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The Invention of Low-Value Speech

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Genevieve Lakier

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THE INVENTION OF LOW-VALUE SPEECH

*Genevieve Lakier**

It is widely accepted that the First Amendment does not apply, or applies only weakly, to what are often referred to as “low-value” categories of speech. It is also widely accepted that the existence of these categories extends back to the ratification of the First Amendment: that the punishment of low-value speech has never, since 1791, been thought to raise any constitutional concern.

This Article challenges this second assumption. It argues that early American courts and legislators did not in fact tie constitutional protection for speech to a categorical judgment of its value, nor did the punishment of low-value speech raise no constitutional concern. Instead, all speech — even low-value speech — was protected against prior restraint, and almost all speech — even high-value speech — was subject to criminal punishment when it appeared to pose a threat to the public order of society, broadly defined. It was only after the New Deal Court embraced the modern, more libertarian conception of freedom of speech that courts employ today that it began to treat high- and low-value speech qualitatively differently. By limiting the protection extended to low-value speech, the New Deal Court attempted to reconcile the democratic values that the new conception of freedom of speech was intended to further with the other values (order, civility, public morality) that the regulation of speech had traditionally advanced. Nevertheless, in doing so, the Court found itself in the difficult position of having to judge the value of speech even though this was something that was in principle anathema to the modern jurisprudence. To resolve this tension, the Court asserted — on the basis of almost no evidence — that the low-value categories had always existed beyond the scope of constitutional concern.

By challenging the accuracy of the historical claims that the Court has used to justify the doctrine of low-value speech, this Article forces a reexamination of the basis for granting or denying speech full First Amendment protection. In so doing, it challenges the Court’s recent claim that the only content-based regulations of speech that are generally permissible under the First Amendment are those that target speech that was historically unprotected. What the history of the doctrine of low-value speech makes clear is that history has never served as the primary basis for determining when First Amendment protections apply. Nor should it today, given the tremendous changes that have taken place over the past two centuries in how courts have understood what it means to guarantee freedom of speech.

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INTRODUCTION

It is widely accepted today that the First Amendment guarantee of freedom of speech does not apply — or applies only weakly — to “low-value” categories of speech such as obscenity and libel. It is also widely accepted today that the existence of these categories extends back to the ratification of the First Amendment: that, since 1791, low-value speech has been considered unworthy of constitutional protection, or at least of the protection afforded “high-value” speech.

This Article challenges this second assumption. It argues that eighteenth- and nineteenth-century courts did not in fact consider low-value speech to be categorically unworthy of constitutional protection. Nor did they treat low-value speech qualitatively differently than they treated other kinds of speech. It was only in the New Deal period that courts began to link constitutional protection to a judgment of the value of different kinds of speech.

The idea that the low-value categories of speech have always existed, and always existed beyond the scope of constitutional concern, is a historical myth or what we might call an “invented tradition.” The term “invented tradition” refers to novel social practices that are justified on the basis of an alleged, but ultimately fictitious, continuity with the past.¹ The historian Eric Hobsbawm, who coined the phrase, noted that the “peculiarity of ‘invented’ traditions is that . . . they are responses to novel situations which take the form of reference to old situations.”²

As this Article shows, the distinction between high- and low-value speech emerged, just as Hobsbawm suggests, in response to a novel situation: namely, the changed judicial climate of the New Deal era and, specifically, the new constraints that the Court’s embrace of a much more libertarian conception of freedom of speech imposed on the government’s ability to enforce basic standards of conduct in public. By identifying certain categories of speech as entirely outside the scope of First Amendment protection, the New Deal Court made it possible for the government to continue to punish speech — at least, certain kinds of speech — not only when it threatened serious violence or disorder, but also when it violated dominant norms of civility, decency, and piety. Nevertheless, in limiting the scope of First Amendment protection in this way, the Court found itself in the difficult position of allowing the government to discriminate against speech on the basis of its content, even though this discrimination was something that the new conception of freedom of speech otherwise disavowed. To resolve

¹ Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 1 (Eric Hobsbawm & Terence Ranger eds., 1992).

² *Id.* at 2.

this tension, the Court insisted that the distinction between high- and low-value speech was a traditional feature of free speech jurisprudence in the United States.

By asserting a historical continuity that did not in fact exist, the New Deal Court attempted, in other words, to justify what was actually a new conception of constitutional boundaries. There is evidence that claims of historical tradition are functioning to the same effect today: that the Roberts Court is using history to justify a shift toward a more absolutist conception of First Amendment boundaries than the twentieth-century Court employed.

In calling into question the historical basis of the doctrine of low-value speech, the Article thus not only contributes to our understanding of the First Amendment's past, but also has important implications for the doctrine's present and future. Specifically, it challenges the merits of the Court's holding in *United States v. Stevens*³ that historical evidence of a "long-settled tradition of subjecting that speech to regulation" is required to establish the existence of a novel category of low-value speech.⁴ The *Stevens* Court argued that, by requiring evidence of this sort to identify novel categories of low-value speech, it ensured fidelity to an original understanding of freedom of speech and prevented judges from denying protection to speech merely because they disliked it. What the history detailed in this Article makes clear, however, is that the *Stevens* test accomplishes neither of these goals. What it does do is impose a very steep bar on the government's ability to regulate speech in new ways even when the regulation furthers important ends and does not impede any of the goals traditionally associated with the First Amendment. These problems with the *Stevens* test suggest that the Court should instead recognize the purpose-driven and functionalist, rather than historical, nature of the distinction between high- and low-value speech.

The Article proceeds in four parts. Part I examines the historical and methodological claims the Court has used to justify the doctrine of low-value speech.

Part II explores the eighteenth- and nineteenth-century case law dealing with questions of freedom of speech. It argues that eighteenth- and nineteenth-century courts employed what we might call a broad but shallow conception of freedom of speech and press. That is, they recognized that even indecent or obscene speech was covered by the constitutional guarantees of speech or press freedom insofar as it could not be restrained in advance. But they did not hesitate to impose criminal punishment — and in some cases, civil liability — on these as

³ 130 S. Ct. 1577 (2010).

⁴ *Id.* at 1585.

well as many other kinds of speech when they appeared to pose a threat to the public order, understood in moral, social, and political terms. In this respect, there was little qualitative difference in how courts treated what later would be recognized as high- and low-value speech.

Part III examines why the New Deal Court turned to history to justify what was in fact the novel distinction it drew between high- and low-value speech.

Part IV examines the contemporary fate of the doctrine of low-value speech. It argues that, in *Stevens* and subsequent cases, the Court has essentially invented the tradition of low-value speech by insisting — as earlier cases did not — that the *only* content-based regulations that do not infringe freedom of speech are those that target categories of speech that were subject to criminal sanctions in the eighteenth and nineteenth centuries. In so doing, the Court has transformed the distinction between high- and low-value speech from a mechanism for limiting constitutional protection for speech into a mechanism for expanding it. Indeed, if taken seriously, the *Stevens* rule could be used to challenge a wide array of existing speech regulations — regulations whose constitutionality up until now had not been in serious doubt.

Because the *Stevens* rule does not in fact reflect longstanding historical practice, this Part argues, the Court's recent reinvention of the doctrine is both unjustified and undesirable. In fact, it threatens to create a test of low-value status that both overprotects and underprotects constitutionally valuable speech. The significant problems with the *Stevens* test demonstrate the difficulties created by the Court's efforts to link the contemporary boundaries of the First Amendment to the past. These problems suggest that First Amendment doctrine would be better served by a purpose-based test of constitutional boundaries. History can help elucidate what those purposes are. Nevertheless, given the tremendous changes that have taken place in how courts understand the means by which those purposes are to be realized, history does not provide a principled basis for determining the scope of constitutional protection today — or at least, it cannot do so without entailing a massive, and unappealing, reorganization of the First Amendment boundaries as they currently exist.

I. THE PROBLEM OF LOW-VALUE SPEECH

Much of modern First Amendment jurisprudence is organized around a two-tier structure that in practice has devolved into more than two tiers. At least when it comes to the review of content-based

regulations of speech, the degree of constitutional scrutiny afforded the regulation will primarily depend on whether the speech it targets is found to be of high or low value.⁵ Content-based regulations of high-value speech are considered presumptively invalid.⁶ As a result, they will survive constitutional scrutiny only if they can be shown to be narrowly tailored to a compelling governmental purpose. Regulations that target low-value speech, in contrast, must satisfy a much less demanding standard of review.

The Court has vacillated on precisely how much constitutional scrutiny the content-based regulation of low-value speech should receive. Initially, it suggested that low-value speech was entitled to no constitutional protection whatsoever.⁷ It has subsequently held that certain categories of low-value speech, such as commercial advertising, are entitled to an intermediate level of constitutional review.⁸ Other low-value categories, such as obscenity, continue to receive in theory no constitutional protection whatsoever, even if a great deal of constitutional labor may be expended determining whether a particular regulation targets obscene speech, or instead merely pornographic or sexually explicit speech.⁹ In general, however, what unites the low-value categories is the fact that they can be regulated on the basis of their content without having to satisfy strict scrutiny.

By creating (at least) two tiers of constitutional scrutiny for regulations that target or in some way limit what is recognized to be speech, the Court has attempted to reconcile the constitutional promise of expressive freedom with the practical need for governmental regulation. Indeed, absent the distinction between high- and low-value speech, it would be much more difficult for the government to justify its regulation of the commercial marketplace,¹⁰ its ability to impose criminal sanctions on speech that facilitates or is otherwise closely connected to

⁵ Although other factors can affect the level of constitutional scrutiny, these factors (such as whether the speech takes place in a school or a prison, or targets a captive audience) only apply in certain circumstances. Nor do they obviate the need to first determine the high- or low-value status of the regulated speech. For purposes of this Article, I thus ignore the complexities these non-subject-matter distinctions create.

⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992).

⁷ *Roth v. United States*, 354 U.S. 476, 483 (1957) (concluding that obscenity is “outside the protection intended for speech and press”); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (concluding that libel is not “within the area of constitutionally protected speech”).

⁸ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564–66 (1980).

⁹ Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 724 (1978) (“Once it is demonstrated that a book or film fits within the definition of obscenity . . . the prosecution’s task is complete; there need be no showing of any ‘clear and present danger’ or imminent lawless activity.”).

¹⁰ See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 25 (2000) (noting that, as a consequence of the lesser First Amendment value of commercial speech, the government may compel commercial speakers to disclose information, and the overbreadth doctrine and the prior restraint doctrine may be suspended).

criminal behavior,¹¹ or its efforts to maintain basic standards of public conduct by prohibiting (for example) threatening and defamatory speech.¹² The distinction between high- and low-value speech thus provides an important mechanism by which courts ensure the workability of the First Amendment by cabining, but only in limited circumstances, the libertarian breadth of its command.

This cabining is not unproblematic, however, insofar as it violates a central principle of the modern First Amendment: namely, the principle of content neutrality. Content neutrality is the idea that, as Justice Marshall famously put it in *Police Department of Chicago v. Mosley*,¹³ “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.”¹⁴ The principle is motivated by the belief that allowing the government to restrict speech on the basis of its content threatens both democracy (by allowing the government to repress the speech of those groups it dislikes or who criticize it) and social progress (by allowing the government to remove ideas from competition in the public marketplace).¹⁵ It also, of course, inhibits individual self-expression by telling citizens what they can and cannot say.¹⁶

By granting less or no protection to low-value speech, the doctrine of low-value speech allows the government to do what it is not supposed to be able to do: that is, to remove ideas it dislikes from public circulation in the marketplace and potentially (though less easily) repress the speech of those who criticize it.¹⁷ The doctrine also, of

¹¹ See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (recognizing that constitutional protection does not extend to “speech or writing used as an integral part of conduct in violation of a valid criminal statute”); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1283 (2005) (noting the extent to which courts rely upon *Giboney* to justify the sanctioning of crime-facilitating speech).

¹² See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (noting that the First Amendment “permits a State to ban a ‘true threat’” to “protect[] individuals from the fear of violence” and “from the disruption that fear engenders” (internal citations omitted)); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) (holding that “the States . . . retain substantial latitude [under the First Amendment] in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual”).

¹³ 408 U.S. 92 (1972).

¹⁴ *Id.* at 95.

¹⁵ See *id.* at 98–99.

¹⁶ Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 n.32 (1983).

¹⁷ In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court made clear that the government could not use low-value speech to enact viewpoint discrimination: that is, it could not use the low-value exceptions to target particular speakers or viewpoints when the targeting of those viewpoints was not the justification for the low-value category as a whole. See *id.* at 384 (“Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain

course, allows the government to absolutely prohibit its citizens from expressing themselves in certain ways.

For this reason, the doctrine has been a persistent source of controversy. Indeed, a number of the most prominent First Amendment theorists of the twentieth century have argued quite strenuously that the distinction between high- and low-value speech, as Professor Thomas Emerson put it, “inject[s] the Court into value judgments concerned with the content of expression, a role foreclosed to it by the basic theory of the First Amendment.”¹⁸ Instead, these theorists argue, the same degree of constitutional protection should apply to all speech.¹⁹

The Court has not agreed — although it has in some cases defined the low-value categories of speech extremely narrowly, thereby limiting the range of cases in which the distinction between high- and low-value speech makes a meaningful difference.²⁰ It has instead attempted to mitigate the conflict between the principle of content neutrality and the doctrine of low-value speech by emphasizing the historical origins of the categories of low-value speech.

The Court’s emphasis on the historical origins of the low-value categories can be traced back to *Chaplinsky v. New Hampshire*,²¹ the 1942 decision in which the Court first explicitly identified the existence of low-value categories of speech. The case involved a First Amendment challenge to the conviction of a Jehovah’s Witness who was prosecuted for using “offensive, derisive, or annoying word[s]” in public after he accused a city marshal of being a “God damned racketeer”²² and “a damned Fascist.”²³ The Court affirmed the conviction without inquiring whether it satisfied the “clear and present danger” test it had recently begun to apply in other cases involving the criminal prosecution of speech because it found that the defendant’s lan-

criticism of the city government or, indeed, that do not include endorsement of the city government.”). This lessens the possibility that the doctrine enacts forbidden repression although it does not entirely eliminate it. For more discussion, see *infra* notes 277–278 and accompanying text.

¹⁸ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 326 (1970) (discussing the classification of “fighting words” as low-value speech). Professor Kenneth Karst argued similarly that the doctrine was “inconsistent with the principle of equal liberty of expression” that underpinned the First Amendment presumption against “governmental control of the content of speech.” Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 31 (1975); see also Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 19 (noting that the “fundamental difficulty of the two-level theory [of low-value speech]” is that it requires courts to “weigh[] the social utility of speech” and this was something “[t]he First Amendment . . . was designed to preclude” (internal quotation mark omitted in final quote)). See generally Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989).

¹⁹ See, e.g., Alexander, *supra* note 18, at 554; Karst, *supra* note 18, at 31.

²⁰ For a discussion of how the Court has narrowed the scope of the low-value categories of obscenity, libel, profanity, and fighting words, see *infra* notes 188–200 and accompanying text.

²¹ 315 U.S. 568 (1942).

²² *Id.* at 569 (internal quotation mark omitted).

²³ *Id.* (internal quotation mark omitted).

guage constituted “‘fighting’ words”; these were one of the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”²⁴ The Court went on to explain that the reason that the prosecution of fighting words, and other kinds of low-value speech, such as “the lewd and obscene, the profane, [and] the libelous” raised no constitutional problem was because speech of this sort formed “no essential part of any exposition of ideas,” and possessed “such slight social value as a step to truth that any benefit that may be derived from [its expression was] clearly outweighed by the social interest in order and morality.”²⁵ In other words, the opinion suggests a functionalist distinction between high- and low-value speech. The text nevertheless implies that what ultimately distinguishes the low-value categories is the historical fact that their content-based regulation had never been thought to raise constitutional concern.²⁶

Subsequent decisions emphasized even further the historical origins of the low-value categories. In *Beauharnais v. Illinois*,²⁷ for example, the Court held explicitly what the *Chaplinsky* Court only suggested in dicta: namely, that libel was “not . . . within the area of constitutionally protected speech.”²⁸ It justified this conclusion by pointing to the historical evidence that “[l]ibel of an individual was a common-law crime, and thus criminal in the colonies”²⁹ and that, in the aftermath of the Revolution, “nowhere was there any suggestion that the crime of libel be abolished.”³⁰ Five years later, in *Roth v. United States*,³¹ the Court similarly concluded that obscenity “was outside the protection intended for speech and press”³² because at the time of the adoption of the First Amendment it was prohibited in at least some states, and subsequently recognized as a crime in many others.³³

Although in the 1970s and 1980s, historical arguments played a very small role in the low-value speech cases, in recent years, the Court has emphasized once again the historical provenance of the categories. Specifically, in *Stevens* in 2010, the Court held that the only content-based regulations of speech that are not presumptively invalid under the First Amendment are those that target speech that either

²⁴ *Id.* at 571–72.

²⁵ *Id.* at 572.

²⁶ *Id.* (noting that the “prevention and punishment” of these categories “have never been thought to raise any Constitutional problem”).

²⁷ 343 U.S. 250 (1952).

²⁸ *Id.* at 266.

²⁹ *Id.* at 254.

³⁰ *Id.* at 254–55.

³¹ 354 U.S. 476 (1957).

³² *Id.* at 483.

³³ *Id.* at 482–83.

falls into a “previously recognized, long-established category of unprotected speech” or constitutes a “categor[y] of speech that ha[s] been historically unprotected, but ha[s] not yet been specifically identified or discussed as such in [the] case law.”³⁴ In holding as much, the Court acknowledged the possibility that new categories of low-value speech might be added to the list of what it described as the “historic and traditional categories [of low-value exception] long familiar to the bar.”³⁵ Nevertheless, it insisted that in all cases these novel categories be identified on the basis of historical evidence. Specifically, what it required to establish the existence of a historically unprotected but heretofore unrecognized category of low-value speech was evidence of a “long-settled tradition of subjecting that speech to regulation.”³⁶ The next year, the Court clarified that what was required was “persuasive evidence . . . of a long (if heretofore unrecognized) tradition of proscription.”³⁷

By emphasizing — and in *Stevens*, insisting on — the historical basis of the low-value categories, the Court has attempted to depict the distinction between high- and low-value speech as the product of something other than the perhaps idiosyncratic value judgments and preferences of its individual members. What it instead reflects, *Roth*, *Beauharnais*, and *Stevens* suggest, is a well-established consensus about what kinds of speech are — and more to the point, are not — included in the “speech” and “press” whose freedom is protected against abridgment by the First Amendment. Construed as such, the distinction between high- and low-value speech appears much less threatening to the basic neutrality of First Amendment law than might otherwise be the case because it offers judges little opportunity to read their own preferences and ideological commitments into the Constitution. Instead, history constrains judicial discretion, and in so doing, helps ensure that judges maintain fidelity to the original meaning of freedom of speech.

At least this is what the Court argued in *Stevens* to justify its conclusion that the only content-based regulations of speech that do not trigger a presumption of invalidity are those that target historically unprotected speech. The case involved a dispute over the constitutionality of a federal statute that criminalized the creation, sale, and possession of visual or auditory images of animal cruelty when the conduct depicted in those images occurred in violation of federal or

³⁴ 130 S. Ct. 1577, 1586 (2010).

³⁵ *Id.* at 1584 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment)) (internal quotation marks omitted).

³⁶ *Id.* at 1585.

³⁷ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011).

state law.³⁸ The government argued that the statute was constitutional because the speech it regulated was entitled to little or no First Amendment protection when evaluated according to what it called the “*Chaplinsky* balancing test.”³⁹ This test, the government claimed, required courts to balance “the expressive value of the speech with its societal costs.”⁴⁰ Because depictions of cruelty to animals formed “no essential part of any exposition of ideas” and incurred significant social costs, the government argued that its prohibition did not violate the First Amendment.⁴¹ The *Stevens* majority adamantly rejected this argument, and the interpretation of the *Chaplinsky* doctrine that supported it, as anathema to fundamental constitutional principles. As Chief Justice Roberts put it in his majority opinion:

The Government contends that “historical evidence” about the reach of the First Amendment is “not a necessary prerequisite for regulation today,” and that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation. . . . The Government thus proposes that . . . “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.⁴²

Balancing provides an illegitimate mechanism for determining when the ordinary First Amendment rules apply, this passage suggests, because it allows judges to impose their own values onto the Constitution. Implicit in the passage is the suggestion that the historical test the Court instead insisted on poses no such threat to the basic neutrality of the First Amendment because it forces judges to comply with original and fixed understandings of what speech is and is not entitled to constitutional protection. As Professor William Araiza notes of the argument: “Because th[e] historical method [that *Stevens* calls for] implies not a *creation* of new categories but a *discovery* of categories that have always existed, it is presumably impervious to context-based

³⁸ *Stevens*, 130 S. Ct. at 1582 (citing 18 U.S.C. § 48 (2012)).

³⁹ Brief for the United States at 12, *Stevens*, 130 S. Ct. 1577 (No. 08-769).

⁴⁰ *Id.*

⁴¹ *Id.* at 21 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (internal quotation marks omitted).

⁴² *Stevens*, 130 S. Ct. at 1585 (internal citations omitted).

analysis or the perceived needs of the moment, at least to the extent a court employs it conscientiously”⁴³

History can only constrain judicial discretion in this way, however, if there are in fact categories of low-value speech that “have always existed” or if the historical record is, at the very least, sufficiently clear and consistent in its treatment of different kinds of speech to bind judges when their intuitions or preferences would lead them another way. It is perhaps because the Court recognizes the threat that a murky and inconsistent record poses to the theoretical justification for the doctrine of low-value speech that it has consistently emphasized the well-defined and narrowly limited nature of the low-value categories.

There is little historical evidence, however, to back up the Court’s claim that the categories of low-value speech we recognize as such today constituted, in the eighteenth and nineteenth centuries, well-defined and narrowly limited exceptions to the ordinary constitutional rules. Nor is there evidence to suggest, as the *Stevens* Court implied, that the contemporary distinction between high- and low-value speech maps onto an earlier, let alone original, understanding of what counted as speech or press for constitutional purposes.

First Amendment scholars have not paid a great deal of attention to the pre-twentieth-century case law dealing with freedom of speech and press, perhaps on the mistaken assumption that there are too few cases from this period to tell us much.⁴⁴ Indeed, if one sticks merely to cases dealing with the First Amendment, the eighteenth- and nineteenth-century case law on questions of speech and press freedom is slim. There is little reason to limit the historical inquiry in this way, however, given the widely shared assumption in the eighteenth and nineteenth centuries that the First Amendment did not create new rights but merely declared — in order to better protect — rights that existed prior to its ratification and that were guaranteed also by the speech and press clauses provided for in all the state constitutions.⁴⁵

⁴³ William D. Araiza, *Citizens United, Stevens, and Humanitarian Law Project: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 829–30 (2011).

⁴⁴ See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 911 n.15 (1993) (noting the paucity of scholarship exploring “the idea of freedom of speech and press in the nineteenth century”); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1700 (1991) (critiquing the tendency of the “orthodox academic history [of the First Amendment to] begin[] with the censorship of the World War I seditious libel cases” and citing examples). Notable exceptions to this general trend include the works of Professors David Rabban, Norman Rosenberg, and John Wertheimer. See generally DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997); NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN* (1986); John W. Wertheimer, *Free-Speech Fights: The Roots of Modern Free-Expression Litigation in the United States* (Jan. 1992) (unpublished Ph.D. dissertation, Princeton University) (on file with the Harvard Law School Library). What follows builds on the contributions of these scholars.

⁴⁵ As the Louisiana Supreme Court put it in 1882:

The dozens upon dozens of state cases that engaged questions of freedom of speech and press thus provide a helpful guide to what courts generally understood the freedom of speech and press guaranteed by *both* the state and federal constitutions to mean. For this reason, the Court itself has frequently turned to these cases to decipher the meaning of the First Amendment guarantees of speech and press freedom.⁴⁶

The next Part examines the state, as well as federal, case law from the eighteenth and nineteenth centuries dealing with questions of freedom of speech and press.⁴⁷ What these cases demonstrate is that early American courts did not in fact recognize the existence of a delimited set of well-defined and narrowly limited categories to which the consti-

The Constitution of the State of Louisiana contains a Bill of Rights. Such Bills are modelled upon the famous English Bill of Rights, and, in the language thereof, are intended as public declarations of the "true, ancient and indubitable rights of the people." They are declaratory of the general principles of republican government, and of the fundamental rights of the citizen, rights usually of so fundamental a character, that, while such express declarations may serve to guard and protect them, they are not essential to the creation of such rights, which exist independent of constitutional provisions.

In our Bill of Rights, side by side with the rights of bearing arms, of religious freedom, of free speech, of assembly and petition, of habeas corpus, is found the declaration that "no law shall be passed abridging the freedom of the press."

A similar provision has existed in every Constitution of this State, exists in the Constitution of the United States and that of every State of this Union. It is a principle of English and American government, and whatever variety may be found in the forms of expression used in different instruments, they all signify the same thing, and convey the general idea which is crystallized in the common phrase, "liberty of the press." This is what the Constitution intends to recognize and to guarantee, and in order to ascertain what meaning and effect to give to the Constitution, we have only to inquire what is meant by "liberty of the press."

State *ex rel.* Liversey v. Judge of Civil Dist. Court, 34 La. Ann. 741, 743 (1882); see also THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 416-17 (1868) (asserting that the state and federal constitutional guarantees of free expression "do not create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed" and that, as a result, we must look to the common law "in order that we may ascertain what the rights are which are thus protected, and what is the extent of the privileges they assure"); Hamburger, *supra* note 44, at 913 ("Late eighteenth-century Americans typically assumed that natural rights, including the freedom of speech and press, were subject to natural law . . ."); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1133-35, 1161-67 (1987) (noting that the rights provisions in both the state and federal constitutions were understood in the eighteenth century as declaratory of inherent and natural rights that preexisted their enactment).

⁴⁶ See, e.g., Roth v. United States, 354 U.S. 476, 482 nn.11-13 (1957); Beauharnais v. Illinois, 343 U.S. 250, 254 nn.1-3, 255 n.5 (1952); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 719 n.11 (1931).

⁴⁷ Because in the contemporary period the guarantee of freedom of press has been subsumed within the guarantee of freedom of speech, I do not distinguish in my analysis of the eighteenth- and nineteenth-century case law decisions dealing with freedom of press specifically and those dealing with freedom of speech. Both elucidate the traditional understanding of what today we think of as freedom of speech. See Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028 (2011) ("The Supreme Court occasionally offers up rhetoric on the value of the free press, but it steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause." (footnotes omitted)).

tutional guarantees of press and speech freedom did not apply. Instead, they applied the same constitutional principles to both what we today would consider to be high-value speech and speech we would consider to be low value. What the eighteenth- and nineteenth-century cases make clear is that, rather than a product of longstanding jurisprudential tradition, the distinction between high- and low-value speech is instead a product of far more recent changes in First Amendment law.

II. FREEDOM OF SPEECH PRIOR TO THE NEW DEAL

To contemporary eyes, one of the most remarkable features of the eighteenth- and nineteenth-century free speech case law is its almost complete inattention to what would emerge in the twentieth century as one of the most pressing and controversial of First Amendment questions: namely, to what kinds of expressions do the guarantees of speech and press freedom apply? Indeed, in only one of the dozens upon dozens of reported cases in which eighteenth- and nineteenth-century courts engaged directly with free speech or press claims did a court conclude that a particular kind of expression was *not* covered by the constitutional guarantees of freedom of speech and of press.⁴⁸ For the most part, eighteenth- and nineteenth-century courts either assumed that the constitutional guarantees applied, or ignored the issue altogether.

Courts did little to delimit the boundaries of the constitutional categories of speech and press because they did not need to. For much of this period, it was widely assumed that the state and federal constitutional guarantees of expressive freedom provided to speakers almost-absolute protection against the prior restraint of speech or writing but only limited protection against after-the-fact punishment for what they uttered or wrote. The freedom that the First Amendment and state provisions guaranteed, in other words, was freedom of expression — but not freedom from responsibility for the ill effects of what one expressed. As Justice Story put it in his influential 1833 treatise on the federal constitution:

⁴⁸ See, e.g., *State v. Blair*, 60 N.W. 486 (Iowa 1894) (holding that a law that prohibited “itinerant vender[s]” from publicly advertising their ability to treat diseases did not violate the state constitutional guarantees of speech and press freedom on the grounds that the “prohibitive features of the act do not go to the rights intended to be secured by the constitutional provision[s],” *id.* at 486). In one other nineteenth-century case, a court held that a particular kind of expression was within the scope of the constitutional guarantee of freedom of speech and press. See *Dailey v. Superior Court*, 44 P. 458 (Cal. 1896) (concluding that “[t]he production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author” and is therefore protected by the free speech and press provision of the California Constitution, *id.* at 459).

[T]he language of [the first] amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government. . . .

. . . .
 . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But, if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.⁴⁹

Justice Story's acceptance of the constitutionality of punishing speech that was "improper, mischievous, or illegal" did not mean — as critics of the eighteenth- and nineteenth-century view would later argue — that he and other jurists believed that government could restrain speech post-publication or post-utterance in whatever way it pleased.⁵⁰ Although this view of the freedom of speech and press had been propagated by some supporters of the Sedition Act of 1798,⁵¹ by the early nineteenth century it had largely been renounced. Justice Story himself made clear that limits existed on what speech government could punish, even after publication. He noted, for example, that government could not, concordant with the First Amendment guarantee of freedom of press, impose criminal penalties on the publication of true statements made "with good motives and for justifiable ends."⁵² Even William Blackstone, the figure primarily associated with the view that the guarantee of press freedom operated exclusively as a bar on prior restraints, agreed that government could only criminally pun-

⁴⁹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874, at 732, §1878, at 736 (1833) (footnotes omitted).

⁵⁰ Professor Zechariah Chafee, most prominently, argued that a number of early nineteenth-century courts adopted the view that, under the First Amendment, "government cannot interfere by a censorship or injunction *before* the words are spoken or printed, but can punish them as much as it pleases *after* publication, no matter how harmless or essential to the public welfare the discussion may be." Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 938 (1919).

⁵¹ For example, Congressman Harrison Gray Otis argued in 1798 that the Sedition Act was constitutional because the "liberty of the press [guaranteed by the First Amendment] is merely an exemption from all previous restraints." 8 ANNALS OF CONG. 2148 (1798). Most supporters of the Act defended its constitutionality on other grounds, however. See GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 44 (2004) ("The Sedition Act provided that malicious intent was an essential element of the crime, that truth was a defense, and that the jury should decide whether the speech had a seditious effect. Federalists could therefore boast that the 1798 act had eliminated those aspects of the English common law that had been particularly controversial in the seventeenth and eighteenth centuries.").

⁵² STORY, *supra* note 49, § 1874, at 733.

ish speech when it constituted what he called a “public vice” — that is, when it posed a public threat of some kind to civil society.⁵³

The constitutional guarantees of speech and press freedom thus did impose constraints on the after-the-fact punishment of expression. Nevertheless these constraints were far weaker than they would later be. As a result, expression could be criminally sanctioned whenever it posed even a relatively attenuated threat to public peace and order. In practice, what this meant was that little depended on whether a given mode of expression was recognized as speech or press for constitutional purposes, other than the constitutionality of the expression’s prior restraint.

Perhaps for this reason, eighteenth- and nineteenth-century courts tended to employ a relatively expansive conception of the constitutional categories of speech and press. Even when litigants raised novel constitutional claims — when, for example, in the late nineteenth century, unions began to challenge state laws that restricted labor picketing on free speech grounds⁵⁴ — courts spent very little energy exploring whether picketing constituted speech for constitutional purposes. Most courts simply assumed that it did. Many nevertheless found that the activity could be prohibited — and even enjoined in some cases — because it was coercive or violent.⁵⁵

⁵³ Moral transgressions that impacted only the individual himself, Blackstone argued — what he called “private vices” — were not within the power of the secular state to punish. 4 WILLIAM BLACKSTONE, COMMENTARIES *41 (“[H]uman laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society . . . and, of consequence, private vices . . . cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes.”). Hence, the “vice of lying, which consists (abstractedly taken) in a criminal violation of truth” could not be subject to criminal punishment unless and until it caused “some public inconvenience, [such] as spreading false news; or some social injury, [such] as slander and malicious prosecution.” *Id.* at *42.

⁵⁴ See Wertheimer, *supra* note 44, at 61–62.

⁵⁵ See, e.g., *Local Union No. 313, Hotel & Rest. Employés’ Int’l Alliance v. Stathakis*, 205 S.W. 450, 452 (Ark. 1918) (“Early cases upholding the right of picketing likened that action to the exercise of the right of free speech. . . . The existence of this right is still generally conceded, and we think such right exists. . . . But as the cases continued to come before the courts and the law on the subject to be molded, it became more and more apparent that picketing was practiced and resorted to, not alone for purposes of publicity and persuasion, but for coercion and intimidation as well; so that, while the tendency of the earlier cases was to uphold picketing as an exercise of the right of free speech, the tendency of later cases is to restrict that right as an act of coercion in its tendencies, and one which in its practical application tends generally to breaches of the peace and other disorders.”). Although some courts did, as *Stathakis* makes clear, construe picketing as inherently coercive, other courts required evidence that the picketing would lead to violence in order to conclude that its prior restraint was constitutional. See, e.g., *Richter Bros. v. Journeymen Tailors’ Union*, 24 Ohio Dec. 45 (Ct. Com. Pl. 1890) (refusing to enjoin a strike absent any evidence of likely harm to property and noting the general American rule that equity will not allow the injunction of libels except when harm to property interests is at stake); see also Joseph

Eighteenth- and nineteenth-century courts also tended to treat acts of symbolic expression as the functional equivalent of acts of linguistic expression. As a result, courts extended to “[p]aintings, liberty poles, and other [kinds of] symbolic expression . . . no less and no more protect[ion] than spoken and printed words.”⁵⁶ For this reason, a number of state supreme courts in the late nineteenth century struck down, as unconstitutional prior restraints, the permit regulations that municipalities began to impose on parades and processions of all kinds.⁵⁷

A. Low-Value Speech

Courts also extended protection, at least against prior restraint, to many of the categories of what would later be recognized as low-value expression.

1. *Commercial Advertising.* — Consider for example the case of commercial advertising. Advertising has been considered a category of low-value speech since the Court rather summarily held, in *Valentine v. Chrestensen*⁵⁸ in 1942, that the Constitution’s protections did not apply to this kind of speech.⁵⁹ *Valentine* was not, however, the first advertising free speech case to come across the Court’s docket. In the late nineteenth century, the Court decided two such cases.⁶⁰ In both cases, litigants challenged the constitutionality of federal statutes that prohibited the circulation in the mail of lottery advertisements and circulars on the grounds that these statutes violated the freedom of press guaranteed by the First Amendment. In neither case did the Court find the constitutional guarantee inapplicable. It instead found the federal statutes to be reconcilable with the guarantee of freedom of press because they allowed the circulation of lottery advertisements and circulars through means other than the mail.⁶¹ The Court thus

Tanenhaus, *Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing*, 14 U. PITT. L. REV. 397, 398–402 (1953).

⁵⁶ Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1059–60 (2009). Liberty poles were, as Professor Eugene Volokh explains, “tall poles that were crowned with flags or ‘liberty caps.’ They originated before the Revolution as symbols of hostility to the assertedly oppressive English government, but by the 1790s, they had become symbols of hostility to asserted oppression by the federal government.” *Id.* at 1072.

⁵⁷ See *City of Chi. v. Trotter*, 26 N.E. 359 (Ill. 1891); *Anderson v. City of Wellington*, 19 P. 719 (Kan. 1888); *In re Frazee*, 30 N.W. 72 (Mich. 1886); *In re Garrabad*, 54 N.W. 1104 (Wis. 1893). *But see* *Commonwealth v. Abrahams*, 30 N.E. 79 (Mass. 1892).

⁵⁸ 316 U.S. 52 (1942).

⁵⁹ *Id.* at 54. In later decisions, the Court recognized that commercial advertising was entitled to at least some degree of constitutional protection, and in recent years, has extended increasingly more protection to such speech. Nevertheless, advertising remains a category of low-value speech insofar as its content-based regulation does not trigger strict scrutiny. See *infra* notes 203–204 and accompanying text.

⁶⁰ *In re Rapier*, 143 U.S. 110 (1892); *Ex parte Jackson*, 96 U.S. 727 (1877).

⁶¹ See, e.g., *Jackson*, 96 U.S. at 736; see also *Rapier*, 143 U.S. at 134 (“We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are

upheld the regulation, but noted that Congress had no power to prohibit more broadly the transportation of the prohibited materials because “[l]iberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.”⁶²

The Court interpreted the First Amendment, in other words, to impose a significant but by no means insuperable limit on the federal government’s power to restrain the circulation of printed material, including commercial advertisements — even commercial advertisements that the Court clearly recognized as “injurious to the public morals.”⁶³ This interpretation was entirely in keeping with the weak nineteenth-century view of press and speech freedom generally. Certainly, at no point in the opinion did the Court suggest that the principles of freedom of speech or press applied differently to advertisers than to others, such as newspaper publishers, who disseminated printed material to the public at large.

The Court’s failure to distinguish between the free press rights of newspaper publishers and commercial advertisers suggests, as Professor Stuart Banner and Judge Alex Kozinski note, that “the *Jackson* Court implicitly considered advertising (or at least printed circulars advertising lotteries) to be speech entitled to the same degree of First Amendment protection as any other.”⁶⁴ Or at least, it suggests how little rode on the distinction between regulations targeted at commercial advertising and regulations targeted at other kinds of speech, given the Court’s general conclusion that Congress possessed the power to prohibit any printed materials it wished from the mails, just so long as it allowed their circulation via other means.

Nor was the Supreme Court the only court to subject the regulation of advertising to First Amendment scrutiny. In the early twentieth century, at least two lower courts treated advertising in much the same way. That is, they denied the free speech or press claims of the advertisers, but did not deny that the constitutional principle of freedom of press applied.⁶⁵

we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people.”)

⁶² *Jackson*, 96 U.S. at 733.

⁶³ *Id.* at 736.

⁶⁴ Alex Kozinski & Stuart Banner, Response, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 765 (1993).

⁶⁵ See *Buxbom v. City of Riverside*, 29 F. Supp. 3, 4–6 (S.D. Cal. 1939) (applying, without inquiry, the state guarantee of free speech to advertising materials but upholding a municipal ordinance that prohibited their distribution to private residences without the owners’ agreement on the grounds that the ordinance left adequate alternative means of communication); *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 73–81 (Ga. 1905) (balancing the right to privacy against the

2. *Libel*. — Advertising was not the only kind of low-value speech to which eighteenth- and nineteenth-century courts applied some degree of constitutional scrutiny. In fact, constitutional concerns constrained to varying degrees the prosecution and punishment of all four of the kinds of speech identified as low value by the *Chaplinsky* Court. These concerns were clearest in the case of libel. Indeed, the prosecution of libel — far from raising no constitutional problem, as the *Chaplinsky* Court asserted — was in many respects at the center of debates about the meaning of freedom of the press in the eighteenth and nineteenth centuries.

Both prior to and after the Revolution, arguments raged among courts, lawyers, and publishers about the extent to which the traditional common law rule that truth was no defense to criminal libel was compatible with the constitutional principle of freedom of the press.⁶⁶ Important revolutionary figures, such as Alexander Hamilton, argued that, in order to safeguard press freedom, true statements, at least those published with good motives, should not be considered criminally libelous.⁶⁷ Others disagreed, arguing that true statements were just as likely as false ones to cause mischief and disorder.⁶⁸

The Hamiltonian side ultimately won. By the early nineteenth century, most states had altered the common law rules to allow truth as a defense to accusations of libel, although most also required, as Hamilton urged, a showing that the true libel had been published with good motives.⁶⁹ In some states, the defense was available only to “papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information.”⁷⁰ However, in many states, the privilege extended to defendants in ordi-

right of free press in a case involving a newspaper advertisement, and affirming the plaintiff’s claim of invasion of privacy after his image was used without his permission in an insurance ad).

⁶⁶ The classic articulation of the common law rule was provided by William Blackstone in his *Commentaries on the Laws of England*. BLACKSTONE, *supra* note 53, at *150–51. As Blackstone makes clear, what motivated the rule was the belief that the purpose of criminal libel law was to prevent the breaches of the peace that would otherwise occur when those defamed took it upon themselves to exact revenge for the injury. *Id.* at *150. (“[I]n a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law.”). Understood as such, there was no reason for the law to prosecute only untrue libels, given that both appeared equally likely to stir up animosity that might result in violence.

⁶⁷ See ROSENBERG, *supra* note 44, at 110–14.

⁶⁸ In 1811, for example, the South Carolina Supreme Court rejected the argument that truth should be allowed as a defense in cases of criminal libel on the grounds that doing so would only encourage strife. Relaxation of the old rule, the Court argued, would allow libelers to expose “the secret infirmities of their neighbors” or “imprudencies, long since committed and repented.” *State v. Lehre*, 4 S.C.L. (2 Brev.) 446, 448 (S.C. 1811), *quoted in* ROSENBERG, *supra* note 44, at 108.

⁶⁹ ROSENBERG, *supra* note 44, at 117.

⁷⁰ PENN. CONST. of 1790, art. IX, § 7; *accord* ILL. CONST. of 1818, art. VIII, § 23; TENN. CONST. of 1796, art. XI, § 19.

nary libel suits as well.⁷¹ In both cases, the rule was motivated by the belief that imposing criminal liability on true speech threatened the expressive freedom that the American Revolution, and the state and federal constitutions enacted in its wake, were intended to protect. As Justice James Kent of the New York Supreme Court of Judicature argued in 1804, to justify his adoption of the Hamiltonian “truth-plus” standard for criminal libel:

The first American congress, in 1774, in one of their public addresses, enumerated five invaluable rights, without which a people cannot be free and happy One of these rights was the *freedom of the press* [T]he Convention of the people of this state, which met in 1788 . . . declared unanimously, that the freedom of the press was a right which could not be abridged or violated. The same opinion is contained in the amendment to the constitution of the United States, and to which this state was a party. . . .

These multiplied acts and declarations are the highest, the most solemn, and commanding authorities, that the state or the nation can produce. . . . And it seems impossible that they could have spoken with so much explicitness and energy, if they had intended nothing more than that restricted and slavish press, which may not publish anything, true or false, that reflects on the character and administration of public men.⁷²

Although Justice Kent was not able to sway the majority of justices on the court to his position, his opinion ultimately persuaded the New York legislature to amend the state constitution to specifically allow parties charged with libel to introduce the Hamiltonian truth-plus defense.⁷³ Similar motivations led courts in other states to adopt a similar rule, even absent an explicit constitutional provision authorizing them to do so.⁷⁴

Nor was the truth-plus defense the only way in which the prosecution of libel in the eighteenth and nineteenth centuries was constrained by constitutional principles. Courts also refused to enjoin allegedly libelous speech on the grounds that doing so constituted a prior restraint on expression. The only exception to this rule was when the party

⁷¹ See, e.g., CAL. CONST. of 1849, art. I, § 9; CONN. CONST. of 1818, art. I, § 7; IND. CONST. of 1851, art. I, § 10; MICH. CONST. of 1835, art. I, § 7; N.J. CONST. of 1844, art. I, § 5; N.Y. CONST. of 1821, art. VII, § 8; R.I. CONST. of 1843, art. I, § 20; W. VA. CONST. of 1863, art. II, § 5; WIS. CONST. of 1848, art. I, § 3.

⁷² *People v. Croswell*, 3 Johns. Cas. 337, 391–92 (N.Y. Sup. Ct. 1804) (opinion of Kent, J.) (citations omitted).

⁷³ See PETER J. GALIE & CHRISTOPHER BOPST, *THE NEW YORK STATE CONSTITUTION* 76 (2d ed. 2012).

⁷⁴ In 1808, the Massachusetts Supreme Judicial Court held, for example, that although truth by itself did not provide a complete defense to the charge of criminal libel, in such a case, the defendant may give evidence of truth in order to show that “the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man,” and on those grounds, not libelous. *Commonwealth v. Clap*, 4 Mass. (3 Tyng) 163, 169 (1808).

seeking the injunction could demonstrate that he or she enjoyed a property right to the speech in question or when the injunction was necessary to prevent “irreparable injury to, and the destruction of” the complaining party’s property rights.⁷⁵ In such cases, the right to free expression lost out to the right to property. Otherwise, the rule was absolute. Hence, in 1839, the New York Court of Chancery denied the plaintiff’s application for a court order to restrain the publication of an allegedly libelous pamphlet on the grounds that so doing would be to “infring[e] upon the liberty of the press, and attempt[] to exercise a power of preventive justice which, as the legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government.”⁷⁶ In 1876, the St. Louis Court of Appeals made a similar, equally forceful argument to explain its decision to dissolve the injunction a lower court had imposed on the publication of “false, slanderous, malicious, and libelous statements.”⁷⁷ The plaintiff claimed that because the publishers of the statements were insolvent, injunctive relief was the only meaningful remedy available.⁷⁸ The court held that, even if this was so, the injunction could not stand because it would violate the state constitutional guarantees of speech and press freedom.⁷⁹

3. *Obscene and Profane Speech.* — The prosecution of obscene and profane speech was also constrained by constitutional concerns in the eighteenth and nineteenth centuries. This was the case notwithstanding the disfavor with which late nineteenth-century courts and legislators regarded obscenity in particular, and the breadth of materials they were willing to consider obscene.⁸⁰ Because both obscene and profane

⁷⁵ *Judson v. Zurhorst*, 20 Ohio Cir. Dec. 9, 11 (1907); see also *Brandreth v. Lance*, 8 Paige Ch. 24, 28 (N.Y. Ch. 1839) (concluding that the court has no authority to intervene where the publication of the work “cannot be considered as an invasion of the rights either of literary or medical property”); Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 641 (1916) (critiquing the settled rule that courts would not enjoin libels when they threatened only “injury to personality”).

⁷⁶ *Brandreth*, 8 Paige Ch. at 26.

⁷⁷ *Life Ass’n of Am. v. Boogher*, 3 Mo. App. 173, 174 (Ct. App. 1876).

⁷⁸ See *id.* at 175.

⁷⁹ See *id.* at 180.

⁸⁰ As Professor Donna Dennis has noted in her history of obscenity law in the United States, in the early nineteenth century, “jurists and treatise writers routinely interpreted the common law of nuisance and obscene libel to give local authorities extremely broad powers to punish any form of expression that had a tendency to promote indecency or corrupt morality.” Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 LAW & SOC. INQUIRY 369, 383 (2002). Although by the end of the century courts had developed a more worked-out definition of the obscene, it was far from narrowly limited. Instead, obscenity was defined as any speech that had a “tendency . . . to deprave and corrupt those whose minds are open to such immoral influences and into whose hands [the obscene] publication . . . may fall.” *Id.* at 383 n.17 (quoting *The Queen v. Hicklin*, (1868) 3 L.R.Q.B. 360, 371 (Eng.)). This language was interpreted to mean that advertisements promoting contraception and abortion services were

speech were technically considered to be species of libel,⁸¹ eighteenth-, nineteenth-, and early twentieth-century courts generally agreed that speech of this kind could not be restrained in advance without violating the constitutional guarantees of expressive freedom. As a Texas court explained in 1893:

The power to prohibit the publication of newspapers is not within the compass of legislative action, in this state, and any law enacted for that purpose would clearly be in derogation of the bill of rights. . . . The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise. The doctrine of the constitution must prevail in this state, which clothes the citizen with liberty to speak, write, or publish his opinion on any and all subjects, subject alone to responsibility for the abuse of such privilege.⁸²

As this passage makes clear, the prohibition against enjoining obscene or profane speech was not granted to such speech for its own sake. Instead, courts refused to grant the government the power to vet speech in advance of publication or utterance because what was in fact obscene, blasphemous, or otherwise indecent could not be determined in the abstract. The rule, on this view, was purely prophylactic.⁸³ Nevertheless what it meant was that, for all intents and purposes, obscenity was constitutionally protected against prior restraint, if not post-publication sanctions.

Even in the early twentieth century — during a period when both the federal and the state governments were expending significant resources to rout out and prosecute obscenity⁸⁴ — courts remained firm in their refusal to enjoin the publication of indecent or obscene materials. As an Ohio court somewhat regretfully noted in 1907, in response

obscene, as were contraceptives and abortifacients themselves, as were many works of what today we would consider high literature. *See id.* at 390–91; Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 53–56 (1938).

⁸¹ *See* Colin Manchester, *A History of the Crime of Obscene Libel*, 12 J. LEGAL HIST. 36, 36 (1991). The offense of profane swearing was generally understood to constitute a subspecies of the broader offense of blasphemy, and therefore was governed by libel doctrine as well. *See* FRANCIS LUDLOW HOLT, *THE LAW OF LIBEL* 75 (1st American ed. 1818).

⁸² *Ex parte Neill*, 22 S.W. 923, 923–24 (Tex. Crim. App. 1893); *see also* *Corliss v. E.W. Walker Co.*, 57 F. 434, 435 (C.C.D. Mass. 1893) (“Th[e] constitutional privilege [of freedom of speech and the press] implies a right to freely utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity, or scandalous character, may be a public offense, or, by its falsehood and malice, may injuriously affect the standing, reputation, or pecuniary interests of individuals.”).

⁸³ In this regard of course it may not be so dissimilar from a great deal of contemporary First Amendment law. *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 198 (1988) (“Not just arguably peripheral doctrines . . . but the most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the ‘real’ first amendment.”).

⁸⁴ *See* FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 12–13 (1976).

to the plaintiff's request for a court order enjoining the publication of what he claimed were obscene libels about him:

Article 1, Sec. 11 of the Ohio constitution declares that:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. . . ."

It is clear that the constitution here provides for the fullest liberty of speech, but subject always to the proviso that every citizen must be held responsible for his abuse of the right. . . .

. . . .

Were we empowered to formulate original principles of law and lay down new rules by which courts of equity should be guided, [the plaintiff's] argument would appeal strongly to our consciences and judgment. But we have no such power. . . .

. . . .

In a proper case instituted by one legally authorized to represent the public, the public exhibition of lewd pictures, immodest statuary, or immoral plays, would unquestionably be enjoined, or otherwise suppressed; and for the same reason an obscene book or pamphlet is prohibited transit through the United States mails. The case presented to us, however, is not of that character and does not authorize the relief sought."⁸⁵

To contemporary eyes, the distinction drawn by the Ohio court — between enjoining the exhibition and sale of "lewd pictures, immodest statuary [and] immoral plays" and enjoining the publication or manufacture of such goods — may seem so formalistic and insubstantial as to make whatever "protection" the freedom of press provided obscene materials essentially meaningless. But in fact the prohibition against prior restraint was not entirely toothless. It meant, for one thing, that the government had to prove, not merely allege, that the materials it wished to enjoin were obscene — and, in most jurisdictions, to do so to the satisfaction of a jury rather than a judge.⁸⁶ Requiring juries to define what was obscene *after the fact* took the power away from individual government officials. And making the jury the arbiter of what was obscene ensured that the prosecution of speech obeyed community

⁸⁵ *Judson v. Zurhorst*, 20 Ohio Cir. Dec. 9, 9, 10, 13, 14 (1907) (quoting OHIO CONST. art. I, § 11).

⁸⁶ See SCHAUER, *supra* note 84, at 22 ("Most of the [nineteenth-century state] cases [dealing with obscenity] held that determination of the issue of obscenity was for the jury . . ." (citing cases from New York, Alabama, and Georgia and noting contrary authority from Texas)).

norms — and resulted in relatively few obscenity convictions, at least in the eighteenth and early- to mid-nineteenth centuries.⁸⁷

That these restraints on the government's power to prevent and punish obscene or otherwise "indecent" speech were felt to be both significant and constitutionally mandated is demonstrated by the opposition that developed when legislators attempted to undermine them. In 1868, for example, Republicans in the New York Senate were forced to remove from a new municipal obscenity bill a provision that authorized magistrates to issue warrants directing police officials to search and destroy materials the magistrate summarily declared to be "obscene and indecent"⁸⁸ after the provision generated intense opposition among the Democratic minority and the Democratic-leaning press.⁸⁹ Critics argued that the proposed provision would undermine both due process and freedom of the press. An editorial in the *Sunday Mercury*, for example, described the provision, as evidence of "Radical despotism" and noted that the law would empower:

any magistrate or any policeman . . . [who] finds a paper with an advertisement in it that he thinks is not sufficiently refined for his pure imagination — [to] seize the same and transmit specimens of it to the District-Attorney's office, and forthwith destroy the remainder thereof; in other words, destroy the entire edition of the paper . . . without complaint or process of law.⁹⁰

When the bill was finally enacted into law, it allowed destruction of obscene materials only after trial.⁹¹

The kerfuffle over the 1868 obscenity bill points to the important, albeit attenuated, role that concerns with press and speech freedom played in the regulation of even obscene or "indecent" speech in the nineteenth century. It calls into question the twentieth-century Court's assertion that obscenity was traditionally considered entirely "outside

⁸⁷ Dennis argues, for example, that in mid-nineteenth-century New York, which was throughout the nineteenth century one of the central sites for the production and dissemination of salacious materials, "prosecutions for obscenity . . . were sporadic and often dropped after indictment" and that "[o]nly a few of the defendants were convicted, and none served a prison sentence." Dennis, *supra* note 80, at 388. Dennis further notes that "authorities generally conceded that they could only obtain indictments against the most explicit sexual materials in circulation." *Id.*; see also SCHAUER, *supra* note 84, at 12 (noting the relatively few prosecutions for obscenity in the pre-Civil War period). Toward the end of the nineteenth century, as Professor Frederick Schauer notes, there was a significant increase in the amount of material prosecuted as obscenity, largely as a result of the enactment of the federal Comstock Act. SCHAUER, *supra* note 84, at 12–13. But of course, because the Comstock Act limited only the circulation of materials in the mail, under *Ex parte Jackson*, 96 U.S. 727 (1877), it could restrict speech in ways that a law of more general application could not.

⁸⁸ DONNA DENNIS, *LICENTIOUS GOTHAM* 225 (2009).

⁸⁹ See *id.* at 225–29.

⁹⁰ *Obscene Literature—Its Radical Organ and Propagators*, *SUNDAY MERCURY*, Apr. 26, 1868, at 4. The newspaper sardonically called the provision "a new illustration of the liberty of the press." *Id.*

⁹¹ DENNIS, *supra* note 88, at 227.

the protection intended for speech and press.”⁹² Indeed, only in the twentieth century did courts first suggest that the prior injunction of speech of this kind might *not* infringe upon the constitutional rights of speech and press.⁹³ Only in the twentieth century, in other words, did courts begin to treat obscenity as if it were not in fact “speech at all” for constitutional purposes.⁹⁴

4. *Fighting Words*. — Even the prosecution of what the *Chaplinsky* Court called “fighting words” was constrained to some degree by constitutional concerns.⁹⁵ Insulting or offensive language tended to be prosecuted in the eighteenth and nineteenth centuries as disorderly conduct or as the common law offense of public nuisance.⁹⁶ In the second half of the nineteenth century, however, states and municipalities began to pass more specific statutory prohibitions on the public use of offensive or insulting language.⁹⁷ In construing these statutes, courts made clear that there were limits on the government’s ability to criminally punish speech merely because of its offensive or insulting content. In *Ex parte Kearny*⁹⁸ in 1880, for example, the California Supreme Court held that a municipal statute that prohibited any person from “utter[ing] in the presence of another, any words, language, or expression, having a tendency to create a breach of the peace”⁹⁹ could only be constitutionally applied when the insulting or offensive language was actually “addressed to, or spoken in the presence of, the

⁹² *Roth v. United States*, 354 U.S. 476, 483 (1957).

⁹³ In *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), the Court laid the groundwork for *Chaplinsky* in some respects by noting that, notwithstanding the general First Amendment prohibition against prior restraint, obscene materials could be enjoined when necessary to enforce what the Court described as the “primary requirements of decency.” *Id.* at 716. As a result, after *Near*, obscene materials could be enjoined in advance, as was not possible doctrinally in the nineteenth century. See B. Kay Albaugh, Comment, *Regulation of Obscenity Through Nuisance Statutes and Injunctive Remedies — The Prior Restraint Dilemma*, 19 WAKE FOREST L. REV. 7 (1983) (describing the use of prior injunctions to abate and censor adult bookstores and obscene films). As Albaugh notes, the use of prior restraints in this area is contested, given the risk that nonobscene material will be suppressed. Nevertheless, a number of state courts have upheld the practice. See, e.g., *Chateau X, Inc. v. State ex rel. Andrews*, 275 S.E.2d 443, 449 (N.C. 1981).

⁹⁴ Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 615 n.146.

⁹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (internal quotation marks omitted).

⁹⁶ See Annotation, *Words as Criminal Offense Other than Libel or Slander*, 48 A.L.R. 83 (1927).

⁹⁷ In 1891, for example, New Hampshire passed a law that prohibited any person from “address[ing] any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place” or to “call him by any offensive or derisive name” or “make any noise or exclamation in his presence and hearing with intent to deride, offend, or annoy him.” *State v. McConnell*, 47 A. 267, 267 (N.H. 1900). *Chaplinsky* was later prosecuted under a revised version of this law. See *Chaplinsky*, 315 U.S. at 569. Similar statutes were passed by Connecticut in 1865, see *State v. Warner*, 34 Conn. 276, 278–79 (1867), and Arkansas in 1868, see *Hearn v. State*, 34 Ark. 550, 550 (1879), among other states.

⁹⁸ 55 Cal. 212 (1880).

⁹⁹ *Id.* at 219 (internal quotation mark omitted).

person whom they have a tendency to incite to a breach of the peace.”¹⁰⁰ Any other construction of the statute, the court held, would allow the government to too easily evade the careful constitutional constraints otherwise imposed on the prosecution of insulting or disorderly speech. As the court explained:

The freedom of the press is surrounded by many constitutional safeguards. . . . Will it be contended that the printer may be deprived of this great constitutional right by providing that he shall be punished, not for libel, but for the publication of words having a tendency to produce a breach of the peace? . . .

. . . .

. . . To hold that the conversation of intimate friends may be reported, or the privacy of domestic circles invaded, to secure evidence of declarations, which, if subsequently communicated to the person to whom they relate, may, in the opinion of a jury in the Police Court, “have a tendency” to induce him to commit a breach of the peace, would recognize and encourage a system of espionage abhorrent to American ideas, and productive of more evil than the practice condemned. . . .

. . . .

. . . That such an ordinance would not accord with our governing policy is further evidenced, perhaps, by the circumstance that no like prohibitory legislation has ever been attempted in this or other States.¹⁰¹

The court held, in other words, that the mere utterance of words that in the abstract had a tendency to breach the peace was not something the municipality could punish while remaining true to the principles that governed the U.S. constitutional system.

Other courts were rather more generous in what they allowed legislatures. Indeed, in other jurisdictions, courts affirmed the conviction of individuals who engaged in offensive or disruptive speech even when this speech was not directly aimed at any one individual, let alone likely to provoke a fight.¹⁰² Nevertheless, the California Supreme Court appears to have been correct that in no jurisdictions was the mere utterance of insulting or provoking words a crime.¹⁰³ As the

¹⁰⁰ *Id.* at 223.

¹⁰¹ *Id.* at 222–25.

¹⁰² *See, e.g.,* *Commonwealth v. Foley*, 99 Mass. 497, 497–99 (1868) (upholding the conviction of a defendant accused of being a “railer and brawler and disturber of the peace,” *id.* at 497, after he “used loud and violent language” consisting of “opprobrious epithets and exclamations” inside or “near his dwelling-house, and frequently to his wife when in the house,” *id.* at 498); *State v. Maggard*, 80 Mo. App. 286, 287–92 (Ct. App. 1899) (upholding conviction of defendants found to have “willfully disturb[ed] the peace of [another family] by cursing and swearing and by offensive and indecent conversation,” *id.* at 291).

¹⁰³ *See* *People v. Loveridge*, 42 N.W. 997 (Mich. 1889) (concluding that the use of obscene language by a “filthy-minded person whose tongue was loosed by drinking” could not be prosecuted as the common law offense of breach of the peace because “[i]t is laid down, very positively, that insulting and abusive language does not [constitute a breach of the peace without] threats of im-

Tennessee Supreme Court noted in 1856, “[m]ere quarrelsome words [without more] are not a punishable offense.”¹⁰⁴ Instead, what was prohibited was the disruption created by the public expression of offensive or insulting language in a context in which such expression was likely to lead to violence or disorder of some sort. The content of the speech alone was not sufficient to justify prosecution, given both constitutional concerns with freedom of expression and common law concerns with the limits of secular state power.

B. High-Value Speech

As *Ex parte Kearny* demonstrates, eighteenth- and nineteenth-century courts extended some degree of constitutional protection to many kinds of low-value speech. Conversely, courts during this period upheld the imposition of criminal sanctions on many kinds of high-value speech that were perceived to be (to use Justice Story’s language) “improper, mischievous, or illegal.”¹⁰⁵

1. *Press*. — For example, courts imposed sometimes-steep penalties on journalists or newspapers that reported on public trials in a manner that appeared to threaten the impartial administration of justice or to demean the judge.¹⁰⁶ Courts did not justify doing so by claiming that newspaper reports about public trials were categorically excluded from constitutional protection. To the contrary: it was widely recognized in the eighteenth and nineteenth centuries that one of the purposes of guaranteeing freedom to the press was to enable the press, as Pennsylvania Supreme Court Chief Justice McKean put it in the 1788 case *Respublica v. Oswald*,¹⁰⁷ to lay “open to the inspection of every citizen . . . the proceedings of the government; of which the judicial authority is certainly to be considered as a branch.”¹⁰⁸ The justification was instead that newspaper reports that insulted or demeaned the court represented an abuse of the constitutional right of press freedom, rather than an exercise of it. As the Supreme Court of the Territory of Michigan argued in 1829, just as the Second Amendment vested citizens with the right to keep and bear arms but not the right to use

mediate violence, or challenges to fight, or incitements to immediate personal violence or mischief,” *id.* at 998); *State v. Taylor*, 35 Tenn. (3 Sneed) 662, 663 (1856) (quashing indictment of defendant accused of inciting another to breach the peace after he publicly called him a liar upon finding insufficient evidence that the words actually threatened to incite the defendant to breach the peace).

¹⁰⁴ *Taylor*, 35 Tenn. (3 Sneed) at 663 (internal quotation marks omitted).

¹⁰⁵ STORY, *supra* note 49, § 1878, at 736.

¹⁰⁶ The offense was generally referred to as “constructive contempt.” For a history of the law of constructive contempt in the United States, see generally Raoul Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602 (1942).

¹⁰⁷ 1 Dall. 319 (Pa. 1788).

¹⁰⁸ *Id.* at 322.

these arms to “destroy [their] neighbor[s],” so the First Amendment vested citizens with the right to publish their sentiments on whatever topic they chose but did not give them the right to use this privilege for an “unlawful or unjustifiable purpose.”¹⁰⁹

2. *Religious Speech*. — The same distinction between freedom and its abuse justified the criminal prosecution of many other kinds of high-value speech. In 1824, for example, the Pennsylvania Supreme Court affirmed the conviction of a defendant who asserted, during a debate organized by a local debating club to which he belonged, that the Bible was a “fable, that . . . contained a number of good things, yet . . . a great many lies.”¹¹⁰ The court found that, although serious debate about religious matters could not be prosecuted as blasphemy in light of the constitutional protections provided for speech as well as religion, the type of language used by the defendant — at least when uttered in a public place and “in the presence and hearing of several persons”¹¹¹ — constituted a “gross offence against public decency and public order, tending directly to disturb the peace of the commonwealth.”¹¹²

The court recognized that in principle religious speech was protected by the guarantees of both freedom of speech and free expression.¹¹³ Nevertheless, it found the speech at issue in the case to represent a threat to public order and public peace, but not because the speech threatened any actual violence. Indeed, there is no suggestion in the opinion or in counsel’s arguments that the audience to the debate was riled up by the defendant’s conduct. Instead, the court concluded that the speech represented a threat to public order because, by calling into question the truth of the Scriptures, it threatened to undermine “those religious and moral restraints, without the aid of which mere legislative provisions [aimed at keeping order] would prove ineffectual.”¹¹⁴ The speech threatened the public peace, in other words, by transgressing dominant norms of public piety. This was all the court required to convict.¹¹⁵

¹⁰⁹ *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829). The Court therefore concluded that, although the First Amendment “prohibits the passing of any law abridging the liberty of the press, it does not follow, that if the act of which this defendant is charged is a contempt of the authority of the court, that it is any the less a contempt because it is committed through the medium of the press.” *Id.* at 346–47.

¹¹⁰ *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 398 (Pa. 1824) (internal quotation mark omitted).

¹¹¹ *Id.* at 398.

¹¹² *Id.* at 405.

¹¹³ *Id.* at 408.

¹¹⁴ *Id.* at 406.

¹¹⁵ A similar justification was invoked by the New York Court for the Correction of Errors to defend the constitutionality of the prosecution of a defendant charged with “wickedly, maliciously, and blasphemously” asserting “in the presence and hearing of divers good and christian people”

3. *Political Speech.* — Eighteenth- and nineteenth-century courts upheld the imposition of sanctions on political speech not only when it threatened to incite immediate violence or disorder, but also when it appeared to more generally encourage subversive and dangerous political behavior. Indeed, as Professor David Yassky notes, the dominant view of freedom of speech in the late eighteenth century was not that “all points of view [had to] have access to public debate.”¹¹⁶ The prevailing view was instead that “[l]arge categories of immoderate public speech were . . . properly subject to censure . . . [and] ‘government . . . had a positive responsibility to monitor — and, when necessary, to step in and moderate — political communication.’”¹¹⁷ This was because it was widely believed that only by punishing what eighteenth- as well as nineteenth-century jurists tended to describe simply as “licentiousness” — namely, speech “inconsistent with the peace and safety of th[e] state” — could the government ensure the long-term stability, and popularity, of the system of free expression itself.¹¹⁸ Only by routing out licentiousness could government protect genuine liberty “from those who would exploit and degrade it.”¹¹⁹

This view remained dominant in the nineteenth century as well — as demonstrated by the willingness of nineteenth-century courts to impose sometimes harsh punishment on dangerous or subversive political expression. In *People v. Most*,¹²⁰ for example, the New York Court of Appeals affirmed the conviction of an anarchist under a state statute that criminalized the assembly of three or more persons who “being as-

that “*Jesus Christ* was a bastard, and his mother must be a whore.” *People v. Ruggles*, 8 Johns. 290, 292–93 (N.Y. 1811) (internal quotation marks omitted). The Court held that language of this sort constituted an actionable “offence against the public peace and safety” because, by calling into question the sanctity of the gospels, it “tend[ed] to lessen, in the public mind, [the] religious sanction” of the public oaths that, then as now, individuals took when joining, or contributing to, judicial or administrative proceedings. *Id.* at 297–98. The implication of this, of course, was that, like the language in *Updegraph*, the speech undermined the moral and religious controls that helped preserve the public and political order. As Professor Sarah Barringer Gordon has noted, the *Ruggles* and *Updegraph* opinions enjoyed widespread popular support in the early nineteenth century. Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682, 693–95 (2000).

¹¹⁶ Yassky, *supra* note 44, at 1707.

¹¹⁷ *Id.* (quoting ROSENBERG, *supra* note 44, at 100).

¹¹⁸ Gordon, *supra* note 115, at 685 (quoting *Ruggles*, 8 Johns. at 296) (internal quotation mark omitted).

¹¹⁹ *Id.* A similar sentiment was expressed by Justice Joseph Story in his discussion of freedom of the press. See STORY, *supra* note 49, § 1874, at 731–33 (arguing that liberty of press means no more than that “every man shall be at liberty to publish what is true, with good motives and for justifiable ends” because “[w]ithout . . . a limitation [on the right], it might become the scourge of the republic, first denouncing the principles of liberty; and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form,” *id.* at 733).

¹²⁰ 27 N.E. 970 (N.Y. 1891).

sembled . . . threaten any act tending towards a breach of peace”¹²¹ after he addressed a crowd of fellow anarchists and warned them that the day of revolution was “not far distant.”¹²² The court noted that, although to its eyes the anarchist’s words were the “ravings of a madman,” it was up to the jury to discern whether they posed a real threat of public disorder, given the circumstances in which he spoke.¹²³ The court also adamantly rejected the defense counsel’s argument that because “the threats [uttered in the speech] related to acts not presently to be done, but to be performed at some future time,” they did not pose a real threat to peace and safety.¹²⁴ “The main purpose of the common law and of the statute relating to unlawful assemblies,” the court wrote, “is the protection of the public peace[:.]”

Incendiary speeches under the circumstances disclosed in this case, before a crowd of ignorant, misguided men, are not less dangerous because the advice to arm for the redress of grievances and the threats of murder are accompanied with the suggestion that the time is not quite come for action. . . . No one can foresee the consequences which may result from language such as was used on this occasion, when addressed to a sympathizing and highly excited audience.¹²⁵

Political speech could be criminally punished, in other words, not only when it threatened imminent political disorder but also when it spread “incendiary” ideas to ignorant and misguided men — and thereby threatened in the long run, if not the short, the safety and security of society.

C. *The Broad but Shallow First Amendment*

What these cases demonstrate is that eighteenth- and nineteenth-century courts applied the same constitutional principles to the regulation of high-value speech as they applied to the regulation of low-value speech. The general rule in the eighteenth and nineteenth centuries was that speech — no matter how valuable it might be — could be sanctioned criminally whenever it threatened, as Justice Story put it, to “disturb the public peace, or . . . subvert the government.”¹²⁶ But almost no speech or writing could be enjoined in advance without violating the constitutional prohibition against prior restraints, except when it posed a threat to person or property.¹²⁷

¹²¹ *Id.* at 972 (quoting N.Y. PENAL LAW § 451.3 (1882)) (internal quotation mark omitted).

¹²² *Id.* at 973.

¹²³ *Id.* at 972.

¹²⁴ *Id.*

¹²⁵ *Id.* at 972–73.

¹²⁶ STORY, *supra* note 49, § 1874, at 732.

¹²⁷ See Pound, *supra* note 75, at 652.

This is not to say that courts and legislators possessed no conception that some categories of speech might be more valuable than others, and therefore entitled to a somewhat greater degree of constitutional protection. As we saw above, in many states, speech that touched on “the official conduct of men in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or . . . matter . . . proper for public information” had to be either untrue or malicious in order to be considered libel or slander.¹²⁸ In the civil context, many jurisdictions also offered defendants in cases involving what were generally referred to as “matters of public interest” a qualified privilege that required the plaintiff to prove that the libel was malicious as well as false in order to receive damages.¹²⁹ Speech that took place during a trial or on the floor of the legislature was protected against accusations of libel because of its great value to the democratic system in the United States.¹³⁰

Nevertheless, the difference in the treatment of this kind of high-value speech and other kinds of speech was for the most part relative, not absolute. Speech about matters of public concern received greater constitutional protection than other kinds of speech but nevertheless was subject to criminal penalties, as well as civil liability, when false or motivated by a malicious intent.¹³¹ And even protected speech given during trial or legislative proceedings remained subject to prosecu-

¹²⁸ ME. CONST. of 1819, art. I, § 4; *see also supra* notes 69–71 and accompanying text.

¹²⁹ *See, e.g.,* *Gott v. Pulsifer*, 122 Mass. 235, 238–39 (1877) (“The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice.”); *see also* CLIFTON O. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS 87–110 (1971) (noting that between the Civil War and 1900, “state after state” adopted a rule granting some sort of privilege to defendants who spoke on public matters of some kind or another, *id.* at 87).

¹³⁰ *See* COOLEY, *supra* note 45, at 421–22; *id.* at 446 (noting that the absolute privilege afforded legislators on the floor of the legislature “[is] secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal” (quoting *Coffin v. Coffin*, 4 Mass. (1 Tyng) 1 (1808))).

¹³¹ *See id.* at 431–34; WILLIAM BLAKE ODGERS, A DIGEST OF THE LAW ON LIBEL AND SLANDER 30 (1st ed. 1881). The requirement that matters of public concern be published with good motives reflected the view that even when it touched on matters of public concern, speech that was motivated by a malicious intent undermined, rather than fostered, the democratic aims of the qualified privilege doctrine because such speech functioned to “unloosen the social band of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power.” *Respublica v. Dennie*, 4 Yeates 267, 270 (Pa. 1805). Once again, the ultimate concern motivating the rule appears to have been a concern with the preservation of the public order, and the moral, religious, and political attitudes believed necessary to sustain it.

tion for perjury.¹³² Meanwhile, even blasphemous and obscene speech was protected against injunction and other kinds of prior restraint.¹³³

Courts adopted, in other words, what we could describe as a broad but shallow conception of the constitutional guarantee of expressive freedom: one that imposed few constraints on the government's ability to regulate speech on the basis of its content but extended constitutional protection — at least against prior restraint — to almost all speech, even when it was immoral or improper or otherwise devalued.

What this means is that in declaring fighting words, obscenity, libel, and profanity to be categorically outside the scope of constitutional protection for speech and press because of what it called their lack of “social value,” the *Chaplinsky* Court was not, as it claimed, simply rendering explicit a longstanding understanding of the limits of constitutional protection for speech and press. Instead, it was creating something new: namely, the two-tier system that continues to organize the doctrine, more or less, to this day. In the next Part, I explore why and how the Court did so before turning, in Part IV, to the implications of this history for the contemporary doctrine.

III. INVENTING A TRADITION

The 1930s and 1940s marked a new deal for freedom of speech. Although legal histories of the New Deal tend to emphasize the constitutional changes that took place during this period in Commerce Clause and Fourteenth Amendment doctrine,¹³⁴ this was also a period of significant change in First Amendment doctrine.¹³⁵

It was during this period that a majority of Justices on the Court adopted for the first time the new understanding of freedom of speech that Justices Holmes and Brandeis had been promoting, largely in dissent, since the teens and twenties, and that free speech activists had been promoting even earlier than that.¹³⁶ In contrast to the more interventionist eighteenth- and nineteenth-century view, this new conception of freedom of speech imposed strong constraints on the government's ability to punish speech after the fact. Rather than empowering the government to protect liberty by routing out what eighteenth- and nineteenth-century courts generally described as “licentiousness,” proponents of this view instead argued that the guaran-

¹³² COOLEY, *supra* note 45, at 441.

¹³³ *Id.* at 421.

¹³⁴ See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 359–82 (1998); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 108 (1998).

¹³⁵ See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 128, 165 (2000).

¹³⁶ For a good history of this development, see David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1345–51 (1983).

tees of speech and press freedom limited the government's ability to decide what was or was not in fact licentious.

Indeed, the great innovation of the New Deal Court's free speech jurisprudence was its embrace of the idea that in order to achieve the purposes long associated with the First Amendment — purposes such as the promotion of democratic government and the advancement of “truth, science, morality, and arts in general”¹³⁷ — the government had to tolerate even harmful speech, except when that speech was so dangerous that it posed an imminent threat to the security of the state or to other vital governmental interests, such as the protection of its citizens against physical harm. Justice Holmes had promoted this idea since at least 1919, when, dissenting in *Abrams v. United States*,¹³⁸ he famously insisted that: “Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law . . . abridging the freedom of speech.’”¹³⁹ But the Court was initially resistant to it. In *Gillow v. New York*¹⁴⁰ and other early twentieth-century cases, it instead continued to articulate a view of freedom of speech very close to the nineteenth-century view described in the previous Part.¹⁴¹

By the 1930s, however, significant personnel changes, among other factors, led the Court to change its view of what it meant to guarantee freedom of speech and press against abridgment.¹⁴² The result was a series of decisions that imposed for the first time significant limits on the government's ability to punish speech merely because it believed it to be subversive or immoderate. In *Stromberg v. California*¹⁴³ in 1931,

¹³⁷ This quote comes from the portion of the 1774 address that the Continental Congress wrote to the inhabitants of Quebec in order to apprise them of the purposes of the Revolution that dealt with freedom of the press. See Address to the Inhabitants of Quebec, 1774, in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 221, 223 (Bernard Schwartz ed., 1971).

¹³⁸ 250 U.S. 616 (1919).

¹³⁹ *Id.* at 630–31 (Holmes, J., dissenting) (omission in original).

¹⁴⁰ 268 U.S. 652 (1925).

¹⁴¹ *Gillow* continued to emphasize, for example, the importance of punishing licentious speech in order to protect liberty. See *id.* at 666–67 (“It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.” *Id.* at 666 (emphasis added)). The opinion also insisted that a state's power to “punish those who abuse [their] freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.” *Id.* at 667.

¹⁴² Between 1930 and 1940, eight new Justices were appointed to the Court, many of whom (Justices Murphy, Black, and Douglas) emerged as strong supporters of the new, expansive conception of the First Amendment that theorists such as Zechariah Chafee had been promoting since the teens and twenties. See WHITE, *supra* note 135, at 143, 356 n.18.

¹⁴³ 283 U.S. 359 (1931).

for example, the Court held that a state statute that prohibited the display of a flag, badge, or banner “as a sign, symbol or emblem of opposition to organized government”¹⁴⁴ violated the First Amendment because it was so “vague and indefinite” in its language as to be construed to allow the punishment of merely “peaceful and orderly opposition to government.”¹⁴⁵ In *Herndon v. Lowry*¹⁴⁶ in 1937, the Court held that a Communist Party member who was charged with insurrection for organizing on behalf of the party could not be convicted absent evidence that his activities posed a “‘clear and present danger’ of the use of force against the state”¹⁴⁷ or posed some other serious “danger to organized government.”¹⁴⁸ And in *Thornhill v. Alabama*,¹⁴⁹ in 1940, the Court extended the use of the clear and present danger test to labor picketing. Specifically, it held that the state could not prohibit labor picketing absent a “clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace.”¹⁵⁰ This was because “freedom of speech and of the press . . . embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment” and picketing, the Court found, provided an important means by which workers engaged in discussion of this sort.¹⁵¹

These cases, insofar as they interpreted the constitutional guarantee of freedom of speech to impose significant constraints on the government’s ability to restrict speech *ex post* as well as *ex ante*, signaled the Court’s decisive break with the nineteenth-century conception. For precisely that reason, however, they also raised difficult questions about what counted as speech for constitutional purposes — questions that eighteenth- and nineteenth-century courts had not needed to confront as directly. Given how much of social life is mediated by language, allowing the government to restrict or sanction speech only when it posed “a clear and present danger” to life, property, privacy, or peace¹⁵² threatened to dramatically impede the government’s ability to regulate not only political expression but also a great deal else. Yet not

¹⁴⁴ *Id.* at 361.

¹⁴⁵ *Id.* at 369.

¹⁴⁶ 301 U.S. 242 (1937).

¹⁴⁷ *Id.* at 255.

¹⁴⁸ *Id.* at 258.

¹⁴⁹ 310 U.S. 88 (1940).

¹⁵⁰ *Id.* at 105.

¹⁵¹ *Id.* at 101–02. In reaching this conclusion, the Court rejected the argument that what was at stake in a labor picket was merely the private struggle between worker and employer. Instead, the Court found that in the “circumstances of our times . . . labor relations are not matters of *mere local or private concern*,” and have a political “importance which is not less than the interests of those in the business or industry directly concerned.” *Id.* at 102–03 (emphasis added).

¹⁵² *Id.* at 105.

even the most zealous advocates of the new, more libertarian understanding of freedom of speech believed it should be interpreted to preclude the government from restricting speech except when it threatened to create a serious and imminent emergency.¹⁵³

Nevertheless, as of the 1930s, there existed few doctrinal rules that could aid courts in determining what counted as speech for constitutional purposes. In his *Abrams* dissent, Justice Holmes noted that, in limiting the government's power to restrict speech only to emergencies, he was speaking "[o]f course . . . only of expressions of opinion and exhortations."¹⁵⁴ Justice Holmes did not explain, however, how courts could determine when speech involved the expression of opinion or exhortation and when it did not. Nor did any other member of the Court subsequently.

And while in two earlier decisions the Court held, for the first time in its history, that certain kinds of expression were categorically not protected by the constitutional guarantees of press or speech freedom, neither opinion provided generalizable principles that courts could use in other contexts to determine when the protections of the First Amendment did and did not apply. In the first decision, the Court held simply that words likely to trigger an unlawful act may be enjoined, notwithstanding the First Amendment, because in such circumstances they constituted "verbal acts," not mere speech.¹⁵⁵ In the second opinion, the Court held that motion pictures are not "part of the press of the country or . . . organs of public opinion" and on that basis sustained an Ohio movie censorship law.¹⁵⁶ Although the opinion represents the first time the Court ruled categorically on the boundary of the constitutional category of the press, it provided little hint of what else besides movies, and perhaps also plays, might be excluded from the category.¹⁵⁷

¹⁵³ Even Theodore Schroeder, by far the most absolutist of the early advocates of the modern conception of freedom of speech, acknowledged that speech could be punished when it constituted or contributed to a criminal act. See Theodore Schroeder, *The Meaning of Unabridged "Freedom of Speech,"* in FREE SPEECH FOR RADICALS 37, 40 (1916). Schroeder also acknowledged that the First Amendment provided stronger protection to public speech than to private speech. David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 567 (1981). All of the other important theorists of the modern conception argued explicitly for the necessity of limiting the scope of constitutional protection for speech in some way. Indeed, it is in their work that one sees the first sustained engagement with what would become the modern preoccupation with First Amendment boundary-setting. See *id.* at 564–68.

¹⁵⁴ *Abrams v. United States*, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting).

¹⁵⁵ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 439 (1911) (internal quotation marks omitted).

¹⁵⁶ *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244 (1915).

¹⁵⁷ Indeed, the *Mutual Film* Court justified its conclusion that movies did not constitute part of "the press of the country" by pointing to the unique features of the medium and specifically its peculiar and dangerous attractiveness to viewers. *Id.* at 244–45 (asserting that movies "are mere representations of events, of ideas and sentiments published and known, vivid, useful and enter-

It was in this context that the Court turned to the work of contemporary theorists of free speech — particularly Professor Zechariah Chafee — to develop a more generalizable theory for when the protections of the First Amendment did and did not apply.

A. *The New Theory*

The Court first suggested such a theory in *Cantwell v. Connecticut*¹⁵⁸ in 1940, when it reversed the conviction of a Jehovah’s Witness accused of inciting others to breach the peace after he stopped two Catholic men on a street in New Haven, Connecticut and played for them a phonograph record that attacked all organized religions as “instruments of Satan.”¹⁵⁹ The Court found insufficient evidence that the defendant’s conduct posed a “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order.”¹⁶⁰ The Court thus made clear that the clear and present danger standard applied to religious expression just as it did to the political expression in *Herndon* and the labor speech in *Thornhill*. In dicta, however, it suggested that its analysis would have been different had the defendant engaged with his unwilling interlocutors in a less polite fashion — if he had, for example, directed “profane, indecent, or abusive remarks” to his audience, or engaged in other behavior “likely to provoke violence and disturbance of good order.”¹⁶¹ This was because, as Justice Roberts wrote in his majority opinion, “[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”¹⁶²

Two years later, *Chaplinsky* turned the suggestion in *Cantwell* that certain kinds of personal attacks were not “in any proper sense communication of information or opinion safeguarded by the Constitution”¹⁶³ into a more generalizable test of First Amendment boundaries. The Court sustained the defendant Walter Chaplinsky’s conviction under the New Hampshire offensive-words statute because it found that the fighting words for which he was convicted comprised one of a

taining no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition” and concluding on that basis that “we cannot regard . . . as beyond the power of government” the authority to require censorship before their exhibition). The Court did suggest, however, that plays and other theatrical spectacles might be similarly excluded from constitutional protection for press. *Id.* at 243–44.

¹⁵⁸ 310 U.S. 296 (1940).

¹⁵⁹ *Id.* at 309; *see id.* at 309–11.

¹⁶⁰ *Id.* at 308; *see id.* at 308–09.

¹⁶¹ *Id.* at 309.

¹⁶² *Id.* at 309–10.

¹⁶³ *Id.* at 310.

number of “well-defined and narrowly limited” kinds of speech that were not, nor had ever been, protected by the First Amendment guarantee of freedom of speech.¹⁶⁴

By identifying certain kinds of speech as categorically outside the scope of constitutional protection, the *Chaplinsky* opinion made it possible for the government to continue to regulate speech — at least certain kinds of speech — not only when that speech threatened the kind of material harm to person and property that the clear and present danger test required, but also when it threatened more intangible harms. Indeed, the opinion made clear that speech could be prosecuted as fighting words not only when it threatened an immediate breach of the peace but also when “[its] very utterance inflict[ed] injury” — that is, when it caused harm, in the form of offense, by violating dominant social norms of how individuals were supposed to relate to one another in public.¹⁶⁵ This was not the kind of harm that the clear and present danger test allowed the government to guard against — as the Court made clear in *Cantwell* when it refused to affirm Newton Cantwell’s conviction even though it found that the record he played attacked religion in general, and Catholicism specifically, “in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows.”¹⁶⁶ Nevertheless, even many of the proponents of the new, more libertarian conception of freedom of speech believed that the regulation of offensive speech served an important function. As Professor Laura Weinrib notes, in the early twentieth century, even members of the ACLU believed that “censorship on the basis of morality . . . facilitate[d] free speech, by enhancing the quality of public discourse.”¹⁶⁷ Some vestiges of the nineteenth-century conception that, in order to preserve liberty, the government had to rout out licentiousness, remained very much alive in the New Deal period — even among those most ardently committed to the new conception of freedom of speech.

The Court was clearly sensitive to this problem. In a decision handed down just months after *Chaplinsky*, Justice Reed noted that the individual right to expressive, as well as religious, freedom could not be interpreted as an absolute, given the necessity of reserving to

¹⁶⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

¹⁶⁵ *Id.* at 572. As Professor Robert Post points out, the harm done by an utterance of this kind is that it is “intrinsically offensive.” Robert C. Post, *Blasphemy, the First Amendment and the Concept of Intrinsic Harm*, 8 TEL AVIV U. STUD. L. 293, 294 (1988).

¹⁶⁶ *Cantwell*, 310 U.S. at 309. The Court noted also that the two men Cantwell forced to listen to his record “were in fact highly offended” by the recording. *Id.*

¹⁶⁷ Laura M. Weinrib, *The Sex Side of Civil Liberties: United States v. Dennett and the Changing Face of Free Speech*, 30 LAW & HIST. REV. 325, 385 (2012) (emphasis omitted).

the government “the sovereign power . . . [required] to ensure orderly living, without which constitutional guarantees of civil liberties would be a mockery.”¹⁶⁸ And in *Near v. Minnesota*¹⁶⁹ in 1931, the Court insisted that, just as the government could constitutionally prohibit as well as enjoin clearly dangerous information — such as the location and movement of troops during wartime — without violating the First Amendment, it could also both prohibit and enjoin the publication of obscenity in order to enforce what the Court called “the primary requirements of decency.”¹⁷⁰ The opinion in *Near* provided, however, no analytic framework to explain the equivalence it drew between dangerous speech such as the publication of information about troop movements during war and indecent speech such as obscenity. *Chaplinsky* provided this analytic framework.

By declaring that certain categories of offensive but not necessarily dangerous speech were simply outside the scope of constitutional concern, the decision in *Chaplinsky* made it possible for the government to prohibit speech not only when it threatened violence and disorder but also when it violated dominant social norms of civility, piety, and decency — for example, by depicting sex in an obscene manner, or by speaking of others in an uncivil manner, or by addressing another in words calculated to cause offense. Nevertheless, by granting this power with respect to only those categories of speech that possessed so little social value that the benefits of their expression were outweighed by the “social interest in order and morality,”¹⁷¹ the decision limited the government’s ability to use this prohibitory power to punish speech merely because it expressed heterodox or subversive views.

Chaplinsky, and the doctrine it gave birth to, thus achieved what we might call a “reconciliation” between the democratic and libertarian values promoted by the Court’s clear and present danger line of cases and the other values (morality, public order, civility) that the regulation of speech had traditionally promoted and that an unconstrained application of the clear and present danger standard appeared to threaten.

B. Problems with the Theory

The reconciliation that the new doctrine of low-value speech made possible was not unproblematic, however. For one thing, by allowing the government so much more freedom to regulate low-value speech than high-value speech, it made questions of categorical definition in-

¹⁶⁸ *Jones v. Opelika*, 316 U.S. 584, 593 (1942), *rev’d* 319 U.S. 103 (1943).

¹⁶⁹ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

¹⁷⁰ *Id.* at 716.

¹⁷¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

credibly important. As a result, in subsequent years sometimes intense disagreement arose among members of the Court, as well as in the lower courts, about how precisely to define the various classes of low-value speech.¹⁷²

This fighting over how to define the categories only exacerbated what was a deeper problem with *Chaplinsky*: that in linking the constitutional status of different kinds of speech to a judgment of their “social value” or lack thereof, the opinion existed in considerable tension with what was then emerging as a central principle of the modern jurisprudence — namely, the principle of content neutrality.

Although the term “content neutrality” would be coined only significantly after the New Deal period, the idea that government has no right to discriminate against speech because it disagreed with or disliked the message the speech conveyed played an important role in the New Deal cases, just as it would in subsequent decades.¹⁷³ Indeed, by proclaiming the neutrality of the First Amendment, the Court was able to distinguish its activism on behalf of free speech from the by-then much reviled activism of the *Lochner* Court.¹⁷⁴ By insisting that

¹⁷² The difficulties the Court faced when, in the wake of *Chaplinsky*, it attempted to define what constitutes the “well-defined and narrowly limited” category of obscenity are by now almost legendary. See David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 111–12 (1994). But it was not only with respect to obscenity that the Court proved incapable for many years of coming up with a definition that provided litigants with predictable rules; the Court’s fighting words jurisprudence in the 1940s and 1950s was similarly muddled and contentious. See, for example, Justice Jackson’s vigorous dissents in *Kunz v. New York*, 340 U.S. 290, 299–300 (1951) (Jackson, J., dissenting) (“This Court’s prior decisions, as well as its decisions today, will be searched in vain for clear standards by which it does, or lower courts should, distinguish legitimate speaking from that acknowledged to be outside of constitutional protection. . . . What evidences that a street speech is so provocative, insulting or inciting as to be outside of constitutional immunity from community interference? Is it determined by the actual reaction of the hearers? Or is it a judicial appraisal of the inherent quality of the language used? Or both?”); *Terminiello v. Chicago*, 337 U.S. 1, 13, 26–28 (1949) (Jackson, J., dissenting); and *Douglas v. City of Jeannette*, 319 U.S. 157, 166 (1943) (opinion of Jackson, J.). See also Ruth McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39, 53 (1973) (noting the Court’s difficulty during this period in reconciling its various fighting words cases).

¹⁷³ The term “content-neutral” only first appeared in a Supreme Court opinion in 1976, although it appeared in the scholarly literature earlier than that. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 84–85 (1976) (Stewart, J., dissenting); Nicholas Johnson, *Freedom to Create: The Implications of Anti Trust Policy for Television Programming Content*, 8 OSGOOD HALL L.J. 11, 17 (1970).

¹⁷⁴ See G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 314 (1996) (“One feature of the *Lochner* decision that made it notorious for Progressive critics was its embrace of the doctrine of ‘liberty of contract[.]’ . . . [M]odernist critics concluded that [the doctrine] functioned simply as a tool that judges could employ to invalidate statutes that they felt threatened the idealized domain of unregulated economic activity.”); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1407 n.102 (2001) (noting that many contemporary commentators “insisted that judges were pawning off their own views, inevitably conservative ones, as the meaning of the Constitution”).

what the First Amendment absolutely prohibited were efforts by the government to repress speech merely because it disliked it, the Court was able to depict the First Amendment as a guardian of democracy, rather than a threat to it.¹⁷⁵ The First Amendment protected democracy, the New Deal cases insist, by preventing the government from unfairly intervening in democratic debates and, more generally, by defending democratic diversity of opinion against governmental efforts to repress it. As the Court put it in *Cantwell*: “The essential characteristic of the[] liberties [guaranteed by the First Amendment] is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed.”¹⁷⁶

Epithets and insults could be prohibited without violating this fundamental First Amendment principle, *Cantwell* suggested, because by “incit[ing] violence and breaches of the peace,” those who used speech of this sort attempted “to deprive others of their equal right to the exercise of their liberties.”¹⁷⁷ *Chaplinsky* made clear, however, that what was excluded from First Amendment protection was not merely coercive and directly inciting speech but also speech that caused injury merely because it violated dominant social norms. As such, the opinion, to a degree that *Cantwell* did not, appeared to undermine the idea of the First Amendment as a “shield” for democratic diversity and difference.

It was in this context that the Court proclaimed a continuity with the past that did not in fact exist. It is difficult to know whether the Court did so deliberately. Nothing in Justice Murphy’s notes from the case says anything about this aspect of the opinion.¹⁷⁸ Nevertheless, the opinion’s text suggests that the Justice was, at the very least, uninterested in the historical truth of the matter.

¹⁷⁵ See White, *supra* note 174, at 341 (“By openly identifying the basis of special constitutional protection for speech as the indispensable connection between free expression and democratic theory, and at the same time distinguishing between speech and liberties deriving from shifting economic arrangements, the [New Deal] cases sought both to link free speech with the idea of America as a democratic society and to disengage protection for economic liberties from that idea.”).

¹⁷⁶ *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). A similar sentiment was articulated by the Court in 1943 in *West Virginia State Board of Education v. Barnette*. 319 U.S. 624, 642 (1943) (“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. If there are any circumstances which permit an exception, they do not now occur to us.”).

¹⁷⁷ *Cantwell*, 310 U.S. at 310.

¹⁷⁸ Regarding the substance of the case, Justice Murphy noted only that he “was convinced that [the statute] was not unconstitutional,” and that the ruling from *Cantwell* should control the outcome. Notes by Justice Murphy, *Walter Chaplinsky vs. State of New Hampshire* (#255), Folder 5, Box 65, microformed on Roll 124, Frank Murphy Papers (on file with the Bentley Historical Library, University of Michigan).

Indeed, as support for the paragraph in which he asserted the historical provenance of the exception for fighting words, obscene and profane speech, and libel, Justice Murphy cited no eighteenth- or nineteenth-century case law or treatises.¹⁷⁹ Instead, he primarily cited two authorities. The first was *Cantwell*.¹⁸⁰ The second was Chafee's recently published *Free Speech in the United States*.¹⁸¹ Justice Murphy cited a passage in which Chafee explained why, on his view, laws that punished seditious speech were unconstitutional but laws that targeted "obscenity, profanity, and gross libels upon individuals" were not.¹⁸² Chafee argued that the former were unconstitutional because they violated a central purpose of the First Amendment, which was to encourage the spread of political truth. The latter, in contrast, did not. Chafee explained:

[T]hese verbal peace-time crimes . . . are too well-recognized to question their constitutionality, but I believe that if they are properly limited they fall outside the protection of the free speech clauses as I have defined them. My reason is not that they existed at common law before the constitutions, for a similar argument would apply to the crime of sedition, which was abolished by the First Amendment. . . . The true explanation is that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see.¹⁸³

Justice Murphy borrowed a great deal from this passage in constructing his opinion in *Chaplinsky*, as is evident from the opinion's text. Nevertheless, there is a crucial difference between Chafee's argument and Justice Murphy's recapitulation of the argument in *Chaplinsky* — namely, that Chafee never claimed that the distinction he drew between what he called the "normal" criminal laws of obscenity, profanity, and libel and the abnormal and unconstitutional sedition statutes was based on historical practice.

To the contrary: Chafee acknowledged on multiple occasions that in the eighteenth and nineteenth centuries, lawmakers prosecuted seditious libel just as they prosecuted obscene or profane speech.¹⁸⁴ Chafee also noted that much of what was previously prosecuted as obscenity, profanity, and libel did not in fact have such "slight social val-

¹⁷⁹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹⁸⁰ *Id.* (citing *Cantwell*, 310 U.S. at 309–10).

¹⁸¹ *Id.* (citing ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 149 (1941)).

¹⁸² CHAFEE JR., *supra* note 181, at 149.

¹⁸³ *Id.* at 149–50.

¹⁸⁴ *Id.* at 153–55. Chafee noted in particular the tendency of Southern lawmakers to punish abolitionist speech in the decades leading up to the Civil War. *Id.* at 154.

ue as a step toward truth” that the interests promoted by its suppression outweighed, on his view, the free speech interests that were harmed.¹⁸⁵ Chafee, in other words, criticized existing tradition, and deeply so. Nevertheless, he insisted that, *in principle*, a distinction could and should be made between certain kinds of speech-restraining laws and others based on a particular analysis of the value of the speech they restricted.

It was Justice Murphy’s opinion in *Chaplinsky* that transformed the theoretical distinction that Chafee drew between the abnormal and normal criminal laws of speech into a claim about historical practice. In doing so, the opinion was able to sidestep, at least in part, the problems created by Chafee’s effort to tie the degree of constitutional protection afforded speech to a judgment of its social value. The opinion accomplished this feat by depicting the distinction between high- and low-value speech as a product of longstanding jurisprudential tradition, rather than the perhaps idiosyncratic or politically motivated desires and beliefs of the members of the Court.

C. Subsequent Development

In *Roth* and *Beauharnais*, the Court once again turned to history to justify denying protection to obscene and libelous speech.¹⁸⁶ By claiming that the denial of protection to these categories of speech was “implicit in the history of the First Amendment,” the Court attempted in these cases to justify what was in fact a very new conception of constitutional boundaries by obscuring what was so new about it.¹⁸⁷

In practice, however, the Court relied very little on historical precedent to actually define the low-value categories. Rather than simply adopting the often extremely broad definitions of obscenity, profanity, and libel that eighteenth- and nineteenth-century courts employed, the Court instead defined each of these categories much more narrowly. In doing so, the Court avoided classifying as low value any speech capable of contributing to what *Thornhill* had declared to be of central

¹⁸⁵ *Id.* at 150. Chafee asserted for example that “[t]he absurd and unjust holdings in some of these prosecutions for the use of indecent or otherwise objectionable language furnish a sharp warning against any creation of new verbal crimes.” *Id.* He noted also that, because the definition of obscenity was “very vague, . . . many decisions have utterly failed to distinguish nasty talk or the sale of unsuitable books to the young from the serious discussion of topics of great social significance.” *Id.* at 150–51.

¹⁸⁶ *Roth v. United States*, 354 U.S. 476, 484 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 254–56 (1952).

¹⁸⁷ *Roth*, 354 U.S. at 484 (“All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties[,] . . . [b]ut implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”).

First Amendment importance: the public and truthful discussion of “matters of public concern.”¹⁸⁸

Hence, in *Roth* the Court rejected the broad definition of obscene speech used by nineteenth-century courts because it defined as obscene any material that meaningfully contributed to discussion about what the Court described as a “vital problem[] of human interest and public concern” — namely, sex.¹⁸⁹ Instead, the Court adopted the significantly narrower definition of obscenity that was developed by lower courts in the 1930s specifically in order to protect medical discourse and works of high art from prosecution.¹⁹⁰

For similar reasons, the Court narrowed the category of the profane to exclude the kind of serious religious debate that in the nineteenth century was prosecuted as either profanity or blasphemy.¹⁹¹ In *Cantwell*, and in the subsequent case, *Joseph Burstyn, Inc. v. Wilson*,¹⁹² the Court made clear that speech could not be prosecuted as either profane or blasphemous merely because it violated dominant social norms of piety or expressed an unpopular view of religion or the divine.¹⁹³

¹⁸⁸ *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940).

¹⁸⁹ *Roth*, 354 U.S. at 487.

¹⁹⁰ Under the test adopted by the Court in *Roth*, material could not be considered obscene unless the “dominant theme of the material taken as a whole” appeared “to the average person, applying contemporary community standards . . . [to] appeal[] to [a] prurient interest.” *Id.* at 489. This distinguished it from the nineteenth-century test, which (as the Court put it in *Roth*) “judg[ed] obscenity by the effect of isolated passages upon the most susceptible persons.” *Id.*

¹⁹¹ Nineteenth-century courts did not tend to distinguish the crime of blasphemy from the crime of profanity. Hence, defendants could be prosecuted for profanity both when they called into question the existence of the deity or the sanctity of the Scriptures and when they used offensive or insulting language that happened to include words like “God” or “damn.” *See, e.g., Holcomb v. Cornish*, 8 Conn. 375 (1831) (affirming the conviction of a defendant prosecuted for “profane cursing and swearing” after he hurled “imprecations of future divine vengeance upon [a] magistrate,” *id.* at 380); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 398 (Pa. 1824) (affirming the conviction of a defendant prosecuted for “wilfully, premeditatedly, and despitefully blasphem[ing], and speak[ing] loosely and profanely of Almighty God, Christ Jesus, [and] the Holy Spirit” after he called the existence of God into question during a public debate (emphasis omitted)).

¹⁹² 343 U.S. 495 (1952).

¹⁹³ *Id.* at 505 (“[F]rom the standpoint of freedom of speech and the press . . . the state has no legitimate interest in protecting any or all religions from views distasteful to them It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.”); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“In the realm of religious faith, and in that of political belief, sharp differences arise. . . . To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”).

Meanwhile, after first embracing a very broad interpretation of what counted as low-value libelous speech in *Beauharnais*,¹⁹⁴ the Court sharply constricted liability for libel when it held in *New York Times Co. v. Sullivan*¹⁹⁵ that public officials could receive damages for defamatory falsehoods about them only if they could show that the falsehoods were made with actual malice, and not as a result of negligence.¹⁹⁶ In later decisions, the Court extended the rule to cases involving public figures.¹⁹⁷ In so doing, the Court more or less constitutionalized the nineteenth-century doctrine of qualified privilege.¹⁹⁸ The justifications the Court provided for limiting what kind of speech could be subject to liability for defamation absent any significant constitutional concern did not, however, include that doing so was mandated by longstanding tradition.¹⁹⁹ Instead, the Court argued that no other rule would effectively safeguard the “unalienable right” of the individual to disseminate his or her opinion on matters of public interest without fear of persecution.²⁰⁰

The Court also did not rely upon history to identify new categories of low-value speech. In *Valentine*, for example, the Court cited no historical precedents to justify its denial of First Amendment protection to commercial advertising.²⁰¹ Instead, the Court pointed to the fact that advertising contained information of only private interest.²⁰² Nor did the Court rely upon history in 1972, when it overruled *Valentine*

¹⁹⁴ *Beauharnais v. Illinois*, 343 U.S. 250, 266–67 (1952) (construing a state statute that prohibited the distribution or exhibit of “any lithograph, moving picture, play, drama or sketch, which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy” as a kind of group libel to which First Amendment protections did not apply). The *Beauharnais* Court did note that it retained its “authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel.” *Id.* at 263–64. Nevertheless, the opinion suggested that even speech that touched overtly on “matters of public concern” — for example, by commenting negatively on contemporary racial relations — could be prohibited when libelous without raising any First Amendment concerns. *See id.* at 272. As Professor Robert Cover noted some years later, *Beauharnais* represented the Court’s attempt to “purify . . . our political discourse” — albeit an attempt that was soon abandoned. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1311 (1982).

¹⁹⁵ 376 U.S. 254 (1964) (plurality opinion).

¹⁹⁶ *Id.* at 283, 288.

¹⁹⁷ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967).

¹⁹⁸ *See supra* p. 2196.

¹⁹⁹ The Court in fact acknowledged that speech of this sort had been prosecuted in the eighteenth century under the Sedition Act of 1798, but argued that its prosecution reflected a poor understanding of the original meaning of, and was ultimately inconsistent with, the First Amendment. *Sullivan*, 376 U.S. at 276.

²⁰⁰ *Curtis Publ’g Co.*, 388 U.S. at 149 (plurality opinion) (internal quotation marks omitted); *see also id.* at 149–51.

²⁰¹ *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

²⁰² *Id.* at 55 (finding the advertisement at issue in the case could be prohibited without raising First Amendment concern because it concerned only “what is for private profit” rather than “what is of public interest”).

and held that even purely commercial advertising was entitled to some degree of constitutional protection.²⁰³ The justifications the Court provided for extending protection to speech of this sort were once again functional, rather than historical. Specifically, the Court pointed to the importance of advertising as a medium for communicating to the public information relevant both to political debates and economic decisionmaking.²⁰⁴

Meanwhile, the Court recognized as high value many kinds of speech that in the eighteenth, nineteenth, and early twentieth centuries were regularly sanctioned. It held, for example, that newspaper reports about public trials could be prosecuted for contempt only upon a showing of “clear and present danger,” given their obvious public importance.²⁰⁵ The Court reached this conclusion notwithstanding the fact that, as Justice Frankfurter pointed out in a forceful dissent, in doing so it enacted a “sudden break with the uninterrupted course of constitutional history.”²⁰⁶ The Court also extended full protection to motion pictures, notwithstanding its earlier conclusion that motion pictures were not press for constitutional purposes. The Court did so because it recognized the capacity of motion pictures to “affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”²⁰⁷ The Court extended high-value status to movies, in other words, because it found them capable of contributing, both directly and indirectly, to public debate about public matters.

These cases demonstrate how little the Court actually relied upon history to distinguish low- from high-value speech. Instead it employed what we might describe as a “purpose-based” approach: one that identified low-value speech by looking at whether its content-based regulation threatened to undermine the goals the First Amendment was intended to advance.²⁰⁸ Chief among these purposes — as

²⁰³ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). Advertising remained a category of low-value speech, however, insofar as it could be regulated more strictly than other kinds of high-value speech. *See id.* at 772; Stone, *supra* note 16, at 194 (noting the low-value status of commercial advertising).

²⁰⁴ *Va. State Bd.*, 425 U.S. at 764 (noting that consumers, as well as “society . . . may have a strong interest in the free flow of commercial information” and that “[e]ven an individual advertisement, though entirely ‘commercial,’ may be of general public interest”).

²⁰⁵ *Bridges v. California*, 314 U.S. 252, 257, 269 (1941) (concluding that allowing the prosecution of speech of this sort when it possessed merely an inherent or reasonable tendency of undermining the administration of justice would “remove from the arena of public discussion” the “controversies that command most interest,” *id.* at 269).

²⁰⁶ *Id.* at 279 (Frankfurter, J., dissenting).

²⁰⁷ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

²⁰⁸ Certainly this is what observers believed at the time. *See* Stone, *supra* note 16, at 194 (noting that “[t]he precise factors that the Court considers” when identifying low-value speech “remain

Roth, Sullivan, and the other low-value speech cases make clear — was protecting against government interference the public debate on matters of public concern that the Court now identified as of core First Amendment importance.

History nevertheless continued to provide the theoretical justification for denying protection to offensive or otherwise immoral speech. At least, the Court continued to invoke the *Chaplinsky* dicta that low-value speech was speech “the prevention and punishment of which have never been thought to raise any Constitutional problem”²⁰⁹ when it needed to explain why it was, for example, that child pornography could be entirely prohibited even when it was not obscene, or why the government could prosecute what the Court called “true threats” but not other kinds of speech.²¹⁰

In *Stevens* in 2010, the Court also cited this passage as support for its conclusion that the only content-based regulations of speech that are ordinarily permissible under the First Amendment are those that target what it called simply “historically unprotected categories of speech.”²¹¹ In its emphasis on the historical basis of the low-value categories, *Stevens* makes clear the continuing importance of the invented tradition of low-value speech to First Amendment doctrine today. It also, however, illuminates the serious problems created by the Court’s continuing reliance on what is essentially a false view of First Amendment history — as the next Part explores.

somewhat obscure” but that in general the Court focuses “on the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment”); Cass R. Sunstein, Commentary, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 556 (1989) (construing the distinction between high- and low-value speech as a distinction “between categories of speech [based upon] . . . their centrality to the purposes of the free speech guarantee”).

²⁰⁹ *New York v. Ferber*, 458 U.S. 747, 754 (1982) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

²¹⁰ *Virginia v. Black*, 538 U.S. 343, 359 (2003) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)) (internal quotation marks omitted). 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.” *Black*, 538 U.S. at 359. The category as such does not include threatening language that operates as political hyperbole, or threats that are not made seriously. However, it includes more than simply language that poses a clear and present danger of harm. As the Court made clear in *Black*, language can be prosecuted as a true threat even when the speaker does “not actually intend to carry out the threat.” *Id.* at 360; *see id.* at 359–60. Like many of the other categories of low-value speech, by designating true threats as outside the scope of constitutional protection, the Court has allowed the government to continue to regulate speech when it threatens intangible harm — in this case, the “fear of violence” engendered by the communication of true threats — even when it does not in fact pose an imminent threat of serious danger to person or property. *Id.* at 360 (quoting *Watts*, 394 U.S. at 708) (internal quotation mark omitted).

²¹¹ *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

IV. REINVENTING THE DOCTRINE

In *Stevens*, the Court essentially reinvented the doctrine of low-value speech when it held that the only content-based regulations that are not presumptively invalid under the First Amendment are those that target speech that either falls into “a previously recognized, long-established category of unprotected speech” or constitutes a “categor[y] of speech that ha[s] been historically unprotected, but ha[s] not yet been specifically identified or discussed as such in [the] case law.”²¹² The Court claimed, in holding that novel categories of low-value speech could be identified only on the basis of evidence showing a “long-settled tradition of subjecting that speech to regulation,” that it was doing nothing new; it was merely making explicit what was previously implicit in the doctrine.²¹³ It acknowledged that there was language in the earlier cases to support the government’s alternative interpretation of *Chaplinsky* as establishing a balancing test that required courts to weigh the expressive value of speech against its social costs.²¹⁴ Nevertheless, it insisted that in practice, it had always “grounded its analysis” of the low-value categories in historical considerations.²¹⁵

In fact, as the previous Part makes clear, the Court had not always grounded its analysis of the low-value categories in history. As the example of commercial speech illustrates, historical considerations played no role in the Court’s analysis of at least some categories of low-value speech.

Prior to *Stevens*, the Court had also never held that the only content-based regulations of speech that are generally permissible under the First Amendment are those that targeted historically unprotected categories of low-value speech. To the contrary: the Court had affirmed on multiple occasions the constitutionality of content-based regulations that imposed sometimes significant restrictions on categories of speech that were either explicitly recognized to be high value — such as the labor picketing in *Thornhill* — or that, prior to the twentieth century, were not the target of governmental regulation. For example, in 1978 in *Ohralik v. Ohio State Bar Association*,²¹⁶ the Court affirmed the constitutionality of laws that restricted “the exchange of information about securities” and imposed content-based restrictions on “corporate proxy statements.”²¹⁷ In other decisions, it affirmed the constitutionality of labor laws that absolutely restricted the right of

²¹² *Id.* at 1586.

²¹³ *Id.* at 1585.

²¹⁴ *Id.* at 1585–86.

²¹⁵ *See id.* at 1586.

²¹⁶ 436 U.S. 447 (1978).

²¹⁷ *Id.* at 456.

unions to engage in certain kinds of strikes and boycotts.²¹⁸ The Court also upheld the use of Title VII of the Civil Rights Act of 1964 to impose civil liability on the use of language that created a hostile work environment on the basis of race or sex.²¹⁹

In none of these cases were the regulations justified — to the extent that they were justified at all — by recourse to history. Instead, courts pointed to context-specific features of the speech targeted by these laws to explain why its regulation was permissible even absent a showing that it served a compelling government purpose and was narrowly tailored to that end. In most cases, the justifications were pragmatic. Courts justified regulations that restricted the “exchange of information about securities,” for example, by pointing to the importance of such regulations to the government’s ability to effectively regulate the securities market.²²⁰ The Court justified the ban on secondary boycotts and picketing, meanwhile, by invoking the necessity of maintaining the “delicate balance” established by the labor laws between the rights of workers and the rights of disinterested third parties.²²¹ In their variability, these cases point to what Professor Steven Shiffrin once described as the “eclectic[ism]” of modern free speech law.²²²

Stevens thus signals a marked shift away from this eclectic approach to questions of First Amendment coverage, and toward a much

²¹⁸ See, e.g., *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 226 (1982) (upholding ban on secondary boycotting on the grounds that neither secondary pickets nor boycotts constitute protected activity); *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 616 (1980) (upholding a ban on secondary picketing on the grounds that “[s]uch picketing spreads labor discord by coercing a neutral party to join the fray”). As Professor Julius Getman noted, the Court’s approach to the First Amendment issues involved in these cases was markedly different than the much more stringent approach it took to restrictions on picketing and boycotts outside the union context. See generally Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984).

²¹⁹ In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), for example, the Court upheld the award of damages under Title VII against an employer who used sexually harassing language without once mentioning the possibility that imposition of damages might violate the First Amendment. This was the case notwithstanding the fact that First Amendment issues were extensively argued in the briefs. See Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn’t Bark*, 1994 SUP. CT. REV. 1, 9–10.

²²⁰ See, e.g., *SEC v. Wall St. Publ’g Inst., Inc.*, 851 F.2d 365, 372–73 (D.C. Cir. 1988) (“Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government, and regulation of such communications has been upheld. If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible — and that result has long since been rejected.” (citations omitted)); *Bangor & Aroostook R.R. Co. v. Interstate Commerce Comm’n*, 574 F.2d 1096, 1107 (1st Cir. 1978) (concluding that the “first amendment has not yet been held to limit regulation in areas of extensive economic supervision”).

²²¹ *Retail Store Emps. Union*, 447 U.S. at 617–18 (Blackmun, J., concurring).

²²² Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251 (1983).

more rigorous application of the two-tier framework for the review of content-based regulations of speech. By taking the historical claims made by the *Chaplinsky* Court much more seriously than the New Deal Court did itself — by insisting, as the New Deal Court did not, that historically unprotected speech is the *only* kind of speech that may be regulated on the basis of its content without triggering grave constitutional concern — the decision makes it significantly more difficult for the government to justify laws burdening speech that was historically *not* unprotected. It also, of course, makes history much more important to the analysis than was previously the case.

That the *Stevens* rule ultimately rests on a false view of history calls into question whether the changes it brings to the doctrine are good ones.

A. *Problems of Justification*

The *Stevens* Court made two arguments to justify its new test of low-value status. It argued that, by requiring evidence of a long-settled tradition of regulation to justify the recognition of any novel low-value categories, it ensured that First Amendment doctrine remained faithful to an original understanding of what speech is and is not worth constitutional protection.²²³ It also insisted that, by grounding the analysis in history, it prevented judges from being able to deny protection to speech merely because they disliked it or believed it lacked value.²²⁴ The history detailed in the previous two Parts undermines both of these arguments.

First, it makes clear that the *Stevens* test does not in fact ensure that the doctrine remains faithful to an original understanding of freedom of speech, even assuming that a well-developed understanding of this sort existed at the time and that it can be deciphered via the post-Ratification practice of courts and legislatures.²²⁵ To the contrary. By requiring courts to extend full First Amendment protection to everything that we would today consider speech for constitutional purposes *except* when the government can affirmatively point to a long-settled

²²³ United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

²²⁴ *Id.*

²²⁵ There is good reason to doubt that a well-developed understanding of this sort existed in the late eighteenth century. As Professor Leonard Levy has noted:

[F]reedom [of speech] had almost no history as a concept or a practice prior to the [ratification of the] First Amendment or even later. It developed as an offshoot of freedom of the press, on the one hand, and on the other, freedom of religion — the freedom to speak openly on religious matters. But as an independent concept referring to a citizen's personal right to speak his mind, freedom of speech was a very late development, virtually a new concept without basis in everyday experience and nearly unknown to legal and constitutional history or to libertarian thought on either side of the Atlantic prior to the First Amendment.

LEONARD W. LEVY, LEGACY OF SUPPRESSION 5 (1960).

tradition of regulating speech of this sort, the test strictly limits when and how the government can regulate even subversive, immoral, or otherwise plainly dangerous speech. It thus establishes a constitutional regime of speech regulation that looks nothing like that which existed in the eighteenth and nineteenth centuries.

Second, the fact that the distinction between high- and low-value speech is a product of the twentieth century, rather than a longstanding feature of the regulation of speech in the United States, calls into question how effective the *Stevens* test will be in preventing judges from imposing their own values onto the Constitution.

The test might significantly limit judicial discretion were it in fact the case that the historical record discloses “well-defined” and “narrowly limited” categories of low-value speech that eighteenth- and nineteenth-century courts treated qualitatively differently from other kinds of speech. In that case, even if it didn’t ensure fidelity to the original meaning of freedom of speech, the rule could nevertheless restrain courts by forcing them to abide by the categorical distinctions that earlier courts employed.

The historical record does not, however, include well-defined and narrowly limited classes of this kind. Instead, it reveals a plethora of what we today would call content-based regulations of speech — many of which applied to high-value speech, not merely to low.²²⁶ The complexity of the historical record means that, even leaving aside the question of original meaning, the task of determining whether a sufficient tradition of prohibition exists to classify a particular kind of speech as of low value will in many cases be a difficult and highly subjective endeavor and one whose outcome will depend in large part on how the Court constructs the relevant categories.

Consider, for example, the most recent opinion in which the Court applied the *Stevens* test, *United States v. Alvarez*.²²⁷ *Alvarez* involved a challenge to the Stolen Valor Act, which made it a crime to know-

²²⁶ To give just a few examples of what I mean, the following is a list of some of the speech-related common law causes of action for nuisance listed in an 1874 treatise: disturbing “public rest on the Lord’s day” by conspicuous secular labor; indulging in “gross and scandalous profanity”; indulging in “habitual, open, and notorious lewdness” (which the author noted could include the display of “a picture of a man naked to the waist, and covered with eruptive sores, so as to constitute an exhibition offensive and disgusting” even though “there is nothing immoral or indecent in the picture”); scolding; brawling; eavesdropping; publishing false alarms, or intelligence calculated to disturb the peace of the community. 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES §§ 2384, 2385, 2391 (1874). The task of translating these offenses into a contemporary context, or interpreting what they mean vis-à-vis freedom of speech, is by no means a simple one. It certainly cannot be said that the First Amendment allows the government to prohibit all of these (expressive as well as nonexpressive) acts; nor is it likely that that is what the Court would understand it to mean.

²²⁷ 132 S. Ct. 2537 (2012).

ly lie about having received a military honor or award.²²⁸ A plurality of the Court found that the speech the Act restricted — namely, false statements of fact — was historically protected because, although courts and legislatures have traditionally imposed sanctions on many kinds of false speech, there is no historical tradition in the United States of prosecuting the act of lying when that lie is unconnected to some other, legally cognizable harm, “such as an invasion of privacy or the costs of vexatious litigation.”²²⁹

The plurality was certainly correct on this point. Indeed, it was widely recognized in the nineteenth century that lying was not by itself an actionable offense under either the common law or the various statutes that governed false representations.²³⁰

It is far from clear, however, why this undoubtedly true fact about the historical tradition of regulating falsity in the United States led the plurality to conclude that statements like those prohibited by the Stolen Valor Act do not fall within a “historic and traditional” category of exception. As the Court itself acknowledged, the Stolen Valor Act was not intended to criminalize falsity *per se*. Instead, Congress intended the Act to criminalize lying that resulted, if not necessarily in material harm to the government or the public, then in harm to the morale and efficacy of the Armed Services.²³¹ This was how it was interpreted in Alvarez’s case.²³² There is plenty of evidence to suggest that nineteenth- or at least early twentieth-century courts and legislators saw nothing amiss in punishing false statements of fact that threatened this kind of intangible harm. For example, someone who falsely claimed to be speaking on behalf of the Government could be criminally punished under a federal statute passed in 1909 that prohibited the impersonation of government officers even absent any evidence that the speech caused financial or property loss.²³³ This was because his or her speech was understood to cause intrinsic harm to “the general good repute and dignity” of government service.²³⁴ In the nineteenth century, meanwhile, the “publishing of false alarm” was a com-

²²⁸ *Id.* at 2543.

²²⁹ *Id.* at 2545.

²³⁰ See, e.g., *Ramey v. Thornberry*, 46 Ky. (7 B. Mon.) 475, 475 (1847) (“To charge a person in general terms, with having sworn a lie or having sworn falsely, is certainly not actionable.”); *Benton v. Pratt*, 2 Wend. 385, 389 (N.Y. Sup. Ct. 1829) (“[N]o action could be supported for telling a bare, naked lie; that is, saying a thing which is false, without any intention to injure, cheat or deceive another person . . .”).

²³¹ Stolen Valor Act of 2005, § 2(1), 120 Stat. 3266 (2006) (identifying the Act’s purpose to be the prevention of the dilution of “the reputation and meaning of military decorations and medals”).

²³² *Alvarez*, 132 S. Ct. at 2548–49.

²³³ *United States v. Barnow*, 239 U.S. 74, 75, 79–80 (1915).

²³⁴ *Id.* at 80.

mon law offense. The cognizable harm it created was, of course, the harm to the public order of the community.²³⁵

Only by construing the relevant category extremely broadly — to include *all* false statements of fact, even those that do not appear to lead to any “cognizable legal harm” — could the *Alvarez* plurality conclude that false statements of fact like those targeted by the Stolen Valor Act were historically protected. That the Court could construe the relevant category in this way — that it could, in other words, determine the terms of the analysis, and in so doing, determine its result — suggests how manipulable the *Stevens* test can be, given the failure of the historical record to clearly demarcate categories of low-value speech that need not be created, merely discovered. Nor is this the only example of serious ambiguity in the Court’s delimitation of the categories.

Stevens itself demonstrates how much can depend upon how the Court construes the relevant categories of analysis. The case, recall, involved a First Amendment challenge to a federal statute that criminalized the creation, sale, and possession of visual or auditory images of animal cruelty when the conduct depicted in those images was illegal under either federal law or the law of the state in which they were created, possessed, or distributed.²³⁶

The Court concluded that the speech regulated by the statute — a category it described as “depictions of animal cruelty” — was not historically unprotected, given the absence of any evidence demonstrating the existence of a long-settled tradition of regulating speech of this kind.²³⁷ And indeed, as the majority pointed out, there is no evidence that eighteenth- or nineteenth-century courts prosecuted speech that depicted cruelty to animals.²³⁸

A good argument can be made, however — indeed, Justice Alito made it in his dissent — that even if depictions of cruelty to animals do not constitute a novel category of historically unprotected speech, they nevertheless fit into the established “historic and traditional” category of speech integral to crime.²³⁹ In *New York v. Ferber*,²⁴⁰ the Court concluded that child pornography was a kind of speech integral to crime because “[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Na-

²³⁵ WHARTON, *supra* note 226, at § 2391.

²³⁶ *United States v. Stevens*, 130 S. Ct. 1577, 1582–83 (2010) (citing 18 U.S.C. § 48 (2012)).

²³⁷ *Id.* at 1585 (emphasis omitted).

²³⁸ *Id.*

²³⁹ *Id.* at 1599–600 (Alito, J., dissenting).

²⁴⁰ 458 U.S. 747 (1982).

tion.”²⁴¹ Like child pornography, many of the depictions of animal cruelty that the federal statute prohibited — such as the dogfighting video for which the defendant in the case was prosecuted — created a market for, and thereby incentivized, “activity illegal throughout the Nation.”²⁴²

It is hard therefore to reconcile the majority’s conclusion regarding the constitutional status of the defendant’s speech with the decision in *Ferber*. The *Stevens* majority certainly provided no hint as to how the two decisions might be reconciled. Instead, it entirely ignored the possibility that the speech targeted by the federal statute might constitute speech integral to crime and concentrated all of its attention on the separate question of whether depictions of cruelty to animals constituted a novel category of historically unprotected speech (they do not).

Ultimately, the decision in *Stevens* might be justified on overbreadth grounds.²⁴³ The Court’s dismissal of even the possibility that the defendant’s speech qualified as low value suggests nevertheless how unpredictable, perhaps even incoherent, the historical test can be, given the difficulty of determining at what level of generality it should be applied. This leaves, obviously, a great deal of room for value judgments to intrude into the analysis, albeit in cloaked form.

B. Costs of the Rule

The fact that the *Stevens* rule relies on a false view of history means that it achieves neither of the benefits the Court has claimed for it. Meanwhile, the test imposes serious costs.

For one thing, by requiring courts to justify decisions about low-value speech in historical terms, it forces whatever value judgments may in fact motivate these decisions to remain silent and hidden. It thus undermines the transparency of judicial decisionmaking that, by making courts’ reasoning vulnerable to popular critique, helps limit the antimajoritarian power of the courts.

²⁴¹ *Id.* at 761.

²⁴² The defendant in *Stevens* ran a business and an associated website through which he sold videos of dogfights. *Stevens*, 130 S. Ct. at 1583. He was prosecuted under 18 U.S.C. § 48, which prohibited the sale of “depiction[s] of animal cruelty . . . for commercial gain” when the conduct depicted in the speech violated federal or state law in the jurisdiction in which the sale took place. *Id.* at 1582 (quoting 18 U.S.C. § 48 (1999) (amended 2010)). As Justice Alito noted in dissent, dogfighting is banned in all fifty states, as well as the District of Columbia, just as child pornography is. *Id.* at 1601 (Alito, J., dissenting).

²⁴³ As the majority pointed out, laws regulating hunting vary considerably across jurisdictions. *Id.* at 1589 (majority opinion). Accordingly, depictions of hunting might run afoul of the statute even though they depicted conduct that was illegal only in the jurisdiction in which they were sold, not the jurisdiction in which the depictions occurred. *Id.* at 1588–89. Hence, the statute criminalized many acts of expression that did not in fact depict — and thereby incentivize — activity that was “illegal throughout the Nation” even if they did depict activity that was illegal in at least one jurisdiction.

To the extent judges employ it in good faith, the test also ensures that decisions about the constitutional status of speech depend, ultimately, on factors — such as, for example, how the court defines the relevant categories, and whether eighteenth- and nineteenth-century legislatures happened to regulate a particular kind of speech — that are not only hard to predict in advance, but also, from a constitutional perspective, quite irrelevant. Whether a court construes the relevant categories broadly or narrowly tells us little or nothing about whether the speech in question is “worthy” of constitutional protection or would have been considered so at the time.

Of course, this is in some sense what the Court crafted the rule in order to achieve. The assumption underlying the decision, however, was that by forcing judges to base their decisions about the constitutional status of speech on historical evidence, rather than their own conceptions of the constitutional value of the speech in question, the rule would allow an original, or at least traditional, understanding of constitutional value to control. Absent that kind of animating understanding, the formalism of the *Stevens* rule is very unattractive — particularly since one of its likely consequences will be to make it much more difficult for the government to regulate speech in new ways.

Consider, for example, the vexed question of the First Amendment status of information. In 2011, in *Sorrell v. IMS Health Inc.*,²⁴⁴ the Court addressed a First Amendment challenge to a Vermont law that prohibited pharmacies from sharing information about doctors’ prescribing practices with marketers.²⁴⁵ Although the Court ultimately struck the law down on other grounds, it noted in passing that there is a “strong argument that prescriber-identifying information is speech for First Amendment purposes.”²⁴⁶ Indeed, in a number of previous cases, the Court had concluded that certain kinds of information — information on beer labels, information in the form of a credit report — counted as speech under the First Amendment, albeit not always high-value speech.²⁴⁷

²⁴⁴ 131 S. Ct. 2653 (2011).

²⁴⁵ *Id.* at 2659.

²⁴⁶ *Id.* at 2667.

²⁴⁷ See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761–62 (1985) (plurality opinion). More generally, in its commercial speech cases, the Court has long emphasized the First Amendment importance of the information that advertisements convey. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (“Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”).

In a future case, the Court thus may well find that personal information of the sort at issue in *Sorrell* is speech for First Amendment purposes. This is not inherently problematic.²⁴⁸ It does however raise the question of what level of protection speech of this sort should receive. The analysis is potentially a complex one, given on the one hand the tremendous value that information of this sort possesses, and on the other hand the serious threat that its circulation and unregulated disclosure might pose to individual privacy.²⁴⁹

Under the *Stevens* rule, however, the only inquiry that matters is historical: namely, can courts discern a long-settled tradition of regulating speech of this sort? But why should it matter whether eighteenth- and nineteenth-century legislatures passed rules to restrict the disclosure of speech of this kind? Given how recently the technology to store personal information on a mass scale emerged, the absence of a tradition of regulating speech of this kind tells us very little about whether courts and legislatures would have believed it constitutionally permissible to do so.²⁵⁰ All it tells us is that the problem of information disclosure had not yet emerged as something legislatures and courts had to concern themselves with. And yet, under *Stevens*, it seems almost certain that, were the Court to recognize personal information as speech (a far from unlikely prospect), it would have to conclude that such speech was high value and could be regulated only in accordance with the demanding standards of strict scrutiny.

In practice, applying *Stevens* to the case of personal information would thus significantly impede the government's ability to restrict the

²⁴⁸ As Professor Ashutosh Bhagwat notes, there are entire industries organized around the collection and dissemination of information of this and similar sorts. Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 864 (2012). To say that such information is not speech would be to leave these industries entirely unprotected against government efforts to restrict their expressive activities. *Id.* (arguing that such a result would "create an absurdly large and dangerous hole in the protections granted by the First Amendment"). This seems obviously problematic.

²⁴⁹ As Bhagwat notes, were the Court to recognize personal information as speech, the ruling could implicate not only data on individual physician prescribing practices but also the following categories:

[P]ersonal medical information in the possession of health care providers; financial information in the possession of financial institutions; purchasing histories in the possession of retailers, including online retailers such as Amazon.com; search information in the possession of search engines such as Google; viewing information in the possession of firms such as Comcast and Netflix; and any number of other forms of personal data that individuals voluntarily share with private-sector firms.

Id. at 868. For a cogent argument about the threat to privacy that the disclosure of information of this sort poses, see A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000).

²⁵⁰ See, e.g., Froomkin, *supra* note 249, at 1472–501 (tracing the recent transformations in how and how much personal information is gathered and retained); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 969–70 (2003) (same).

disclosure of many kinds of personal information.²⁵¹ Although restrictions on the disclosure of personal medical information might survive strict scrutiny, it is much less likely that laws that prohibit the disclosure of other kinds of information would.²⁵² Certainly in the past the Court has held that the First Amendment prevents the government from limiting or imposing liability on the disclosure of truthful information in order to protect personal privacy.²⁵³ It is hard to believe that the Court will find that laws restricting the disclosure of information about an individual's buying habits, or credit history, or video rental records serve a compelling state interest when it has not found that laws restricting the disclosure of, for example, information about a rape victim, or a juvenile defendant, do. Yet it is difficult to see what First Amendment interests are harmed by such laws. In contrast to the earlier cases, the information targeted by privacy laws of this sort is usually not already in the public domain or likely to end up there. Restricting its circulation does not therefore appear to undermine public debate on matters of public concern.²⁵⁴ Nor does information of this sort appear sufficiently important to the search for truth or the individual right to autonomy, to preclude any restrictions on its disclosure.²⁵⁵

Privacy laws are not the only kinds of laws that the *Stevens* test threatens. It also threatens the various labor, securities, and civil rights laws described above. Eighteenth- and nineteenth-century courts did not, after all, regularly sanction sexually harassing speech or restrict speech about public securities, save for some limited regulation

²⁵¹ See Solove, *supra* note 250, at 971–72 (noting the “panoply of federal and state statutes that limit disclosures of personal data [including] . . . information from school records, cable company records, video rental records, motor vehicle records, and health records” (footnotes omitted)).

²⁵² See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 112–14 (2014) (arguing that under heightened scrutiny, the confidentiality provisions in the Health Insurance Portability and Accountability Act of 1996, the Fair Credit Reporting Act, and other federal laws should be struck down); Bhagwat, *supra* note 248, at 871–72 (noting that “[i]t seems beyond peradventure that individuals’ interests in maintaining the secrecy of their financial transactions, or their personal health history, qualify as compelling” but concluding that it is much less likely that the interest in maintaining personal privacy about other kinds of information would similarly qualify).

²⁵³ See, e.g., *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 830, 845–46 (1978) (invalidating a Virginia statute that imposed criminal punishment for publishing truthful information about confidential proceedings); *Okla. Publ’g Co. v. Dist. Court*, 430 U.S. 308, 309–10 (1977) (per curiam) (striking down a pretrial order that enjoined the news media from publishing the name or picture of a child); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975) (holding that a state may not allow damages for an invasion of privacy caused by the publication of the name of a deceased rape victim).

²⁵⁴ See Solove, *supra* note 250, at 984.

²⁵⁵ As Daniel Solove points out, laws restricting the disclosure of personal information in fact vindicate an important autonomy interest — that of the individual to control the disclosure of information about him or herself. *Id.* at 990–91.

of fraud.²⁵⁶ And although there is a considerably longer history of regulating strikes and boycotts, this history extends for the most part only to the late nineteenth century.²⁵⁷ The fact that the Court has not specified how long a history of regulation must be to qualify as “long-settled” means that *Stevens* could be interpreted so as to avoid conflicting with these or any other by-now familiar regulatory schemes. The originalist language in the opinion suggests, however, that by a long-settled tradition of regulation, what the Court means is a tradition extending back to the eighteenth century, or as close to it as seems capable of illuminating original understandings.

Assuming therefore that what a “long-settled” tradition of regulation means is a tradition that extends into the nineteenth and even perhaps eighteenth centuries, *Stevens* calls the constitutionality of all of these laws into serious question. Again, however, it is not clear that it should. Certainly the fact that eighteenth- and nineteenth-century legislatures did not regulate the speech of public companies, or prohibit the use of sexually harassing speech, or prohibit secondary boycotts, does not mean that they would have considered prohibitions of this sort to be unconstitutional. Nor does it mean that we should do so today.

There are, of course, critics of these laws who argue that they violate the First Amendment and should therefore be struck down.²⁵⁸ The arguments made against these laws do not, however, tend to rely upon history. Instead, critics of these laws argue that they are unconstitutional because they impede important First Amendment inter-

²⁵⁶ Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 859 (1993) (“Sexual harassment was [only] recognized as a legitimate cause of action under Title VII in 1976.”). For a detailed history of securities regulation in the United States in the mid-nineteenth century, see STUART BANNER, *ANGLO-AMERICAN SECURITIES REGULATION* (1998).

²⁵⁷ WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 59–60 (1991) (noting that “[i]n 1900, strikes to improve wages and working conditions were clearly legal, as they had been virtually throughout the century,” *id.* at 59–60, and that “[b]efore the 1890s, courts had barely considered the legal status of many kinds of boycotting activities,” *id.* at 60); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 922–23 (1988) (“[N]o American case before the 1890s condemned laborers for the simple act of combining in order to increase wages.”).

²⁵⁸ See, e.g., Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997) (arguing that at least some of the speech targeted by Title VII restrictions on harassing language deserves First Amendment protection); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1845–55 (1992) (same); see also Getman, *supra* note 218, at 20–22 (arguing that the laws prohibiting unions from engaging in secondary boycotts “resemble[] an intellectual rubble heap,” *id.* at 21, and should be overturned, *id.* at 20); Susan B. Heyman, *The Quiet Period in a Noisy World: Rethinking Securities Regulation and Corporate Free Speech*, 74 OHIO ST. L.J. 189, 211–17 (2013) (arguing that securities regulations that prohibit the disclosure of truthful information violate the First Amendment when assessed under strict scrutiny or the intermediate scrutiny afforded commercial speech).

ests.²⁵⁹ What is problematic about the *Stevens* test is that, by making the inquiry an exclusively, or at least primarily, historical one, the test deprives courts of any opportunity to determine whether the critics are right.

C. *The Problem of Principle*

The preceding discussion points to the fundamental problem with the *Stevens* rule: it fails to provide courts with a principled basis for making determinations about the scope and limits of constitutional protection for speech. Nor could a historical-boundary test like it do so, given the tremendous changes that have taken place in how courts understand what it means to guarantee freedom of speech, without entailing a massive reorganization of the constitutional boundaries that currently exist.

Indeed, were the Court to genuinely attempt to craft a test of First Amendment boundaries that resulted in a distribution of constitutional protections for speech that looked anything like that which existed in the eighteenth and nineteenth centuries, it would have to either (1) extend protection to the many categories of low-value speech that were protected, at least against prior restraint, during this period or (2) deny protection to the many kinds of high-value speech that were criminally sanctioned when they posed a threat — even what we would today consider to be an attenuated threat — to the public order of society. Embracing the former view of constitutional boundaries would mean essentially doing away with the doctrine of low-value speech altogether. Embracing the latter view would mean vesting the government with considerably greater power than it now possesses to punish speech merely because it dislikes it or believes it improper or immoral.

Neither conception of constitutional boundaries is normatively attractive. The former threatens to undermine the government's ability to regulate commercial, criminal, or other kinds of low-value speech not only when it poses an imminent danger of serious harm to person or property, but also when it threatens other, more intangible but nevertheless important harms — harms to reputation, civility, public confidence in the marketplace, and so on. The latter conception is undesirable because it undermines the central insight of the modern jurisprudence: namely, that granting government the power to repress speech that it dislikes threatens democracy, the search for truth, and individual self-expression.

²⁵⁹ See Heyman, *supra* note 258, at 218 (arguing that securities regulations that restrict speech in advance of an initial public offering “raise[] serious First Amendment concerns” because the speech they regulate operates much like traditional advertising and therefore deserves the same protection); Volokh, *supra* note 258, at 1856 (critiquing the antidemocratic implications of hostile workplace laws that allow speech to be restricted because of its political content).

The *Stevens* test does not, of course, create either unpalatable scenario. It preserves the existing low-value categories, notwithstanding their historical pedigree or lack thereof. It merely imposes a steep bar to the recognition of novel categories of low-value speech. As a result, what it produces is an ultimately unprincipled distribution of constitutional protection: one that does not clearly reflect either an original *or* a contemporary understanding of freedom of speech.

The test consequently threatens to both underprotect and overprotect speech. Indeed, the *Stevens* Court insisted quite forcefully that a reconsideration of the existing low-value categories was foreclosed by history, just as the recognition of novel categories of low-value speech is.²⁶⁰ The Court's resistance to reexamining the existing low-value categories is problematic for many of the same reasons that the Court's refusal to recognize novel categories of low-value speech is.

There may be good reasons to believe that some categories of low-value speech pose a greater threat to First Amendment interests and values than others do. The exception carved out for obscene speech, for example, is much harder to square with *Cantwell's* stirring ode to the importance of diversity than is the exception carved out for commercial advertising because the former appears much more likely to be used to target those who hold a particular set of beliefs or espouse a particular viewpoint.²⁶¹ For that reason, the content-based regulation of obscenity appears to pose a greater threat to the democratic values of the First Amendment than the regulation of commercial advertising.²⁶²

Yet the *Stevens* framework provides no vocabulary or set of standards courts can use to evaluate whether the existing categories of low-value speech pose a threat to democracy, or social progress, or any of

²⁶⁰ *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (asserting that the freedom of speech referred to by the First Amendment does not include "a freedom to disregard the[] traditional limitations" on the scope of its application, just as it does not include the freedom to recognize novel categories of low-value speech (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992)) (internal quotation mark omitted)).

²⁶¹ An alternative way to express this point is to say that prohibitions against obscenity shade much closer to impermissible viewpoint discrimination than do many of the other laws that the doctrine of low-value speech makes possible. See Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 122–28 (1996) (arguing that the prohibition against obscene speech is viewpoint based); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111–12 (1978) (arguing that the repression of sexually explicit speech is likely to "have a potent viewpoint-differential impact," *id.* at 112, because speech of this sort "will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores," *id.* at 111–12, and that "[t]o treat such restrictions as viewpoint-neutral seems simply to ignore reality," *id.* at 112).

²⁶² Of course, even prohibitions on commercial advertising might have viewpoint differential effects. Pro-consumption advertising is likely to be much more common than advertising expressing the opposite point of view, for obvious reasons. But the impact is less stark. Ads of the latter persuasion certainly do exist. See DOUGLAS J. GOODMAN & MIRELLE COHEN, *CONSUMER CULTURE* 49–74 (2004).

the other purposes associated with the First Amendment. This might be justifiable were it the case that the rule in fact expressed the principled judgments of the Founders that certain speech simply didn't count as speech for constitutional purposes. But it doesn't. Instead, the rule merely makes immutable the perhaps idiosyncratic, biased, or outdated judgments reached by earlier courts about the harms that the regulation of low-value speech such as obscenity threaten. This fact suggests that even free speech absolutists — those who might otherwise rally around the *Stevens* rule because of the steep bar it imposes on the recognition of novel categories of low-value speech — should be unhappy with the Court's insistence on a historical test of First Amendment boundaries.

D. Embracing Purposes

The problems with the *Stevens* rule illustrate the dangers of crafting doctrinal rules that rely, ultimately, upon a false view of the past. By forcing courts to determine the constitutional value of speech by means of a historical test that does not illuminate original understandings of what speech is worth protecting, the rule threatens to create a set of doctrinal distinctions that rest either on hidden value judgments — value judgments that are, as a result, very difficult to understand, engage with, or critique — or are the product of factors that are constitutionally irrelevant. In so doing, it threatens the very reconciliation between freedom and order for which the Court developed the distinction between high- and low-value speech. Certainly, if applied consistently, the rule will make it virtually impossible for the government to regulate speech in new ways. Meanwhile, it forecloses the serious reconsideration of the existing categories of low-value speech and forces whatever revisions to the categories the Court comes to believe to be necessary to occur *sub rosa*, through a narrowing of categorical definitions.

What these problems suggest is that, however important historical claims may have been to the initial justification of the doctrine of low-value speech, the Court's continuing emphasis on the historical basis of the low-value categories only creates more problems for the doctrine than it solves. They suggest that First Amendment doctrine would be better off were the Court to more affirmatively embrace the purposive and functional, rather than historical, nature of the distinction between high- and low-value speech.

Returning to a purpose-based test like the “matters of public concern” test the Court used throughout the twentieth century to determine the constitutional status of movies, commercial advertising, and nonprurient speech about sex would avoid many of the problems created by the *Stevens* test. It would ensure much greater doctrinal transparency by allowing courts to articulate the value judgments that

in fact inform their decisionmaking. It would also provide courts the flexibility to recognize novel categories of low-value speech, even when these kinds of speech either did not exist in the eighteenth or nineteenth century or were not, for whatever reason, a subject of legislative or judicial concern at the time. And of course it would provide courts with the tools to critically evaluate the merits of the existing low-value categories.

This is not to say that embracing a purpose-based approach would not pose its own problems. For one thing, asking courts to determine the constitutional status of speech by examining the extent to which it furthers the First Amendment's purposes would still leave courts a great deal of room to determine the outcome of the analysis by construing the relevant speech category broadly or narrowly. Furthermore, the approach would require courts to identify, and agree upon, the purposes of the First Amendment. At least in the scholarly literature, there is considerable debate about what these purposes may be.²⁶³ And while the Supreme Court's jurisprudence has tended to emphasize primarily the democracy- and truth-promoting purposes of the First Amendment,²⁶⁴ these purposes alone do not easily explain all of the Court's decisions regarding where and to what kinds of speech First Amendment protections apply.²⁶⁵ What purposes actually inform the case law may therefore be considerably harder to discern than one might initially assume.

Neither of these problems is insurmountable, however. Certainly the Court could, if it wished, articulate much more clearly than it has

²⁶³ See Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–54 (1989) (outlining the various purposes invoked to justify freedom of speech, including the promotion of democracy, the advancement of truth, and the safeguarding of individual autonomy). For a good survey of recent debates about First Amendment purposes, see *Virginia Law Review Symposium on Free Speech*, 97 VA. L. REV. 477 (2011).

²⁶⁴ See Greenawalt, *supra* note 263, at 145 (“Arguments from democracy have been said in a comparative study to be the ‘most influential . . . in the development of twentieth-century free speech law.’” (alteration in original) (quoting E. BARENDT, *FREEDOM OF SPEECH* 23 (1985))); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 n.2, 3 (noting the influence of the metaphor of the marketplace of ideas and its accompanying search-for-truth rationale on the development of modern First Amendment doctrine); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 488 (2011) (arguing that although “the value of democratic self-governance can[not] explain all First Amendment decisions[,] . . . this value best corresponds to the major outlines and structure of our inherited decisions”); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 491 (2011) (“[C]ontemporary American free speech doctrine is best explained as assuring the opportunity for individuals to participate in the speech by which we govern ourselves. . . . Descriptively, no other theory provides nearly as good an explanation of the actual pattern of the Supreme Court’s free speech decisions.”).

²⁶⁵ See C. Edwin Baker, Response, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 VA. L. REV. 515, 527–28 (2011); Post, *supra* note 264, at 488; Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 559 (2011).

so far a theory of First Amendment purposes. It could also develop rules to govern the task of delimiting the relevant speech categories, similar to those that govern the identification of fundamental rights in the Due Process Clause context.²⁶⁶ The only thing stopping the Court from doing so, in fact, is the presumption that underlies the *Stevens* test: namely, that the categories of low-value speech have always existed in something roughly like their contemporary form and that the task of categorical definition is a relatively simple and objective one (as it clearly is not).

Embracing more affirmatively than the Court has done up until now the purpose-based nature of the low-value inquiry could therefore do a great deal to make the analysis of constitutional boundaries both more predictable and more transparent than it has been to date. Of course, doing so would require the Court to acknowledge more explicitly that the principle of content neutrality is not in fact as all-encompassing as it has claimed: that both courts and legislatures in fact retain considerable power to discriminate against speech because of the message it communicates.

It would also mean vesting judges with considerable discretion to determine when a particular category of speech does or does not advance the First Amendment's purposes. But in this respect a purpose-based test is not inferior to a historical test like that outlined in *Stevens*. In both cases, the test grants courts considerable leeway to determine the constitutional value of the regulated speech. In the former case, however, this discretion is evident, and the court's reasoning and conclusions are subject to critique. In the latter case, however, the discretion built into the test is hidden, and is therefore much more difficult to understand and respond to.

Furthermore, there are ways to constrain judicial discretion under a purpose-based approach that would limit, even if not entirely eliminate, the threat of what the *Stevens* Court rather derisively called "ad hoc balancing."²⁶⁷ Certainly for much of the twentieth century, the Court did not simply balance what it perceived to be the expressive value of speech, when considered in light of the First Amendment's purposes, against its social costs. Instead, as Part III discussed, it

²⁶⁶ See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (arguing that, to determine whether a liberty interest was "traditionally protected by our society," *id.* at 122, and therefore protected by the Due Process Clause of the Fourteenth Amendment, courts should look to the most specific relevant tradition available). The approach taken by the plurality in this case has earned its share of criticism. See, e.g., Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 33–36 (1992); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). The point is not that the Court should follow the specific approach adopted in the Due Process Clause context, but that rules for determining the level of generality of analysis can be developed, and have been developed in other contexts.

²⁶⁷ *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

asked whether speech of a given category was capable of impacting, directly or indirectly, public debate about “matter[s] of political, social, or other concern to the community.”²⁶⁸ If it was thought to do so, in most cases the speech received full or close to full First Amendment protection — notwithstanding a long-settled tradition of regulating speech of this sort.²⁶⁹ If it did not, it tended to be relegated to the status of low-value speech and receive little or no constitutional protection.²⁷⁰

The matters of public concern test thus did not require courts to make first-order judgments of the value of speech per se. Indeed, the Court extended full First Amendment protection under this test to many kinds of speech that it clearly believed lacked value.²⁷¹ This is not to say that judges did not continue to enjoy considerable freedom under the test to define matters of public concern as they desired. The Court itself recently acknowledged as much.²⁷² And commentators have long criticized the test for its lack of standards.²⁷³ But the Court’s failure to develop explicit rules for when speech touches on matters of public concern may be less an inherent problem with the

²⁶⁸ *Connick v. Myers*, 461 U.S. 138, 146, 147–48 (1983) (describing the “matters of public concern” test). The Court developed this test to deal with the rather specific category of employee speech. But the Court has subsequently made clear that the test applies beyond this limited realm. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011) (applying the test to picketing at a funeral); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761–62 (1985) (plurality opinion) (applying the test to a credit report).

²⁶⁹ See *supra* p. 2210.

²⁷⁰ For example, in its libel jurisprudence, the Court has held that defamatory speech that touched on matters of public concern received greater First Amendment protection than speech on merely private issues. See Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 8–12 (1990). The Court also has extended First Amendment protection only to government-employee speech that touched on matters of public concern. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). And of course, it has denied protection to obscene speech and other kinds of low-value speech that appeared to contribute little to the “exposition of ideas.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

²⁷¹ In *Winters v. New York*, 333 U.S. 507 (1948), for example, the Court held that true-crime magazines were entitled to full First Amendment protection because, like any other kind of mass publication, magazines of this sort possessed the capacity to affect public attitudes and beliefs, notwithstanding the fact that the Court itself could “see nothing of any possible value to society in these magazines,” *id.* at 510. Another example is *Cohen v. California*, 403 U.S. 15 (1971), where the Court struck down the defendant’s conviction under an offensive conduct statute for wearing a jacket that made a “vulgar allusion to the Selective Service System,” *id.* at 20.

²⁷² See *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam) (noting that “the boundaries of the public concern test are not well defined”).

²⁷³ See, e.g., Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 259 (1987) (arguing that the test amounts to “little more than a message to judges and attorneys that no standards are necessary because they will, or should, know a public concern when they see it”); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 668 (1990) (“Although the ‘public concern’ test rests on a clean and superficially attractive rationale, the Court has offered virtually no analysis to develop its logic.”).

test than a consequence of the submerged and somewhat implicit way in which the test operated in many areas of the law. In other words, it may be yet another casualty of the Court's reliance on a false view of First Amendment history. Embracing the modernity of the distinction between high- and low-value speech more affirmatively than the Court has been willing to do to date could thus help avoid not only the problems of the *Stevens* test but also at least some of the problems associated with the matters of public concern test itself.

To be sure, the matters of public concern test is not the only purpose-based test that courts can use to distinguish high-value speech from low. Indeed, the test has a major shortcoming: it extends no protection to speech that concerns only private matters. And yet, the fact that speech that touches on matters of public concern clearly advances one or more of the First Amendment's purposes does not mean that speech on private matters does not.²⁷⁴ One can understand the opinions in *Alvarez* and *Sorrell* to reflect the desire among at least some members of the Court to explicitly extend constitutional protection to private speech of this sort. Certainly, the *Alvarez* plurality expressed concern that the Stolen Valor Act might apply not only to public lies but to "personal, whispered conversations within a home."²⁷⁵ And personal information of the kind at issue in *Sorrell* is not the kind of publicly oriented expression to which the matters of public concern test has traditionally been applied. There may be good reason therefore to develop an alternative or additional purpose-based test for distinguishing high- from low-value speech.

The point here is not to decide which purpose-based test the Court should use to identify low-value categories of speech. It is only to note that a purpose-based test like the matters of public concern test would provide a principled basis for distinguishing between high- and low-value speech. The history of constitutional boundary-setting in Parts II and III makes clear that a historical test like that developed by the *Stevens* Court does not provide a principled basis for making distinctions of this sort.

E. The Irresolvable Conflict

What the history of the doctrine of low-value speech makes clear, in other words, is that courts cannot avoid the conflict between the doctrine of low-value speech and the principle of content neutrality by turning to history. At least they cannot do so without risking the crea-

²⁷⁴ Numerous commentators have made this point. See, e.g., Baker, *supra* note 265, at 526–27; Frederick Schauer, "Private" Speech and the "Private" Forum: *Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217, 235–36; Shiffrin, *supra* note 265, at 561.

²⁷⁵ *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion).

tion of a set of doctrinal distinctions unmoored from any conception of the purposes they are supposed to serve — whether those of the Founders, those of nineteenth-century courts, or those of courts today.

This is not to say that courts cannot turn to history to help determine what purposes the First Amendment was intended to further. Eighteenth- and nineteenth-century discourses about freedom of speech and press, in their emphasis on the democracy- and truth-promoting purposes of guaranteeing freedom of expression, suggest that there has been much less change in how we conceive the ends that the First Amendment promotes than in how we conceive the means by which it does so.²⁷⁶ History may therefore be helpful in uncovering what the important First Amendment interests are, and in coming to consensus about them. Nevertheless, given the tremendous changes in how courts have understood those purposes are to be realized, historical practice provides a very poor basis on which to determine more specifically what kinds of expressive acts are and are not entitled to constitutional protection, and to what degree.

The fact that courts cannot make their own judgments about the constitutional value of speech and cannot rely upon the past to do so for them, however, is not as much of a problem for the democratic legitimacy of the First Amendment as strong versions of the principle of content neutrality suggest, and certainly not as the New Deal Court appeared to believe. Although the New Deal Court asserted initially that low-value speech enjoyed no constitutional protection, the Court has subsequently made clear that the government may not restrict even the lowest-value speech (such as libel) in order to penalize particular viewpoints.²⁷⁷ Hence, although “the government may proscribe libel[,] . . . it may not make the further content discrimination of proscribing *only* libel critical of the government.”²⁷⁸ Today, as a result, the government cannot easily use the doctrine of low-value speech to repress dissent. It can, of course, use the exception carved out for low-value categories such as obscenity and libel to do what the New Deal Court announced that the First Amendment prevented: namely, “pre-

²⁷⁶ In articulating the goals of freedom of the press to the people of Quebec in 1774, for example, the Continental Congress highlighted, much as would many of the twentieth- and twenty-first-century First Amendment cases, the importance of guaranteeing freedom of expression in order to protect good democratic government and advance the search for truth. Address to the Inhabitants of Quebec, 1774, in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 221, 223 (Bernard Schwartz ed., 1971) (“[The] importance of [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.”).

²⁷⁷ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992).

²⁷⁸ *Id.* at 384.

scribe what shall be orthodox,²⁷⁹ if not in politics or religion then at least when it comes to matters of personal expression and style.

The doctrine of low-value speech thus clearly continues to pose a problem for the antinormativity impulse of the modern First Amendment at least. However, this fact provides only further reason to believe that the Court's continuing reliance on a mythical view of the First Amendment's past is a problem, insofar as it discourages critical engagement with the question of when and in what ways the existing low-value exceptions pose a threat to First Amendment interests.

Of course, returning to a purpose-based approach to the delimitation of high- and low-value speech inevitably means, as I have suggested, vesting courts with discretion to deny speech protection merely because they dislike it. But the only alternative to granting courts this discretion would be to get rid of the distinction between high- and low-value speech altogether. Doing so, however, would have tremendous costs of its own. It would force courts either to dilute the level of protection afforded high-value speech in order to allow the government to continue to regulate commercial speech, prohibit threats, sanction criminal speech, and so on, or to impose such a stringent burden on the content-based regulation of low-value speech that the regulation would be hard to sustain in practice.²⁸⁰

Unless we are willing to return to something like the nineteenth-century model of speech regulation — a model that looks distinctly unpleasant to contemporary eyes, precisely because of the lack of protection it affords high-value speech — courts have no recourse but to engage in the difficult task of judging constitutional value. Certainly, the twentieth-century case law makes clear that, while in principle the Court has long been committed to a conception of the First Amendment that precludes the government from limiting expression except when it poses a serious threat of material harm, in practice the doctrine has long recognized broad exceptions to these rules. As Professor Richard Fallon has noted in another context, although “the principle of content neutrality . . . frequently is identified as the First Amend-

²⁷⁹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²⁸⁰ Professor Cass Sunstein has certainly argued as much. *See* Sunstein, *supra* note 208, at 558 (“It is difficult to maintain that false commercial speech, libel of private figures, conspiracies, or child pornography ought to be immunized from governmental control — as in all likelihood they would be if the stringent burden properly imposed on governmental efforts to regulate political speech were extended to all categories of expression. In these circumstances, the most likely outcome of a doctrinal refusal to look at the ‘value’ side would be that judgments about value would be made tacitly, and the articulated rationale for decisions would not reflect an assessment of all factors thought relevant by the courts.”).

ment's operative core, [in practice it] is neither so pervasive nor so unyielding as is often thought."²⁸¹

The history detailed in this Article helps explain why, notwithstanding the formal doctrinal commitment to content neutrality, value judgments in fact pervade First Amendment law. Attempting to hide these judgments under the cloak of history does not make them go away; it merely makes them harder to understand, engage with, and critique.

CONCLUSION

This Article has argued that, to justify what was in fact a novel distinction between high- and low-value speech, the New Deal Court invented a tradition, by claiming a continuity with a past that did not exist. Invented traditions of this kind may be quite common in the law, given the tremendous legitimating power that claims of historical continuity possess in a common law legal system such as our own. As Justice Holmes remarked somewhat critically over a hundred years ago: "Everywhere the basis of [legal] principle is tradition."²⁸² This may be less true in constitutional law than it is in other areas of the law, and less true in recent years than previously.²⁸³ Even in this con-

²⁸¹ Fallon, *supra* note 219, at 2; see also Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 205 (1982) ("Despite its repeated invocations of a near-absolute content neutrality rule, the Court has not followed its own precept. . . . In several cases where the principle has seemed relevant, the Court has not considered seriously whether it applied. Throughout, it has failed either to reconcile these results with the absolute rule it enunciated or to describe the dimensions of the more limited rule it actually has applied.").

²⁸² O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 472 (1897).

²⁸³ The popularity of originalism as a judicial methodology may have led courts in recent years to emphasize Founding-era intentions rather than longstanding jurisprudential tradition when deciphering the meaning of the constitutional text. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5–7 (1998) (criticizing originalists for ignoring post-Ratification developments); Larry Kramer, *Fidelity to History — and Through It*, 65 FORDHAM L. REV. 1627, 1628 (1997) (criticizing originalist methods of constitutional interpretation as "Founding obsessed" and unduly focused on "Founding moments"). But even originalist judges frequently invoke constitutional tradition as a means of getting to the original meaning of the text. See, e.g., *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2503–04 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." (alteration in original) (quoting *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2347–48 (2011)) (internal quotation marks omitted)). And efforts to justify contemporary doctrine via historical claims about legal practice at the time of the Founding or Ratification are susceptible to all of the problems that claims based on longstanding tradition are. See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 125 (critiquing the Court's use of history "as a precedent-breaking instrument, by which the Court could purport to return to the aboriginal meaning of the Constitution" and thus to "declare that in breaking with precedent it was really maintaining constitutional continuity").

text, however, invocations of tradition possess a great deal of power. By turning to tradition, courts are able to fill in absences in the constitutional text, and thereby justify a particular interpretation of what the Constitution means.²⁸⁴

But in fact, history is not always continuous; times change and so do legal understandings and the values that motivate them. Courts may therefore misuse history by asserting a continuity with a past that does not exist in order to justify what is in fact a new doctrinal position or understanding. The irony of the invented tradition is that it marks change, not continuity. As Hobsbawm noted: “Where the old ways are alive, traditions need be neither revived nor invented.”²⁸⁵

Paying attention to when these invented traditions come into being thus may help illuminate and identify points of significant doctrinal transformation. But, as this Article suggests, it also should lead us to be wary of efforts to cast history as the final arbiter of constitutional meaning. Particularly in bodies of law that have witnessed significant evolution, claims about history may reflect nothing more than an attempt on the part of the court to avoid having to provide a more principled justification for a new rule or interpretation. In this respect, the rhetorical power that claims about history possess in the law can undermine doctrinal development by allowing courts to avoid difficult debates about constitutional meaning.

At least in the context of the First Amendment, what an examination of the history of constitutional boundaries makes clear is that courts cannot avoid the difficult task of judging the constitutional value of novel categories of speech by turning to history. At least they cannot do so without risking the creation of a set of doctrinal distinctions unmoored from any conception of the purposes they are supposed to serve.

²⁸⁴ For a recent example of the Court’s use of tradition to do just this, see *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014) (“[I]n interpreting the [Recess Appointments] Clause, we put significant weight upon [post-Ratification] historical practice . . . [because] ‘[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions’ regulating the relationship between Congress and the President.” (italics omitted) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929))).

²⁸⁵ Hobsbawm, *supra* note 1, at 8.