive against the categorical approach to First Amendment law would make the obscenity exclusion an early, welcome casualty. Indeed, a landmark Rehnquist Court decision questioned whether the government may even regulate conduct for purely moral reasons.[117] The Roberts Court, however, has actually strengthened the exclusion of obscenity from the First Amendment. Both *Stevens* and *Entertainment Merchants* favorably contrasted the obscenity doctrine with government arguments for excluding depictions of violence.[118] The *Stevens* Court's suggestion that a narrower ban on crush videos might pass First Amendment review also nodded toward obscenity, given that crush videos exist to feed a sexual fetish.[119] This Court's fixation on tradition explains its enthusiasm for the obscenity doctrine. How can we tolerate categorical nonprotection of extreme sexually explicit speech, even as we soundly reject categorical nonprotection of extreme violent speech? Because we have always been tougher on sex than on violence. Past performance dictates future results.

B. Using Tradition to Justify Categorical Exclusions

The Roberts Court's use of tradition to limit expressive freedom transcends its enthusiastic embrace of the obscenity doctrine. In three very different cases, the Court has broadened important categorical exclusions or solidified limits on the First Amendment's coverage. Each decision relied in some way on the Court's assertion that the speech at issue has traditionally been subject to regulation.

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117. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (internal quotation marks and citation omitted)).

118. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2731 (2011); United States v. Stevens, 130 S. Ct. 1577 (2010).

119. *Stevens*, 130 S. Ct. 1592.

These cases reveal the speech-restrictive underbelly of *Stevens* and *Entertainment Merchants*.

United States v. Williams, a case that predated *Stevens* and *Entertainment Merchants*, made questionable law about the least controversial category of unprotected speech: child pornography.[120] I have explained that the Court's exclusion of child pornography from First Amendment protection, announced decades ago in *New York v. Ferber*, focused on the act of exploiting children to produce speech, not on an obscenity-style justification for punishing the speech itself.[121] I have also argued that *Ferber* did not fit the Roberts Court's assertion in *Stevens* and *Entertainment Merchants* that tradition must and does explain all categorical First Amendment exclusions.[122] *Williams*, although it did not talk explicitly about "tradition," leveraged the child pornography exclusion's now well-settled state to expand that exclusion.

Williams followed up a speech-protective Rehnquist Court child pornography case, *Ashcroft v. Free Speech Coalition*.[123] The Court in *Free Speech Coalition* struck down a law that criminalized the possession or sale of simulated child pornography (images created on a computer to look like depictions of actual children having sex) and of material that had been pandered as, but was not in fact, child pornography.[124] Those materials, *Free Speech Coalition* explained, do not actually exploit children, and they therefore fell outside the *Ferber* justification for withholding First Amendment protection.[125] Congress wanted to cast a wide criminal net, to catch as many people as possible who actually exploit children,[126] but the First Amendment bars the government from criminalizing protected speech—even sleazy, awful protected speech—to get at unprotected speech.[127]

Williams considered a new law designed to get back some of what *Free Speech Coalition* took away.[128] In essence, the new law made it a federal crime for me to offer you "child pornography," even when

120. 553 U.S. 285 (2008).
121. 458 U.S. 747 (1982); *see supra* notes 27-30 and accompanying text.
122. *See supra* notes 43-48, 112 and accompanying text.
123. 535 U.S. 234 (2002).
124. *See id.* at 242-43.
125. *Id.* at 250-51, 254.
126. *See id.* at 241-42.
127. *Id.* at 255-56.
128. United States v. Williams, 553 U.S. 285, 289 (2008).

the material I have is not really child pornography, or even if I have no material in hand at all, as long as my offer "reflects the belief, or ... [ ] is intended to cause [you] to believe," that the material really is child pornography.[129] How can the First Amendment let the government punish a person who has no material that the First Amendment lets the government restrict? The answer, according to *Williams*, is that the panderer in this scenario *offers* to provide material the First Amendment lets the government restrict.[130] The fact that the person making the offer has no unprotected material makes no difference.

Justice Scalia spent a lot of time in his majority opinion hashing out what the words of the statute mean,[131] and Justice Stevens's concurring opinion added a detailed analysis of the legislative history behind the law.[132] In short, Justices Scalia and Stevens (strange bedfellows, by the way) wanted to prove that this new law would punish different conduct than the law struck down in *Free Speech Coalition*. Justice Souter demurred, arguing in dissent that *Williams* undermined *Free Speech Coalition* by letting Congress punish speech that the Court had granted First Amendment protection in the earlier case.[133] Justice Scalia, however, distinguished the simulated child pornography of *Free Speech Coalition* from "the collateral speech that introduces such material into the child-pornography distribution network."[134] All nine Justices agreed that the government may properly punish someone for offering to provide child pornography when he, in fact, possesses nothing.[135] Out of respect for *Free Speech Coalition*, Justice Souter (joined by Justice Ginsburg) argued that the government should not be able to punish someone for offering to provide child pornography when he, in fact, possesses something that is not child pornography.[136]

Justice Scalia's opinion actually made a second categorical claim that reinforced nonprotection of another speech category. "Offers to

129. *Id.* at 289-90 (quoting 18 U.S.C. § 2252A(a)(3)(B) (2012)).

130. *Id.* at 298.

131. *See id.* at 293-97.

132. *See id.* at 307 (Stevens, J., concurring).

133. *See id.* at 310-27 (Souter, J., dissenting).

134. *Id.* at 293 (majority opinion). *Williams* also rejected an argument that the pandering law was unconstitutionally vague. *See id.* at 306.

135. *Id.* at 285.

136. *Id.* at 311 (Souter, J., dissenting).

engage in illegal transactions," he declared, "are categorically excluded from First Amendment protection."[137] Justice Scalia framed that statement as a simple recitation of existing law, and no other Justice contradicted him. But no previous decision has identified "offers to engage in illegal transactions" as an unprotected *category* of speech. Certainly the government frequently punishes criminal offers without First Amendment scruples. Fred Schauer identifies criminal solicitation as a category of speech that the First Amendment does not cover.[138] In Professor Schauer's view, an array of political, cultural, historical, and other forces causes courts not even to think about some speech as raising First Amendment concerns.[139] Besides criminal solicitation, other such uncovered speech categories include violations of antitrust laws, securities regulations, and evidentiary rules.[140] A lack of First Amendment coverage works very differently from a categorical exclusion. As we have seen, 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. In contrast, legislatures decide what to do about uncovered speech with little, if any, judicial oversight. Indeed, noncoverage often occurs in policy areas where legislatures or administrative agencies have set up strong regulatory systems that the public has accepted.[141] In *Williams*, Justice Scalia stealthily transformed criminal solicitation from a noncovered category into a new categorical exclusion.

Justice Scalia cited two past Supreme Court decisions as having called offers of illegal transactions categorically unprotected.[142] As

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137. *Id.* at 297 (majority opinion). In defending the pandering law's application to knowingly false offers to provide child pornography, Justice Scalia actually mentioned yet a third unprotected category: fraudulent commercial speech. *See id.* at 299.

138. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1770-71 (2004).

139. *See id.* at 1787-800.

140. *See id.* at 1777-84. Professor Schauer describes copyright law, at least prior to the Rehnquist Court's decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), as falling into the "uncovered" category as well. *See* Schauer, *supra* note 138, at 1783. I discuss *Golan v. Holder*, 132 S. Ct. 873 (2012), the Roberts Court's successor decision to *Eldred* later in this Article. *See infra* notes 151-76 and accompanying text.

141. *See* Schauer, *supra* note 138, at 1805-07.

142. *See Williams*, 553 U.S. at 297 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949)).

to the first, *Giboney v. Empire Storage & Ice Co.*, he was just wrong.[143] In that case, the Court said only that "it has rarely been suggested" that the First Amendment protects "speech or writing used as an integral part of" a crime.[144] An offer to engage in an illegal transaction is not the same thing as speech used in committing a crime, and "rarely suggesting" is not rejecting.[145] Justice Scalia's second precedent, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, came closer to supporting his claim.[146] The Court in that case said, "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."[147] That single sentence, however, makes no categorical judgment about all speech that proposes illegal transactions. It does not discuss the relative danger or value of various proposals to break the law. In *Williams*, Justice Scalia simply tossed off a claim about the "unprotected category" of illegal proposals because that claim helped him expand on the unprotected category of child pornography.

Justice Scalia's conversion of criminal solicitation from a generally uncovered category to a categorical exclusion raises troubling questions. For example, may the government punish someone who offers to donate (or sell) her time to organize a political protest, like a sit-in that involves trespassing? I hope not, but Justice Scalia suggested no political exception to the new categorical exclusion for criminal proposals. As a matter of doctrine, what has happened to *Brandenburg v. Ohio*?[148] That case sharply limited the government's power to punish speech that urges illegal action.[149] The First Amendment protects a person unless, and until, she incites others to commit an immediate lawless act that she knows or expects will occur.[150] Categorically excluding mere proposals of unlawful trans-

143. 336 U.S. 490 (1949).

144. *Id.* at 498.

145. Justice Kennedy may have been trying either to clean up this mistake or to tweak Justice Scalia when, in a subsequent case, he listed "speech integral to criminal conduct" among the categorical exclusions from First Amendment protection. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (citing *Giboney*, 336 U.S. 490).

146. 413 U.S. 376 (1973).

147. *Id.* at 388.

148. 395 U.S. 444 (1969).

149. *See id.* at 447-48.

150. *See id.*

actions seems to throw wide open a door *Brandenburg* had closed. The Court's long practice of letting legislatures identify and punish egregious sorts of criminal proposals neutralized these hard line-drawing questions. Turning that passive noncoverage into an active categorical exclusion makes those line-drawing questions very important.

The *Williams* Court stacked up unprotected speech categories to justify punishing speech that does not fit any of them. The speech at the heart of the case is not obscenity. It is not child pornography, although it refers to child pornography that does not really exist. Some of the speech is fraudulent, and the First Amendment generally permits punishment of fraud; but some of it is not. The speech proposes an "illegal transaction," but the material the speakers propose to hand over is not really illegal. The result in *Williams* did not follow from *Ferber*. Rather, *Williams* only makes sense under a tradition analysis. Even though the decision did not talk specifically about tradition, it showed how a focus on established practices can weaken speech protection. If we have previously denied First Amendment protection to a category of speech (or three), says *Williams*, then that history can justify continuing to ban that speech reflexively, or even expanding the scope of the ban.

The Roberts Court's other two speech-restrictive categorical decisions follow the *Williams* form of thickening what had been uncovered speech into more formally excluded categories. Probably the most broadly important of all the Roberts Court's categorical speech decisions, *Golan v. Holder*, involved a First Amendment challenge to a federal copyright statute.[151] Copyright disputes tend to involve conflicts between two different sorts of free speech interests. The Patent and Copyright Clause of the Constitution lets Congress protect intellectual property "[t]o promote the Progress of Science and useful Arts."[152] Copyright promotes authorship by ensuring authors' ability to profit from their works. A failure by the government to protect copyright does not violate the First Amendment, but the Court has held in other contexts that the government does violate the First Amendment when it affirmatively interferes

151. 132 S. Ct. 873 (2012).
152. U.S. CONST. art. I, § 8, cl. 8.

with an author's ability to profit from her work.[153] Thus, copyright laws protect a sort of interest that the First Amendment also protects. On the other side of the ledger, unauthorized uses of copyrighted material always involve speech. Therefore, at least as a first cut, copyright violations fall within the First Amendment's protective scope. The presence of serious speech interests on each side of a dispute would seem to compel the Court to perform a nuanced analysis that compares and balances the competing interests.

The Court, however, has resolved First Amendment copyright claims categorically in favor of copyright holders. *Golan* upheld a federal statute that writes an international copyright agreement into U.S. law.[154] The agreement grants copyright protection to certain foreign works that had passed into the public domain, meaning that their copyrights had expired and anyone could use or publish them.[155] The statute restores their copyright protection.[156] Artists and publishers who had been freely using the works challenged the statute, claiming that its new constraint on their uses violated the First Amendment.[157] Justice Ginsburg's majority opinion closely followed the reasoning of another opinion she wrote a decade earlier: *Eldred v. Ashcroft*.[158] *Eldred* rejected a First Amendment challenge to a law that extended the durations of existing copyrights, holding that the First Amendment does not generally apply to copyright disputes.[159] *Golan* reiterated and intensified that holding. Justice Ginsburg completely rejected the idea that copyright raises any First Amendment problems.[160] She

153. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (striking down a state law that garnished profits from convicted criminals' writings to compensate their victims).

154. *See* 17 U.S.C. § 104A (2012); Berne Convention for the Protection of Literary and Artistic Works, *adopted* Sept. 9, 1886, S. TREATY. DOC. NO. 99-27, 1161 U.N.T.S. 3 (amended Sept. 28, 1979).

155. *See Golan*, 132 S. Ct. at 874-75.

156. *See id.* at 890.

157. *See id.* at 878. The *Golan* challengers also argued that Congress lacked the power to enact the statute in the first place. The Court rejected that claim. *Id.* at 884-89. Justice Breyer's dissent disputed this holding in light of the First Amendment interests at stake, but did not reach the distinct First Amendment issue. *See id.* at 900, 907-08 (Breyer, J., dissenting).

158. 537 U.S. 186 (2003).

159. *Id.* Note that a copyright may still violate the First Amendment if it offends some distinct free speech principle, like discriminating based on an author's viewpoint.

160. *See Golan*, 132 S. Ct. at 889-90 (majority opinion).

reasoned that two long-standing rules of copyright law assuage any free speech concerns. The first rule says authors may not copyright "ideas," but only "expressions," and the second says making "fair use" of a protected work for purposes such as criticism, scholarship, and news reporting does not violate copyright.[161]

Golan, like *Eldred* before it, shrugged off one of the most important free speech concerns for our information-driven society. The Internet's rapid growth has multiplied the amount of information that people can access. Increased access encourages people to use information in new and creative ways. In music, for example, hip-hop producers sample old funk, rock, and soul records to create new sounds; bedroom DJs layer seemingly incongruous songs into ingenious mash ups; and aspiring pop stars court attention by posting fresh covers of familiar songs to YouTube. We may have good reasons to place some copyright limits on such practices. Even so, should not the First Amendment, our defense against excessive speech restrictions, have something to say about whether and when copyright law applies too broadly and suppresses or chills too much speech?

Golan echoed *Eldred* in saying no.[162] Justice Ginsburg embraced a particular economic theory about copyright: any amount of copyright protection, no matter how long it lasts, serves the uniquely valuable purpose of giving authors incentives to create.[163] That theory has obvious flaws. Even if we accept the questionable premise that authors would not create works absent copyright protection, time-limited protection should suffice to make creation worthwhile, and the protection could incorporate some limits without destroying the incentive to create. On the other side of the conflict, Justice Ginsburg simply ignored the possibility that enabling derivative uses may add more to public discourse than it costs. Since Justice Stevens's retirement, Justice Ginsburg may be the Court's most reliable "liberal," but her liberalism here took on a classical, rather than contemporary, cast. She characterized the creative process as an arid economic realm in which the market's authority maintains an economically desirable status quo.[164]

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161. *See id.* at 890.
162. *See id.* at 889-91.
163. *See id.* at 888-89.
164. *Id.*

Golan went even farther than *Eldred* in its disregard for the First Amendment in one important way: its use of a story about tradition to limit speech protection. *Eldred* stated that "[w]hen ... Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[165] That statement implied that the First Amendment bars Congress from changing the "traditional contours" to the extent they protect speech. *Golan*, however, did not repeat, let alone fulfill, that implication. The law upheld in *Golan* revived copyright protection for works whose copyrights had expired. That tops the law upheld in *Eldred*, which extended the lengths of copyrights still in effect when the law was enacted. The newer law certainly looks like an important change in "traditional contours." The *Golan* Court, though, found this distinction unimportant, treating passage of the affected works into the public domain as a legal aberration that "deprived [authors] of protection" during part of "the normal copyright term."[166] The mere persistence of other "traditional contours of copyright protection," namely the idea-expression dichotomy and the fair use doctrine, made First Amendment review of copyright protections unnecessary.[167] The Court's reliance on tradition in *Stevens* and *Entertainment Merchants* led it to reaffirm First Amendment protection for depictions of violence. In contrast, the Court's selective reliance on tradition in *Golan* led it to reaffirm First Amendment nonprotection for uses of (re)copyrighted material. Rather than confronting the conflict between speech interests, asking whether the idea-expression distinction and the fair use doctrine protect enough speech, or giving a substantive reason for letting Congress remove works from the public domain, *Golan* simply invoked tradition to give Congress a pass.

Neil Netanel, one of our deepest thinkers about copyright law, believes *Golan* and *Eldred* have decent potential to protect speech interests.[168] Professor Netanel calls the Court's approach to copyright a form of "definitional balancing."[169] The Court, he argues,

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165. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (citations omitted).

166. *See Golan*, 132 S. Ct. at 893.

167. *Id.* at 890 (internal quotation marks omitted).

168. *See* Neil W. Netanel, *First Amendment Constraints on Copyright After* Golan v. Holder, 60 UCLA L. REV. 1082, 1086-87 (2013).

169. *Id.* at 1086. Professor Netanel draws the concept from Melville B. Nimmer, *Does*

weighed the speech interests that cut against copyright and the nonspeech interests he thinks cut in its favor. He portays the idea-expression distinction and the fair use doctrine as the tools the Court used to settle the conflict.[170] Professor Netanel does not think courts have applied these doctrines with enough rigor,[171] but he believes the doctrines, properly applied, can do the necessary speech-protective work in copyright law. He points out that the Court has used definitional balancing to shape other categories of unprotected speech.[172] For example, the Court in *New York Times Co. v. Sullivan* performed definitional balancing by carving out some but not all defamatory speech as unprotected libel.[173]

I agree with Professor Netanel that definitional balancing has value for addressing conflicts in both defamation and copyright disputes. The trouble is that the Court takes a much harder line in copyright disputes than in defamation disputes. Although the First Amendment does not shield speakers from liability for defaming an ordinary private citizen, it does prohibit states from imposing liability without fault, and it heightens the showing a private plaintiff must make to recover punitive damages.[174] Copyright works very differently because *Eldred,* and especially *Golan*, have written the First Amendment entirely out of the script. The idea-expression distinction and the fair use doctrine, which Professor Netanel portrays as the vehicles for definitional balancing in copyright, are not First Amendment mandates. They are just limits Congress has chosen to place on copyright. Professor Netanel understands the difference, and he argues forcefully that the Court should invoke the First Amendment if Congress, for example, tries to weaken the fair use doctrine.[175] As we have seen, however, the *Eldred* Court's implied promise to defend "the traditional contours of copyright protection" came to nothing in *Golan*.[176]

Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180 (1970).

170. *See* Netanel, *supra* note 168, at 1095-103 (discussing *Eldred* and *Golan*).

171. *See id.* at 1103-13 (critiquing the idea-expression distinction and the fair use doctrine in practice).

172. *See id.* at 1088.

173. 376 U.S. 254 (1964); *see* Netanel, *supra* note 168, at 1088.

174. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 349 (1974).

175. *See* Netanel, *supra* note 168, at 1113-27.

176. Eldred v. Ashcroft, 537 U.S. 186, 191 (2003).

The final case in the Roberts Court's restrictive categorical trilogy once again relied on a tradition-bound analysis, but it also transcended tradition in ways that anticipated the Roberts Court's decisions about the First Amendment in the political process. *Nevada Commission on Ethics v. Carrigan* unanimously upheld a Nevada law that bars a "public officer" from voting on, or advocating about, any matter as to which the official has a conflict of interest.[177] Michael Carrigan, a city council member, challenged the law.[178] He argued that his legislative votes expressed his viewpoints and that the First Amendment should bar the government from forcing him to forego this form of expression.[179] Justice Scalia once again wrote for the Court. As a "preliminary detail," he brushed aside concerns about the Nevada law's restriction on advocacy.[180] Justice Scalia surmised that the restriction meant "advocating [a matter's] passage or failure during the legislative debate."[181] Assuming the restriction on voting passed muster, he explained, the restriction on advocacy by officials barred from voting served to prevent legislative sessions from becoming "massive town-hall meetings."[182]

Justice Scalia then focused on the Nevada law's voting restriction. Although he did not explicitly find public officials' votes to be an excluded speech category, he effectively treated them that way. Two distinct lines of reasoning led him to that result. First, in the manner of (though without citing) *Stevens*, Justice Scalia emphasized that a long national tradition supported the constitutionality of recusal requirements for conflicts of interest.[183] Surveying federal and state legal history as to both judges and legislators, he found not one case that struck down an even-handed recusal rule.[184] Second, Justice Scalia argued that legislative votes are not expressive, and therefore not protected speech.[185] A legislator's vote, he reasoned, is not the legislator's expression at all. Rather, "a legislator's vote is the commitment of his apportioned share of the legislature's power

177. 131 S. Ct. 2343 (2011) (upholding NEV. REV. STAT. § 281A.420 (2007)).
178. *See id.* at 2343.
179. *See id.* at 2347.
180. *Id.*
181. *Id.*
182. *Id.*
183. *See id.* at 2348.
184. *See id.* at 2347-50.
185. *Id.*

to the passage or defeat of a particular proposal."[186] The legislator had no right to his vote, and without a rights-bearing speaker, the First Amendment had nothing to protect. Only Justice Alito's partial concurrence challenged Justice Scalia's argument that legislative votes are not expressive. Justice Alito pointed out that legislative votes convey information, and therefore must be protected speech.[187] In the end, however, he agreed with the tradition-based argument for allowing the recusal rule to restrict speech.[188]

I take no issue with the main holding in *Carrigan*: that the First Amendment should not bar recusal rules for public officials. Moreover, *Carrigan* improved in one important respect on the other categorical First Amendment decisions discussed above. Justice Scalia did not begin and end his analysis with talk of tradition. Instead, he provided a specific, substantial reason, entirely distinct from tradition, for excluding legislative votes from First Amendment protection: legislative votes are not expressive.[189] If the Court wants to place categories of speech outside the First Amendment's boundaries, this sort of reasoning seems essential. Unfortunately, the particulars of Justice Scalia's substantive argument raise serious concerns.

First of all, Justice Scalia skated too quickly past the Nevada law's restriction on "advocacy." This paladin of precise textualism[190] breezily presumed that "advocacy" referred only to legislative debates. Even if that premise is right, strong First Amendment and legislative process interests support letting legislators debate even about bills on which they cannot vote. Legislators' arguments inform both the public and their colleagues as surely as arguments by nonconflicted legislators do. But the premise is probably wrong. The Nevada law applies to all "public officers," not just to legislators.[191] Nonlegislators do not ordinarily "advocate" in legislative sessions.

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186. *Id.* at 2350. The Roberts Court's opinion and Justice Thomas's concurrence in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), echoed the idea that electoral ballots are not expressive.

187. *Carrigan*, 131 S. Ct. at 2354 (Alito, J., concurring in part and concurring in the judgment).

188. *See id.* at 2354-55.

189. *See id.* at 2351 (majority opinion).

190. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 15-28 (2012).

191. NEV. REV. STAT. § 281A.420 (2007).

The meaning of "advocacy" in the Nevada law thus must extend well beyond legislative debates, creating First Amendment problems that Justice Scalia blithely ignored.

The major problem with Justice Scalia's argument that legislative votes are not expressive is that the argument sweeps in more than just legislative votes. Justice Scalia tied *Carrigan* to two Rehnquist Court cases that rejected First Amendment challenges to a restriction on whom a political party could nominate for office[192] and a ban on write-in votes.[193] Taken together, these three decisions roughly define "speech in the course of executing governmental or electoral functions" as categorically unprotected by the First Amendment. That is a big idea, one that *Carrigan* does not come close to defending thoroughly.[194] Nonprotection of governmental and electoral speech resonates with the Roberts Court's deference to speech regulations when the government acts as institutional manager[195] or property owner.[196] Justice Alito, however, is right to argue that legislative votes have expressive content. Parties' candidate nominations and voters' write-in ballots also have expressive content. The *Carrigan* Court should have reached its result by balancing the legislator's speech interest against the public's interest in corruption-free government. Such a balancing analysis would not change the result in *Carrigan*, although it would, and should, have doomed the candidate nomination restriction and the write-in ban from the earlier cases. Unfortunately, the Roberts Court hesitated no more in *Carrigan* than in *Williams* or *Golan* to let categorical analysis clear a path to restricting speech.

A final, major problem with *Carrigan* is that it dove recklessly into contentious debates about politics. When Justice Scalia posited

192. *See Carrigan*, 131 S. Ct. at 2351 (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997)).

193. *See id.* (citing Burdick v. Takushi, 504 U.S. 428 (1992)).

194. For one thing, that categorical exclusion seems to conflict with the Roberts Court's somewhat tentative holding in *Doe v. Reed*, 130 S. Ct. 2811 (2010), that signing a petition for a ballot measure is protected speech. Justices Scalia and Alito clash over the depth of that conflict. *Compare Carrigan*, 131 S. Ct. at 2351, *with Reed*, 130 S. Ct. at 2354-55 (Alito, J., concurring in part and concurring in the judgment).

195. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006) (rejecting a city prosecutor's challenge to an adverse employment action based on his internal criticism of a prosecution).

196. *See* Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (rejecting a religious group's challenge to a city's refusal to display a monument the group donated alongside similar monuments in a public park).

that only constituents, not legislators, have rights in legislators' votes, he implicitly favored a particular theory of representative government under which legislators act as agents for their constituents rather than exercising independent judgment.[197] A similar difficulty animated Justice Kennedy's strange, intriguing concurring opinion. Justice Kennedy agreed with the Court, but said he might have thought differently if the case had raised a different First Amendment concern—that conflict-of-interest recusal rules discourage the kinds of associations and relationships that might cause conflicts of interest.[198] Justice Kennedy's opinion is strange because the case *does* present the concern he identified. *Carrigan* argued that the recusal rule violated his First Amendment interests, and those interests included associations foregone or compromised due to the rule. The opinion is intriguing because it suggests that Justice Kennedy distrusts broad legal barriers against political corruption. That same distrust plays a huge role in his pivotal opposition to campaign finance regulations.[199] The *Carrigan* Court's failure to engage Justice Kennedy's concern, or more generally to connect its reasoning with the related problems that arise in the campaign finance cases, almost certainly reflects strategic compromise, because the nearly unanimous *Carrigan* majority has split bitterly over campaign finance.[200] That failure, however, reinforces the sense that *Carrigan* depended on unstated political premises the Court has not thought through.

The Roberts Court's fixation on tradition in *Stevens* and *Entertainment Merchants* raises warning flags about the depth of the Court's speech-protective commitments. *Williams*, *Golan*, and *Carrigan* set those flags fluttering. Even when this Court rightly rejects a First Amendment claim, as it did in *Carrigan*, its tradition-bound analysis corrodes expressive freedom by letting the Court entrench

197. *See generally* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861) (discussing theories of representation). Deborah Hellman includes *Carrigan* among a group of Supreme Court decisions that she criticizes for preferring particular theories of democracy. *See* Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1389-90 (2013).

198. *See Carrigan*, 131 S. Ct. at 2352 (Kennedy, J., concurring).

199. *See* Citizens United v. FEC, 130 S. Ct. 876, 908-11 (2010) (rejecting an anticorruption rationale for a federal ban on independent corporate and union expenditures in election campaigns).

200. *See Citizens United*, 130 S. Ct. 876.

speech-restrictive legal doctrines. Taken together, the two speech-protective and three speech-restrictive categorical majority decisions depict a Court with dubious free speech commitments. The Roberts Court uses its account of legal traditions to protect a bit of speech, reinforce and broaden some important categorical exclusions, and above all keep a more assertive hand on the categorical First Amendment rudder than we have seen in almost half a century.

IV. ONCE MORE INTO THE BREACH?

The Roberts Court's most recent categorical First Amendment decision revived some of the promise of *Stevens* and *Entertainment Merchants*. It also reinforced the concerns the speech-restrictive cases raise about the Roberts Court's tradition-bound approach to categorical First Amendment exclusions.

The Court in *United States v. Alvarez* struck down a federal law called the Stolen Valor Act.[201] Congress passed the law to punish people who claim to have won high military honors they never actually won.[202] More people do this than you probably think, for reasons that range from calculating to compulsive. Quite a few people, like the defendant in this case, Xavier Alvarez, even lie about having received the Congressional Medal of Honor.[203] These lies naturally offend real recipients of high military honors and their comrades and loved ones.[204] The Stolen Valor Act reveals the tip of a very interesting legal iceberg: Should the First Amendment protect outright lies? The value of lying for the pursuit of truth, democratic self-government, or individual fulfillment through speech is hard to pin down. "Lying," however, is an enormous category that sweeps in a lot of different speech. At least some lies, like telling survivors of a burn victim that their loved one died without pain, or leaking the wrong information about troop movements, serve good purposes. Thinking categorically about First Amendment protection for lies turns out to be tricky. The *Alvarez* opinions reflect that difficulty.

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201. 132 S. Ct. 2537 (2012) (plurality opinion).
202. *See id.* at 2539.
203. *See id.* at 2558 (Alito, J., dissenting).
204. *See id.* at 2549 (plurality opinion).

The government wanted the Court in *Alvarez* to exclude lies from the First Amendment to the greatest extent possible, extending only enough protection to ensure that laws against lying do not chill truthful speech.[205] The government pointed out that many federal and state laws punish various sorts of lies, including perjury, commercial fraud, and impersonating a government official.[206] But Justice Kennedy, writing for the four-Justice plurality, portrayed each of those laws as targeting a "legally cognizable harm associated with a false statement."[207] The Stolen Valor Act, in contrast, "targets falsity and nothing more."[208] Reiterating the holding of *Stevens* that tradition provides the proper lens for analyzing categorical speech exclusions,[209] Justice Kennedy conceded that "our law and tradition show ... instances in which the falsity of speech bears upon whether it is protected."[210] He insisted, however, that those instances did not support categorically excluding lies from First Amendment protection. Perhaps realizing that no tradition forecloses categorical exclusion of lies either, he ended his categorical analysis with dire warnings about the dangers of "government authority to compile a list of subjects about which false statements are punishable."[211] To make sure no one would miss his point, he even cited George Orwell's *Nineteen Eighty-Four*.[212]

Justice Kennedy made a sound substantive case that even lies can benefit public debate, noting that "the outrage and contempt" lies inspire "can serve to reawaken and reinforce the public's respect" for valuable ideas or institutions (here, military medals and their recipients).[213] Then he went further and did even better: "Society has the right and civic duty to engage in open, dynamic, rational discourse."[214] In other words, even if we cannot be sure public debate will put bad speech in its place, the First Amendment compels us to take a leap of faith. With the categorical argument out of the way,

205. *Id.* at 2539.
206. *Id.*
207. *Id.*
208. *Id.* at 2545.
209. *See id.* at 2544 (citing United States v. Stevens, 130 S. Ct. 1577 (2010)).
210. *Id.* at 2546.
211. *Id.* at 2547.
212. *See id.* (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949)).
213. *Id.* at 2550.
214. *Id.*

Justice Kennedy finished his opinion by ruling that the government's serious interest in protecting the integrity of the military honors system does not justify restricting false honors claims.[215] He found no real evidence that lies about military honors undermine public perception of the honors system, and he urged counterspeech (in the form of an easily accessible registry of military honors recipients) as a better way of preventing whatever harm the lies might do.[216]

Justice Kennedy's opinion stated the views of only four Justices. The result in *Alvarez* depended on the additional votes of Justices Breyer and Kagan, who concurred only in the Court's judgment, not endorsing any of Justice Kennedy's language. "I do not," begins Justice Breyer's concurring opinion, "rest my conclusion upon a strict categorical analysis."[217] Well, of course not. The only way to decide the case on a strict categorical analysis would be to hold lies categorically excluded from the First Amendment, thus voting to strike down the law. What Justice Breyer appears to have meant, and what his opinion is all about, is that the Court should have used a more flexible balancing analysis to decide whether the government's interest in protecting the integrity of military honors justified the Stolen Valor Act.[218] Unfortunately, his odd way of dealing (or not dealing) with the plurality's categorical exclusion analysis prevents us from saying with confidence that *Alvarez* firmly rejected categorical exclusion of lies from the First Amendment. Having thus muddied the waters, Justice Breyer proceeded to make a convincing, characteristically pragmatic argument about why the First Amendment should block at least the Stolen Valor Act's attempt to punish lies. He echoed and fleshed out Justice Kennedy's argument that this law went further than other, valid laws that restrict lying, and he then echoed and fleshed out Justice Kennedy's argument that counterspeech can adequately address the concerns behind the law.[219]

Justice Alito, dissenting for himself and Justices Scalia and Thomas, would have denied First Amendment protection to "false

215. *Id.* at 2551.
216. *See id.* at 2549-51.
217. *Id.* at 2551 (Breyer, J., concurring).
218. *See id.* at 2551-52.
219. *See id.* at 2553-56.

factual statements that inflict real harm and serve no legitimate interest."[220] That phrase stacked the deck. If we are certain that a given speech category does great harm and absolutely no good, then of course the government should be able to ban it. Justice Alito then proceeded to advance a series of dubious arguments. He suggested that the government needs the Stolen Valor Act to prevent fraudulent claims for veterans' benefits,[221] although separate fraud laws already protect against that problem. He justified the Act as checking lies that "debase the distinctive honor of military awards,"[222] although a landmark Rehnquist Court decision on flag burning rejected a very similar sort of interest as illegitimate for punishing speech.[223] Justice Alito justified the Act as helping the military "to foster morale and esprit de corps,"[224] even though the Court has long since repudiated an infamous early First Amendment decision that validated a similar interest as more important than free speech.[225] He insisted that a registry of military award recipients would not protect the integrity of the honors system because the Defense Department has said it cannot create a full registry,[226] which must mean either that the Department is incompetent or that the "false statements of fact" he wanted to let the government ban could not actually be proven false. He further objected to a counter-speech remedy because public discussion of false honor claims might "increase skepticism among members of the public about the entire awards system,"[227] an argument that insults the public's judgment

220. *Id.* at 2557 (Alito, J., dissenting).

221. *See id.* at 2558-59.

222. *Id.* at 2559. Justice Breyer also made this argument. *Id.* at 2555 (Breyer, J., concurring).

223. *See* Texas v. Johnson, 491 U.S. 397, 410-21 (1989) (rejecting the American flag's function of symbolizing national unity as a justification for a legal ban on flag burning). Christina Wells assails the Stolen Valor Act for resembling the infamous punishment of "seditious libel," basically libel against the government, which she explains sought "to preserve honor and status roles." Christina E. Wells, *Lies, Honor, and the Government's Good Name: Seditious Libel and the Stolen Valor Act*, 59 UCLA L. REV. DISC. 136, 148 (2012).

224. *See Alvarez*, 132 S. Ct. at 2559 (Alito, J., dissenting).

225. *See* Schenck v. United States, 249 U.S. 47 (1919) (upholding criminal convictions for distributing leaflets that urged conscripts not to join the military); *cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969) (announcing a rigorous incitement test to replace the permissive "clear and present danger" test under which the Court had upheld the convictions in *Schenck*).

226. *Alvarez*, 132 S. Ct. at 2559.

227. *Id.* at 2560.

so brazenly that it validates Justice Kennedy's *Nineteen Eighty-Four* reference.

Despite those deep problems, the dissent's most important feature is its fairly credible use of tradition to attack the Stolen Valor Act. Justice Alito posited "a long tradition of [congressional] efforts to protect our country's system of military honors," as well as a long tradition of judicial holdings that lies have no value worth protecting under the First Amendment.[228] His story about tradition carries at least as much weight as the majority Justices' efforts to distinguish different kinds of lies by the supposedly different sorts of damage they do. Justice Alito's effective reliance on tradition put serious wind behind his attack on the majority's "radical interpretation of the First Amendment."[229]

What should we make of *Alvarez*? In an important sense, the case stands tall alongside *Stevens* and *Entertainment Merchants*. The Court, using a tradition-based analysis, rejected the government's call to place a category of speech outside the scope of First Amendment protection. Moreover, the category of lies seems broader and more legally vulnerable than the category of violent depictions. That makes *Alvarez* potentially more important than *Stevens* or *Entertainment Merchants*, both of whose practical significance I have questioned. The key word, though, is "potentially." Even though six Justices in *Alvarez* signed onto arguments that support First Amendment protection for lies, the lack of a majority opinion makes *Alvarez* less valuable as a legal precedent than any of the other decisions discussed in this Article. The case stands as a garbled beginning to what will have to be a longer conversation.[230] *Alvarez* also shows us another angle on the problems of the Roberts Court's tradition-bound approach to categorical speech decisions. The majority and dissenting opinions dueled, in a way absent from the other categorical cases, about which result the tradition analysis should yield. Even if *Alvarez* had squarely and unanimously used tradition

228. *See id.* at 2557, 2560-62.

229. *Id.* at 2563.

230. One First Amendment scholar holds up the fractured opinions of *Alvarez* as the poster child for what he sees as the Supreme Court's chronic failure to develop and stick with firm principles for free speech law. *See* Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of* United States v. Alvarez, 76 ALB. L. REV. 499 (2013).

to sustain the First Amendment claim, it would just be one more data point for the tradition analysis's capacity to protect speech. Instead, the dissenting Justices' ability to tell a forceful story about why tradition should defeat the First Amendment claim reinforces doubts that the tradition analysis can effectively protect speech at all.

CONCLUSION

Why have the Roberts Court years seen an explosion in arguments about categorical speech exclusions? The categorical renaissance may simply reflect government lawyers' strategic choices to make categorical exclusion arguments. Those choices, in turn, may reflect heightened concerns about depictions of violence, opportunism grounded in the tantalizing vitality of the obscenity doctrine, desire to cut through the ever-increasing complexity of First Amendment law, or any number of other factors. On the other hand, the Court may have wanted to revisit the categorical aspects of First Amendment law. Although these decisions do not generally break down along simple liberal-conservative lines, the Justices' analytic focus on tradition reflects core conservative values in its reverence for the past, axiomatic resistance to government regulation, and allowance for legal restrictions on socially undesirable behavior. With the notable exception of *Golan*, conservative Justices wrote all of the majority and plurality opinions in the categorical cases. Perhaps the Chief Justice and his colleagues have decided the time has come to state fresh justifications in this venerable but long-neglected area of free speech law—justifications both for protecting some speech and for exposing other speech to regulation.

Stevens, *Entertainment Merchants*, and *Alvarez* all uphold speech protections, and they contain some of the Supreme Court's most direct, vigorous rhetoric in recent memory about the value of expressive freedom. Both the law those cases made and some of the reasons they gave for making that law deserve applause from civil libertarians. As I have shown, however, even those cases brought mixed blessings for First Amendment speech protection, and the Court's other, less-heralded categorical speech decisions—*Williams*, *Golan*, and *Carrigan*—expose their Janus face. I have focused on these decisions' emphasis on tradition, which justified speech

restrictions in the second cluster of decisions and prompted sharp disagreement in *Alvarez*. Beyond tradition, the categorical decisions present other grounds for concern. Commercial speakers with economic power fared better in these cases than more marginal speakers. The Court, especially in *Golan*, seemed to view speech as little more than an economic commodity. *Golan* also showed the Court's refusal to confront conflicts between different free speech values. These elements recur elsewhere in the Roberts Court's First Amendment jurisprudence.

The limits, deficiencies, and outright failures of the Roberts Court's categorical speech decisions look especially glaring if we want First Amendment law to encourage diversity in the range of people active in public debates and in the range of ideas those debates generate, with the aim of enabling political and social change. *Stevens* and *Entertainment Merchants* have very limited value for achieving those goals. Both decisions did the right thing within their bounds, but decrying a categorical method that the Court has long disfavored does not move the speech protection needle. Both decisions directly benefited commercial entities whose speech interests, while relevant under an appropriately broad view of First Amendment rights, do not face any systematic threat or suppression. Although *Entertainment Merchants* showed some appreciation of speech as a creative force, neither decision suggested any path for expanding the range of participants and ideas in public debate. The Court's reliance on tradition to chart the First Amendment's boundaries seems likely to discourage such expansion. *Golan* effectively raised the cost of entry for speakers who want to make novel use of cultural materials, while *Williams* and *Carrigan* reinforced the Court's retrograde emphasis on tradition. *Alvarez* suggested the Court has some appetite for protecting the interests of marginal, even despised speakers and for resisting calls to exclude speech categories from First Amendment protection. That decision, however, is neutered by its lack of a majority opinion.

I am not a free speech absolutist. I do not believe the Court should extend First Amendment coverage to, for example, erroneous bond ratings or unprotected sex.[231] I think many uncovered

231. *See* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613 (2015).

categories of speech should remain uncovered, and I think some of the Court's long-standing, qualified categorical exclusions (incitement, defamation, true threats) largely make sense. In general, though, I would rather balance vulnerable speech against the government's regulatory interest than bury it under a categorical exclusion.

Analysis of the Roberts Court's categorical First Amendment decisions makes a fair beginning to a comprehensive study and critique of this Court's free-speech jurisprudence. The Justices deserve to have their best face put forward, and the categorical decisions offer the most familiar evidence for characterizing this Court as a beacon of expressive freedom. As this Article has shown, however, thorough examination of the Roberts Court's categorical speech decisions reveals at best an ambivalent Court, following a self-charted path of tradition to a troubling mixture of free speech victories and losses. If these decisions present the Roberts Court at its speech-protective best, free speech advocates should not hold out much hope that the whole of the Court's First Amendment jurisprudence will make them happy.