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SCIENTER, CAUSATION, AND HARM IN FREEDOM OF EXPRESSION ANALYSIS: THE RIGHT HAND SIDE OF THE CONSTITUTIONAL CALCULUS

Wilson Huhn*

But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.¹

INTRODUCTION

Laws that infringe on freedom of expression, like all prohibitory laws, are enacted to prevent harm from occurring. The Supreme Court has refused to confer absolute protection upon freedom of expression, a position that would render all laws restricting expression unconstitutional.² Instead, to determine the constitutionality of laws restricting expression, the Court has turned to a balancing approach, which requires the Court to balance the value of freedom of expression against the harm to be prevented.³ The more that a law closes off opportunities

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¹ *Whitney v. California*, 274 U.S. 357, 373 (1926) (Brandeis, J., concurring).

² See *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The protections afforded by the First Amendment . . . are not absolute”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”) (citing *Schenck v. United States*, 249 U.S. 47 (1919)).

³ See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 339 (1989) (“Sensible interpretation of the First Amendment requires evaluation of the values of liberty of speech and of the dangers of particular kinds of communications.”). See also WILLIAM W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* (1984) (proposing a general formulation describing the Court’s approach to resolving First Amendment cases). Professor Van Alstyne states:

The question in each case is whether the circumstances were sufficiently compelling to justify the degree of infringement resulting

for the expression of ideas, the more evidence of harm the government must offer to justify the law.

In a previous article,⁴ I proposed that the constitutionality of laws affecting freedom of expression may be determined by reference to a "constitutional calculus," which is expressed by the following formula:

EXPRESSIVE VALUE (content, character, context, nature, and scope)
 COMPARED TO
 PROOF OF HARM (scienter, causation, and nature and degree of harm)⁵

The article suggested that the Supreme Court is developing a new approach in freedom of expression cases. The standard approach has been based upon the fact that expression is a function of two variables: (i) the ideas that are expressed and (ii) the means or modes of expression that are used to communicate those ideas.⁶ Traditionally, laws that prohibit the expression of particular ideas have been characterized as "content based," while laws that close off opportunities for

from the law, given the relationship of the speech abridged to the pre-suppositions of the first amendment, and the relationship of the law to the responsibilities of the level of government that has presumed to act.

Id. at 48.

But see C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 996 (1997) ("This thesis rejects the popular and intuitively plausible premise that prevention of harm (with 'harm' meaning pain, injury, or set back of interest) justifies limits on liberty."). Professor Baker states that "speech covered by the rationale for free speech should never be regulated because of the harm that it causes." *Id.* at 979. In place of a balancing approach, Professor Baker has sought to develop a categorical approach to resolving the constitutionality of laws restricting liberty generally and freedom of speech in particular. For example, Baker distinguishes between laws that "prohibit" liberty and laws that merely "allocate" liberty. *Id.* at 1001. He defines "liberty" narrowly so as to exclude exploitative behavior such as "price fixing, air or water pollution, maintaining an unsafe workplace, payment of less than a minimum wage, drunk driving, and selling unsafe products." *Id.* at 1005. He explains that the permissibility of laws regulating such behavior "hinges on the relevant liberty not being at stake, or, in a few peculiar situations, being at stake on both sides of the issue." *Id.*

In my opinion, a practical problem with the categorical approach to determining the constitutionality of laws restricting expression is that, in order to explain cases of any complexity, it is necessary to develop an increasingly complex set of categories. More importantly, the categories themselves must ultimately be justified. The purpose of this Article is to identify the underlying elements that determine the outcome in freedom of expression cases, regardless of the categories that are employed to represent those elements.

⁴ Wilson Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801 (2004) [hereinafter Huhn, *Assessing the Constitutionality*].

⁵ *Id.* at 809.

⁶ See *id.* at 810-13 (discussing Justice Stevens's proposed constitutional calculus).

expression have been classified as “content neutral,” and typically content based laws have been evaluated under a stricter standard of review than content neutral laws.⁷ The central problem with this framework is that in many difficult freedom of expression cases, the laws in question limit both the ideas being expressed and the modes of expression, making it impossible to characterize the laws as purely content based or purely content neutral.⁸ Where a law restricting expression has both content based and content neutral elements, the expressive value of what has been lost consists of both the value of the ideas that are being suppressed and the value of the modes of expression that are being closed off.⁹ The Court increasingly uses a multi-factor standard (developed by Justice John Paul Stevens) that takes into consideration the content, character, context, scope, and nature of a regulation on speech in order to assess the degree or extent of the restriction on speech.¹⁰ This constitutes an estimation of the expressive value of what has been lost, and it is the *left hand side* of the “constitutional calculus.”¹¹

The purpose of this Article is to describe the *right hand side* of the constitutional equation for freedom of expression.¹² Exactly what is it that the government must prove in order to justify a regulation of speech? I suggest that the government must prove the existence of three factors: scienter, causation, and harm. As used in this Article, the term “scienter” means the *state of mind* that a speaker must have before he or she may be punished for expressing a certain idea or using a medium of expression.¹³ Causation is the *likelihood* that harm will result from the speaker’s actions. The harm itself consists of two separate elements: (i) the *nature* and (ii) the *degree* of the injury that the government is seeking to prevent. In order for a law regulating expression to be found constitutional, the harm that will be prevented by enacting the restriction on expression must be greater than the expressive value that is lost. The greater the expressive value, the more the government must prove in terms of scienter, causation, and harm.

⁷ *Id.* at 804 n.11.

⁸ *Id.* at 806 (“Many laws regulating expression — perhaps most such laws — are *both* content-based *and* content-neutral.”).

⁹ *See id.*

¹⁰ *See Huhn, Assessing the Constitutionality*, *supra* note 4, at 810–13.

¹¹ *See id.* at 813.

¹² The tendency of the Supreme Court to focus its analysis on “harm” is apparent in the language of its recent First Amendment opinions. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241–42, 249–50, 255 (2002) (using the word “harm” seven times); *id.* at 262, 264–65 (O’Connor, J., concurring) (using the word “harm” three times).

¹³ *See BLACK’S LAW DICTIONARY* 1373 (8th ed. 2004) (defining “scienter” as “[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission”). I have used the term “scienter” instead of the more neutral term “state of mind” in order to emphasize the fact that in many freedom of expression cases, the Constitution requires the government to prove that the speaker possessed a culpable state of mind.

The analytical framework for proof of harm arises from the confluence of two principles that undergird the doctrine of freedom of expression: the "harm principle" and the "value principle." These two principles are based on competing visions of the First Amendment. The harm principle promotes individual autonomy, and the value principle serves social purposes such as promoting democratic structures and facilitating the search for truth. The interaction between these two principles implies that the more valuable the expression that is suppressed, the more proof of harm that is needed to justify the suppression.

This Article consists of the following parts. Part I describes the "harm principle" and the "value principle" and how the interaction between these principles has shaped the law of freedom of expression. Part II suggests that "proof of harm" consists of four components: scienter, causation, the nature of the harm, and the degree of the harm. Each of these components is illustrated with examples from recent Supreme Court opinions. Part III demonstrates how constitutional doctrine calibrates proof of harm to the expressive value of speech, using the law of defamation as an example. The higher the value of the speech, the higher the level of scienter, causation, and harm that must be proven to sustain the constitutionality of a law suppressing the speech. Part IV suggests that there is an emerging trend in Supreme Court decisions towards an empirical, fact-based analysis of the harm resulting from speech. I conclude that to an ever-increasing extent, the constitutionality of laws regulating expression under the Court's decisions turns upon a careful and reasoned analysis of the nature of the harm resulting from speech, the degree of the harm, the probability that the speech will cause the harm, and in certain cases, the intent of the speaker to cause the harm.

I. THE HARM PRINCIPLE AND THE VALUE PRINCIPLE

Felix Frankfurter once observed that "there is hardly a question of any real difficulty before the Court that does not entail more than one so-called principle."¹⁴ First Amendment questions are no exception. In difficult cases arising under the First Amendment, fundamental principles intersect and clash, and our understanding

¹⁴ FELIX FRANKFURTER, *OF LAW AND MEN* 43 (1956). H.L.A. Hart agrees with Frankfurter's assessment:

It is of crucial importance that cases for decision do not arise in a vacuum but in the course of the operation of a working body of rules, an operation in which a multiplicity of diverse considerations are continuously recognized as good reasons for a decision. . . . Frequently these considerations conflict, and courts are forced to balance or weigh them and to determine priorities among them.

H.L.A. Hart, *Problems of Philosophy of Law*, 6 *THE ENCYCLOPEDIA OF PHILOSOPHY* 271 (Paul Edwards, ed., 1967).

of freedom of expression is the result of compromise among these principles.

There are two basic principles that the Supreme Court has invoked in assessing the constitutionality of laws affecting expression: the “harm principle” and the “value principle.” The harm principle requires that any law that regulates expression must not do so simply because the ideas being expressed are unpopular, but rather because the expression will harm others. This principle reflects our respect for individual autonomy — people are free to think what they want and to say what they think.¹⁵ For example, this principle explains why laws that forbid burning the American flag are unconstitutional.¹⁶

The value principle is the concept that speech that serves the search for political, religious, scientific, or artistic truth receives more protection under the First Amendment than speech that does not. This principle instantiates the communitarian purposes of the First Amendment, and reflects the idea that freedom of speech is the engine that drives the search for truth and the foundation upon which our democracy is built. The intersection of the harm principle and the value principle establishes the concept that there is a direct correlation between the value of the speech being regulated and the degree and likelihood of harm that must be proven before the speech can be suppressed.

Parts A and B below describe the harm principle and the value principle. Part C describes how the Supreme Court has extended the value principle to create hierarchies within categories of speech based upon their relative value to society. Part D discusses the application of the value principle to content neutral aspects of laws regulating expression. Part E describes how the competing visions of the First Amendment represented by the harm principle and the value principle have required the Court to balance the First Amendment rights of the speakers against the First Amendment rights of the listeners. Part F describes a number of conflicts between the right to freedom of expression and non-constitutional governmental interests.

A. The Harm Principle

In 1859 John Stuart Mill published his famous treatise *On Liberty* in which he articulated the idea that people have the right to do what they want so long as they

¹⁵ See *Whitney v. California*, 274 U.S. 357, 375 (1925) (Brandeis, J., concurring) (describing the First Amendment as protecting the “freedom to think as you will and to speak as you think”).

¹⁶ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating that the law may not “prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

do not harm others,¹⁷ a concept which is known as the "harm principle."¹⁸ A number of legal philosophers agree with Mill that the presence of harm is a necessary condition to justify government regulation.¹⁹ In 2003, the Supreme Court adopted that view, effectively making the harm principle a necessary component of substantive due process, at least in cases where fundamental rights are involved. In *Lawrence v. Texas*,²⁰ in the course of striking down a state statute making homosexual intercourse a crime, the Court stated that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not

¹⁷ See JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859). Mill wrote:

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Id. at 9.

¹⁸ See Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1442 (2003) ("John Stuart Mill famously advanced what might be termed the 'Harm Principle': Only those actions which cause harm to persons other than the actor ought to be criminally proscribed and punished.").

¹⁹ Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 114 (1999). Bernard Harcourt observes that "in the writings of John Stuart Mill, H.L.A. Hart, and Joel Feinberg, the harm principle acted as a *necessary but not sufficient* condition for legal enforcement." Accord, Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 159 (2001) (stating that proponents of the harm principle admit that harm is a necessary but not a sufficient condition for criminality).

²⁰ 539 U.S. 558 (2003) (striking down a state statute making homosexual intercourse a crime).

a sufficient reason for upholding a law prohibiting the practice.”²¹ The Court noted that the law criminalizing homosexual intercourse did not regulate sexual activity with children, sexual imposition on non-consenting persons, public acts of indecency, prostitution, or marriage.²² The issue framed by the Court was whether the “profound and deep convictions” of the majority of people in the state condemning homosexuality as immoral were sufficient to support the constitutionality of the law.²³ The Court concluded that “[t]he Texas statute furthers no legitimate

²¹ *Id.* at 571 (quoting Justice Stevens’s dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)). The Supreme Court expressly overruled *Bowers* on this issue. In *Bowers*, the Court ruled that morality, in and of itself, was a legitimate reason supporting legislation banning “sodomy.” The Court had stated:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Bowers, 478 U.S. at 196. See also Justice Scalia’s concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 574–75 (1991) (“[T]here is no basis for thinking that our society has ever shared the Thoreauvian ‘you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else’ beau ideal—much less for thinking that it was written into the Constitution.”).

Justice Blackmun dissented in *Bowers* on the ground that morality in and of itself is *not* sufficient justification to support criminalizing sodomy:

That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.

Bowers, 478 U.S. at 211 (Blackmun, J., dissenting).

²² Justice Kennedy stated:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578.

²³ Justice Kennedy further stated:

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful

state interest which can justify its intrusion into the personal and private life of the individual.”²⁴ In her separate concurring opinion in *Lawrence*, Justice Sandra Day O’Connor applied the same principle to equal protection cases, stating: “Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”²⁵

In the First Amendment context, the harm principle is the precept that people are free to say what they want so long as they do not harm others.²⁶ In recent years, the Supreme Court has embraced the harm principle in determining the constitutionality of laws under the First Amendment. The leading Supreme Court

voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.

Id. at 577.

²⁴ *Id.* at 578.

²⁵ *Id.* at 582. (O’Connor, J., concurring). Justice O’Connor’s reasoning is consistent with a number of cases decided under the Equal Protection Clause where the Supreme Court has held that mere dislike of a politically unpopular group is not sufficient to justify differential treatment. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (In invalidating a state constitutional amendment that blocked the adoption of gay rights legislation, the Court stated: “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”); *Cleburne v. Cleburne Living Ctrs., Inc.*, 473 U.S. 432, 455 (1985) (Stevens, J., concurring) (In striking down a city’s refusal to issue a special use permit for the operation of a group home for the mentally retarded, the Court stated: “The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in home.”); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (In overturning a federal requirement disqualifying unrelated persons living together from eligibility for food stamps, the Court stated: “The legislative history . . . indicates that the amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (In striking down the refusal of the San Francisco Board of Supervisors to issue permits to persons of Chinese ancestry to operate laundries, the Court stated: “no reason for [the refusal] exists except hostility.”).

²⁶ The principal focus of Mill’s work, *ON LIBERTY*, is freedom of expression. See MILL, *supra* note 17, at 15–52 (encompassing Chapter II, entitled *Of the Liberty of Thought and Discussion*). See also Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 656–57 (2002) [hereinafter Heyman, *Spheres of Autonomy*] (discussing the views of John Stuart Mill and John Locke on freedom of expression).

case recognizing the harm principle is *Texas v. Johnson*,²⁷ in which the Court held that people have a constitutional right to burn the American flag in protest. The Court wrote, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."²⁸ In support of its ruling the Court cited and quoted its 1943 decision in *Barnette v. West Virginia*, holding that the government could not force children to say the Pledge of Allegiance:

In holding in *Barnette* that the Constitution did not leave this course open to the government, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."²⁹

The harm principle is applicable whenever the government suppresses or compels speech, but it does not apply when the government speaks³⁰ or funds the speech of others.³¹

²⁷ 491 U.S. 397 (1989).

²⁸ *Id.* at 414.

²⁹ *Id.* at 415 (quoting *Barnette v. West Virginia*, 319 U.S. 625, 642 (1943)).

³⁰ The government is permitted to express and promote its point of view on any matter except on the subject of religion. *See Lee v. Weisman*, 505 U.S. 577 (1992) (outlawing prayer at public school graduation ceremonies). The Court explained:

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.

Id. at 591 (citations omitted).

³¹ In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld a federal law that prohibited federally-funded family planning agencies from counseling, referring, or providing information regarding abortion services. The Court distinguished this law from one that suppresses speech, noting: "[W]e have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to

According to John Stuart Mill, the mere fact that people disagree with or disapprove of an idea is not a "harm" that justifies suppressing expression of the idea. Mill stated: "If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind."³² The Supreme Court has agreed with this corollary of the harm principle by embracing a virtual *per se* rule against viewpoint based laws.³³ Viewpoint based laws are laws that suppress expression of one point of view merely because the lawmakers disagree with that point of view. Professor Elena Kagan draws this connection between the harm principle and the rule against viewpoint based laws:

[T]he government may not restrict expressive activities because it disagrees with or disapproves of the ideas espoused by the speaker; it may not act on the basis of a view of what is a true (or false) belief or a right (or wrong) opinion. Or, to say this in a slightly different way, the government cannot count as a harm, which it has a legitimate interest in preventing, that ideas it considers faulty or abhorrent enter the public dialogue and challenge the official understanding of acceptability or correctness.³⁴

The prohibition on viewpoint based laws must not be confused with the presumptive invalidity of content based laws. Laws that are viewpoint based — that suppress one point of view and not the other — are *per se* invalid.³⁵ Laws that are content based — that suppress expression of any point of view dealing with a particular topic — are merely *presumed* invalid.³⁶ Content based laws will be upheld

fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194–95. *See also* *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572 (1998) (The Court upheld the constitutionality of a federal law that required the National Endowment for the Arts to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in making grants for artistic projects.) (citing 20 U.S.C. § 954(d)(1)). In *Finley*, the Court stated: "Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 587–88.

³² MILL, *supra* note 17, at 16.

³³ *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 56 (2000) ("[V]iewpoint restrictions have never been upheld.").

³⁴ Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 428 (1996).

³⁵ *See supra* note 28 and accompanying text.

³⁶ *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

if the harm caused by the speech is sufficient to justify the suppression of speech. For example, in *Burson v. Freeman*,³⁷ the Supreme Court upheld a state law that outlawed electioneering within 100 feet of a polling place on election day.³⁸ A majority of the Court held that this statute was a content based law restricting political speech, and accordingly, that the statute should be reviewed under strict scrutiny.³⁹ A plurality of the Court found that the law was narrowly tailored to serve the state's compelling governmental interests of discouraging voter intimidation and election fraud, and that accordingly, the presumption of invalidity was overcome and the law was valid.⁴⁰ Writing for the plurality, Justice Blackmun stated: "In conclusion, we reaffirm that it is the rare case in which we have held that a law survives strict scrutiny."⁴¹ In contrast, if the law had purported to ban representatives of one political party from the polling place but not the other, the law would have been viewpoint based and unconstitutional.⁴²

The confusion between the absolute prohibition against viewpoint based laws and the mere presumption against the validity of content based laws may be traced to language in the decision of the Supreme Court in *Police Department of Chicago*

³⁷ 504 U.S. 191 (1992) (upholding a state statute prohibiting solicitation of votes or display of campaign materials within 100 feet of polling place on election day).

³⁸ See *id.* at 211 (Blackmun, J., plurality opinion).

³⁹ *Id.* at 198 (Blackmun, J., plurality opinion) ("As a facially content-based restriction on political speech in a public forum, § 2-7-111(b) must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'") (citing *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Three Justices concurred with Justice Blackmun's opinion. Justice Kennedy wrote a concurring opinion stating that the statute's limitation on expression was valid only because it served another fundamental right, i.e., the right to vote. *Id.* at 213-14 (Kennedy, J., concurring). Justice Scalia wrote an opinion concurring in the judgment on the ground that according to American tradition there was no right to solicit votes or distribute campaign materials at the polling place, and that therefore the environs of a polling place is not a "traditional public forum." *Id.* at 216 (Scalia, J., concurring). Justices Stevens, O'Connor, and Souter agreed with the plurality that "Tennessee must show that its 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* at 217 (Stevens, J., dissenting) (citations omitted). However, the dissenting Justices found that Tennessee had not met its burden of proof. *Id.* Justice Thomas did not participate in the decision.

⁴⁰ *Id.* at 209-11 (Blackmun, J., plurality opinion).

⁴¹ *Id.* at 211 (Blackmun, J., plurality opinion).

⁴² Justice Scalia implied that a viewpoint based law would have been struck down when he observed: "I believe that §2-7-111, though content based, is constitutional because it is a reasonable, *viewpoint-neutral* regulation of a nonpublic forum. I therefore concur in the judgment of the Court." *Id.* at 214 (Scalia, J., concurring) (emphasis added). He added, "[f]or the reasons that the plurality believes §2-7-111 survives exacting scrutiny, I believe it is at least reasonable; and respondent does not contend that it is *viewpoint discriminatory*." *Id.* at 216 (Scalia, J., concurring) (emphasis added) (citations omitted).

v. Mosley,⁴³ where the Court stated: "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."⁴⁴ In the same case the Court reiterated: "The regulation [in question] 'thus slip(s) from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted."⁴⁵

In *R.A.V.*, Justice Stevens explained that despite the broad dicta in *Mosley*, content based laws may be upheld if the government is able to justify the intrusion on speech:

Although the Court has, on occasion, declared that content-based regulations of speech are "never permitted," [citing *Mosley*] such claims are overstated. Indeed, in *Mosley* itself, the Court indicated that Chicago's selective proscription of nonlabor picketing was not *per se* unconstitutional, but rather could be upheld if the city demonstrated that nonlabor picketing was "clearly more disruptive than [labor] picketing." Contrary to the broad dicta in *Mosley* and elsewhere, our decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment.⁴⁶

In *R.A.V.*, Justice Scalia gave an example that concisely illustrates the difference between content based and viewpoint based laws: "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."⁴⁷

Among the most challenging freedom of expression cases that the Court has considered in recent years are those involving hate speech and child pornography. It is in these cases that the Court's application of the harm principle has been most obvious. For example, in the case of *R.A.V.*, Justice Scalia, writing for the majority, struck down a city ordinance banning hate speech in part because he considered the law to be "viewpoint based." Justice Scalia explained:

⁴³ 408 U.S. 92 (1972) (striking down a municipal ordinance prohibiting all picketing within 150 feet of a school except for peaceful labor picketing).

⁴⁴ *Id.* at 95.

⁴⁵ *Id.* at 99 (citation omitted) (quoting Harry Kalven, Jr., *The Concept of the Public Forum*: *Cox v. Louisiana*, 1965 SUP. CT. REV. 29).

⁴⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (Stevens, J., concurring) (citing and quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99-100 (1972)). *See also* *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) ("However, this principle, like other First Amendment principles, is not absolute.").

⁴⁷ *R.A.V.*, 505 U.S. at 384.

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words — odious racial epithets, for example — would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender — aspersions upon a person’s mother, for example — would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.⁴⁸

Justice Stevens concurred in the result reached by the Court, but did not agree with the Court’s characterization of the law as viewpoint based. Rather, he concluded that the city ordinance was aimed at *harms* and not at *ideas*:

Significantly, the St. Paul ordinance regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the *harm* the speech causes. In this regard, the Court fundamentally misreads the St. Paul ordinance. The Court describes the St. Paul ordinance as regulating expression “addressed to one of [several] specified disfavored *topics*,” as policing “disfavored *subjects*,” and as “prohibit[ing] . . . speech solely on the basis of the *subjects* the speech addresses.” Contrary to the Court’s suggestion, the ordinance regulates only a subcategory of expression that causes *injuries based on* “race, color, creed, religion or gender,” not a subcategory that involves *discussions* that concern those characteristics.⁴⁹

In a footnote to his opinion, Justice Stevens identified the harm that flows from hate speech: “One need look no further than the recent social unrest in the Nation’s cities to see that race-based threats may cause more harm to society and to individuals than other threats.”⁵⁰

In 2003, the Supreme Court returned to the question of “content discrimination”

⁴⁸ *Id.* at 391–92.

⁴⁹ *Id.* at 433 (Stevens, J., concurring) (citations omitted).

⁵⁰ *Id.* at 433 n.9 (Stevens, J., concurring).

within an “unprotected category” of speech in the case of *Virginia v. Black*.⁵¹ The majority of the Court, applying Justice Scalia’s reasoning from *R.A.V.*, found that the law forbidding cross burning as a form of intimidation was a permissible content based distinction within a category of unprotected speech and upheld the law.⁵² The dissenting Justices, led by Justice Souter, found that the law was an impermissible viewpoint based law.⁵³ The difference was that the majority considered the law as aimed at the harms of cross burning (threats and intimidation),⁵⁴ while the dissenting Justices found that the reason for the content discrimination was disapproval of the Ku Klux Klan and its racist message.⁵⁵

The harm principle by itself cannot explain the great majority of instances where laws affecting expression are declared unconstitutional. In most of these cases, the government asserts that it is upholding an interest which is at least legitimate if not important, and yet the law is nevertheless struck down because the interest in free expression outweighs the governmental interest. Consistent with this observation, Bernard Harcourt suggests that “although the harm principle formally remains a *necessary but not sufficient* condition”⁵⁶ in determining whether behavior may be criminalized, the principle has become largely irrelevant because “non-trivial harm arguments are being made about practically every moral offense.”⁵⁷ Accordingly, says Harcourt, the courts must “focus on the types of harm, the amounts of harms, and the balance of harms.”⁵⁸ In the context of the First Amendment, in order to conduct this balance it is necessary to measure the value of the particular expression that the state is seeking to suppress. This leads us to the second fundamental principle that governs the law of freedom of expression, a familiar concept that I have dubbed the “value principle,” which is described in the following section of this Article.

⁵¹ 538 U.S. 343 (2003).

⁵² See *id.* at 363 (“The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.”).

⁵³ See *id.* at 384 (Souter, J., concurring in part and dissenting in part) (In distinguishing the examples of permissible content discrimination set forth in the majority opinion in *R.A.V.*, Souter stated: “I thus read *R.A.V.*’s examples of the particular virulence exception as covering prohibitions that are not clearly associated with a particular viewpoint, and that are consequently different from the Virginia statute.”).

⁵⁴ See *supra* note 52 and accompanying text.

⁵⁵ See *Black*, 538 U.S. at 384–85 (Souter, J., concurring in part and dissenting in part) (“[N]o content-based statute should survive even under a pragmatic recasting of *R.A.V.* without a high probability that no ‘official suppression of ideas is afoot.’ I believe the prima facie evidence provision stands in the way of any finding of such a high probability here.”) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)).

⁵⁶ Harcourt, *supra* note 19, at 114.

⁵⁷ *Id.*

⁵⁸ *Id.*

B. The Value Principle

The value principle is the idea that different categories of expression have different values under the First Amendment, and that high value expression is entitled to more constitutional protection than low value expression. This idea may be traced to the 1942 decision of the Supreme Court in *Chaplinsky v. New Hampshire*,⁵⁹ where the Court stated:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁶⁰

The Supreme Court has declared that the so-called “unprotected” categories of speech, like fighting words or obscenity, are not utterly devoid of constitutional protection. In his majority opinion in the *R.A.V.* decision, Justice Scalia explained that although “fighting words” are of *low* constitutional value, they are not altogether outside the protection of the First Amendment:

[O]ur society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” . . .

We have sometimes said that these categories of expression are “not within the area of constitutionally protected speech,” or that the “protection of the First Amendment does not extend”

⁵⁹ 315 U.S. 568 (1942) (holding that “fighting words” are not constitutionally protected) (footnotes omitted).

⁶⁰ *Id.* at 571–72 (footnotes omitted).

to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all." What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution⁶¹

Justice Scalia added:

It is not true that "fighting words" have at most a "*de minimis*" expressive content, or that their content is *in all respects* "worthless and undeserving of constitutional protection;" sometimes they are quite expressive indeed. We have not said that they constitute "*no* part of the expression of ideas," but only that they constitute "*no essential* part of any exposition of ideas."⁶²

Concurring in the judgment in the same case, Justice Stevens observed that the Supreme Court has established a "rough hierarchy" in the constitutional protection that is accorded to each of the content-based categories of speech:

Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.⁶³

Perhaps the nation's leading critic of the value principle is Professor Jed Rubenfeld. Rubenfeld emphatically disagrees with the concept that the Constitution recognizes different values of speech.⁶⁴ He states that he "rejects the entire apparatus of First Amendment balancing, including any 'high-value/low-value' distinctions among different 'categories' of protected speech."⁶⁵ For example, he

⁶¹ R.A.V., 505 U.S. at 382–83 (citations omitted).

⁶² *Id.* at 384–85 (citations omitted).

⁶³ *Id.* at 422 (Stevens, J., concurring).

⁶⁴ See Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 800 (2001).

⁶⁵ *Id.* See also *id.* at 822–26 (criticizing the *Chaplinsky* framework of high-value/low-value speech).

argues that begging should receive the same protection from governmental regulation as political speech.⁶⁶ A principal objection that Rubenfeld has towards assigning "value" to different categories of speech is that it does not explain why viewpoint based laws suppressing speech are unconstitutional *per se*. Rubenfeld states that "the whole problem here is that the cost-benefit approach offers no adequate explanation of the categorical First Amendment principle against viewpoint discrimination."⁶⁷ Rubenfeld is correct in noting that the *value principle* does not account for the rule against viewpoint discrimination. However, Rubenfeld's analysis is incomplete, because the rule against viewpoint based laws is explained by the *harm principle*.⁶⁸

Professor Rubenfeld acknowledges that if the Court were to abandon the hierarchical strategy of assigning values to different categories of speech, the Court would have to overturn a number of established doctrines. For example, he notes that laws against obscenity would almost certainly be deemed constitutional,⁶⁹ and that commercial speech would necessarily receive full First Amendment protection.⁷⁰ Professor Rubenfeld's proposals are explicitly prescriptive rather than

⁶⁶ See *id.* at 798–801. Rubenfeld criticizes *Smith v. City of Fort Lauderdale*, 117 F.3d 954 (11th Cir. 1997), *cert. denied*, 528 U.S. 966 (1999), which upheld a Fort Lauderdale ordinance that prohibited begging in the beach area. Rubenfeld stated:

Does the First Amendment permit a city to decide that tourist dollars are worth more than political advocacy in the city's parks or other public places?

This question will not throw a balancer off-balance. He will say that begging is just not as "weighty," for First Amendment purposes, as "political speech." Political speech, he will say, has the highest First Amendment value; begging has a much lower value.

....

... The whole high-value/low-value balancing-test approach to the First Amendment, familiar as it is, and necessary as it is to support cases such as *Smith v. City of Fort Lauderdale*, is unacceptable.

If Fort Lauderdale cannot arrest people on the beach for soliciting votes or for criticizing the weather, it should not be able to arrest them for soliciting alms.

Id. at 800–01.

⁶⁷ *Id.* at 825.

⁶⁸ See *supra* notes 26–33 and accompanying text.

⁶⁹ See Rubenfeld, *supra* note 64, at 830 (discussing that "laws banning obscenity would almost certainly be unconstitutional under the theory I have been developing here").

⁷⁰ See *id.* ("Commercial speech, however, could no longer be treated as a second-class First Amendment citizen."). Rubenfeld contends that the Court is moving in the direction of according full First Amendment protection to commercial speech. See *id.* ("These conclusions may run counter to some of the language of the older commercial speech cases, but they are consistent with the recent cases, which arguably have arrived at this result already.").

descriptive of current doctrine.

The value principle has had an enduring impact on the law governing freedom of expression. In countless cases the result has turned upon the value that the Supreme Court has ascribed to the expression. If the Court finds that a particular category of expression has little value, it is unlikely to invalidate a law restricting such expression. For example, in upholding a public nudity law as applied to nude dancing in *Erie v. Pap's A.M.*,⁷¹ the plurality opinion stated that "nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."⁷² Similarly, if the Court considers that the value of a form of expression is high, it is likely to strike down a law that suppresses it. For example, the Court reversed a defendant's conviction for disturbing the peace where the information being communicated in vulgar language was political speech,⁷³ and it reversed a judgment against a radio station for violation of privacy laws where the station broadcast illegally recorded conversations that involved matters of public importance.⁷⁴

The value principle has played a particularly critical role in the Court's analysis of the constitutionality of laws banning child pornography. In *New York v. Ferber*,⁷⁵ although the Court unanimously upheld a New York State statute as applied to films of young boys masturbating,⁷⁶ several Justices expressed reservations about the constitutionality of the law as applied to works containing significant literary or scientific value.⁷⁷ Similarly, in *Ashcroft v. Free Speech Coalition*,⁷⁸ Justice Kennedy

⁷¹ 529 U.S. 277 (2000) (upholding a law prohibiting public nudity as applied to nude dancing establishment).

⁷² *Id.* at 289 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991)).

⁷³ *Cohen v. California*, 403 U.S. 15 (1971) (holding that the First Amendment prohibits the conviction of a defendant who walked through a courthouse corridor wearing a jacket bearing the words, "Fuck the Draft.").

⁷⁴ *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that the First Amendment prohibits a suit brought under state and federal privacy laws against a radio station that broadcasted a tape of an illegally intercepted cellphone conversation involving matters of public importance.).

⁷⁵ 458 U.S. 747 (1982) (upholding a state law forbidding distribution of material depicting a sexual performance by a child under the age of sixteen).

⁷⁶ *See id.* at 752.

⁷⁷ *See id.* at 775 (O'Connor, J., concurring). Justice O'Connor stated:

On the other hand, it is quite possible that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court. For example, clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks, might not involve the type of sexual exploitation and abuse targeted by New York's statute. Nor might such depictions feed the poisonous "kiddie porn" market that New York and other States have attempted to regulate. Similarly, pictures of children engaged in rites widely approved by their cultures, such as those that might appear in

struck down the Child Pornography Protection Act in part on the ground that the sexuality of minors is a prominent theme of classical and contemporary artists.⁷⁹ In the course of the opinion, Justice Kennedy cited examples of such works including Shakespeare's *Romeo and Juliet* and the movies *Traffic* and *American Beauty*.⁸⁰ Kennedy's moving description of these works emphasizes the value of such depictions:

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous,

issues of the National Geographic, might not trigger the compelling interests identified by the Court. It is not necessary to address these possibilities further today, however, because this potential overbreadth is not sufficiently substantial to warrant facial invalidation of New York's statute.

Id. See also *id.* at 776 (Brennan, J., concurring) ("[I]n my view application of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment.").

⁷⁸ 535 U.S. 234 (2002) (striking down portions of the Child Pornography Protection Act).

⁷⁹ See *id.* at 247 ("Both themes — teenage sexual activity and the sexual abuse of children — have inspired countless literary works.").

⁸⁰ See *id.* at 247–48. Justice Kennedy stated:

William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, *Traffic*, which was nominated for Best Picture. The film portrays a teenager, identified as a 16-year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her to a filthy room to trade sex for drugs. The year before, *American Beauty* won the Academy Award for Best Picture. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man.

Id. (citations omitted).

disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach.⁸¹

Like the harm principle, the value principle is an integral part of First Amendment law, affecting every decision where the Court must balance expressive rights against the demands of an organized society. I suggest below that the value principle not only establishes a hierarchy of categories of speech, but that it also establishes hierarchies within categories.

C. Extending the Value Principle to Subcategories of Speech

The “rough hierarchy” established by the Court mandates the highest protection for the categories of political, religious, literary, and scientific speech; middling protection for commercial and indecent or offensive speech; and relatively little protection for incitement, fighting words, defamation, obscenity, and child pornography.⁸² However, the distinctions among categories of speech are far more nuanced than this brief outline suggests. A review of cases reveals that the Supreme Court has drawn distinctions within each category of speech. The Court has created a number of *de facto* subcategories of speech based upon its estimation of the potential value of each specific subcategory. For example, political speech may include advocacy, incitements, threats, or insults,⁸³ which are arranged hierarchically in that order.

To prohibit political advocacy, the government must prove that the law is necessary to achieve a compelling governmental interest.⁸⁴ Incitements may be banned if the threatened violence is likely, imminent, and serious.⁸⁵ “True threats” are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,”⁸⁶ while insults are punishable only if they are directed at an individual in a face-to-face confrontation.⁸⁷ The necessary showing of harm decreases as we

⁸¹ *Id.* at 248.

⁸² See *supra* note 57 and accompanying text.

⁸³ Obviously, advocacy, incitements, threats, and insults may also be non-political.

⁸⁴ See discussion of *Burson v. Freeman*, *supra* note 39 and accompanying text.

⁸⁵ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id.

⁸⁶ See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

⁸⁷ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (defining “fighting words” as “what men of common intelligence would understand would be words likely to cause an

descend the scale of value. The Court deems the relatively low level harm of provocation sufficient to punish insults because insults "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."⁸⁸

Commercial speech admits of at least two internal hierarchies. Informational commercial speech such as price advertising or the labeling of contents has received vigorous protection from the Court,⁸⁹ while promotional advertising has on occasion not been protected.⁹⁰ Another hierarchy of commercial speech is dependent upon

average addressee to fight").

⁸⁸ *Id.* at 572.

⁸⁹ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down a state statute prohibiting advertising of prices for liquor); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down a federal law prohibiting beer labels from displaying alcohol content); *Va. State Bd. of Pharmacy v. Va. Consumer Citizens Council, Inc.*, 425 U.S. 748 (1976) (striking down a state statute prohibiting licensed pharmacists from advertising the prices of prescription drugs). In *44 Liquormart, Inc.*, the Court stated, "the State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the 'commercial aspect of [it] — with offerors communicating offers to offerees.'" *44 Liquormart, Inc.*, 517 U.S. at 499 (quoting *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 96 (1977)).

⁹⁰ See *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding a Puerto Rico statute restricting advertising of casinos to Puerto Rico residents). *But see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down state regulations restricting tobacco advertising); *Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (striking down a state regulation imposing a total ban on promotional advertising by an electrical utility). Professor Paul Horwitz has argued that some forms of promotional advertising should be categorized as "misleading" and therefore regulatable:

As commercial speech has become less a vehicle for the direct transmission of information, and more a vehicle for the transmission of images, symbols, and the sending of signals about the "lifestyle" to which a product is supposed to correspond, more commercial speech has become broadly "misleading" even as it becomes more difficult to judge the truth or falsity of that speech.

Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 60 [hereinafter Horwitz, *Free Speech as Risk Analysis*] (2003).

The hierarchy granting enhanced First Amendment value to informational commercial speech over promotional commercial speech is reversed, however, in the area of compelled commercial speech. Laws that require disclosure of information useful to consumers are likely to be upheld. See *44 Liquormart, Inc.*, 517 U.S. at 498 ("[T]he state may require commercial messages to 'appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.'" (quoting *Va. State Bd. of Pharmacy v. Va. Consumer Citizens Council, Inc.*, 425 U.S. 748, 772, n. 24 (1976))). *But see Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (invalidating a state law requiring retailers to label products from cows treated with growth hormone).

the type of activity being advertised. Advertising of constitutionally protected activity receives the highest protection,⁹¹ followed by advertising of products and services that are lawful,⁹² and last, commercial speech regarding illegal products or services.⁹³ Previously, the Supreme Court had held that advertising for "vice" products or services such as gambling could be restricted, not only to children and unwilling listeners, but also to consenting adults.⁹⁴ More recently, the Court has indicated that advertising for these products should stand on the same basis as advertising for other lawful products.⁹⁵

However, a company's refusal to join forced promotion of products is in some cases constitutionally protected. *See* *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (striking down USDA assessments for mushroom advertising). *But see* *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding a USDA assessment for generic advertising for California fruits). *See generally* Edward J. Schoen et al., *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech — Now You See It, Now You Don't*, 39 AM. BUS. L.J. 467 (2002) (discussing the compelled commercial speech doctrine).

⁹¹ *See* *Bolger v. Youngs Drug Prods.*, 463 U.S. 60 (1983) (invalidating a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1978) (invalidating a state's prohibition on advertisements for contraceptive products); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (In striking down a state statute prohibiting any publication encouraging abortions as applied to advertisement for abortion clinic, the Court stated: "[I]n this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.").

⁹² *See* *Central Hudson Gas*, 447 U.S. at 563–64 ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity."); *Va. State Bd. of Pharmacy*, 425 U.S. at 772 (striking down a prohibition on advertising of prescription drug prices in part because "there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way").

⁹³ *See* *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (upholding a municipal agency order prohibiting gender-designated help-wanted advertisements).

⁹⁴ *See* *Posados de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding a Puerto Rico statute and regulations restricting advertisements for casino gambling directed at Puerto Rico residents). *See also* *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) (upholding a federal regulation prohibiting broadcaster in non-lottery states from broadcasting lottery advertisements).

⁹⁵ *See* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down a number of restrictions on indoor and outdoor advertisements for tobacco products); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) (striking down a federal restriction on advertising of casino gambling as applied to broadcasters located in a state where such gambling is allowed); Michael Hoefges & Milgros Rivera-Sanchez, "Vice" Advertising Under the Supreme Court's Commercial Speech Doctrine: The Shifting Central Hudson Analysis, 22 HASTINGS COMM. & ENT. L.J. 345, 388 (2000) ("[A] strong argument exists that the 'vice' distinction retains little, if any, legal significance under the current

The extent of constitutional protection for public disclosure of confidential information depends upon the nature of the information disclosed. A number of Supreme Court decisions have struck down privacy and confidentiality laws as applied to matters of public importance.⁹⁶ For example, the Court recently held that a radio station has the right to broadcast a recording of a private conversation between union leaders contemplating violence against their opponents.⁹⁷ Similarly, the constitutional protection accorded to defamatory statements depends, in part, upon whether the subject matter is a matter of public concern.⁹⁸ This topic will be examined in more detail in Part III of this article, which describes the different standards that plaintiffs must meet in proving harm for each category of defamation. The following section discusses the application of the harm principle and the value principle to content neutral laws.

D. Application of the Value Principle to Content Neutral Laws

The “constitutional calculus” proposed by Justice John Paul Stevens in *R.A. V.* identifies four elements, besides the content of the speech, that must be taken into account in determining the constitutionality of laws that affect expression.⁹⁹ These factors are the “context” of the speech, the “character” of the mode of expression, the “scope” of the law restricting speech, and the “nature” of the restriction.¹⁰⁰ I have described these elements at length elsewhere.¹⁰¹ What follows is a brief

configuration of the commercial speech doctrine.”). See also William W. Van Alstyne, *To What Extent Does the Power of Government to Determine the Boundaries and Conditions of Lawful Commerce Permit Government to Declare Who May Advertise and Who May Not?*, 51 EMORY L.J. 1513, 1554 (2002) (arguing for application of “strict scrutiny” review of laws restricting advertising of lawful products).

⁹⁶ See *Butterworth v. Smith*, 494 U.S. 624 (1990) (invalidating a state statute forbidding grand jury witnesses from ever disclosing their own testimony); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (invalidating a state statute forbidding publication of the name of a juvenile offender as applied to a newspaper that lawfully obtained information); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (invalidating a state statute prohibiting disclosure of confidential matters before a judicial review commission as applied to a newspaper reporting that the commission was contemplating investigation of a state judge); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (invalidating an injunction issued by a federal court prohibiting publication of classified documents detailing history of American involvement in Vietnam).

⁹⁷ See *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (forbidding a civil suit against a radio station under federal and state privacy laws for a broadcast of information of public importance, where the radio station had lawfully obtained its information).

⁹⁸ See *infra* notes 319–26 and accompanying text.

⁹⁹ See *R.A. V.*, 505 U.S. at 429–30 (Stevens, J., concurring) (discussing how “context,” “character,” “scope,” and “nature” of restrictions on speech affect First Amendment analysis).

¹⁰⁰ See *id.*

¹⁰¹ See Huhn, *Assessing the Constitutionality*, *supra* note 4, at 846–50.

summary of this theory.

The "context" or setting of speech — where the speech occurs — has a profound effect on the constitutionality of any law affecting expression. Public forum analysis — whether the speech occurs in a public forum,¹⁰² a limited public forum,¹⁰³ a non-public forum,¹⁰⁴ or a setting that is not a forum at all¹⁰⁵ — is an important factor in standard First Amendment analysis. However, the public forum doctrine is not a simple and straightforward principle. Rather, it entails a complex and nuanced judgment about the necessity and appropriateness of the setting for purposes of communication. Sidewalks, for example, are typically considered to be public forums, but not all sidewalks are equivalent for First Amendment purposes. The sidewalks outside a courthouse,¹⁰⁶ statehouse,¹⁰⁷ or a diplomatic mission¹⁰⁸ receive more First Amendment protection than sidewalks abutting a post office,¹⁰⁹ near an abortion clinic,¹¹⁰ or in front of a private residence.¹¹¹

¹⁰² See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (striking down a municipal ordinance forbidding public meetings in streets and other public places without a permit). The Court stated: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions." *Id.* at 515.

¹⁰³ See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (holding a state fair to be a limited public forum).

¹⁰⁴ See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1998) (holding that political debate on a state-owned television station is a "non-public forum"); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (holding that an airport is not a public forum); *Adlerly v. Florida*, 385 U.S. 39 (1966) (holding that a jailhouse's driveway is not a public forum).

¹⁰⁵ See *Forbes*, 523 U.S. at 672–75 (noting that a state-owned television station is not a forum and therefore generally is not subject to the requirement of viewpoint neutrality).

¹⁰⁶ See *Cox v. Louisiana*, 379 U.S. 536 (1965) (striking down a statute forbidding obstruction of public passages as applied to peaceful demonstrators, and declaring the municipal practice of conferring unfettered discretion upon local officials to regulate the use of streets for peaceful parades and meetings to be unconstitutional).

¹⁰⁷ *Edwards v. South Carolina*, 372 U.S. 229 (1963) (overturning the convictions of civil rights demonstrators for breach of the peace as a result of a peaceful march on the sidewalk around State House grounds).

¹⁰⁸ See *Boos v. Barry*, 485 U.S. 312 (1988) (striking down a District of Columbia provision forbidding demonstrations or displays of signs critical of foreign governments within 500 feet of a foreign embassy).

¹⁰⁹ See *United States v. Kokinda*, 497 U.S. 720 (1990) (O'Connor, J., plurality opinion) (holding that a sidewalk on post office property that links the post office to a parking lot was a non-public forum).

¹¹⁰ See *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding a state statute making it unlawful to approach within eight feet of another person to pass a leaflet, display a sign, or engage in oral protest, education, or counseling, if within 100 feet of a health care facility).

¹¹¹ See *Frisby v. Shultz*, 487 U.S. 474 (1988) (upholding a municipal ordinance prohibiting targeted residential picketing).

The “character” of an expression refers to the mode of communication — speaking, writing, broadcasting, etc. — and this factor also has a substantial bearing on the constitutionality of laws regulating expression.¹¹² Over fifty years ago, Justice Robert Jackson observed that each type of media has different characteristics that affect the constitutionality of laws restricting expression. Justice Jackson stated that “[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck, and the street corner orator have differing natures, values, abuses, and dangers.”¹¹³ The vast expansion of avenues of communication wrought by the information age has forced the Court to evaluate the differing “natures, values, abuses, and dangers” of myriad emerging modes of communication. For example, in recent years the Court has decided First Amendment cases involving restrictions of expression on cable television,¹¹⁴ over the internet,¹¹⁵ and by means of computer-generated images.¹¹⁶

The “scope” of restrictions on expression obviously affects the analysis in that narrowly tailored laws are more likely to be upheld.¹¹⁷ Laws that impose precisely

¹¹² See Huhn, *Assessing the Constitutionality*, *supra* note 4, at 848.

¹¹³ *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). See *infra* notes 138–42 and accompanying text (describing the differential treatment accorded newspapers and the broadcast media regarding “right to reply” and “equal time” provisions).

¹¹⁴ See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (invalidating a provision of the Telecommunications Act of 1996 that required cable operators to either “fully scramble” sexually explicit channels or to limit their hours of transmission); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (upholding the “must carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992).

¹¹⁵ See *Ashcroft v. A.C.L.U.*, 535 U.S. 564 (2002) (considering the constitutionality of a statute banning postings on the internet that are “harmful to minors” on the basis of “contemporary community standards”); *Reno v. A.C.L.U.*, 521 U.S. 844 (1997) (invalidating provisions of the Communications Decency Act of 1996, which attempted to protect minors from “indecent” and “patently offensive” speech in the internet).

¹¹⁶ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (invalidating a portion of a federal statute that banned virtual child pornography).

¹¹⁷ See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (Stevens, J., concurring). Justice Stevens stated:

Finally, in considering the validity of content-based regulations we have also looked more broadly at the scope of the restrictions. For example, in *Young v. American Mini Theatres* we found significant the fact that “what [was] ultimately at stake [was] nothing more than a limitation on the place where adult films may be exhibited.” Similarly, in *FCC v. Pacifica Foundation*, the Court emphasized two dimensions of the limited scope of the FCC ruling. First, the ruling concerned only broadcast material which presents particular problems because it “confronts the citizen . . . in the privacy of the home”; second, the ruling was not a complete ban on the use of selected offensive words, but rather merely a limitation on the times such speech could be broadcast.

targeted limitations on the time and place of expression are more likely to be upheld than “total bans” on expression.¹¹⁸ For example, a law that prohibits electioneering within fifty feet of a polling place on election day is more likely to be upheld than a broader limitation on political speech,¹¹⁹ and an eight foot “bubble” around patients visiting abortion clinics to prevent harassment by protestors¹²⁰ is more likely to be considered constitutional than a fifteen foot bubble.¹²¹

In addition, the extent of laws regulating expression in terms of their “context,” “character,” and “scope” is central to First Amendment analysis because content neutral laws must “leave open ample alternative channels of communication.”¹²²

Id. at 431 (citations omitted).

¹¹⁸ See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (striking down a federal statute forbidding prohibiting “indecent” commercial telephone messages — “dial-a-porn” services). The Court stated:

In attempting to justify the complete ban and criminalization of the indecent commercial telephone communications with adults as well as minors, the federal parties rely on *F.C.C. v. Pacifica Foundation*, a case in which the Court considered whether the FCC has the power to regulate a radio broadcast that is indecent but not obscene. In an emphatically narrow holding, the *Pacifica* Court concluded that special treatment of indecent broadcasting was justified.

Pacifica is readily distinguishable from these cases, most obviously because it did not involve a total ban on broadcasting indecent material. The FCC rule was not “intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.” The issue of a total ban was not before the Court.

Id. at 127 (citations omitted). See also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 562 (2001) (The Court struck down a restriction on outdoor advertising of tobacco products on the ground that “[i]n some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers.”); *Erie v. Pap’s A.M.*, 529 U.S. 277, 319 (2000) (Stevens, J., dissenting) (contending that a municipal ordinance prohibiting nudity constituted a “total ban” on nude dancing).

¹¹⁹ See *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding a state statute prohibiting solicitation of votes or display of campaign materials within 100 feet of polling places on election day).

¹²⁰ See *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding a state statute creating a floating eight foot bubble zone around health care facility patients).

¹²¹ See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (striking down an injunction imposing a fifteen foot floating buffer zone around persons seeking to enter or leave abortion clinic).

¹²² See *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (The Court struck down a municipal ordinance banning the display of signs on residential property, noting that “even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must ‘leave open ample alternative channels for communication.’”)

The “nature” of laws restricting speech includes the judgment as to whether the law is a “prior restraint” or a “subsequent punishment.”¹²³ Prior restraints are held to a stricter standard than subsequent punishments.¹²⁴

The value principle applies to these content neutral aspects of communication because laws that restrict the time, place, or manner of speech limit opportunities for expression, opportunities which have constitutional value. The constitutional calculus attempts to compare the value of the expression being regulated against the harm being prevented. With respect to content neutral regulations, the lost value is the extent to which freedom to communicate has been closed off by the law.

In summary, the harm principle demands that some harm must be shown before any restriction on speech may be upheld, while the value principle measures both the value of the ideas being suppressed (content) and the value of the modes of communication being restricted (context, character, scope, and nature). At first blush it might appear that the value principle is perfectly consistent with the harm principle. However, in many cases there is an inherent tension between the harm principle and the value principle. This tension is discussed in the following portion of this article.

E. The Tension Between the Harm Principle and the Value Principle

The most eloquent statement of the purposes of the First Amendment remains Justice Louis Brandeis’s concurring opinion in *Whitney v. California*¹²⁵ delivered over three-quarters of a century ago. In the course of his celebrated dissertation, Brandeis articulated two fundamentally different objectives that freedom of speech accomplishes. He stated:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and

(quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

¹²³ See *R.A.V. v. St. Paul*, 505 U.S. 377, 430 (1992) (Stevens, J., concurring). According to Justice Stevens, the “nature” of a law also refers to whether the law discriminates on the basis of viewpoint. *Id.* Viewpoint discrimination is a content based element, rather than content neutral. Laws that run the danger of viewpoint discrimination are disfavored. See *id.* at 388 (“[Where] the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”); *id.* at 430 (Stevens, J., concurring) (referring to viewpoint discrimination as “particularly pernicious”).

¹²⁴ See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

¹²⁵ 274 U.S. 357 (1927) (affirming the defendant’s conviction for violation of a state criminal syndicalism act).

that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.¹²⁶

According to Brandeis, freedom of speech is both an end in itself and a necessary means for creating and maintaining a “deliberative” political system and for discovering and spreading political truth.¹²⁷

The harm principle and the value principle respectively reflect these personal and social purposes of the First Amendment.¹²⁸ The harm principle arises from concern for the dignity of the individual. In this regard, Brandeis celebrated not

¹²⁶ *Id.* at 375 (Brandeis, J., concurring).

¹²⁷ See R. GEORGE WRIGHT, *THE FUTURE OF FREE SPEECH* LAW 255 (1990) (“[F]ree speech values include the ascertainment of truth, promotion of political democracy, and self-realization or development.”). See also THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970) (articulating four main premises that support the First Amendment). Professor Emerson identified the following four purposes served by the First Amendment:

First, freedom of expression is essential as a means of assuring individual self-fulfillment. . . .

Second, freedom of expression is an essential process for advancing knowledge and discovering truth. . . .

Third, freedom of expression is essential to provide for participation in decision making by all members of society. . . .

Finally, freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.

Id. at 6–7.

¹²⁸ See MARK A. GRABER, *TRANSFORMING FREE SPEECH* 216 (1991) (noting that the personal and social purposes of the First Amendment emerged at different times historically) (“Conservative libertarianism expressed the value that late nineteenth-century thinkers placed on individual rights. Civil libertarianism expresses the value that twentieth-century thinkers place on democratic processes.”). See also Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1317–55 (1998) [hereinafter Heyman, *Righting the Balance*] (exploring the individual and social values underlying the First Amendment).

only the right "to think as you will and to speak as you think,"¹²⁹ but also "the right to be let alone."¹³⁰ In contrast, the value principle arises from the *social* benefits of the freedom of speech, a concept that was developed by Justice Oliver Wendell Holmes. However, Justice Holmes can hardly be considered a champion of individual liberty.¹³¹ For example, Justice Holmes scorned the notion that the Constitution enshrines libertarian principles such as *laissez faire* economics.¹³² But

¹²⁹ *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

¹³⁰ *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting). Justice Brandeis stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. See also Heyman, *Spheres of Autonomy*, *supra* note 26, at 657 ("Brandeis's rhetoric underscores the close relationship that the liberal tradition has always perceived between those freedoms and the idea of privacy.").

¹³¹ See generally Rodney A. Smolla, *The Trial of Oliver Wendell Holmes*, 36 WM. & MARY L. REV. 173 (1994) (bringing to life the intellectual triumphs and moral shortcomings of Justice Holmes's jurisprudence).

¹³² See *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting). Holmes stated:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.

the old pragmatist¹³³ endowed us with the most memorable metaphor in American free speech jurisprudence: the marketplace of ideas. Dissenting in *Abrams v. United States*,¹³⁴ Justice Holmes said that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹³⁵ He was skeptical of absolute truth,¹³⁶ but he firmly believed that the people have the right to discover their own version of the truth. For example, Justice Holmes observed: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."¹³⁷ Justice Holmes and Justice Brandeis conceived the First Amendment as guaranteeing the people the freedom to express the truth as they see it and the opportunity to persuade others to see their point of view.

Accordingly, the harm principle protects personal autonomy while the value principle promotes popular sovereignty. However, the harm principle and the value principle do not always work in harmony, because there are occasions where personal autonomy clashes with popular sovereignty. The expressive choices that individuals make often interfere with the democratic process or the search for truth. In such cases, the Court must decide whether the rights of speakers to express themselves or the rights of the public to receive information should prevail. In some instances, the Court has elevated the right of individuals to say what they want, but in others the Court has deemed that the interest of society in the free trade of ideas trumps individual autonomy.

Conflicts between the expressive rights of speakers and the expressive needs of society inevitably arise in situations where the speaker controls access to an important medium of communication.¹³⁸ For example, in *Miami Herald Publishing*

¹³³ See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989) (describing Justice Holmes's thought as the "jurisprudential development of certain central tenets of American pragmatism").

¹³⁴ 250 U.S. 616 (1919) (affirming the defendants' convictions for violation of the federal Espionage Act).

¹³⁵ *Id.* at 630 (Holmes, J., dissenting).

¹³⁶ See THE FIRST AMENDMENT: A READER 28 (John H. Garrey & Frederick Schauer eds., 1996) (Letter from Oliver Wendell Holmes to Billings Learned Hand, June 24, 1918, stating, "I don't bother about absolute truth or even inquire whether there is such a thing, but define Truth as the system of my limitations.").

¹³⁷ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

¹³⁸ See Nancy J. Whitmore, *The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck "Rule" in the Turner Decisions*, 8 COMM. L. & POL'Y 25, 27 (2003) (contending that the Court applied a lower level scrutiny in the *Turner* cases because it perceived cable television as a "bottleneck" for communication). Professor Whitmore states:

The bottleneck characteristic of cable distribution provided the legal reasoning the Court needed to overcome arguments by the Turner Broadcasting System that the must-carry regulation was content-based

*Co. v. Tornillo*¹³⁹ and *Red Lion Broadcasting v. FCC*¹⁴⁰ the Court considered the constitutionality of laws that gave public officials and candidates a right to reply to editorial attacks. The Court held that the right of reply statute was unconstitutional as applied to a newspaper because of the importance of protecting the editorial discretion of newspaper publishers,¹⁴¹ but that such a policy was constitutional as applied to the broadcasting industry because, in the case of radio and television, “[i]t is the rights of viewers and listeners . . . which is paramount.”¹⁴²

Similarly, in *Denver Area Educational Telecommunications Consortium v. FCC*,¹⁴³ the Court split over the question of the constitutionality of a law that gave cable operators the right to refuse to carry indecent programming on leased access

because the purpose for enacting the rules was to “promote speech of a favored content,” “compel cable operators to transmit speech,” favor broadcast programmers over cable programming, and “single out certain members of the press — here, cable operators — for disfavored treatment.” These purposes would most likely have justified application of the strict scrutiny standard if the medium targeted was print, but given the bottleneck characteristic of cable distribution, the Court reasoned that heightened scrutiny was unwarranted.

Id. (citations omitted). See also Gretchen Sween, *Rituals, Riots, Rules, and Rights: The Astor Place Theater Riot of 1849 and the Evolving Limits of Free Speech*, 81 TEX. L. REV. 679, 712 (2002) (Sween describes the Astor Place Theater Riot in part as reaction to attempts to limit audience participation during theatrical performances, and notes that “[w]hen the mob was in the theater, playing an active role in the ritual, it could be an invigorating, positive part of the event.”).

¹³⁹ 418 U.S. 241 (1974) (striking down state a statute requiring newspapers to allow political candidates a “right of reply” to attacks).

¹⁴⁰ 395 U.S. 367, 391 (1969) (upholding the FCC’s “fairness doctrine”).

¹⁴¹ See *Miami Herald Publ’g Co. v. Tanillo*, 418 U.S. 241, 258 (1974). The Court stated:

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id.

¹⁴² *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

¹⁴³ 518 U.S. 727 (1996) (upholding in part and invalidating in part a federal law giving cable operators the power to refuse to carry indecent programming).

channels and public access channels. Justice Thomas compared cable operators to newspaper publishers and voted to allow them editorial discretion to decide what programming to carry on leased access and public channels.¹⁴⁴ He contended that cable programmers had no First Amendment right to access the cable platform.¹⁴⁵ Justice Kennedy contended that the cable television operators should be treated as a common carrier, like telephone companies, who are obliged to act as a conduit for the speech of others.¹⁴⁶ A common carrier, like a public forum, is open to all users.¹⁴⁷ As a result, Justice Kennedy found that the cable platform should be open to use by cable programmers, and that it was the cable operators who had no rights that were at stake.¹⁴⁸ In contrast to Justice Thomas and Justice Kennedy, Justice Breyer, in his plurality opinion, balanced the rights of cable operators, cable programmers, and the public¹⁴⁹ in deciding to uphold the law as to leased access channels¹⁵⁰ and to strike the law down as to public access channels.¹⁵¹

¹⁴⁴ See *id.* at 817 (Thomas, J., concurring in part and dissenting in part) (“Like a freelance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no freestanding First Amendment right to have that programming transmitted.”).

¹⁴⁵ See *id.* (Thomas, J., concurring in part and dissenting in part).

¹⁴⁶ See *id.* at 796 (Kennedy, J., concurring in part and dissenting in part) (“Laws requiring cable operators to provide leased access are the practical equivalent of making them common carriers, analogous in this respect to telephone companies: They are obliged to provide a conduit for the speech of others.”).

¹⁴⁷ See *id.* at 797–98 (Kennedy, J., concurring in part and dissenting in part) (“A common-carriage mandate, nonetheless, serves the same function as a public forum. It ensures open, nondiscriminatory access to the means of communication.”).

¹⁴⁸ See *id.* at 796 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy stated:

For purposes of these cases, we should treat the cable operator’s rights in these channels as extinguished, and address the issue these petitioners present: namely, whether the Government can discriminate on the basis of content in affording protection to certain programmers. I cannot agree with Justice Thomas that the cable operator’s rights inform this analysis.

Id.

¹⁴⁹ See *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 747 (Breyer, J., plurality opinion) (“While we cannot agree with Justice Thomas that *everything* turns upon the rights of the cable owner, we also cannot agree with Justice Kennedy that we must ignore the expressive interests of cable operators altogether.”) (emphasis omitted); Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer’s New Balancing Approach*, 31 U. MICH. J.L. REFORM 817 (1998) (“[T]he new balancing analysis highlights the entire gamut of interests in play.”).

¹⁵⁰ See *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 747 (Breyer, J., plurality opinion). With respect to leased access channels, Justice Breyer stated:

The existence of this complex balance of interests persuades us that the permissive nature of the provision, coupled with its viewpoint-

The principles of speaker autonomy and public access also clashed in the two *Turner Broadcasting* cases,¹⁵² where the Court upheld provisions of federal law that require cable operators to lease channels to local broadcast stations (the “must carry” provisions).¹⁵³ The majority, led by Justice Kennedy, found the “must carry” requirement to be a content neutral law that was intended to preserve public access to free broadcast television,¹⁵⁴ while the dissent, led by Justice O’Connor, found the law to be a content based restriction of the cable operator’s freedom of expression.¹⁵⁵

Another pattern where the personal and social purposes of the First Amendment collide is where speech interferes with the democratic process. The classic example of such a law is the one considered in *Burson v. Freeman*,¹⁵⁶ prohibiting political

neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed in 1984.

Id.

¹⁵¹ See *id.* at 766 (Breyer, J., plurality opinion). With respect to public access channels, Justice Breyer stated:

The upshot, in respect to the public access channels, is a law that could radically change present programming-related relationships among local community and nonprofit supervising boards and access managers, which relationships are established through municipal law, regulation, and contract. In doing so, it would not significantly restore editorial rights of cable operators, but would greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear. At the same time, given present supervisory mechanisms, the need for this particular provision, aimed directly at public access channels, is not obvious. Having carefully reviewed the legislative history of the Act, the proceedings before the FCC, the record below, and the submissions of the parties and *amici* here, we conclude that the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end.

Id.

¹⁵² *Turner Broadcasting Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997) (upholding “must carry” provisions); *Turner Broadcasting Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994) (declaring “must carry” provisions of federal Television Consumer Protection and Competition Act to be content neutral).

¹⁵³ See *Turner II*, 520 U.S. at 224–25 (upholding “must carry” provisions).

¹⁵⁴ See *Turner I*, 512 U.S. at 643–52 (finding the Act to be content neutral).

¹⁵⁵ See *id.* at 676 (O’Connor, J., dissenting) (“I cannot avoid the conclusion that [the law’s] preference for broadcasters over cable programmers is justified with reference to content.”).

¹⁵⁶ 504 U.S. 191 (1992) (striking down a state statute prohibiting solicitation of votes or display of campaign materials within 100 feet of polling place on election day).

expression within 100 feet of a polling place on election day. Some legal scholars would extend this principle to suppress types of expression that either denigrate the democratic process itself or that degrade and marginalize groups of people within society, thus damaging their ability to participate as full citizens.¹⁵⁷ For example, Robert Bork believes that Justice Sanford was right and Brandeis and Holmes were wrong on the question of whether “criminal advocacy” was punishable under the First Amendment.¹⁵⁸ Advocacy of criminal conduct, according to Bork, is punishable because it necessarily denigrates the democratic process.¹⁵⁹ In contrast, under the Holmes/Brandeis rationale adopted in *Brandenburg*, “mere advocacy” of unlawfulness is not punishable.¹⁶⁰ Similarly, Professors Elizabeth Malloy and Ronald Krotoszynski suggest that “harm advocacy” should be actionable.¹⁶¹ They state:

Recently, many racist and anti-Semitic hate groups and other fringe organizations have provided information in books and over the internet on dedicated web sites on how to build bombs, pollute water supplies, and build weapons. The time has come to ask whether the social costs of such “Harm Advocacy” must be taxed against individual victims and the community at large. At least in some circumstances, the courts should be able to impose the cost of this Harm Advocacy on the speaker, provided that the rules used to assign such costs do not unduly chill otherwise protected expression.¹⁶²

Other scholars have taken the position that pornography and hate speech should be suppressed because the degradation and contempt inherent in such speech has the effect of relegating its victims to second class status, thus substantially interfering

¹⁵⁷ See *infra* notes 158 and 161.

¹⁵⁸ See Robert H. Bork, *Neutral Principles and Some First Amendment Principles*, 47 IND. L.J. 1, 31 (1971) (“[L]ogic and principle appear to drive us to the conclusion that Sanford rather than Brandeis or Holmes was correct in *Gitlow* and *Whitney*.”).

¹⁵⁹ See *id.* (“Advocacy of law violation is a call to set aside the results that political speech has produced. . . . There should, therefore, be no constitutional protection for any speech advocating the violation of law.”).

¹⁶⁰ See *supra* note 85 (setting forth the standard for punishing incitement).

¹⁶¹ See S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159 (2000) (suggesting that “harm advocacy” should be proscribable under the First Amendment). See generally Ian A. Kass, Note, *Regulating Bomb Recipes on the Internet: Does First Amendment Law Permit the Government to React to the Most Egregious Harms?*, 5 S. CAL. INTERDISC. L.J. 83 (1996) (suggesting that government could constitutionally ban the publication of “bomb recipes”).

¹⁶² Malloy & Krotoszynski, *supra* note 161, at 1166–67.

with their ability to fully participate in society.¹⁶³ Professor Steven Heyman, for example, maintains that “violent pornography may be banned because it violates the rights of women to personality, personal security, and equality, as well as the most fundamental right of all — the right to recognition.”¹⁶⁴ Similarly, proponents

¹⁶³ See CATHERINE A. MACKINNON, *ONLY WORDS* 109 (1993) (arguing in favor of laws prohibiting pornography and hate speech). Professor MacKinnon states:

Where is all this leading? To a new model for freedom of expression in which the free speech position no longer supports social dominance, as it does now; in which free speech does not most readily protect the activities of Nazis, Klansmen, and pornographers, while doing nothing for their victims, as it does now; in which defending free speech is not speaking on behalf of a large pile of money in the hands of a small group of people, as it is now. In this new model, principle will be defined in terms of specific experiences, the particularity of history, substantively rather than abstractly. It will notice who is being hurt and never forget who they are.

Id. See also Joseph A. Giordano & Joseph Michellucci, *American Free Speech v. Canadian Harm to Society: A Comparative Analysis of Obscenity and Pornography as Forms of Expression*, 14 J. SUFF. ACAD. L. 1, 2 (2000). The authors attribute differences in Canadian and American approaches to pornography to the tendency of Canadian establishment to “protect free speech while incorporating safeguards designed to protect against expression primarily offensive to females, minorities, and other groups historically perceived to have been unfairly treated.” The authors state:

Lastly, the notion of group rights is also not one that is well received by American courts. On the other hand, the Canadian approach which embraces the concept of “social harm” appears, at the very least, partially anchored on group rights and the extension of preferential treatment to some but not others. . . .

Indeed, the Canadian pornography and obscenity laws strongly favor females

Id. at 20–21.

¹⁶⁴ Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 617 (2003) [hereinafter Heyman, *Ideological Conflict*]. Consistent with his “rights-based” approach to freedom of expression problems, however, Professor Heyman would extend constitutional protection to non-violent pornography, including obscenity:

[V]iolent pornography may be banned because it violates the rights of women to personality, personal security, and equality, as well as the most fundamental right of all — the right to recognition. In this regard, violent pornography also infringes the rights of the community as a whole, by undermining the mutual recognition that constitutes the community. The community also should have the right to exclude pornography from the public sphere, to shield children from such material, and to decline to subsidize such material. Contrary to the Supreme Court’s traditional doctrine, however, the community should have no general power to ban material that it considers to be obscene, for such a power is inconsistent with the autonomy of individuals to determine the content of their own thought and expression.

Id.

of laws regulating hate speech contend that "certain words and actions wound minorities and contribute to their oppression."¹⁶⁵

The most significant contemporary conflict between the rights of speakers and the preservation of the democratic process arises from efforts to adopt laws limiting contributions and expenditures of money in political campaigns.¹⁶⁶ Supporters of these measures claim that they reduce the corrupting influence of money on political campaigns.¹⁶⁷ Opponents contend that these laws are in violation of the First Amendment.¹⁶⁸ The movement for campaign finance reform achieved a

¹⁶⁵ See Erika George, *Words as Sticks and Stones: Naming the Harm of Racist Speech*, 11 HARV. BLACKLETTER J. 221, 222 (1994) (reviewing MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993)). Professor George states:

The authors maintain that an "absolutist" approach to First Amendment jurisprudence does not adequately reflect the reality that certain words and actions wound minorities and contribute to their oppression. They not only state the case in favor of regulating racist speech, but also provide a clear and concise statement of the intellectual foundations of critical race theory.

Id. But see Anuj C. Desai, *Attacking Brandenburg with History: Does the Long-Term Harm of Hate Speech Justify a Criminal Statute Suppressing It?*, 55 FED. COMM. L.J. 353 (2003) (reviewing ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (2002)). Professor Desai concludes:

In sum, although Tesis's goal of preventing atrocities against racial and ethnic minorities is laudable, he has not sufficiently supported his view that a criminal law banning what he refers to as "hate speech" would further that goal. Indeed, because he has not adequately considered the potential for government abuse that his proposal invites, his proposed law could very well do more harm than good.

Id. at 394.

¹⁶⁶ See *F.E.C. v. Beaumont*, 539 U.S. 146–63 (2003) (upholding a prohibition on political contributions from corporations as applied to a non-profit advocacy organization); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392–98 (2000) (upholding a state statute setting limits on contributions to candidates for state office); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (upholding contribution limits and striking down expenditure limits contained in federal law).

¹⁶⁷ According to the parties and *amici*, the primary interest served by the [contribution and expenditure] limitations, and, indeed, the [Federal Election Campaign] Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.

Buckley, 424 U.S. at 25. See GRABER, *supra* note 128, at 233 ("No one has a right to use economic privilege to magnify otherwise relatively weak political skills.").

¹⁶⁸ See Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. LAW 783, 785 (2001) ("[C]ampaign finance reform measures — including both those which have been held constitutional and unconstitutional by the

milestone legislative victory with the enactment of the McCain-Feingold measure.¹⁶⁹ The Supreme Court recently upheld McCain-Feingold in *McConnell v. Federal Election Commission*,¹⁷⁰ after explicitly balancing the rights of speakers against the need to rein in political corruption.¹⁷¹

In cases where the harm principle and the value principle work at cross purposes — that is, where the personal and social purposes of the First Amendment conflict — the exercise of one person's freedom of speech infringes upon other people's right to freedom of expression. However, freedom of speech cases arise in many situations where there is not a conflict of expressive rights, but rather a conflict between expressive rights and other governmental interests. This point is developed in the following section.

F. Non-Speech Harms Also Justify Laws Regulating Expression

Professor Steven Heyman has eloquently written of the various harms that speech may inflict, such as the invasion of unwilling listeners' privacy¹⁷² or the intentional infliction of terror or grief.¹⁷³ However, Professor Heyman contends that the law of freedom of expression should not be understood as balancing free speech against state interests.¹⁷⁴ In an effort to avoid the incommensurability of comparing rights against interests, Heyman has constructed a "rights-based" approach to resolving freedom of expression conflicts.¹⁷⁵ Heyman has stated that the right to

Court — must be found to violate core notions of free expression.”).

¹⁶⁹ See Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), 2 U.S.C. § 431 *et seq.*

¹⁷⁰ 124 S.Ct. 619 (2003) (upholding most provisions of McCain-Feingold against First Amendment attack).

¹⁷¹ See *id.* at 660–86.

¹⁷² See Heyman, *Spheres of Autonomy*, *supra* note 26, at 674 (“Ultimately, however, there cannot be an unlimited right to force communication on an unwilling individual if the idea of listener's autonomy is to have any meaning.”).

¹⁷³ See *id.* at 676 (“[M]ost people would experience fear upon receiving a threat of violence, or intense grief at news of a loved one's death, and would regard these as serious injuries.”).

¹⁷⁴ See Heyman, *Righting the Balance*, *supra* note 128, at 1311–12 (“[B]alancing is appealing from a common sense standpoint. From a theoretical perspective, however, balancing is perhaps the least coherent of the three approaches, for it is difficult to see how free speech and state interests are to be balanced against each other.”).

¹⁷⁵ See Heyman, *Ideological Conflict*, *supra* note 164, at 534 (developing further the “rights-based” model of the First Amendment). Professor Heyman states:

[A] central task of constitutional jurisprudence is to develop a common language or framework within which to debate controversial issues. . . . I argue that such a framework can be found in a rights-based theory of the First Amendment. On this view, First Amendment problems should not be seen as conflicts between the right to free speech and other,

freedom of speech may be subject to restriction whenever it invades the "fundamental rights" of others.¹⁷⁶ Heyman's approach is consistent with the distinction that Ronald Dworkin draws between "principles" and "policies."¹⁷⁷ According to Dworkin, principles protect individual rights, while policies promote collective goals.¹⁷⁸ Dworkin believes that while courts are competent to analyze and determine legal principles, the adoption and application of policies are committed to the legislative process.¹⁷⁹ One interpretation of Dworkin's theory is that courts may define and limit rights by balancing competing "principles," but courts may not limit rights by invoking "policies."¹⁸⁰

incommensurable values. When understood in this way, such problems may well appear to involve intractable conflicts between opposing ideological positions. Instead, many First Amendment problems should be understood as conflicts between free speech and other rights — rights that are rooted in the same values as free speech itself. In this way, it may be possible to develop some common ground in debates over the First Amendment, or at least to develop a common language within which those debates can take place.

Id.

¹⁷⁶ See Heyman, *Righting the Balance*, *supra* note 128, at 1279 (stating that his "central thesis is that free speech is a right that is limited by the fundamental rights of other individuals and the community as a whole"). Professor Heyman describes First Amendment cases as involving a "conflict of rights," stating "[c]onflicts between rights should be resolved in light of their relative value, the relationship between them, and their respective roles in the system of constitutional liberty." *Id.* at 1364. In a more recent work, Professor Heyman describes these competing rights as follows:

The liberties protected by the First Amendment can be understood in part on this level. Freedom of mind is an aspect of the right to one's person, while the freedom to speak falls within the broader liberty to act as one likes. But the idea of external freedom also encompasses other rights — above all, the right to personal security, which can be infringed by incitement and threats of violence. In this way, the same principles that justify free speech also give rise to other rights which set bounds to that freedom.

Heyman, *Spheres of Autonomy*, *supra* note 26, at 678.

¹⁷⁷ See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1067 (1975).

¹⁷⁸ See *id.* ("Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal.").

¹⁷⁹ See *id.* at 1067–73.

¹⁸⁰ For example, Dworkin characterizes Learned Hand's pragmatic balancing test as requiring the weighing of "principles," not "policies." See, e.g., *id.* at 1077 ("Hand's formula, and more sophisticated variations . . . do not subordinate an individual right to some collective goal, but provide a mechanism for compromising competing claims of abstract right."). However, at other points Dworkin admits the possibility that rights may be circumscribed in the presence of overriding considerations of policy. See, e.g., *id.* at 1073 ("Suppose it is conceded that the right to equality between races is sufficiently strong that it must prevail over all but the most pressing argument of policy, and be compromised only as required by competing arguments of principle.").

I have previously argued that the distinction Ronald Dworkin draws between the roles of principles and policies in judicial reasoning misconceives the nature of the judicial process.¹⁸¹ In my opinion, the factor that limits the use of policy analysis in judicial reasoning is not the *type* of value that is at stake, but rather whether it is possible to prove that a particular value is in fact a purpose of the law.¹⁸² In interpreting the law, the courts are called upon to identify the values and interests that laws are intended to serve. Whether the law is constitutional text, a statutory enactment, or an administrative regulation, the purpose of the law may be to promote individual rights, collective goals, or a combination of both.¹⁸³ It is both legitimate and appropriate for a court to interpret the law in a manner that is consistent with its purposes, individual and/or collective.¹⁸⁴

In particular, in freedom of expression cases, the difficulty with the “rights-based” approach is that the “rights” with which speech interferes need not rise to the level of *constitutional* rights, and the harms that speech causes need not be *constitutional* violations in order for the government to be justified in suppressing the speech. In general, the Constitution delimits the powers of the government, but it does not apply to the acts of individuals.¹⁸⁵ The government may choose to redress harms inflicted by individuals, but it is not constitutionally required to do so.¹⁸⁶ It follows that the state may choose to protect peoples’ reputations from injury by individuals or private corporations, or it may refrain from protecting them; it may choose to protect people from misleading advertising, or it may choose not to do so; it may prohibit private acts of intimidation, or it may allow them. Moreover, the government has discretion to protect individuals from mental or physical harm

¹⁸¹ See WILSON HUH, THE FIVE TYPES OF LEGAL ARGUMENTS 135 (2002) [hereinafter HUH, FIVE TYPES].

¹⁸² See *id.* at 131. This is the second of five ways to attack policy arguments, which are:

1. Is the factual prediction accurate?
2. Is the asserted policy one of the purposes of the law?
3. Is the asserted policy sufficiently strong?
4. How likely is it that the decision in this case will serve this policy?
5. Are there other, competing policies that are also at stake?

Id.

¹⁸³ See *id.* at 135–36.

¹⁸⁴ See *id.*

¹⁸⁵ See, e.g., U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1 (creating and vesting powers in the legislative, executive, and judicial departments); art. I, § 9 (imposing limits on the power of Congress); art. I, § 10 (imposing limits on the power of the states); amends. I–VIII (identifying rights that the federal government may not infringe); amend. XIV (identifying rights that the states may not infringe). There is one instance where the Constitution does protect individuals against private action. See U.S. CONST. amend. XIII (outlawing slavery).

¹⁸⁶ See *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189 (1989) (ruling that a state had no constitutional duty to protect a child from being physically abused by his or her father).

inflicted by private actors, even if that private action involves constitutionally protected activity. For example, a fetus is not a “person” within the meaning of the Constitution, and therefore has no constitutional rights.¹⁸⁷ However, the state may enact a law that prohibits a woman from aborting a viable fetus because the interest of the state in protecting viable fetal life outweighs the procreative and bodily integrity rights of the pregnant woman, unless abortion is “necessary to preserve the life or health of the mother.”¹⁸⁸ Similarly, laws proscribing expression such as child pornography, incitement, threats, insults, and defamation are all addressed to prevent physical and emotional harms that are not constitutional in origin, but are serious harms that the government may prevent through the enactment of content based laws.

The distinction between Heyman’s “rights-based” approach and the “harm-balancing” approach proposed in this Article may be partly semantic. Heyman notes that John Stuart Mill himself indicated that the “harms” that justify limitations on liberty include “not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights.”¹⁸⁹ Even if the distinction between these approaches is semantic, in my opinion, it is often simpler to describe the purpose of laws restricting expression as preventing “harms” rather than protecting “rights.” For example, in the campaign finance reform cases, preventing the harm of political corruption is clearly a valid governmental interest, but it is difficult to characterize this goal as promoting an individual right.

The principle that laws regulating speech may be justified by the desire to promote collective goals and prevent non-constitutional harms is even more evident in the analysis of content neutral laws. For example, restrictions on the operation of sound trucks or music amplifiers,¹⁹⁰ injunctions against anti-abortion protestors,¹⁹¹

¹⁸⁷ See *Roe v. Wade*, 410 U.S. 113, 158 (1973) (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

¹⁸⁸ See *id.* at 163–64. The Court stated:

With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id.

¹⁸⁹ Heyman, private correspondence on file with author (quoting MILL, ON LIBERTY, *supra* note 17, ch. IV para. 3).

¹⁹⁰ See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding a municipal noise regulation requiring performers in a park bandshell to employ municipal technicians to operate sound equipment); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding a municipal

and permit requirements for assemblies in public parks¹⁹² all address non-First Amendment concerns relating to noise abatement and orderly access to private and public facilities. Content neutral laws, by definition, interfere with constitutionally protected avenues of expression, but constitutional rights do not automatically trump non-constitutional interests. Rather, the constitutionality of any law regulating expression depends upon balancing “the liberty of the individual . . . and the demands of organized society.”¹⁹³

In summary, three consequences emerge from the confluence of the harm principle and the value principle. First, all laws limiting freedom of expression must be justified on the basis that the expression will cause harm to others beyond mere moral offense. Second, the harm that results from speech may consist of injury to the free speech rights of others or other physical or emotional injury. Third, in order for a law restricting speech to be considered constitutional, the degree of harm resulting from speech must be greater than the value of the expression. The next portion of this Article describes the elements that make up “proof of harm.”

II. SCIENTER, CAUSATION, DEGREE OF HARM, NATURE OF HARM

Over half a century ago, in *United States v. Dennis*,¹⁹⁴ Judge Learned Billings Hand articulated a formula for measuring the constitutionality of laws affecting expression. According to Judge Hand, in rulings under the First Amendment, the courts take into account both the seriousness and the likelihood of the harm resulting from speech. He stated: “In each case they [the courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”¹⁹⁵ However, Judge Hand altered the Holmes-Brandeis analysis in one critical respect: he watered down the causation element by

ordinance prohibiting the use of sound trucks that emit loud or raucous noises).

¹⁹¹ See *Madsen v. Women’s Health Ctr.*, 512 U.S. 753 (1994) (upholding a thirty-six-foot buffer zone and noise abatement around an abortion clinic’s entrances but striking down other aspects of an injunction against abortion protestors).

¹⁹² See *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (upholding a municipal park ordinance requiring users to obtain a permit before conducting events involving more than fifty persons against facial attack).

¹⁹³ See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Justice Harlan stated that due process “has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.” *Id.* See also *Watchtower Bible & Tract Soc’y, Inc. v. Vill. of Stratton*, 536 U.S. 150, 165 (2002) (“We must also look, however, to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.”).

¹⁹⁴ 183 F.2d 201 (1950), *aff’d* 341 U.S. 494 (1951) (affirming defendants’ convictions for violating the Smith Act).

¹⁹⁵ See *id.* at 212.

removing the requirement of "immediacy."¹⁹⁶

The Supreme Court adopted Judge Hand's formula,¹⁹⁷ and as a result, the Court's opinion was insufficiently protective of speech.¹⁹⁸ The central problem with the Supreme Court's reasoning in *Dennis* was not that it utilized Judge Hand's balancing approach, but rather that it failed to estimate properly the remoteness of the threatened harm, and accordingly, it failed to evaluate properly the relative weight of the freedom to advocate for unpopular political positions. It is not feasible to extend categorical protection to all political speech because, at some point, lawful political advocacy may become unlawful incitement. However, the Court in *Dennis* failed to extend sufficient protection to political advocacy, a mistake which the Court corrected eighteen years later in *Brandenburg v. Ohio*.¹⁹⁹ In my opinion, if

¹⁹⁶ See *id.* Judge Hand cast the relevant standard in terms of "probability" instead of "remoteness:"

The phrase, "clear and present danger," has come to be used as a shorthand statement of those among such mixed or compounded utterances which the Amendment does not protect. Yet it is not a *vade mecum*; indeed, from its very words it could not be. It is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can. . . . We have purposely substituted "improbability" for "remoteness," because that must be the right interpretation. Given the same probability, it would be wholly irrational to condone future evils which we should prevent if they were immediate; that could be reconciled only by an indifference to those who come after us. It is only because a substantial intervening period between the utterance and its realization may check its effect and change its importance, that its immediacy is important; and that, as we have said, was the rationale of the concurrence in *Whitney v. People of State of California*. We can never forecast with certainty; all prophecy is a guess, but the reliability of a guess decreases with the length of the future which it seeks to penetrate. In application of such a standard courts may strike a wrong balance; they may tolerate "incitements" which they should forbid; they may repress utterances they should allow; but that is a responsibility that they cannot avoid. Abdication is as much a failure of duty, as indifference is a failure to protect primal rights.

Id. (citation omitted).

¹⁹⁷ See *Dennis*, 394 U.S. at 510 (adopting Judge Hand's formula for freedom of expression).

¹⁹⁸ See *id.* at 516-17 (upholding the convictions of persons who advocated an eventual communist takeover).

¹⁹⁹ 395 U.S. 444 (1969).

These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing

properly applied as it was in *Brandenburg*, the balancing approach is just as protective of speech as is the categorical approach.²⁰⁰

Each of the four elements of harm — sciemer, causation, and nature and degree of harm — represents one aspect of the harm that may result from unregulated speech. In any particular case, one element or another may assume priority depending upon which aspect of the harm is most problematic. What follows is a discussion of the Court's treatment of these "elements of harm" in recent cases, beginning with the Court's identification of the precise harm that the law regulating speech is intended to ameliorate.

A. *The Nature of the Harm*

The first step in analyzing the right-hand side of the constitutional calculus is to identify the "harm" that the government is seeking to mitigate or prevent. In his concurring opinion in *Watchtower*, Justice Breyer noted that the government has the responsibility for articulating the governmental interest it is attempting to protect.²⁰¹

In the 2003 case *United States v. American Library Association, Inc.*,²⁰² the central issue that divided the Court was the precise nature of the harm that the law was intended to address. The federal law that was challenged in that case, the Children's Internet Protection Act (CIPA), required public libraries, as a condition to receiving federal funding, to install internet filters that would deny patrons access to obscenity and child pornography and prevent minors from accessing material

imminent lawless action and is likely to incite or produce such action.

Id. at 447.

²⁰⁰ See Huhn, *Assessing the Constitutionality*, *supra* note 4, at 861 (arguing that the "constitutional calculus" is as protective of speech as the categorical approach).

²⁰¹ See *Watchtower Bible & Tract Soc'y, Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., concurring). Justice Breyer stated:

In the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative body has not given. That does not mean, as The Chief Justice suggests, that only a government with a "battery of constitutional lawyers," could satisfy this burden. It does mean that we expect a government to give its real reasons for passing an ordinance. Legislators, in even the smallest town, are perfectly able to do so — sometimes better on their own than with too many lawyers, *e.g.*, a "battery," trying to offer their advice. I can only conclude that if the village of Stratton thought preventing burglaries and violent crimes was an important justification for this ordinance, it would have said so.

Id. (citations omitted).

²⁰² 539 U.S. 194 (2003) (upholding a provision of the Children's Internet Protection Act requiring public libraries receiving federal funds to use internet filters against obscenity, child pornography, and, in the case of patrons who are children, material that is harmful to children).

harmful to children.²⁰³ Chief Justice Rehnquist, writing for himself and three other Justices, implied that the purpose of CIPA was quite broad. The plurality suggested that in addition to denying minors access to harmful materials and denying adults access to illegal obscenity and child pornography, the law was also intended to address the problem of adult patrons who were using public libraries to obtain access to pornography.²⁰⁴ The plurality opinion repeatedly returned to this theme that libraries could and should prevent both adults and children from viewing pornography.²⁰⁵

The two Justices who concurred in the judgment of the Court and the three dissenting Justices adopted a much narrower view of the valid purposes of the Act. Justice Kennedy concurred in the judgment upholding the constitutionality of the Act on the basis of assurances given by the Solicitor General in the oral argument that adult library patrons had the right to demand the prompt disabling of internet filters without significant delay,²⁰⁶ and stated that if adults were prevented from viewing constitutionally protected materials, it could form the basis for an as-applied challenge to the Act.²⁰⁷ Justice Breyer, also concurring in the judgment, specifically identified the purposes of the Act as prohibiting adult patrons access to obscenity and child pornography, and preventing children from gaining access to material that is harmful to them.²⁰⁸ He concluded that requiring adult patrons to

²⁰³ *Id.* at 199 (Rehnquist, C.J., plurality opinion) ("Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them.").

²⁰⁴ *Id.* at 200 ("The accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography.").

²⁰⁵ *Id.* ("Congress became concerned that the E-rate & LSTA [federal funding] programs were facilitating access to illegal and harmful pornography."); *id.* at 201 n.3 ("Moving terminals to places where their displays cannot easily be seen by other patrons, or installing privacy screens or recessed monitors, would not address a library's interest in preventing patrons from deliberately using its computers to view online pornography."); *id.* at 212 ("[B]ecause public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs.").

²⁰⁶ *See id.* at 214 (Kennedy, J., concurring) ("If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact.").

²⁰⁷

If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.

Id. at 215.

²⁰⁸ *See* 539 U.S. at 218 (Breyer, J., concurring) ("The Act seeks to restrict access to

request library officials to disable the internet filter was a “comparatively small burden,”²⁰⁹ and that there did not appear to be any less burdensome alternative that would nevertheless accomplish the government’s purpose.²¹⁰ Like Justice Kennedy, he suggested that if local practices under the Act substantially interfered with the right of adults to access “overblocked” materials, this could be the subject of an as-applied challenge to the Act.²¹¹

In their dissents, both Justice Stevens and Justice Souter argued that CIPA is unconstitutional because it censors what adults can see. Justice Stevens observed that the law “operates as a blunt nationwide restraint on adult access to ‘an enormous amount of valuable information’ that individual librarians cannot possibly review.”²¹² He characterized the law as an unlawful prior restraint.²¹³ Justice Souter, joined by Justice Ginsburg, agreed with Justice Stevens that the problem with the Act was that it interfered with adult access to the internet. He stated, “if the only First Amendment interests raised here were those of children, I would uphold application of the Act.”²¹⁴ He concluded that even if the internet filters had been freely adopted by public libraries, this would constitute unlawful censorship of adults’ use of the internet.²¹⁵

The disagreement between the plurality and the remaining five Justices did not center on the validity or the necessity of blocking internet access to obscenity, child pornography, or protecting children from exposure to harmful materials. Rather, it concerned whether or not it is legitimate for libraries to forbid adults from viewing

obscenity, child pornography, and, in respect to access by minors, material that is comparably harmful.”).

²⁰⁹ See *id.* at 220 (“Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act’s legitimate objectives.”).

²¹⁰ See *id.* at 219 (“Due to present technological limitations, however, the software filters both ‘overblock,’ screening out some perfectly legitimate material, and ‘underblock,’ allowing some obscene material to escape detection by the filter. But no one has presented any clearly superior or better fitting alternatives.”) (citations omitted).

²¹¹ See *id.* at 219–20 (“Perhaps local library rules or practices could further restrict the ability of patrons to obtain ‘overblocked’ Internet material. But we are not now considering any such local practices. We here consider only a facial challenge to the Act itself.”) (citations omitted).

²¹² *Id.* at 220 (Stevens, J., dissenting).

²¹³ See 539 U.S. at 225 (Stevens, J., dissenting) (“Unless we assume that the statute is a mere symbolic gesture, we must conclude that it will create a significant prior restraint on adult access to protected speech.”).

²¹⁴ *Id.* at 232 (Souter, J., dissenting).

²¹⁵ See *id.* at 234–35 (Souter, J., dissenting) (“A library that chose to block an adult’s Internet access to material harmful to children . . . would be imposing a content-based restriction on communication of material in the library’s control that an adult could otherwise lawfully see. This would simply be censorship.”).

pornographic materials that are constitutionally protected. The plurality implicitly assumed that this was a legitimate purpose, while the dissenting Justices found that it was not. The decision of the Court turned upon the nature of the harm that the law was intended to address.

B. The Degree of the Harm

In the field of Constitutional law, perhaps the single most important jurisprudential trend of the twentieth and twenty-first centuries has been the increasing tendency of the Supreme Court to base its analysis of the constitutionality of laws upon an assessment of the *degree* of harm imposed upon individuals or society.²¹⁶ In 1937, the Supreme Court created the “affectation doctrine” that radically expanded Congress’s power under the Commerce Clause by reference to the *degree* of the effect of adverse working conditions upon interstate commerce and the Nation’s economy.²¹⁷ In 1954, the Court declared state-sponsored segregation in the Nation’s public schools unconstitutional because it “may affect [children’s] hearts and minds in a way unlikely ever to be undone.”²¹⁸ In 1973, the Supreme Court acknowledged a woman’s right to terminate a pregnancy prior to viability because of the extent of the physical, mental, and economic impact of unwanted pregnancy, childbirth, and motherhood on women and their families.²¹⁹ Most recently, in 2003, the Court

²¹⁶ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 17–18, 199–200 (1992). See generally, Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305 (2003) (explaining the functions of formalistic, analogistic, and realistic legal analysis and relations among them).

²¹⁷ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”). The expansion of Congress’s power authorized in *Jones & Laughlin Steel* was presaged by Justice Cardozo’s concurring opinion in *Schechter*, where he rejected the formalistic distinction between “direct” and “indirect” effects in favor of a realistic standard based upon the *degree* of the effect. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (“The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain.”).

²¹⁸ See *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

²¹⁹ Justice Blackmun stated:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm

extended constitutional protection to the sexual conduct of gays and lesbians because of the stigmatizing effect of criminalizing this behavior.²²⁰ In each of these cases, the Court's decision turned upon its assessment of the seriousness of the harm that would result from its determination of constitutionality.

This trend is also evident in First Amendment cases, and as with many other First Amendment principles, it finds support in Justice Louis Brandeis's opinion in *Whitney v. California*.²²¹ Justice Brandeis expressly embraced the notion of balancing the value of the expression against the seriousness of the anticipated harm when he stated that political advocacy may not be suppressed "unless the evil apprehended is *relatively serious*."²²² Justice Brandeis added, "[p]rohibition of free

medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Roe v. Wade, 410 U.S. 113, 153 (1973).

²²⁰ Justice Kennedy stated:

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

Lawrence v. Texas, 539 U.S. at 575. Justice Kennedy added, "[t]he stigma this criminal statute imposes, moreover, is not trivial." *Id.* Justice O'Connor similarly found the criminal statute to be stigmatizing, stating:

[T]he effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing."

Id. at 581–82 (O'Connor, J., concurring) (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)). See generally Wilson Huhn, *The Jurisprudential Revolution Unlocking Human Potential in Lawrence and Grutter*, 12 WM. & MARY BILL RTS. J. 65, 114–15 (2004) (discussing how the Supreme Court is increasingly sensitive to the effect of laws on people's lives).

²²¹ 274 U.S. 357 (1927).

²²² *Id.* at 377 (Brandeis, J., concurring) (emphasis added).

speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a *relatively* trivial harm to society.”²²³ Justice Brandeis’s repeated use of the word “relatively” in this formula implies that the degree of the harm must outweigh the value of the expression before the government is justified in suppressing expression. Justice Brandeis’s great contribution to First Amendment analysis was not the adoption of a categorical rule protecting freedom of expression. Rather, it was that he placed great value on political expression, which correspondingly required great proof of harm before the speech could be restricted. Justice Brandeis illustrated this point by means of a hypothetical:

[A] State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State.²²⁴

Recent First Amendment decisions of the Court are consistent both with the larger jurisprudential trend towards consideration of harm and with Justice Brandeis’s admonition that the harm resulting from speech must be “relatively

²²³ *Id.* (emphasis added).

²²⁴ *Id.* at 377–78. *See also* *Schneider v. State*, 308 U.S. 147, 161 (1939) (striking down an anti-leafletting law). The Court expressly stated that in determining the constitutionality of the law it was necessary to “weigh the circumstances” and “appraise the substantiality of the reasons” for the law:

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

serious" before the speech may be suppressed. For example, in *Virginia v. Black*,²²⁵ the Court devoted several pages to describing the terrifying effect of cross burning on the African-American community²²⁶ and voted to uphold the statute banning cross burning because of that impact.²²⁷ In *New York v. Ferber*,²²⁸ the Court based its decision upholding a law proscribing child pornography on the finding that "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem."²²⁹ In cases restricting the location or nature of sex businesses, the Court has expressly based its decisions upon the serious nature of the harmful "secondary effects" of such businesses upon the surrounding community.²³⁰ And the abortion protester cases have turned upon a careful weighing of the protestors' right to freedom of expression against the interest of patients and staff of abortion clinics to safety and freedom from harassment.²³¹

²²⁵ 538 U.S. 343 (2003).

²²⁶ See *id.* at 352–57 (describing the history of cross burning from its origins in 14th Century Scotland to recent times). The Supreme Court noted: "Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement." *Id.* at 355–56.

²²⁷ See *id.* at 363 ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.").

²²⁸ 458 U.S. 747 (1982).

²²⁹ *Id.* at 749.

²³⁰ See, e.g., *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 435–36 (2002) (O'Connor, J., plurality opinion). Justice O'Connor stated:

The central component of the 1977 study is a report on city crime patterns provided by the Los Angeles Police Department. That report indicated that, during the period from 1965 to 1975, certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole. For example, robberies increased 3 times faster and prostitution 15 times faster in Hollywood than citywide.

. . . [W]e find that reducing crime is a substantial government interest and that the police department report's conclusions regarding crime patterns may reasonably be relied upon to overcome summary judgment against the city

Id.

²³¹ See, e.g., *Hill v. Colorado*, 530 U.S. 703, 717–18. Justice Stevens stated:

Before confronting the question whether the Colorado statute reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners, it is appropriate to examine the competing interests at stake. A brief review of both sides of the dispute reveals that each has legitimate and important concerns.

Id. at 714. Justice Stevens added: "The dissenters, however, appear to consider recognizing

It is apparent from these cases that the Supreme Court routinely evaluates the seriousness of the harm that would result from unrestricted speech. However, the Court must not only assess the *degree* of harm that speech may cause, but it must also estimate the *likelihood* that the harm will occur. This aspect of the constitutional calculus is discussed in the following section.

C. The Causal Link Between the Speech and the Harm

Professor Steven Heyman correctly observes that “for the most part, modern First Amendment doctrine allows regulation only where there is a close relationship between speech and injury.”²³² The importance of this principle may be illustrated by contrasting two cases reviewing laws that regulate child pornography. Child pornography consists of images of minors engaging in sexual conduct,²³³ and the purpose of laws that restrict these images is to deter acts of child sexual abuse.²³⁴ The central issue in the cases decided by the Supreme Court was whether the laws under review were likely to achieve this purpose.

In 1982, in the case of *New York v. Ferber*, the Court considered the constitutionality of a state law that prohibited the production, distribution, and procurement of materials that depict *actual* children engaging in sexual performances.²³⁵ The Court voted unanimously to uphold the law. The majority of the Court cited among its reasons for prohibiting actual child pornography: (1) “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child;”²³⁶ (2) “the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation;”²³⁷ and (3) “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”²³⁸

However, in 2002, a majority of the Supreme Court voted to strike down the

any of the interests of unwilling listeners — let alone balancing those interests against the rights of speakers — to be unconstitutional. Our cases do not support this view.” *Id.* at 718.

²³² Heyman, *Spheres of Autonomy*, *supra* note 26, at 675.

²³³ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239 (2002) (describing a statute as prohibiting “sexually explicit images that appear to depict minors”); *Ferber*, 458 U.S. at 749 (describing statutes as prohibiting distribution of materials depicting sexual performances by children).

²³⁴ See *infra* notes 242–45 and accompanying text.

²³⁵ See generally *Ferber*, 458 U.S. 747 (1982) (upholding a state law forbidding any person to produce, promote, direct, exhibit, or sell any material depicting a sexual performance by a child under the age of sixteen).

²³⁶ *Id.* at 758.

²³⁷ *Id.* at 759.

²³⁸ *Id.*

child pornography law that was reviewed in *Ashcroft v. Free Speech Coalition*.²³⁹ This case concerned the constitutionality of the federal Child Pornography Prevention Act of 1996 (CPPA) that outlawed the production, distribution, and possession of any material that “appears to be” of a minor engaging in sexually explicit conduct.²⁴⁰ The CPPA purported to extend the reach of child pornography laws to movies and pictures in which youthful adult actors and actresses portray children engaging in sexual behavior, and to computer generated images that are “virtually indistinguishable” from depictions of sexual acts by actual children.²⁴¹ The purpose of the CPPA was the same as the law that was reviewed in *Ferber* — to deter or prevent the sexual abuse of children.²⁴² However, in contrast to *Ferber*, the Court in *Free Speech Coalition* held that the law would do little or nothing to prevent child sexual abuse. In *Ferber*, children were sexually abused when the materials were produced, sold, and exhibited.²⁴³ In *Free Speech Coalition*, the Court noted that images of apparent child pornography “do not involve, let alone harm, any children in the production process.”²⁴⁴

The government asserted that apparent child pornography leads to child abuse because the images might stimulate potential child abusers to act upon their impulses.²⁴⁵ The Supreme Court rejected this argument on the ground of causation.

²³⁹ 535 U.S. 234 (2002).

²⁴⁰ See *id.* at 241 (quoting and summarizing 18 U.S.C. § 2256(8)(B)).

²⁴¹ See *id.* at 239–40 (“The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging.”); *id.* at 249 (“The Government seeks to address this deficiency[, the fact that some classical and contemporary works appear to depict sexual conduct by children,] by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value.”).

²⁴² See *id.* at 244 (noting that “sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people”).

²⁴³ See *supra* notes 235–38 and accompanying text.

²⁴⁴ See *Free Speech Coalition*, 535 U.S. at 241.

²⁴⁵ *Id.* at 253–54. The government made other arguments as well to support the constitutionality of the CPPA. It argued that pedophiles might use apparent child pornography to seduce children. *Id.* at 251. The Court rejected this argument on the ground that many lawful items such as candy or video games might serve the same purpose, and that in any event the government could enact a more narrowly tailored law prohibiting persons from distributing harmful materials to children. See *id.* at 251–53. The government also claimed that apparent child pornography should be banned because persons accused of purveying images of actual child pornography might defend themselves by claiming that the images were produced with mature actors or with computer technology. See *id.* at 254–55. The Court responded by noting that it would be anomalous to outlaw *protected* speech on the ground that it resembled *unprotected* speech. See *id.* In an opinion concurring in the judgment, Justice Thomas noted that “the Government points to no case in which a defendant has been acquitted based on a ‘computer-generated images’ defense.” *Id.* at 259 (Thomas, J., concurring).

The Court invoked the rule that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it,”²⁴⁶ noting that advocacy of violence is punishable only where the unlawfulness is both “imminent” and “likely.”²⁴⁷ The Court found that unlike *Ferber*, where the child abuse was “intrinsically related” to the production of the images, the “causal link” between apparent child pornography and child abuse was “contingent and indirect.”²⁴⁸ Justice Kennedy stated, “[t]he harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”²⁴⁹ He added, “[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.”²⁵⁰

The government also argued that apparent child pornography whets the appetite of the public for actual child pornography, and therefore stimulates the production of works exploiting actual children.²⁵¹ The Court found this hypothesis “somewhat implausible,” concluding instead that permitting the distribution of apparent child pornography would probably have the effect of driving actual child pornography from the market.²⁵²

Causation is also a crucial, critical element in commercial speech analysis. The

²⁴⁶ *Id.* at 253.

²⁴⁷ *Id.* (“The government may suppress speech for advocating the use of force or a violation of law only if ‘such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’”) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

²⁴⁸ *See id.* at 250 (“Virtual child pornography is not ‘intrinsically related’ to the sexual abuse of children, as were the materials in *Ferber*. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect.”) (citation omitted). Justice O’Connor agreed with the decision of the majority regarding the weakness of the causal relationship between the speech and the harm. She stated: “The Court correctly concludes that the causal connection between pornographic images that ‘appear’ to include minors and actual child abuse is not strong enough to justify withdrawing First Amendment protection for such speech.” *Id.* at 262 (O’Connor, J., concurring in part and dissenting in part).

²⁴⁹ *Id.* at 250.

²⁵⁰ *Free Speech Coalition*, 535 U.S. at 253–54.

²⁵¹ *See id.* at 254 (“In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children.”).

²⁵² *See id.* (“If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.”). Justice Kennedy also noted that the Court in *Ferber* had considered virtual images to be a permissible alternative to actual child pornography. *See id.* at 251 (quoting *New York v. Ferber*, 458 U.S. 747 (1982)).

third prong of the *Central Hudson* test is that the law must “directly advance” the governmental objective.²⁵³ As Justice Anthony Kennedy stated in *Edenfield v. Fane*:²⁵⁴ “This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”²⁵⁵

Professor Michael Hoefges has carefully traced the evolution of the “directly advance” prong in commercial speech cases, noting that the Supreme Court has swung back and forth on the question of how much proof of causation the government must adduce in support of a regulation of commercial speech.²⁵⁶ Professor Paul Horwitz criticizes the Court for requiring substantial proof that advertising increases consumption of harmful products such as alcohol, tobacco, and gambling, and suggests that the Supreme Court has failed to assess adequately the dangers of commercial advertising because it is wedded to a rational model of decision making that fails to take account of the “judgment-distorting effects of advertising.”²⁵⁷ He

²⁵³ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980) (“[T]he restriction must directly advance the state interest involved.”).

²⁵⁴ 507 U.S. 761, 777 (1993) (striking down a state regulation prohibiting CPAs from engaging in “direct, in-person, uninvited solicitation”) (quoting Fla. Admin. Code § 21A-24.002(2)(c) (1992)).

²⁵⁵ *Id.* at 770–71.

²⁵⁶ See Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL’Y 267, 276–80 (2003) (describing the application of the “direct-advancement” prong of *Central Hudson* in cases leading up to *Lorillard Tobacco*). Professor Hoefges questions the quality and sufficiency of the evidence presented by the government in commercial speech cases, stating:

Under the third *Central Hudson* factor, which requires the government to demonstrate that its regulation directly advances a substantial regulatory goal in a direct and material way, it is increasingly clear that the government needs to submit a sufficient evidentiary record in support of its case. The Supreme Court considered the extent of the evidentiary record under this factor in *Coors Brewing*, 44 *Liquormart* and *Greater New Orleans Broadcasting*, and did so again in *Lorillard Tobacco*. The Court abandoned in those cases the more deferential approach taken in *Posadas* and *Edge Broadcasting*, in which the Court had accepted the government’s claims of direct advancement with little or no evidence. Even so, the Court’s approach in all of these cases is mitigated by the rather loose evidentiary standard it has taken when determining the sufficiency of government evidence supporting claims of direct advancement under the third factor.

Id. at 306.

²⁵⁷ See Horwitz, *Free Speech as Risk Analysis*, *supra* note 90, at 56. Professor Horwitz states:

Since *Virginia State Board of Pharmacy*, the Supreme Court’s

notes that because of the inability of the Court to evaluate the effects of advertising, "it may be entirely appropriate to leave the issue to legislators and regulators."²⁵⁸

Causation was the decisive element in the *Turner Broadcasting* cases,²⁵⁹ where the central issue was whether the "must carry" provisions were likely to achieve the statutory goal of preserving local broadcast television stations in the face of competition from cable television.²⁶⁰ It was also decisive in the *Renton* line of

speech-protective approach to commercial speech has been founded on the theory that consumers are capable of rational choices about product purchases. Thus, informed consumer choices require "the free flow of commercial information." As Hanson and Kysar note, however, "it is naive to presume that consumers can rationally process all the information necessary to optimize their purchases." Manufacturers are well aware of the means that are most effective in affecting people's ability to make meaningful "informed consumer choices," and do their best to manipulate these choices through a host of judgment-distorting, preference-framing techniques.

Id. (quoting *Va. State Bd. of Pharmacy v. Va. Consumer Citizens Council, Inc.*, 425 U.S. 748, 763–65 (1976), and Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1454 (1999)). Professor Horwitz gives this description of "judgment-distorting" effects of advertising:

Consumers who read or watch commercial speech are subject to pervasive cognitive illusions. Indeed, as this section shows, over the same period of time in which the Court moved toward a more speech-permissive view of commercial speech, propelled by the view that consumers are capable of rationally analyzing advertising and other such speech, the advertising industry has taken advantage of its own store of psychological research into marketing and advertising to ensure that consumers will be deprived of the fullest use of their powers of ratiocination. Moreover, some high-risk products, such as tobacco, are highly addictive and thus still less likely to permit "rational" consumer choice. Nor are informational strategies designed to counter the effects of commercial speech an adequate response. While current behavioral treatments of commercial speech have focused on how tort liability might be altered to respond to the preference-distorting effects of commercial speech involving such products, this section suggests that behavioral analysis counsels a more speech-restrictive approach than the one toward which the Court is moving.

Id. at 49–50.

²⁵⁸ *Id.* at 61.

²⁵⁹ See *Turner Broad. Sys., Inc. v. FCC* (Turner II), 520 U.S. 180, 224–25 (1997) (upholding "must carry" provisions); *Turner Broad. Sys., Inc. v. FCC* (Turner I), 512 U.S. 622–62 (1994) (declaring "must carry" provisions of the federal Cable Television Consumer Protection and Competition Act of 1992 to be content neutral).

²⁶⁰ See *Turner I*, 512 U.S. at 667–68 (Kennedy, J., plurality opinion) (remanding the case to lower courts to determine whether local broadcasting was in danger from cable television

cases,²⁶¹ where the Court increasingly split over the question of whether laws regulating adult businesses are likely to achieve their goal of suppressing "secondary effects" such as crime, prostitution, and drug use. These cases are discussed in Part IV of this article, which examines the nature and reliability of the evidence that the Court requires to justify laws restricting expression.

The final factor on the right-hand side of the constitutional calculus is whether the speaker intended to cause harm.

D. The Speaker's Intent to Cause the Harm

The criminal law requires proof of *mens rea* in order to distinguish innocent from blameworthy conduct.²⁶² Scierter is particularly important in First Amendment cases because of the constitutional presumption that expression is permitted and therefore constitutes innocent behavior. In the course of explaining why proof of scierter is a necessary element for offenses related to expression, the Supreme Court articulated this constitutional presumption in *United States v. X-Citement Video, Inc.*:²⁶³ "Persons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view."²⁶⁴ In *Ferber*, which was

and whether more narrowly tailored means would feasibly address the problem). Justice Kennedy stated:

Without a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty, we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions made by these appellants.

Id. at 667.

²⁶¹ See, e.g., *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) (holding that the city could reasonably rely upon a police department study correlating crime with concentration of adult businesses); *Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (upholding a law prohibiting public nudity as applied to nude dancing establishment); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54-55 (1986) (upholding a municipal ordinance requiring adult movie theatres to be located more than 1000 feet from any dwelling, church, park, or school).

²⁶² See Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 952 (1999) ("Harmful acts may be done innocently; hence the long tradition of requiring proof of a culpable state of mind, a *mens rea*, in order to convict."). See also *New York v. Ferber*, 458 U.S. 747, 765 (1982) ("[C]riminal responsibility may not be imposed without some element of scierter on the part of the defendant.").

²⁶³ 513 U.S. 64 (1994) (interpreting the term "knowingly" in a criminal statute prohibiting distribution of child pornography to apply to the material's nature and the performer's age).

²⁶⁴ *Id.* at 71 (explaining why laws restricting expression do not qualify as "public welfare")

also a challenge under the First Amendment, the Court expressly held that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant."²⁶⁵ The Supreme Court has held that the government may not obtain convictions for possession of obscenity and child pornography except upon proof that the defendant had "knowledge" of the nature and character of the materials.²⁶⁶ The constitutional requirement of scienter in First Amendment prosecutions is so strong that in *X-Citement Video*, the Court interpreted the federal child pornography statute as requiring the defendant to have knowledge that the performers were underage²⁶⁷ despite the absence of express statutory language to support this interpretation,²⁶⁸ and in the face of persuasive legislative history to the contrary,²⁶⁹ in order to avoid substantial constitutional problems.²⁷⁰

The importance of scienter in First Amendment cases may be traced to Justice Holmes's famous dissent in *Abrams v. United States*,²⁷¹ which is the modern well-spring of protection for freedom of expression. In *Abrams*, where the majority of

offenses which are exempt from scienter requirements).

²⁶⁵ *Ferber*, 458 U.S. at 765.

²⁶⁶ See *Smith v. California*, 361 U.S. 147 (1959) (stating that knowledge of the material's character is a necessary element of the offense of possession of obscenity).

²⁶⁷ See *X-Citement Video*, 513 U.S. at 73 ("One would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults. Therefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct.").

²⁶⁸ See *id.* at 68. The statute provided that "[a]ny person who knowingly transports or ships" or "knowingly receives, or distributes, any visual depiction" that has been shipped or transported if "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct" is guilty of a felony. *Id.* The Court cited its "reluctance to simply follow the most grammatical reading of the statute" *Id.* at 70.

²⁶⁹ See *id.* at 73-78 (citing conflicting legislative history). The Justice Department, commenting upon an early draft of the bill, had stated:

To clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved.

Id. at 75 (quoting a Justice Department evaluation of an early form of the bill). The Conference Committee, in commenting upon a parallel provision of the Act, stated, "it is not a necessary element of a prosecution that the defendant knew the actual age of the child." *Id.* at 76.

²⁷⁰ See *id.* at 78. The Court stated in its opinion authored by Chief Justice Rehnquist: "Cases such as *Ferber*, *Smith v. California*, *Hamling v. United States*, and *Osborne v. Ohio* suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts." *Id.* (citations omitted).

²⁷¹ 250 U.S. 616, 624 (1919) (affirming defendants' convictions for violation of the Espionage Act).

the Court affirmed the defendants' convictions for violating the Espionage Act because of inflammatory pamphlets that the defendants distributed, Justice Holmes dissented on the ground that the defendants did not "intend" to impede the war effort within the meaning of the Act.²⁷² He emphasized that the statutory element of "intent" was not satisfied, stating: "It seems to me that no such intent is proved."²⁷³ First, he defined "intent" as specific intent: "a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed."²⁷⁴ He then argued: "It seems to me that this statute must be taken to use its words in a strict and accurate sense."²⁷⁵ To explain why the law forbidding expressions that obstruct the war effort must contain a scienter element, he offered a simple example:

A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime.²⁷⁶

According to Justice Holmes, proof of intent to obstruct the war effort was a necessary element of the offense because it was indispensable for distinguishing protected political speech from unprotected incitement.²⁷⁷

In 2003, the Supreme Court returned to the question of "intent" in First Amendment challenges in *Virginia v. Black*,²⁷⁸ which concerned the constitutionality of a Virginia statute making it illegal to burn a cross in a public place or on the property of another person with the intent of intimidating another person.²⁷⁹ However, the statute also provided, "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."²⁸⁰ Eight Justices found the "prima facie evidence" provision to be unconstitutional because it punished cross burning that was purely political as well as cross burning that was

²⁷² See *id.* at 626–27 (Holmes, J., dissenting).

²⁷³ *Id.* at 626.

²⁷⁴ *Id.* at 627.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ 250 U.S. at 627–28 (Holmes, J., dissenting).

²⁷⁸ 538 U.S. 343 (2003) (upholding a statute criminalizing cross burning with intent to intimidate, but striking down a provision stating that the act of cross burning constituted prima facie evidence of intent to intimidate others).

²⁷⁹ See *id.* at 358–63 (O'Connor, J., plurality opinion) (describing the Virginia statute).

²⁸⁰ *Id.* at 348 (quoting VA. STAT. ANN. § 18.2–423).

performed for purposes of intimidation.²⁸¹ Justice O'Connor stated:

The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute — and potentially convict — somebody

²⁸¹ *Id.* at 367 (striking down the “prima facie evidence” provision as overbroad and facially unconstitutional). Justice O'Connor stated:

The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face.

Id.; *id.* at 372–73 (Scalia, J., concurring in part and dissenting in part) (denying that statute was facially overbroad, but finding that it was unconstitutionally applied in this case). Justice Scalia stated:

The plurality is correct in all of this — and it means that some individuals who engage in protected speech may, because of the prima facie-evidence provision, be subject to conviction. Such convictions, assuming they are unconstitutional, could be challenged on a case-by-case basis. The plurality, however, with little in the way of explanation, leaps to the conclusion that the *possibility* of such convictions justifies facial invalidation of the statute.

Id.; *id.* at 386 (Souter, J., concurring in part and dissenting in part) (finding the “prima facie evidence” provision to be not only unconstitutional in itself but rather as evidence that the entire statute is unconstitutional as viewpoint based law). Justice Souter stated:

Thus, the appropriate way to consider the statute's prima facie evidence term, in my view, is not as if it were an overbroad statutory definition amenable to severance or a narrowing construction. The question here is not the permissible scope of an arguably overbroad statute, but the claim of a clearly content-based statute to an exception from the general prohibition of content-based proscriptions, an exception that is not warranted if the statute's terms show that suppression of ideas may be afoot. Accordingly, the way to look at the prima facie evidence provision is to consider it for any indication of what is afoot. And if we look at the provision for this purpose, it has a very obvious significance as a mechanism for bringing within the statute's prohibition some expression that is doubtfully threatening though certainly distasteful.

Id.

engaging only in lawful political speech at the core of what the First Amendment is designed to protect.²⁸²

The reasoning of the plurality and concurring Justices in *Black* echoed the reasoning of Justice Holmes in *Abrams* and the reasoning of the Court in *X-Citement Video*. As Holmes had illustrated with his “aeroplane” example,²⁸³ and as the Court had explained in the child pornography case,²⁸⁴ to punish speech without the element of scienter would unconstitutionally sweep innocent expression within the scope of the statute, rendering the statute unconstitutionally overbroad.²⁸⁵

Justice Thomas agreed with the plurality that the principal law forbidding cross burning with intent to intimidate was constitutional,²⁸⁶ but he disagreed with the Court’s decision to strike down the “prima facie evidence” provision of the law.²⁸⁷ He made two arguments supporting his position that the “prima facie evidence” provision was constitutional. First, Justice Thomas noted that in statutory rape cases, there is no requirement that the victim did not consent to engage in sexual

²⁸² See *id.* at 365 (O’Connor, J., plurality opinion).

²⁸³ See *supra* note 276 and accompanying text.

²⁸⁴ See *supra* note 263 and accompanying text.

²⁸⁵ See *supra* notes 264, 266 and accompanying text.

²⁸⁶ See *Black*, 538 U.S. at 394 (Thomas, J., dissenting) (“[T]his statute prohibits only conduct, not expression.”). In response to this argument, the plurality of the Court noted that expressive conduct is protected under the First Amendment, and that cross burning is expressive conduct.

Justice Thomas argues in dissent that cross burning is “conduct, not expression.” While it is of course true that burning a cross is conduct, it is equally true that the First Amendment protects symbolic conduct as well as pure speech. As Justice Thomas has previously recognized, a burning cross is a “symbol of hate,” and a “a symbol of white supremacy.”

Id. at 360 n. 2 (O’Connor, J., plurality opinion) (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770–71 (1995) (Thomas, J., concurring)) (citation omitted). See also FRANKLYN S. HAIMAN, “SPEECH ACTS” AND THE FIRST AMENDMENT 6 (1993) (affirming that expressive conduct is protected by First Amendment). Professor Haiman states:

Burning a cross on one’s own lawn or displaying a swastika at a rally in a public park is symbolic behavior that qualifies as speech. Burning a cross on somebody else’s lawn, putting a torch to his or her house, painting a swastika on a group’s place of worship or breaking their windows are acts of physical trespass and defacement or destruction of property that are legally punishable, regardless of their possible symbolic purposes or effects.

Id.

²⁸⁷ See *Black*, 538 U.S. at 395 (Thomas, J., dissenting) (“Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.”).

conduct.²⁸⁸ He argued that cross burning is so reprehensible that it, too, should be punished without proof of scienter on the part of the perpetrator.²⁸⁹ Second, he observed that the abortion protestors who violated the Colorado statute upheld in *Hill v. Colorado* could be punished for coming within eight feet of clinic patients even if their intent was not to intimidate.²⁹⁰ Because "intent to intimidate" was not an element of the Colorado statute, Justice Thomas reasoned that it need not be an element of the Virginia cross burning statute.²⁹¹ He implied that the Court was

²⁸⁸ For instance, there is no scienter requirement for statutory rape. That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. In fact, "[f]or purposes of the child molesting statute . . . consent is irrelevant. The legislature has determined in such cases that children under the age of sixteen (16) cannot, as a matter of law, consent to have sexual acts performed upon them, or consent to engage in a sexual act with someone over the age of sixteen (16)." The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.

Id. at 397-98 (Thomas, J., dissenting) (citations omitted). In my opinion, in support of his argument that intent to intimidate is not a necessary element in order to prosecute cross burning, it would have been more appropriate for Justice Thomas to argue that in statutory rape cases there is no requirement that the *defendant* was aware of the fact that the victim was underage, rather than to focus on the *victim's* lack of consent to sex.

²⁸⁹ See *id.* at 397.

²⁹⁰ [I]n *Hill v. Colorado* the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments "from unwanted advice" and "unwanted communication." In so concluding, the Court placed heavy reliance on the "vulnerable physical and emotional conditions" of patients. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on "unwanted advice," which, notably, can be given only from a distance of at least eight feet from a prospective patient, justified by the countervailing interest in obtaining abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.

Id. at 399-400 (citations omitted).

²⁹¹ See *id.*

biased in favor of the Ku Klux Klan and against abortion protestors.²⁹² The plurality and concurring Justices did not expressly respond to either of these two arguments put forth by Justice Thomas. In the following, I put forth arguments the majority might have made to address his points.

Justice Thomas's first argument drawing the analogy to statutory rape laws proves too much. While it is true that there are a small number of narrowly circumscribed laws imposing criminal liability in the absence of *mens rea*, this is hardly an argument for extending strict liability to *all* offenses. Regulatory offenses (imposing strict liability for offenses such as environmental crimes),²⁹³ statutory rape (ignorance as to the age of the victim is no defense)²⁹⁴ and felony murder (requiring intent to commit the underlying felony but not the killing itself)²⁹⁵ all impose criminal liability in the absence of scienter as to a key element of the crime. However, none of these actions are expressive in nature. The rules dispensing with the requirement of scienter in these cases are exceptions to the general thrust of the criminal law distinguishing innocent from blameworthy behavior, and, as the Court explained in *X-Citement Video*, these exceptions are not applicable to expressive offenses.²⁹⁶ As the plurality in *Black* explained, the requirement of specific intent to intimidate is all that distinguishes protected political expression from unprotected acts of intimidation.²⁹⁷

These Justices might have responded to Justice Thomas's second point contrasting the result in *Black* to the result in *Hill v. Colorado*²⁹⁸ with three separate arguments. First, they could have distinguished *Hill* from *Black* in that the law keeping abortion protestors at bay in *Hill* was found to be content neutral,²⁹⁹ while

²⁹² See *id.* at 399 ("What is remarkable is that, under the plurality's analysis, the determination of whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims.").

²⁹³ See Kadish, *supra* note 262, at 954 (discussing strict liability regulatory offenses).

²⁹⁴ See Vicki J. Bejma, *Protective Cruelty: State v. Yanez and Strict Liability as to Age in Statutory Rape*, 5 ROGER WILLIAMS U. L. REV. 499, 501 (2000) ("Although *mens rea* is central to our legal tradition, since the 19th century most courts have interpreted statutory rape and child molestation laws as an exception to this rule with respect to the complainant's age.").

²⁹⁵ See Kadish, *supra* note 262, at 957–58 (discussing strict liability aspects of felony-murder rule).

²⁹⁶ See *supra* note 263 and accompanying text.

²⁹⁷ See *supra* notes 278–81 and accompanying text.

²⁹⁸ 530 U.S. 703 (2000).

²⁹⁹

The Colorado statute's regulation of the location of protests, education, and counseling is easily distinguishable from *Carey*. It places no restrictions on — and clearly does not prohibit — either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners.

Id. at 723.

the law prohibiting public cross burning in *Black* was held to be content based,³⁰⁰ and that therefore it was appropriate to require proof of specific intent to cause harm in *Black* and not in *Hill*. Specific intent to cause the resulting harm is not required under content neutral laws. For example, musical performers who operate their own sound equipment in a city park without city sound technicians, in violation of a municipal park's "Use Guidelines," need not be proven to have intended to disturb nearby residents — intent to commit the act of operating the sound equipment should be sufficient for conviction.³⁰¹ Similarly, in determining the constitutionality of a municipal zoning law that dispersed adult businesses,³⁰² the Supreme Court required the government to submit evidence of causation and harm, but not scienter to support the legislative judgment. Specific intent to cause harm is not a requirement for violation of purely content neutral laws.

Second, one could respond to Justice Thomas's argument by conceding that the Colorado statute at stake in *Hill* was aimed at political protestors and was therefore content based,³⁰³ but that the Colorado statute which prohibited protestors from approaching within eight feet of patients and staff within 100 feet of a health facility was a far more limited restriction than the Virginia statute, which prohibited cross burning in all public places. Accordingly, even if "strict scrutiny" applied to both

³⁰⁰ See *Black*, 538 U.S. at 359 (O'Connor, J., plurality opinion) (Although the First Amendment erects a presumption against content based laws, certain content based categories of speech such as fighting words can be proscribed, and stating, "the First Amendment also permits a State to ban a 'true threat.'").

³⁰¹ See *Ward v. Rock Against Racism*, 491 U.S. 781, 787 n. 2 (1989). The Use Guidelines state, in pertinent part:

To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS.

Id.

³⁰² See *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 429 (2002) (O'Connor, J., plurality opinion) (quoting a municipal ordinance that prohibits "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof").

³⁰³ See, e.g., Stephan E. Oestreicher, Jr., *Effectual Interpretation and the Content-Neutral Inquiry: On Justice Scalia and Hill v. Colorado*, 12 GEO. MASON U. CIV. RTS. L.J. 1, 3 (arguing "for adoption of a holistic interpretive framework under which federal courts would attempt to discern, by any means available, what the effects of a particular statutory speech restriction are or will be").

laws, the Colorado statute was more likely to be considered constitutional because it was "less restrictive" than the Virginia statute.

Third, one could agree with Justice Thomas that the Colorado statute was intended to silence abortion protestors, and that the law was therefore viewpoint based and should have been declared unconstitutional.³⁰⁴ If that were the case, Justice Thomas's argument would prove that *Hill* was wrongly decided, but it would also indicate that, by extension, the Virginia statute forbidding cross burning was also viewpoint based, and therefore unconstitutional with or without the scienter requirement.

The plurality in *Black* upheld the cross burning law as being a subset of "true threats," which is a category of unprotected speech.³⁰⁵ The Court held that under *R.A.V.*, the cross burning law constitutes permissible content discrimination within an unprotected category of speech.³⁰⁶ If Justice Thomas's reasoning had been adopted by the Court, and if proof of intent to intimidate were unnecessary for conviction, then cross burning would necessarily constitute a separate category of unprotected speech. Yet cross burning, by itself, is not analogous to unprotected categories of speech such as misleading advertisements, defamation, obscenity, and child pornography, all of which have little or no constitutional value. In addition to its use for intimidation, cross burning may also be an act of political expression which is entitled to the highest protection under the First Amendment.³⁰⁷ All that distinguishes protected acts of political expression from unprotected acts of intimidation is the intent of the speaker. The cross burning law is a content based law that requires proof of specific intent to intimidate so as to prevent it from being overbroad.³⁰⁸

One of the great innovations of the Model Penal Code was the delineation of

³⁰⁴ See *Hill*, 530 U.S. at 741 (Scalia, J., dissenting) (Justice Thomas joined Justice Scalia's dissenting opinion accusing the majority of the Court of bias against abortion protestors.). Justice Scalia stated:

What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.

Id. See also Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, 100 (1997) (In *Madsen* and *Schenck*, "the impact of the law in question was not only content-based, singling out speech on abortion, but also viewpoint based, restricting speech of anti-abortion activists.").

³⁰⁵ See *Black*, 538 U.S. at 359–60.

³⁰⁶ See *id.* at 361–63.

³⁰⁷ See *supra* note 281 and accompanying text.

³⁰⁸ See *supra* note 278 and accompanying text.

four categories of *mens rea*: intent, knowledge, recklessness, and negligence.³⁰⁹ For example, following a notorious case in which a stalker's conviction was reversed for failure to prove "intent" to intimidate,³¹⁰ the Minnesota legislature immediately responded.³¹¹ The legislature lowered the level of scienter to "negligence," amending the statute to criminalize expression or conduct which "the actor knows or has reason to know [that the intentional conduct] would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted or intimidated."³¹² In contrast, the courts have generally refused to lower the scienter requirement from intent to negligence in suits claiming "imitative harm," that is, in cases where individuals have imitated crimes depicted in movies or television shows.³¹³ As one author observes:

The First Amendment should not permit a plaintiff to recover civil damages from a speaker when imitative harm occurs, unless *Brandenburg's* culpability requirement has been satisfied. *Gertz v. Robert Welch, Inc.* permits a lower culpability requirement in the case of libels against private parties, but applying the same low constitutional culpability standard to harm caused by mimicry would pose a great threat that majorities would be able to silence unpopular opinions.³¹⁴

³⁰⁹ See Kadish, *supra* note 262, at 952. Professor Kadish states:

The Code's *mens rea* proposals dissipated these clouds of confusion with an astute and perspicuous analysis that has been adopted in many states and has infused thinking about *mens rea* everywhere. We have been taught to eschew the traditional epithetical and moralistic jurisprudence of *mens rea*. Instead, we now inquire whether the crime requires that the defendant have acted purposely, knowingly, recklessly, or negligently in doing the action prohibited.

Id. (citations omitted).

³¹⁰ See *State v. Orsello*, 554 N.W.2d 70 (Minn. 1996) (holding that a statute requires proof of specific intent to intimidate); Demetra M. Pappas, *When a Stalker's Hot Pursuit Turns Coldly Calculated Chase in Minnesota: How Specific Need Expressions of Intent Be or Do Actions Speak Louder Than Words?*, 20 HAMLINE L. REV. 371 (1996) (describing *Orsello* and its legislative response).

³¹¹ See *id.* at 372 ("[T]he case of *State v. Orsello* prompted the immediate formation of a legislative subcommittee, and, upon the reconvening of the Minnesota state legislature in January 1997, Minnesota's anti-stalking law was immediately rewritten.") (citations omitted).

³¹² *Id.* at 393.

³¹³ See Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984, 987 (1994) ("Most courts deciding the First Amendment issue in such mimicry cases . . . have applied *Brandenburg v. Ohio's* rigorous incitement standard and have barred recovery.") (citation omitted).

³¹⁴ *Id.* at 1044 (citations omitted).

Accordingly, the level of scienter is an important element in analyzing the constitutionality of a law regulating speech.

In summary, proof of harm, which constitutes the right-hand side of the constitutional calculus, is comprised of several elements. In order to punish expression, the government must prove the nature of the harm that it is seeking to prevent; that the severity of the harm outweighs the value of the expression; that the expression, if permitted, would likely cause the harm; and, in certain cases, it must prove that the speaker intended to cause specific harm.

The following portion of this article explains how the Court adjusts the elements of the harm analysis in relation to the value of the expression being suppressed.

III. CALIBRATING SCIENTER, CAUSATION, AND DEGREE OF HARM TO EXPRESSIVE VALUE — THE EXAMPLE OF DEFAMATION

The level of harm necessary to justify a regulation of expression varies in proportion to the value of the ideas or mode of expression that is being suppressed. In effect, constitutional doctrine measures the constitutionality of laws restricting expression by means of a “sliding scale” of harm. This principle explains why, for example, sexually explicit materials that have serious scientific, artistic, or literary value may not be suppressed,³¹⁵ and why political speech is protected unless the resulting danger is serious, likely, and immediate.³¹⁶

Defamation presents an excellent opportunity to explain the “constitutional calculus” for a number of reasons. First, the Supreme Court has devoted considerable attention to this topic, given the desirability of “uninhibited, robust, and wide open” debate on social issues³¹⁷ and the need for determinate rules of liability.³¹⁸

³¹⁵ See *Miller v. California*, 413 U.S. 15, 24 (1973) (Chief Justice Burger wrote for the majority that obscene materials are those “which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”).

³¹⁶ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (Political advocacy may not be punished “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

³¹⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (“[W]e have been especially anxious to assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise. To that end this Court has extended a measure of strategic protection to defamatory falsehood.”) (citation omitted).

³¹⁸ But see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774 (1985) (White, J., concurring). Justice White argued that the constitutional protection afforded by *Sullivan* and *Gertz* would not financially protect the media:

Nor am I sure that [the rule in *Gertz*] has saved the press a great deal of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed

Second, the Court has applied the constitutional doctrine of defamation in a variety of factual settings, making it possible to draw broad conclusions about the architecture of the doctrine. Third, the structure of the law of defamation may be presented along a spectrum, nicely illustrating matters of degree.

Speech about public officials and matters of public concern constitutes political speech, and accordingly it is of higher value to society than speech about private figures or matters of private concern. As a result, the plaintiff's burden of proof is correspondingly greater in cases involving the defamation of public officials regarding matters of public concern. In the foundation case *New York Times v. Sullivan*,³¹⁹ the Supreme Court identified the "central meaning of the First Amendment"³²⁰ to be protection of the right of citizens to engage in "criticism of government and public officials."³²¹ Accordingly, in *Sullivan* the Court ruled that where a public official sues for defamation regarding a matter of public concern, the Constitution imposes a number of requirements upon the plaintiff. The public official must prove that the defendant made a false statement of fact,³²² that the false

investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds.

Id. (citation omitted).

³¹⁹ 376 U.S. 254, 292 (1964) (overturning a judgment against a newspaper for defamation on constitutional grounds).

³²⁰ *Id.* at 273. Justice Brennan stated for the majority:

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, which first crystallized a national awareness of the central meaning of the First Amendment.

Id. (citation omitted).

³²¹ *Id.* at 276 ("These views reflect a broad consensus that the [Sedition] Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.").

³²² *Id.* at 278-79. The Court struck down the rule under state law placing the burden upon the defendant to prove that the statements were true, stating:

The state rule of law is not saved by its allowance of the defense of truth. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

statement was “of and concerning” the public official,³²³ and that the defendant either knew that the statement was false or acted with reckless disregard as to the truth.³²⁴ In *Sullivan*, the Court also found that the plaintiff had failed to prove “actual malice” with “convincing clarity,”³²⁵ a requirement the Court later interpreted to mean that public officials or public figures must prove their case by “clear and convincing evidence.”³²⁶

The elements of a claim brought by a non-public figure for defamation growing out of a matter of public concern are somewhat lower. Under *Gertz*,³²⁷ the plaintiff need not prove that the defendant acted knowingly or recklessly with regard to the truth; instead, negligence was held sufficient for liability.³²⁸ The plaintiff may recover actual damages (if proven) and punitive damages upon a showing of actual malice,³²⁹ and the plaintiff may meet its burden by proving its case by a

Id. (citation omitted).

³²³ *Id.* at 288 (“We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury’s finding that the allegedly libelous statements were made ‘of and concerning’ respondent.”). The Court explained that allowing a public official to sue for general criticism of official conduct would have the effect of “transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.” *Id.* at 292.

³²⁴ *Id.* at 287–88 (“We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.”).

³²⁵ *Sullivan*, 376 U.S. at 285–86 (“Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law.”).

³²⁶ *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984) (“The burden of proving ‘actual malice’ requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.”). *See also* *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 531 (2002) (“An example of such ‘breathing space’ protection is the requirement that a public official seeking compensatory damages for defamation prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity.”).

³²⁷ 418 U.S. 323, 347 (1974) (establishing constitutional parameters for a suit claiming defamation of a private individual relating to a matter of public concern).

³²⁸ *See id.* at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”).

³²⁹ *See id.* at 348–49.

[W]e endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold

preponderance of the evidence.³³⁰

According to the plurality opinion in *Dun & Bradstreet, Inc.*,³³¹ in cases where a private figure sues for defamation regarding a matter of private concern, the plaintiff's burden of proof is even lower because such speech is of lower constitutional value.³³² The Court held that damages may be presumed³³³ and did not specify

that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Id. Justice Powell also stated:

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 350.

³³⁰ See *id.* at 366 (Brennan, J., dissenting) ("Moreover, in contrast to proof by clear and convincing evidence required under the *New York Times* test, the burden of proof for reasonable care will doubtless be the preponderance of the evidence.").

³³¹ 472 U.S. 749 (1985) (ruling that the plaintiff need not prove "actual malice" to recover presumed and punitive damages where defamatory statements did not relate to a matter of public concern). The Justice who concurred in the plurality opinion agreed that *Gertz* was not applicable in a case merely involving matters of private concern. See *id.* at 764 (Burger, C.J., concurring) ("I agree that *Gertz* is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance, and that the expression in question here relates to a matter of essentially private concern."); *id.* at 774 (White, J., concurring) ("[A]s Justice Powell indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I concur in the Court's judgment."). Furthermore, since the concurring justices would have overruled *Gertz* and *Sullivan*, *id.* at 763-65 (Burger, C.J., concurring); *id.* at 765-74 (White, J., concurring), the views of the plurality represent the narrowest articulated grounds supporting the decision of the Court, and therefore are entitled to precedential force under the rule of *Marks v. United States*, 430 U.S. 188, 192-94 (1977) (In the case of a split majority, the narrowest reasoning of the Justice supplying the decisive vote should be considered the reasoning of the Court.).

³³² *Dun & Bradstreet, Inc.*, 472 U.S. at 758-59 (Powell, J., plurality opinion) ("The First

any particular level of scienter that needs to be proven.³³⁴

The following chart illustrates how the plaintiff's burden of proof, the defendant's level of scienter, and the type of damages that may be recovered varies according to the type of information being suppressed.

PROOF OF HARM FOR CATEGORIES OF DEFAMATION

Category of Defamation	Plaintiff's Burden of Proof	Defendant's Level of Scienter	Recoverable Damages
Defamation of Public Figure Regarding Matters of Public Concern	Clear and Convincing Evidence	Recklessness or Knowledge of Falsity	Actual Damages
Defamation of Private Figure Regarding Matters of Public Concern	Preponderance of the Evidence	Negligence	Actual Damages
Defamation of Private Figure Regarding Matters of Private Concern	Preponderance of the Evidence	No Fault	Presumed and Actual Damages

In summary, the constitutional calculus balancing value against harm is boldly illustrated by the law of defamation. The greater the value of the speech being suppressed, the more proof of harm must be presented to justify the suppression of that speech.

Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'") (citation omitted).

³³³ In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. This interest, however, is "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest.

Id. at 760 (citation omitted).

³³⁴ *Id.* at 761 ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of 'actual malice.'") (citation omitted).

IV. THE EMERGING EMPIRICAL TREND IN PROVING HARM

Over the last decade there has emerged a simple and striking trend in the reasoning of the Supreme Court regarding freedom of expression. Instead of focusing on the *right* to freedom of expression, the Court is increasingly turning its attention to an analysis of the *harm* that may result from allowing the speech to remain unregulated. In place of analyzing what the *law* is, the Court is attempting to determine the *facts* that would justify regulation of speech. Rather than conducting a *legal analysis*, the Court is engaging in an *empirical inquiry*.³³⁵

This trend is consistent with the pragmatic legal philosophy of Judge Richard Posner, which is essentially a commitment to consequentialist analysis.³³⁶ Posner argues that “[m]ost Americans, including most American judges, are pragmatists rather than ideologues, but to come up with pragmatic solutions they have to understand the empirical dimensions of the legal disputes that come before them for resolution.”³³⁷ In particular, Judge Posner favors a pragmatic approach to solving

³³⁵ See Huhn, *Assessing the Constitutionality*, *supra* note 4, at 851 (briefly discussing how the Supreme Court is “replacing categories with evidence” in First Amendment analysis).

³³⁶ See Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 738 (2002) [hereinafter Posner, *Pragmatism Versus Purposivism*]. Posner describes “pragmatism” as being concerned not with “truth” but with the consequences of a decision:

Pragmatism is a complex philosophical movement the core of which is a challenge to the preoccupation of the central philosophical tradition of the West, from Plato to Kant and Russell and Carnap, with establishing the foundations of knowledge — the conditions under which scientific, moral, and political beliefs can be said to be true. Pragmatists believe that the task of establishing such foundations and so validating our beliefs as objective is either impossible or uninteresting, and in either case not worth doing. The test for knowledge should not be whether it puts us in touch with an ultimate reality (whether scientific, aesthetic, moral, or political) but whether it is useful in helping us to achieve our ends. The human mind developed not to build a pipeline to the truth but to cope with the physical environment in which human beings evolved, and so a proposition should be tested not by its correspondence with “reality” but by the consequences of believing or disbelieving it.

Id. See also Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350, 362 (2002) (Professor Gottlieb argues for consequentialist approach in equal protection cases: “All levels of scrutiny imply a balance between the harm caused by the violation of some protected right or interest and the social purposes pursued over the damaged body of that right or interest.”).

³³⁷ Richard A. Posner, *Conceptions of Legal “Theory”: A Reply to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377, 387 (1997).

First Amendment problems,³³⁸ and has called for more empiricism in First Amendment analysis, stating:

Constitutional scholarship, including the scholarship of free speech, is preoccupied on the one hand with Supreme Court decisions that are notably lacking in an empirical dimension and on the other hand with normative theories of free speech that have no empirical dimension either. Vast as the literature is, very little of it is concerned with the kind of empirical questions raised by this paper. This should be a source of concern to anyone who believes that the instrumental approach to free speech should have a role to play in the formation of public policy.³³⁹

However, complicating the empirical approach is the absence of standards governing the nature of the evidence and the quantum of proof necessary to sustain the constitutionality of laws regulating speech. These standards are lacking because constitutionality is a pure question of law for the court, not a question of fact for the trier of fact. Accordingly, questions of admissibility of evidence bearing on constitutionality are not governed by the rules of evidence,³⁴⁰ but rather are subject to judicial notice as matters of "legislative fact."³⁴¹ Furthermore, the quantum of proof

³³⁸ See generally Posner, *Pragmatism Versus Purposivism*, *supra* note 336 (rebutting the intentionalist approach of Professor Rubenfeld).

³³⁹ Richard A. Posner, *The Speech Market and the Legacy of Schenck*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 121, 151 (Lee C. Bollinger & Geoffrey C. Stone eds., 2002). See also Horwitz, *Free Speech as Risk Analysis*, *supra* note 90, at 67 (quoting the cited passage and discussing Posner's views).

³⁴⁰ See FED. R. EVID. 201(a) ("This rule governs only judicial notice of adjudicative facts."); FED. R. EVID. 201(a) advisory committee notes ("This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of 'adjudicative' facts. No rule deals with judicial notice of 'legislative facts.'").

³⁴¹ See FED. R. EVID. 201(a) advisory committee notes (explaining the difference between "adjudicative facts" and "legislative facts"). The advisory committee notes adopt the suggestions of Professor Morgan regarding judicial notice of legislative fact:

Professor Morgan gave the following description of the methodology of determining domestic law:

In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process.

This is the view which should govern judicial access to legislative

for inquiries incidental to questions of law is not determined by reference to familiar standards such as preponderance of the evidence. For example, in *City of Erie v. Pap's A.M.*, Justice Souter observed: "In several recent cases, we have confronted the need for factual justifications to satisfy intermediate scrutiny under the First Amendment. Those cases do not identify with any specificity a particular quantum of evidence, nor do I seek to do so in this brief concurrence."³⁴²

Despite the fact that proof of harm is a "question of law" for courts, as standard doctrine turns from a categorical to a balancing approach in freedom of expression cases, the courts necessarily assume the responsibility to make a more intensive investigation of the underlying facts. As Justice Antonin Scalia has observed:

[W]here an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law.³⁴³

Justice Scalia's observation is borne out when we consider the information that is needed to determine constitutionality under the pragmatic approach which balances "expressive value" against "proof of harm." Traditionally, in the field of constitutional law, legal research consisted of: identifying and reviewing the relevant constitutional text and drawing implications from the text; investigating the history of the drafting and adoption of the relevant constitutional provisions; examining the reasoning contained in judicial opinions; considering the precedential weight that should be accorded to those decisions; and uncovering relevant

facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however leave open the possibility of introducing evidence through regular channels in appropriate situations.

Id. (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944)).

³⁴² *City of Erie*, 529 U.S. 277, at 311 (Souter, J., concurring in part and dissenting in part).

³⁴³ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989). Justice Scalia does not approve of this development. He states:

To reach such a stage is, in a way, a regrettable concession of defeat — an acknowledgment that we have passed the point where "law," properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.

Id.

constitutional traditions, including the traditional practices of our governmental entities as well as the customs and customary understanding of the people.³⁴⁴ But the Supreme Court is turning its focus from these traditional building blocks of legal reasoning toward an overt and realistic balancing of the harms that government is seeking to prevent. The Court is, as Justice Scalia predicted, becoming a “finder of fact.” It is the culmination of the process that Louis Brandeis initiated in *Muller v. Oregon*,³⁴⁵ when he submitted a brief which consisted of two pages of legal argument supplemented by over ninety pages summarizing social studies describing the effect of long hours and low wages on women workers and their families.³⁴⁶

In recent freedom of expression cases, the Court is increasingly turning its attention to the quality and quantity of proof of the causal link between speech and harm. For example, the sufficiency of the government’s evidence of harm was the fulcrum issue in *Turner I*³⁴⁷ and *Turner II*,³⁴⁸ which concerned the constitutionality of a federal statute requiring cable operators to reserve channels for local broadcast stations.³⁴⁹ The principal empirical question that faced the Court was whether the federal government had adduced sufficient evidence that local broadcasting faced extinction absent governmental intervention.³⁵⁰ In *Turner I*, Justice Stevens concluded that there was enough evidence in the record to support the conclusion that the “must carry” provisions of federal law were necessary to protect broadcast

³⁴⁴ See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–30 (1991) (identifying six constitutional “modalities” of constitutional interpretation); HUHNS, FIVE TYPES, *supra* note 181 (classifying five types of legal arguments, and the standard ways to rebut each type of argument).

³⁴⁵ 208 U.S. 412 (1908) (upholding a state statute establishing maximum work hours for women).

³⁴⁶ See 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63–178 (Philip B. Kurland & Gerhard Casper, eds., 1975) (reproducing the original brief). See also PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 75–87 (1972) (describing the brief and discussing its significance).

³⁴⁷ 512 U.S. 622 (1994).

³⁴⁸ 520 U.S. 180 (1997).

³⁴⁹ See *Turner II*, 520 U.S. at 185. Justice Kennedy stated:

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 require cable television systems to dedicate some of their channels to local broadcast television stations. Earlier in this case, we held the so-called “must-carry” provisions to be content-neutral restrictions on speech, subject to intermediate First Amendment scrutiny

Id.

³⁵⁰ See *Turner I*, 512 U.S. at 665 (Kennedy, J., plurality opinion) (“In defending the factual necessity for must-carry, the Government relies in principal part on Congress’ legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be ‘seriously jeopardized.’”).

television.³⁵¹ However, the plurality of the Court led by Justice Kennedy wanted an expanded record, so it remanded the case to the District Court with instructions to take more evidence on this issue.³⁵² When the case returned to the Supreme Court in *Turner II*, the Justices conducted a painstaking review of the legislative and judicial record.³⁵³ The majority concluded that the massive record provided adequate support for the legislative findings,³⁵⁴ but the dissenting Justices found that the legislative and judicial record was inadequate to support the constitutionality of the "must carry" provisions.³⁵⁵ In *Turner I*, Justice Kennedy repeated the familiar principle that the government has the burden of presenting evidence in support of a regulation of speech:

³⁵¹ See *id.* at 673 (Stevens, J., concurring in part and concurring in the judgment) ("While additional evidence might cast further light on the efficacy and wisdom of the must-carry provisions, additional evidence is not necessary to resolve the question of their facial constitutionality.").

³⁵² See *Turner II*, 520 U.S. at 185. Justice Kennedy stated:

A plurality of the Court [in *Turner I*] considered the record as then developed insufficient to determine whether the provisions were narrowly tailored to further important governmental interests, and we remanded the case to the District Court for the District of Columbia for additional factfinding.

On appeal from the District Court's grant of summary judgment for appellees, the case now presents the two questions left open during the first appeal: First, whether the record as it now stands supports Congress' predictive judgment that the must-carry provisions further important governmental interests; and second, whether the provisions do not burden substantially more speech than necessary to further those interests. We answer both questions in the affirmative, and conclude the must-carry provisions are consistent with the First Amendment.

Id.

³⁵³ See *id.* at 189–223 (discussing the evidence presented to Congress and the evidence presented to lower courts). Justice Kennedy observed:

On our earlier review, we were constrained by the state of the record to assessing the importance of the Government's asserted interests when "viewed in the abstract." The expanded record now permits us to consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way.

Id. at 195 (citation omitted).

³⁵⁴

We cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination. Those requirements were met in this case, and in these circumstances the First Amendment requires nothing more.

Id. at 224–25.

³⁵⁵ See *id.* at 240–56 (O'Connor, J., dissenting).

When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply “posit the existence of the disease sought to be cured.” It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.³⁵⁶

However, Justice Kennedy did not adopt a particularly rigorous standard for reviewing the evidence adduced by the government. He specifically articulated a “substantial evidence” standard, which is the standard for reviewing adjudicative decisions of administrative agencies,³⁵⁷ but he stated that the Court would apply this standard in a more deferential manner to Congressional findings than it would in reviewing the findings of an administrative agency.³⁵⁸ He noted that the dissenting Justices had called for the taking of additional detailed evidence to support the necessity and efficacy of the “must carry” provisions,³⁵⁹ but he specifically rejected their request, observing that it would be “an improper burden for courts to impose on the Legislative Branch”³⁶⁰ and “as unreasonable in the legislative context as it is constitutionally unwarranted.”³⁶¹

Similarly, Justice David Souter focused on the problem of establishing a standard for measuring the quantum of proof that the government must offer to support legislation restricting speech in his dissenting opinion in *Alameda Books*, and concluded that the burden of proof depended in part upon the availability of

³⁵⁶ *Turner I*, 512 U.S. at 664 (Kennedy, J., plurality opinion) (citation omitted).

³⁵⁷ See *Turner II*, 520 U.S. at 195 (“In reviewing the constitutionality of a statute, ‘courts must accord substantial deference to the predictive judgments of Congress.’ Our sole obligation is ‘to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.’”) (quoting *Turner I*, 512 U.S. at 665–66 (Kennedy, J., plurality opinion)).

³⁵⁸ See *id.* See also Horwitz, *Free Speech as Risk Analysis*, *supra* note 90, at 61 (Questions relating to customer response to advertising ought to be committed to legislators or regulators, stating, “it may be entirely appropriate to leave the issue to legislators and regulators.”).

³⁵⁹ *Id.* at 112–13. Justice Kennedy stated:

Despite the considerable evidence before Congress and adduced on remand indicating that the significant numbers of broadcast stations are at risk, the dissent believes yet more is required before Congress could act. It demands more information about which of the dropped broadcast stations still qualify for mandatory carriage; about the broadcast markets in which adverse decisions take place; and about the features of the markets in which bankrupt broadcast stations were located prior to their demise.

Id. (citations omitted).

³⁶⁰ *Id.* at 213.

³⁶¹ *Id.*

relevant evidence. Justice Souter expressed dissatisfaction with the evidence adduced by the City of Los Angeles in support of a zoning ordinance dispersing adult businesses, stating that "requiring empirical justification of claims about property value or crime is not demanding anything Herculean."³⁶² Justice Souter noted that the type and quantum of evidence "varies with the point that has to be established,"³⁶³ but that where the evidence is "readily available" the Court "must be careful about substituting common assumptions for evidence."³⁶⁴ He contended that it would have been feasible for the City of Los Angeles to have produced evidence supporting the legislative judgment, stating:

Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities.³⁶⁵

Justice Souter found that "no study conducted by the city has reported that this type of traditional business, any more than any other adult business, has a correlation with secondary effects in the absence of concentration with other adult establishments in the neighborhood."³⁶⁶ Accordingly, he dissented from the ruling of the majority that the municipal ordinance should survive a challenge to its constitutionality on summary judgment, stating that the "principal reason" for his dissent was the "evidentiary insufficiency" of the evidence presented by the city.³⁶⁷

³⁶² City of Los Angeles v. Alameda Books, 535 U.S. 425, 458 (2002).

³⁶³ *Id.* at 459 (Souter, J., dissenting).

³⁶⁴ *Id.* at 459.

³⁶⁵ *Id.* at 458–59.

³⁶⁶ *Id.* at 463–64.

³⁶⁷ *Id.* at 454. Justice Souter stated;

The justification claimed for this application of the new policy remains, however, the 1977 survey, as supplemented by the authority of one decided case on regulating adult arcades in another State. The case authority is not on point, and the 1977 survey provides no support for the breakup policy. Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the Court's judgment today.

Id. (citations omitted). See also Christopher Thomas Leahy, *The First Amendment Gone Awry: City of Erie v. Pap's A.M., Ailing Analytical Structures, and the Suppression of Protected Expression*, 150 U. PA. L. REV. 1021, 1058–65 (2002) (critiquing evidence purporting to support the role of nude dancing establishments in causing "secondary effects" such as crime, prostitution, drug use, and decline in property values).

The recent trend towards empiricism was followed in *McConnell v. Federal Election Commission*,³⁶⁸ where, after a lengthy examination of the evidence linking “soft money” to political corruption,³⁶⁹ the majority opinion, jointly authored by Justices O’Connor and Stevens, concludes that “there is substantial evidence to support Congress’ determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption.”³⁷⁰ Professor Jeffrey Rosen characterizes the Court’s opinion in *McConnell* as “practical” and “very pragmatic,” noting that the majority avoided employing a “rigid rule” to decide the case.³⁷¹

In summary, First Amendment jurisprudence has developed to the point where complex factual assessments are necessary for making determinations of constitutionality. These are often matters which are susceptible to resolution only after receiving and carefully weighing expert opinion testimony from the field of economics or other social sciences.³⁷² This in turn has given rise to a number of difficult questions relating to the “admissibility” and “sufficiency” of the evidence considered by the Court. For example, is expert testimony necessary regarding the relation between speech and harm, or may the Court draw “common sense”

³⁶⁸ 124 S. Ct. 619 (2003) (upholding most provisions of McCain-Feingold against a First Amendment challenge).

³⁶⁹ See *id.* at 652–60 (discussing a 1998 report of the Senate Committee on Governmental Affairs, setting forth extensive evidence of linkage between unregulated contributions and governmental action); *id.* at 672–76 (summarizing evidence of the corrupting influence of large contributions presented to a lower court).

³⁷⁰ See *id.* at 666 (upholding key provisions of the Act).

³⁷¹ See *All Things Considered* (National Public Radio broadcast, Dec. 11, 2003). Referring to the majority opinion in *McConnell*, Professor Rosen remarked:

Very pragmatic, indeed. And that’s the most interesting thing about this decision. O’Connor, the former state legislator, was willing to look at the actual flow of money just as she did in the affirmative action case, where she understood the strong pressure by universities to keep up the numbers of minorities and the pressure to lower academic standards. So here she, instead of imposing a very rigid rule, such as “Money is speech, or individuals are corporations,” was far more practical. And that was a welcome development, as well.

Id.

³⁷² See Horwitz, *Free Speech as Risk Analysis*, *supra* note 90, at 67 (arguing that the courts should place more reliance upon the social science of “behavioral analysis” in First Amendment cases). Professor Horwitz states:

As long as instrumental arguments about free speech are in play, then, it makes sense to add a new player to the game. The law of free speech is, in the final analysis, about making decisions under uncertainty. Behavioral analysis helps us understand better how to go about making those decisions.

Id.

conclusions regarding cause and effect?³⁷³ Must the material evidence be placed upon the record created by the trial court, or may the appellate court take judicial notice of relevant treatises and scientific studies? Should the testimony of experts and others be subject to the rigors of cross examination? Should *Daubert* standards apply in determining what scientific evidence may be considered? Finally, and perhaps most importantly, are the courts the appropriate entity to draw conclusions regarding these complex matters, or should the courts defer to legislative or regulatory authorities?³⁷⁴ As the Court increasingly turns to empirical data to support arguments in favor of constitutionality, it will necessarily continue to confront these difficult questions of interpretative process.

V. CONCLUSION

In the interpretation of the First Amendment, the United States Supreme Court has not only embraced the vision of Louis Brandeis and Oliver Wendell Holmes as to the critical importance of the First Amendment in American life and law, but it has also adopted their pragmatic method of jurisprudence. The law of freedom of expression is turning away from rigid categorical analysis and toward an open-ended process of balancing, whereby the Court conducts a careful examination comparing the expressive value of speech to the harm that would likely result if the speech were not regulated.

Categorical approaches to constitutional law give the illusion of being a bulwark against governmental overreaching. However, our freedoms are protected not by doctrine, but by the value that our society, and ultimately the courts, accord to these freedoms. In the final analysis, the First Amendment depends upon reasoned decisions that thoughtfully weigh the precious right to freedom of expression against the harms caused by speech: decisions that are based upon reliable and substantial evidence of harm, decisions that place the burden of proof on the government to prove scienter, and the causal link between speech and harm. With greater intrusions upon the freedom of expression, the courts must insist that the government prove higher levels of scienter, more immediate connections between speech and

³⁷³ Compare *Watchtower v. Stratton*, 536 U.S. 150, 178 (2002) (Rehnquist, C.J., dissenting) (In appealing to "common sense" when evaluating the constitutionality of a law regulating door-to-door solicitation, Rehnquist stated: "We have approved of permit requirements for those engaging in protected First Amendment activity because of a common sense recognition that their existence both deters and helps detect wrongdoing."), with *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 459 (2002) (Souter, J., dissenting) (In arguing that the Court should demand empirical data and not simply rely upon "common sense" in determining the efficacy of zoning laws dispersing adult businesses, Souter stated: "reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction.").

³⁷⁴ See *supra* notes 340–46 and accompanying text.

harm, and more serious harms before laws suppressing speech may be upheld.

The law of freedom of expression is framed by two competing principles: the “harm principle” and the “value principle.” The harm principle arises from respect for individual autonomy, and it requires that before speech may be suppressed, the government must prove that the speech causes some harm other than mere societal disapproval of the message. The value principle is drawn from the social purposes of freedom of expression, which are to foster democracy and advance the search for political, religious, scientific, and artistic truth, and it presumes that speech that serves these goals possesses more constitutional value than speech that does not. The standard that is derived from the interaction of the harm principle and the value principle is that the greater the value of the expression that is being restricted, the more proof of harm that the government must adduce in order to justify the restriction.

Proof of harm consists of four elements: (i) the intent of the speaker, (ii) the strength of the causal link between speech and the harm, and (iii) the nature and (iv) degree of the anticipated harm. In recent cases the Court has devoted considerable attention to these elements. Several decisions have turned upon these factors, and the Court is beginning to formalize the procedures for determining each factor to improve the reliability and probativeness of the constitutional evidence before the Court.