

## The First Amendment Structure for Speakers and Speech

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### ABSTRACT

A noticeable trend in the Roberts Court’s free speech decisions is heightened attention to the dimensions of the First Amendment. From holding false factual statements, violent video games, and animal cruelty depictions are covered by the First Amendment, to determining that a legislator’s vote, the government’s acceptance of a monument, and a law school’s refusal to allow access to military recruiters are not, the Court has highlighted the importance of evaluating both the scope of the First Amendment and the appropriate attribution of communicative efforts. But the Court has failed to announce an overarching structural framework for resolving these prefatory coverage and attribution issues, instead compartmentalizing speech and speaker concerns into separate doctrinal strands.

This Article illustrates the interrelationship of these speech and speaker issues and their amenability to a structural framework based upon historical traditions and contemporary communicative utility. Linguistic communications presumptively fall within First Amendment coverage except when historically treated as outside the guarantee’s scope or when traditionally viewed as attributable to the government or polity. The presumption, though, is reversed for nonlinguistic communicative attempts; founding-era traditions indicating the form’s predominant expressiveness are necessary to presume coverage. Yet even communicative efforts outside the First Amendment’s presumptive scope may be covered based on contemporary insights regarding the expressive value of the

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communicative effort when compared to its associated harms.

The Supreme Court's doctrine supporting this coverage structure reveals both the salience of originalism in determining the First Amendment's baseline scope and the implausibility of a single unifying free expression theory. The fundamental question of First Amendment coverage is informed by a combination of historical practices and contemporary insights. These traditions and attitudes have not developed from an integrative force, but through our nation's experiences and an ongoing dialectic in which different visions of the core purposes of the First Amendment have been proposed, debated, and absorbed within the American expressive commitment.

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### I. THE BEDROCK INQUIRIES

What is speech? Who is speaking?

These questions are at the core of the First Amendment.<sup>1</sup> Yet despite the Roberts Court's heightened attention to resolving them

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<sup>1</sup> See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004) [hereinafter Schauer, *Boundaries*] (“[Q]uestions about the involvement of the First Amendment in the first instance are often far more consequential than are the issues surrounding the strength of protection that the First Amendment affords.”); R. George Wright, *What Counts as “Speech” in the First Place? Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1218 (2010) (urging that the “most fundamental question in free speech law” is “whether ‘speech,’ for purposes of the First Amendment, is even present”).

in recent cases, puzzles remain. Why is a legislator voting “aye” or “yes” to a proposition not engaged in First Amendment speech,<sup>2</sup> while a citizen signing a referendum petition or providing a campaign contribution to a legislator is?<sup>3</sup> Why is the commercial sale of the most violent video games First Amendment speech,<sup>4</sup> but a law school’s refusal to allow or to equalize access to military recruiters on campus is not?<sup>5</sup> Why is a particularized message required for speech coverage in some situations,<sup>6</sup> but no discernible message is necessary in other situations?<sup>7</sup> What allows an individual’s words or utterances to be attributed under the First Amendment to the government or polity?<sup>8</sup>

The Court has not pronounced a structure for resolving these puzzles.<sup>9</sup> Noted treatises typically compartmentalize speech and speaker issues into various sub-strands of First Amendment doctrine without acknowledging either their interconnection or their import as a prerequisite to constitutional protection.<sup>10</sup> Nonetheless, the first inquiry in any First Amendment challenge should be whether the challenger is engaged in expression covered by the First Amendment, which entails examining both the scope of the First Amendment and the attribution of the speech. Only after these questions are answered can the challenge be categorized into the appropriate level of scrutiny and resolved under the governing standard.<sup>11</sup>

This initial coverage determination is challenging, though,

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<sup>2</sup> Nev. Comm’n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347–51 (2011).

<sup>3</sup> See, e.g., Doe v. Reed, 130 S. Ct. 2811, 2817–18 (2010) (referendum petition); Buckley v. Valeo, 424 U.S. 1, 20–23 (1976) (campaign contributions).

<sup>4</sup> Brown v. Entm’t Merch. Ass’n, 131 S. Ct. 2729, 2733–38 (2011).

<sup>5</sup> Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 64–66 (2006).

<sup>6</sup> See, e.g., Carrigan, 131 S. Ct. at 2350; Rumsfeld, 547 U.S. at 64–66.

<sup>7</sup> See, e.g., Pleasant Grove City v. Summum, 555 U.S. 460, 476–77 (2009); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995).

<sup>8</sup> See, e.g., Carrigan, 131 S. Ct. at 2350; Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 560–66 (2005).

<sup>9</sup> Cf. Schauer, *Boundaries*, *supra* note 1, at 1767 (highlighting that the question of First Amendment coverage is “rarely addressed, and the answer is too often simply assumed”).

<sup>10</sup> See, e.g., ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 949–50, 959–60 (4th ed. 2011) (organizing First Amendment materials into various sections without a section dedicated to coverage issues); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1252–53 (8th ed. 2010) (same).

<sup>11</sup> See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 268 (1981) [hereinafter Schauer, *Categories*] (contending an implicit initial issue in every First Amendment case is ascertaining “whether the conduct at issue constitutes ‘speech,’” which must be resolved before deciding the constitutionality of the government’s action).

because the First Amendment's scope is both broader and narrower than the spoken, printed, or written word. The concept is broader because the First Amendment covers forms of nonlinguistic communication and conduct, such as marches or burning a flag, although not every action that transmits some message qualifies for coverage.<sup>12</sup> On the other hand, the concept is narrower because some words that an individual writes, publishes, or utters are considered outside the First Amendment's scope, including not only well-recognized exceptions such as incitement, fighting words, and obscenity,<sup>13</sup> but also at least some aspects of the law of antitrust, employment regulation, professional regulation, and securities regulation.<sup>14</sup> In addition, even otherwise covered expression is sometimes attributed to the government or polity, such as when the government funds or controls the message.<sup>15</sup>

This Article assembles a First Amendment coverage structure for resolving such issues. Leaving aside further questions regarding the appropriate level of scrutiny and the ultimate constitutionality of various types of speech regulation,<sup>16</sup> I will then sketch the implications this speech coverage framework has on First Amendment theory.

The framework I identify depends on two primary

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<sup>12</sup> See, e.g., Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 WIS. L. REV. 1525, 1531–37 (summarizing Supreme Court decisions on when such conduct falls within the First Amendment's scope).

<sup>13</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

<sup>14</sup> See Schauer, *Boundaries*, *supra* note 1, at 1768, 1778–84; James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 491–92 (2011) [hereinafter Weinstein, *Participatory Democracy*]. Cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

<sup>15</sup> Cf. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560–66 (2005).

<sup>16</sup> The only constitutional protection afforded to communicative efforts outside the First Amendment's scope is that a government regulation must not (except in cases of government speech) discriminate based on any ideas, messages, or viewpoints that may be contained in the challenger's utterance; otherwise, the government is free to regulate, restrict, or even ban such utterances. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–92 (1992). In contrast, communicative efforts within the First Amendment typically cannot be regulated by the government to prevent communicative harms unless the regulation is the only means to serve a compelling government objective. See, e.g., Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 236–38 (2012). The government is allowed, however, to regulate First Amendment speech to prevent deleterious effects from its non-communicative aspects under a lower threshold of scrutiny. The government also has more leeway when either overseeing a restrictive environment (such as the military or prisons) or acting in a proprietary capacity as an employer, educator, or property owner. See *id.*

considerations: historical traditions and communicative impact. The first consideration is the historical traditional view of whether the communicative effort is within the scope of expressive constitutional guarantees. Linguistic communications are presumptively covered by the First Amendment, unless excluded based on an unbroken tradition of judicial acquiescence in laws prohibiting or regulating that subcategory of communication or of viewing the communication as belonging to the government or to the general public. On the other hand, nonlinguistic communications are only entitled to presumptive First Amendment status when traditionally treated as comparable in expressive value to linguistic communications.

While all traditionally covered linguistic and nonlinguistic communications are within the scope of the First Amendment, the second consideration acknowledges that nontraditional forms may also fall within the ambit of First Amendment speech, depending on contemporary insights regarding the value of the communicative effort in light of its associated harms. This valuation depends on balancing the utility of the communicative thought conveyed through hearing or sight to a recipient, the harm likely to arise from that particular form, and the attribution of the message.<sup>17</sup> This allows the Court, for example, to find that a traditional linguistic exclusion from First Amendment speech, such as defamation, deserves some First Amendment coverage,<sup>18</sup> and that a nontraditional nonlinguistic form, such as a sit-in, is First Amendment speech in certain contexts.<sup>19</sup>

The Article proceeds as follows. Part II reviews the Supreme Court's doctrine on the First Amendment's range and displays the current methodological consistencies across the various coverage issues. Part III then develops the structural framework I have identified and evaluates its normative and analytical utility. Part IV concludes with the insights on First Amendment theory that might be gleaned from this structural framework. The Court's decisions have incorporated original First Amendment practices as a coverage baseline, but have supplemented this baseline with contemporary valuations of the relative costs and benefits of extending speech coverage in light of both the lessons from past American experiences and an ongoing public dialogue on our commitment to expressive freedom.

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<sup>17</sup> Cf. John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1340 (2008) (contending that free-speech "communication occurs when Person A conveys a thought to Person B, and Person B freely chooses whether to accept that thought").

<sup>18</sup> See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268–76 (1964).

<sup>19</sup> See, e.g., *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (plurality opinion).

## II. THE FIRST AMENDMENT'S SCOPE

Putting aside the religious liberty guarantees, the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>20</sup> The expressive freedoms thus include speech, press, assembly, and petition, although the Court has long emphasized “speech” as the paramount guarantee, providing minimal additional substantive import to the other separate expressive elements.<sup>21</sup>

From a textual perspective, the predominant ordinary meanings of “speech,” “press,” and “petition” relate to the spoken, printed, or written word, all of which are linguistic forms of communication.<sup>22</sup> This does not mean, of course, that only linguistic communications fall within the coverage of the First Amendment; indeed, “the right . . . to assemble” is a right to gather together or congregate, which does not encompass a predominantly linguistic connotation.<sup>23</sup> Historical evidence also confirms the framers did not intend to protect only the spoken, printed, or written word.<sup>24</sup> Yet such linguistic connotations apparently were the foremost consideration,<sup>25</sup> which supports separately analyzing linguistic and nonlinguistic forms of communication in attempting to ascertain the First Amendment’s range. Moreover, Supreme Court precedent indicates different coverage presumptions apply to linguistic and nonlinguistic communications.

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<sup>20</sup> U.S. CONST. amend. I.

<sup>21</sup> See, e.g., *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494–98 (2011); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991).

<sup>22</sup> “Speech” traditionally has been defined as the utterance of sounds or the articulation of words to describe ideas, perceptions, or emotions. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2189 (1976) [hereinafter WEBSTER’S THIRD]; WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1062 (1848) [hereinafter WEBSTER’S AMERICAN]. A traditional definition of “press” is printed or written matter. WEBSTER’S THIRD, *supra*, at 1794–95; WEBSTER’S AMERICAN, *supra*, at 864. And “petition” has typically been defined as a written request to those in authority. WEBSTER’S THIRD, *supra*, at 1690; WEBSTER’S AMERICAN, *supra*, at 820. All of these are predominantly linguistic forms related to language and speech.

<sup>23</sup> WEBSTER’S THIRD, *supra* note 22, at 113; WEBSTER’S AMERICAN, *supra* note 22, at 76.

<sup>24</sup> See Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1059–63 (2009) [hereinafter Volokh, *Symbolic Expression*].

<sup>25</sup> See *id.* at 1083.

A. *Presumptive Coverage for Linguistic Communications*

The use of words or language to attempt to communicate any assertion, idea, perception, emotion, or thought—or any attempt to receive such words or language—is presumptively covered by the First Amendment. Outside specific, judicially defined traditional exclusions,<sup>26</sup> the Supreme Court’s contemporary decisions have not denied First Amendment coverage to any linguistic communicative attempt, whether the purpose is to advocate,<sup>27</sup> persuade,<sup>28</sup> actuate,<sup>29</sup> inform,<sup>30</sup> advertise,<sup>31</sup> proselytize,<sup>32</sup> solicit,<sup>33</sup> entertain,<sup>34</sup> brag,<sup>35</sup> titillate,<sup>36</sup>

<sup>26</sup> See *infra* Parts II.A.1 & II.A.2.

<sup>27</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 52 (1976) (recognizing First Amendment right of political candidates and citizens to advocate); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (protecting newspaper advertisement that “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement”).

<sup>28</sup> See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011) (explaining that “the fear that speech might persuade provides no lawful basis for quieting it” in all but the rarest of circumstances); *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding First Amendment protects corporate independent expenditures to persuade voters).

<sup>29</sup> See, e.g., *Sorrell*, 131 S. Ct. at 2670 (“Speech remains protected even when it may ‘stir people to action . . . .’”) (quoting *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2010)); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.”); *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (explaining First Amendment “extends to more than abstract discussion, unrelated to action” but instead covers “the opportunity to persuade to action”).

<sup>30</sup> See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762–66 (1976) (holding First Amendment protects disseminating commercial factual information); *Wood v. Georgia*, 370 U.S. 375, 391–92 (1962) (“The First Amendment envisions that persons be given the opportunity to inform the community of both sides of the issue . . . .”).

<sup>31</sup> See, e.g., *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466, 472 (1988) (“Lawyer advertising is in the category of constitutionally protected commercial speech.”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”).

<sup>32</sup> See, e.g., *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (discussing precedent protecting the expression of religious views); *Cantwell v. Connecticut*, 310 U.S. 296, 308–10 (1940) (concluding the First Amendment prevents the government from “unduly suppress[ing] free communication of views, religious or other”).

<sup>33</sup> See, e.g., *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 611 (2003) (“The First Amendment protects the right to engage in charitable solicitation.”); *Meyer v. Grant*, 486 U.S. 414, 421–22, 422 n.5 (1988) (holding soliciting signatures for a petition involved First Amendment speech); *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980) (“[C]haritable appeals for funds . . . are within the protection of the First Amendment.”).

<sup>34</sup> See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977)

embarrass,<sup>37</sup> offend,<sup>38</sup> disgust,<sup>39</sup> shock,<sup>40</sup> or address any other “field of human interest.”<sup>41</sup> And the mode of communication—as long as it is has not been traditionally reserved for government purposes<sup>42</sup>—does not matter. Thus, the Court has held that the First Amendment covers not only linguistic communications in historical forms such as speeches, newspapers, handbills, leaflets, pamphlets, banners, signs, plays, and books,<sup>43</sup> but twentieth century forms as well, including the

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(“There is no doubt that entertainment, as well as news, enjoys First Amendment protection.”); *Winters v. New York*, 333 U.S. 507, 510 (1948) (holding that the divide “between the informing and the entertaining is too elusive” to govern First Amendment coverage).

<sup>35</sup> *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2545–48 (2012) (plurality opinion) (protecting false claims regarding military awards); *id.* at 2553–54 (Breyer, J., concurring).

<sup>36</sup> *See, e.g.*, *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 811 (2000) (concluding sexually oriented programming covered by First Amendment); *Reno v. ACLU*, 521 U.S. 844, 853, 874–75 (1997) (holding First Amendment protection extended to indecent sexually explicit textual material on the Internet); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (holding indecent dial-a-porn messages covered by the First Amendment).

<sup>37</sup> *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (“Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring) (“The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.”).

<sup>38</sup> *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1219–20 (2011) (protecting offensive funeral picketing inflicting “great pain”); *Hill v. Colorado*, 530 U.S. 703, 715–16 (2000) (recognizing offensive communications are not outside the First Amendment’s scope).

<sup>39</sup> *See, e.g.*, *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (protecting excessively violent video games in part because “disgust is not a valid basis for restricting expression”).

<sup>40</sup> *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (acknowledging the emotive force of the words “Fuck the Draft” in protecting its display on a jacket).

<sup>41</sup> *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (concluding free speech and press rights “are not confined to any field of human interest”).

<sup>42</sup> *See infra* Part II.A.2.

<sup>43</sup> *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (applying the First Amendment to words on a banner); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (holding that soliciting donations and distributing religious literature were within First Amendment’s scope); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 92 (1977) (holding “for sale” and “sold” signs protected by the First Amendment); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (holding theater production covered by First Amendment in part because “theater usually is that acting out—or singing out—of the written word”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (protecting two newspapers from prior restraint); *Schacht v. United States*, 398 U.S. 58, 61–63 (1970) (recognizing that the First Amendment covers amateur actors in street theatrical performances); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (extending First Amendment protection to paid newspaper advertisement); *Bantam*



linguistic components in motion pictures,<sup>44</sup> television and radio broadcasts,<sup>45</sup> cable television,<sup>46</sup> the Internet,<sup>47</sup> and interactive video games.<sup>48</sup> All communicative attempts incorporating linguistic elements (including sign language, Morse code, or other representations of specific words or letters) thus presumptively fall within the First Amendment's scope, with the presumption rebuttable only if there is an established tradition of exclusion.

This is not to say that all linguistic communications presumptively receive the same level of First Amendment *protection*—rather, only that they are all *presumptively covered by and within the scope of* the First Amendment. When a linguistic communication is made, the presumption is the First Amendment applies, even though the rigor of judicial scrutiny may vary depending on such factors as the nature of the government regulation, the medium or locale in which the communication is made, and the extent to which the

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Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963) (concluding that the First Amendment “embraces the circulation of books as well as their publication”); Smith v. California, 361 U.S. 147, 150 (1959) (“[P]ublication and dissemination of books and other forms of the printed word furnish very familiar applications of . . . constitutionally protected freedoms.”); Thomas v. Collins, 323 U.S. 516, 532–34 (1945) (protecting speech urging workers to unionize); Martin v. Struthers, 319 U.S. 141, 143 (1943) (protecting door-to-door leaflet distribution); Murdock v. Pennsylvania, 319 U.S. 105, 108–11 (1943) (protecting door-to-door distribution of religious tracts with a request for funds); Jamison v. Texas, 318 U.S. 413, 416 (1943) (protecting handbill distribution on public streets); Lovell v. City of Griffin, 303 U.S. 444, 450–52 (1938) (holding that the First Amendment protected distributing pamphlets, leaflets, magazines, and periodicals, which were “historic weapons in the defense of liberty”); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 717–20 (1931) (protecting an allegedly defamatory newspaper from prior restraint).

<sup>44</sup> See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975) (protecting film projection at drive-in movie theaters); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (holding “motion pictures are a significant medium for the communication of ideas” covered by the First Amendment).

<sup>45</sup> See, e.g., *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012) (recognizing First Amendment implications of FCC’s television indecency policy); *FCC v. Pacifica Found.*, 438 U.S. 726, 746–51 (1978) (holding radio broadcasting enjoys limited First Amendment protection). While these decisions indicate that the level of protection for broadcast media is at least currently more limited than it is for other modes of communication, television and radio broadcast media are nonetheless undoubtedly within the First Amendment’s scope.

<sup>46</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“Cable programmers and cable operators engage in and transmit speech . . .”); *City of Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 494 (1986) (holding that cable television operations communicated messages covered by the First Amendment).

<sup>47</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 864–80 (1997) (applying free speech principles to the Internet).

<sup>48</sup> See, e.g., *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (holding that interactive video games warrant First Amendment coverage because they “communicate ideas—and even social messages”).

communication entails a matter of public concern.<sup>49</sup> Yet the presumption for linguistic aspects of communication, irrespective of their perceived value,<sup>50</sup> is that the First Amendment at least “shows up.”<sup>51</sup>

Although some early precedents suggested a more limited view,<sup>52</sup> the Supreme Court’s adoption of presumptive First Amendment coverage for all (even supposedly worthless) linguistic communications is apparent in its recent decisions. Consider this passage from *United States v. Stevens*: “Most of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation.”<sup>53</sup> Or this one: “Even ‘[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.”<sup>54</sup> The Court has thus acknowledged that a use of words—no matter for what purpose—presumptively implicates the First Amendment.

This is further evidenced by the Court’s prompt extension of First Amendment coverage to cable television, the Internet, and interactive video games, which all transmit at least some linguistic expression, in contrast to the Court’s early twentieth century dawdling for motion pictures, which when first introduced did not.<sup>55</sup> The Court in 1915 determined in *Mutual Film Corp. v. Industrial Commission* that silent motion pictures were not protected by state constitutional expressive guarantees.<sup>56</sup> Decades passed before the

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<sup>49</sup> Cf. CHEMERINSKY, *supra* note 10, at 949–50, 959–60.

<sup>50</sup> See, e.g., *Winters v. New York*, 333 U.S. 507, 510 (1948) (“Though we can see nothing of any possible value to society in these [true crime] magazines, they are as much entitled to the protection of free speech as the best of literature.”).

<sup>51</sup> Professor Schauer employed this apt colloquialism in *Boundaries*, *supra* note 1, at 1767.

<sup>52</sup> See, e.g., *Mut. Film Corp. v. Indus. Comm’n*, 236 U.S. 230, 242–44 (1915) (concluding that silent motion pictures were not covered under the Ohio Constitution as part of “a free press and liberty of opinion” because of their capacity for harm, especially to minors), *abrogated in part by Joseph Burnstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

<sup>53</sup> *United States v. Stevens*, 559 U.S. 460, 479 (2010).

<sup>54</sup> *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971) (quoting *Winters*, 333 U.S. at 528 (Frankfurter, J., dissenting))). For a thorough and insightful analysis of how even nonsense can implicate traditional First Amendment values, see Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. (forthcoming 2014).

<sup>55</sup> See Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665, 672–73 (2012) (noting that early films were “visual novelties” consisting only of boxing or dancing footage).

<sup>56</sup> *Mut. Film Corp. v. Indus. Comm’n*, 236 U.S. 230, 242–44 (1915).

Court reversed course and afforded First Amendment coverage to movies in *Joseph Burstyn, Inc. v. Wilson*, with the Court reasoning that motion pictures communicated ideas in addition to entertaining and that any harms from motion pictures did not require dispensing with First Amendment principles.<sup>57</sup> *Burstyn* also highlighted that it was “not without significance that talking pictures were first produced in 1926, eleven years after the *Mutual* decision,” foreshadowing the Court’s modern presumption that communications with linguistic elements fall within the First Amendment’s scope.<sup>58</sup>

*City of Los Angeles v. Preferred Communications, Inc.* illustrates this presumption, with the Court holding after a mere seven sentences of reasoning that cable broadcasting “plainly implicates” the First Amendment.<sup>59</sup> The Court explained that the cable company’s factual recitation regarding its business established that, “through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [the company] seeks to communicate messages on a wide variety of topics and in a wide variety of formats.”<sup>60</sup> The Court next analogized cable television’s transmission of speech and ideas to “the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers.”<sup>61</sup> This comparison led the Supreme Court to summarily conclude cable television operations fell within the scope of the First Amendment, just as wireless broadcasting did.<sup>62</sup>

The Court extended First Amendment coverage to the Internet in 1997 without any separate analysis at all. In *Reno v. ACLU*, after recounting in the factual recitation the “wide variety of communication and information retrieval methods” on the Internet that provide a forum for communication “as diverse as human thought,”<sup>63</sup> the Court employed First Amendment precedents and concepts to review the government regulations at issue without independently considering whether the Internet fell within the scope of the First Amendment.<sup>64</sup> The Court thereby indicated the coverage issue was self-evident, warranting no explanation.<sup>65</sup>

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<sup>57</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).

<sup>58</sup> *Id.* at 502 n.12.

<sup>59</sup> *City of Los Angeles v. Preferred Commc’ns. Inc.*, 476 U.S. 488, 494 (1986).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 494–95.

<sup>63</sup> *Reno v. ACLU*, 521 U.S. 844, 851–52 (1997).

<sup>64</sup> *Id.* at 864–80.

<sup>65</sup> *See id.* While portions of *Reno* compared and contrasted the Internet to other protected mediums of expression, this comparison was not undertaken to ascertain

The Court likewise treated First Amendment coverage for interactive video games as a largely self-evident proposition in *Brown v. Entertainment Merchants Association*.<sup>66</sup> As a prelude to defending the application of strict scrutiny to California's regulation of violent video games, the Court noted that "California correctly acknowledges that video games qualify for First Amendment protection."<sup>67</sup> In accord with its longstanding precedent that "[t]he line between the informing and the entertaining is too elusive" to be the touchstone of the First Amendment,<sup>68</sup> the Court explained that video games, like books, plays and movies, "communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)." That, according to the Court, "suffice[d] to confer First Amendment protection."<sup>69</sup> Accordingly, the "basic principles" of the First Amendment applied to video games, including exacting judicial scrutiny of content-based speech regulations.<sup>70</sup>

With interactive video games, then, just like cable television and the Internet previously, the Supreme Court applied the First Amendment to new media integrating linguistic communications with little or no discussion. This rapid acceptance of new technologies, and the Court's willingness to afford First Amendment coverage to any communication conveyed through the written, spoken, or printed word, indicate that the First Amendment presumptively applies to all linguistic communications in whatever form and for whatever purpose. Only the exceptions to speech coverage for linguistic communications necessitate justification; otherwise, coverage is presumed. The use of words—whether spoken, printed, or written—should be presumed to be First

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First Amendment *coverage*, but rather the appropriate level of First Amendment *scrutiny*. The government contended that regulations of the Internet should be subject to the lesser scrutiny afforded to broadcast media regulations. *Id.* at 868. The Court rejected this contention, concluding that the government had not licensed the Internet's creation, the Internet was not as invasive as broadcast media, and the Internet was not a scarce expressive commodity. *Id.* at 868–70. Instead, the Internet was a "vast democratic forum[]" that combined traditional print and news services with interactive platforms for dialogue and other content that allowed users to "become a town crier with a voice that resonates farther than it could from any soapbox" and a "pamphleteer" disseminating throughout the world. *Id.* at 869–70.

<sup>66</sup> *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>67</sup> *Id.* at 2733.

<sup>68</sup> *Winters v. New York*, 333 U.S. 507, 510 (1948).

<sup>69</sup> *Brown*, 131 S. Ct. at 2733.

<sup>70</sup> *Id.* at 2734.

Amendment speech, with the presumption rebuttable only in two circumstances: (1) the words fall within a so-called “unprotected” category, or (2) the words are attributed to the government or polity.

### 1. Categories Outside First Amendment Coverage

A longstanding limitation on First Amendment coverage is that “certain well-defined and narrowly limited classes of speech” may be prohibited or punished without “rais[ing] any Constitutional problem.”<sup>71</sup> Linguistic exchanges that fall within one of these unprotected classes or categories are outside the normal scope of the First Amendment, in a “First Amendment Free Zone.”<sup>72</sup> The government has free reign to regulate, punish, or prohibit such communications, as long as the government does not act as an ideological censor based on the ideas, messages, or viewpoints within the proscribed category.<sup>73</sup>

*Chaplinsky v. New Hampshire* furnishes an early illustration of this categorical exclusion doctrine. Chaplinsky’s conviction for deriding a city official to his face as a “God damned racketeer” and “damned fascist” was upheld on the basis that the government could criminalize such “fighting words” as one of those classes of speech “which has never been thought to raise any Constitutional problem.”<sup>74</sup> The government thus did not have to satisfy any type of First Amendment judicial scrutiny to have Chaplinsky’s conviction upheld for uttering fighting words—such utterances were simply outside the First Amendment’s scope.

The significance of this classification requires careful attention to identifying these uncovered categories. *Chaplinsky* listed the “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting words.’”<sup>75</sup> Subsequent decisions have narrowed the scope of some of these traditional categorical exceptions, while also recognizing that *Chaplinsky*’s enumeration was incomplete.<sup>76</sup> But a

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<sup>71</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>72</sup> *United States v. Stevens*, 559 U.S. 460, 469 (2010) (quoting *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)).

<sup>73</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–92 (1992) (holding that, while a general prohibition on fighting words would be constitutional, punishing only those fighting words based on race, gender, or religion was unconstitutional).

<sup>74</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>75</sup> *Id.*

<sup>76</sup> *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 297 (2008) (acknowledging offers to engage in illegal transactions as unprotected); *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (recognizing “true threats” as unprotected); *R.A.V.*, 505 U.S. at 382–83 (acknowledging the narrowing “of the scope of the traditional categorical exceptions for defamation and obscenity”); *New York v. Ferber*, 458 U.S. 747, 763–64

more fundamental issue than the grouping or listing of these uncovered zones is ascertaining the means for their identification.

*Chaplinsky's* evaluation of this issue was cursory. The Court first mentioned that the regulation or prohibition of these "well-defined and narrowly limited classes of speech" had "never been thought to raise any Constitutional problem,"<sup>77</sup> thereby intimating an approach grounded in historical traditions and longstanding judicial precedent. The Court continued, though, that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>78</sup> This language suggested a balancing approach, weighing the communicative value of the category of utterances against the harm associated with that form of communication. *Chaplinsky's* rationale thus foreshadowed two potential methods to identify utterances outside the First Amendment's coverage.

The dual indication of a historical approach and a cost-benefit analysis continued in subsequent Court decisions. *Beauharnais v. Illinois* relied on both the history and continuing traditions of libel laws, as well as reciting the "no essential part of any exposition of ideas" conception from *Chaplinsky*, to hold that defamation was not within the First Amendment's ambit.<sup>79</sup> To support its holding that obscenity was outside First Amendment coverage, *Roth v. United States* examined founding-era restrictions on blasphemy, profanity, and obscenity, along with contemporary indicia of obscenity's lack of "redeeming social importance."<sup>80</sup> The Supreme Court's holding in *New York v. Ferber* that distributing child pornography was not covered by the First Amendment relied on five separate considerations, including both the historical understanding that "[i]t rarely has been suggested" that First Amendment coverage extends to speech or writing that is an integral part of unlawful conduct such as producing

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(1982) (holding child pornography unprotected).

<sup>77</sup> *Chaplinsky*, 315 U.S. at 571-72.

<sup>78</sup> *Id.* at 572. To support this proposition, the Court cited to ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 149-50 (1941). Professor Chafee argued that obscenity, profanity, blasphemy, and libel were outside the scope of the First Amendment, not for historical reasons, but because they "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." *Id.*

<sup>79</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 254-57 (1952).

<sup>80</sup> *Roth v. United States*, 354 U.S. 476, 481-85 (1957). The contemporary indications included judicial precedent, international agreements, and state and federal obscenity laws. *Id.* at 484-85.

child pornography,<sup>81</sup> and the Court's ad hoc balancing of "the evil to be restricted [that] so overwhelmingly outweighs the expressive interests . . . at stake."<sup>82</sup> *R.A.V. v. City of St. Paul* likewise acknowledged both the longstanding historical exclusion of these types of utterances from First Amendment coverage and their limited social utility in comparison to their deleterious impact.<sup>83</sup>

Relying on such repeated references to speech valuation, the government in *United States v. Stevens* contended that visual and auditory depictions of animal cruelty constituted another categorical exclusion from First Amendment coverage because the worth of such depictions was minimal compared to their societal cost.<sup>84</sup> But in *Stevens*, the Supreme Court emphatically rejected a simple balancing test as the touchstone of First Amendment coverage, describing it as a "startling and dangerous" proposition.<sup>85</sup> The First Amendment itself, according to the Court, was the American people's balance of the social costs and benefits of free speech, foreclosing "any attempt to revise that judgment on the basis that some speech is not worth it."<sup>86</sup>

While acknowledging that its prior opinions had "described historically unprotected categories of speech" as of de minimis worth when compared to their societal toll, the Court maintained that such statements were only "descriptive" and did not "set forth a test that may be applied as a general matter to permit the Government to imprison any speaker as long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."<sup>87</sup> Instead, the Court predicated the

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<sup>81</sup> *New York v. Ferber*, 458 U.S. 747, 761–62 (1982) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

<sup>82</sup> *Id.* at 763–64. The Court's other complementary rationales included the compelling state interest in safeguarding children from physical and psychological harms, the connection between the distribution of child pornography and sexual abuse of children, and the minuscule value of such materials. *Id.* at 757–64.

<sup>83</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) ("From 1791 to the present, however, our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (quoting *Chaplinsky*, 315 U.S. at 572)).

<sup>84</sup> *United States v. Stevens*, 559 U.S. 460, 467–70 (2010). Stevens sold dog fight videos in violation of a federal statute that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty. *Id.* at 463–69. He challenged his conviction on free speech grounds, with the government arguing that such depictions were "categorically unprotected by the First Amendment." *Id.* at 467–69.

<sup>85</sup> *Id.* at 469–71.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 469–72.

recognition of categories of unprotected speech on a historical approach: a longstanding and ongoing tradition dating to the founding of excluding the utterances from First Amendment coverage.<sup>88</sup> Because no First Amendment tradition prohibited *portrayals* of animal cruelty (even though the underlying *acts* of cruelty have long been outlawed), depictions of animal cruelty were not one of those communicative efforts—like obscenity, fraud, or incitement—outside the First Amendment’s reach.<sup>89</sup>

Although *Stevens* correctly required a showing of a longstanding historical tradition to support a categorical exclusion from the First Amendment’s coverage, the Court’s offhand remark downplaying the balancing approach as merely “descriptive” contravened its earlier precedents. *Chaplinsky*, after discussing the costs and benefits of fighting words and other categories of uncovered utterances, cited to Professor Chafee’s *Free Speech in the United States*, which contended that the exclusions from First Amendment coverage depended on the value of the communication at issue in comparison to its impact on the social order.<sup>90</sup> And the *Ferber* Court, while mentioning as one of five considerations the speech integral to criminal conduct historical exception, emphasized to a greater degree that “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”<sup>91</sup> Under no fair reading of these cases can the balancing discussion be accurately described as merely “descriptive.”

Nonetheless, *Stevens*’s consequential insight that the Court’s prior opinions did not support “a *simple* cost-benefit analysis” as the touchstone of First Amendment coverage is undeniable.<sup>92</sup> While cost-benefit balancing was conducted in *Chaplinsky* and *Ferber*, their analyses also incorporated at least a passing allusion to historical exclusions as well. *Roth* and *Beauharnais* expatiated at length on founding-era restrictions in holding that obscenity and libel were outside the scope of the First Amendment, with comparative value

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<sup>88</sup> See *id.* at 469, 472.

<sup>89</sup> *Id.* at 469–72.

<sup>90</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 n.4 (1942) (citing ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 149–50 (1941)).

<sup>91</sup> *New York v. Ferber*, 458 U.S. 747, 761–64 (1982). *Ferber* also nowhere discussed a need to ground a new unprotected speech category into a pre-existing category with a longstanding tradition of exclusion. *Id.* As Professor Strossen noted, *Stevens* was thus a “novel” recasting of *Ferber*. Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2009–10 CATO SUP. CT. REV. 67, 84–85.

<sup>92</sup> *United States v. Stevens*, 559 U.S. 460, 470–72 (emphasis added).



receiving relatively short shrift.<sup>93</sup> The Court's precedents before *Stevens* supported both a historical approach *and* a balancing approach—not one to the exclusion of the other.

These precedents thus confirm the holdings in *Stevens* and subsequent cases that categorical exclusions from First Amendment coverage require a longstanding historical tradition.<sup>94</sup> But while such a tradition is a *necessary* condition of exclusion, it is not by itself *sufficient*. History alone cannot justify the First Amendment's contemporary scope. Current protections for profanity and blasphemy were not contemplated as part of free expression at the founding, nor were the modern protections afforded to defamation and incitement. The Supreme Court's twentieth century circumscriptions of founding practices regarding unprotected expression demonstrate that categorical exclusions necessitate *both* a longstanding historical tradition *and* a continued contemporary perspective that the harms associated with that type of utterance exceed its relative benefits. While the Court cannot augment the historic categorical exclusions, it may narrow or even eliminate them under contemporary evaluations of their continued propriety.

Profanity proscriptions are illustrative. The original states enforced norms of respect and propriety regarding public discourse—criminalizing public profanity, blasphemy, or both.<sup>95</sup> Such laws were considered constitutional despite state constitutional free speech protections,<sup>96</sup> and were still prevalent—and regarded as enforceable—from the ratification of the Fourteenth Amendment

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<sup>93</sup> *Roth v. United States*, 354 U.S. 476, 481–85 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 254–57 (1952).

<sup>94</sup> *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2544–47 (2012) (plurality opinion) (relying on *Stevens* to reject the government's assertion that false statements fell outside the First Amendment's coverage); *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2734–35 (2011) (following *Stevens* to hold that violent video games were not outside the First Amendment); *Stevens*, 559 U.S. at 469–72.

<sup>95</sup> *See Roth*, 354 U.S. at 482 n.12 (listing founding-era state statutory provisions regarding profanity and blasphemy); LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 400–23 (1995) (discussing American state blasphemy laws and prosecutions during the eighteenth and early nineteenth centuries).

<sup>96</sup> *See, e.g.*, *Commonwealth v. Kneeland*, 37 Mass. 206, 220–21 (1838) (holding blasphemy statute did not violate state constitution); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 399–408 (Pa. 1824) (upholding blasphemy statute against constitutional challenge while reversing conviction on other grounds); *cf. State v. Chandler*, 2 Del. 553 (1837) (upholding state statute criminalizing blasphemy against constitutional challenges based on religious freedoms); *People v. Ruggles*, 8 Johns. 290, 294–96 (N.Y. Sup. Ct. 1811) (holding that blasphemous and profane disparagements of Christianity were common law offenses despite state constitutional protections of religious freedom).

into the twentieth century.<sup>97</sup> In 1942, *Chaplinsky* even listed “the profane” as one of the classes of utterances outside the First Amendment’s scope.<sup>98</sup> But profanity’s categorical exclusion from the First Amendment is no more. Not one of the Court’s opinions over the last half a century has mentioned profane utterances as uncovered by the First Amendment.<sup>99</sup> Rather, profanity today is often protected from government sanctions.<sup>100</sup> *Cohen v. California* famously held that the government could not criminalize the public display of the word “Fuck” on a jacket.<sup>101</sup> In doing so, the Court emphasized speech’s import in the American political system, which necessitated governmental regulatory forbearance regarding almost all forms of individual expression, unless necessary for undeniable government

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<sup>97</sup> See, e.g., *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (stating in dicta that the constitutional guarantee of free expression did not “permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation”); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 422, 471–76 (1st ed. 1868) (discussing profanity and blasphemy laws as comporting with constitutional precepts of free speech and religious liberty).

<sup>98</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *Chaplinsky* did not list the blasphemous, though, as uncovered speech, presumably because the Court’s decision two years earlier in *Cantwell v. Connecticut* indicated that characterizing speech as blasphemous did not remove First Amendment protection. 310 U.S. 296, 305 (1940). *Cantwell*’s conviction for breaching the peace by playing a record to two men that attacked all organized religions as the work of Satan was reversed because the government “may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.” *Id.* at 308–09. Any lingering doubt on the constitutionality of blasphemy statutes was dispelled by *Joseph Burstyn, Inc. v. Wilson*, which held that, under free speech and press principles, “the state has no legitimate interest in protecting any or all religions from views distasteful to them.” 343 U.S. 495, 505 (1952).

<sup>99</sup> This contention only appears in dissents quoting *Chaplinsky*. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 430 (1989) (Rehnquist, C.J., dissenting); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 385 (1974) (White, J., dissenting); *Lewis v. City of New Orleans*, 415 U.S. 130, 140–41 (1974) (Blackmun, J., dissenting); *Papish v. Bd. of Curators*, 410 U.S. 667, 676 (1973) (Rehnquist, J., dissenting); *Rosenfeld v. New Jersey*, 408 U.S. 901, 903 (1973) (Powell, J., dissenting).

<sup>100</sup> See, e.g., *Lewis*, 415 U.S. at 133–34 (invalidating a state statute prohibiting cursing, reviling, or opprobrious language towards a police officer); *Papish*, 410 U.S. at 667–70 (protecting on-campus distribution of a newspaper with “Mother Fucker” in an article title); *Cohen v. California*, 403 U.S. 15, 23–26 (1971) (protecting a display of “Fuck the Draft” on jacket). This does not mean, of course, that profanity is immune from government regulation, especially in certain contexts involving minors. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683–86 (1986) (upholding sanction for student’s vulgar assembly speech); *FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978) (upholding sanction for “filthy” radio broadcast).

<sup>101</sup> *Cohen*, 403 U.S. at 23–26.

interests.<sup>102</sup> The government's claimed concern with propriety and respect was simply insufficient, according to *Cohen*, to justify interfering with the open debate vital to our society.<sup>103</sup> The choice of linguistic expression encompasses not only ideas but also emotions, with words frequently chosen "as much for their emotive as their cognitive force."<sup>104</sup> These contemporary insights regarding the emotive force of even vulgar language now prohibit profanity's criminalization, despite the contrary practices at the founding. Only those profane utterances that meet another categorical exception—such as "fighting words" in a face-to-face exchange in circumstances that would cause the average addressee to respond violently and breach the peace—are now outside the First Amendment's scope.<sup>105</sup>

A similar desirable progression occurred for defamation. The original founding states prosecuted libels, without considering such prosecutions as inconsistent with state constitutional or natural law principles of free speech.<sup>106</sup> Throughout the nineteenth century and into the twentieth, the judiciary continued to view state expressive guarantees as not undermining the common-law and statutory doctrines subjecting libels to criminal and civil sanction.<sup>107</sup> Based on this ongoing historical tradition, *Beauharnais* held in 1952 that

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<sup>102</sup> *Id.* at 24–25.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 26.

<sup>105</sup> *Id.* at 20, 23–26; accord *Lewis*, 415 U.S. at 132–34; *Gooding v. Wilson*, 405 U.S. 518, 528 (1972). While *Chaplinsky* held that epithets hurled at a city marshal such as "God damned racketeer" and "damned Fascist" were fighting words, even though under the presented circumstances there was no reasonable likelihood of an actual breach of the peace, the Supreme Court's recent decisions have clarified that fighting words require a likelihood, under the presented circumstances, that "the person addressed would make an immediate violent response." *Gooding*, 405 U.S. at 528.

<sup>106</sup> In some states, the state constitution's expressive guarantee specifically authorized prosecuting libels and then detailed defenses, evidentiary rules, and appropriate jury determinations. See, e.g., Del. Const. of 1792 art. I, § 5; Pa. Const. of 1790 art. IX, § 7; R.I. Const. of 1842 art. I, § 20. In other states, founding era state judicial decisions established that libel prosecutions did not violate free speech principles. See, e.g., *Commonwealth v. Blanding*, 20 Mass. 304, 313 (1825) (holding state constitutional press guarantee did not abrogate indictments for criminal libel); *People v. Croswell*, 3 Johns. Cas. 337, 391–94 (N.Y. 1804) (Kent, J.) (concluding that liberty of press authorized evidence regarding the truth but did not protect false libelous statements); *Commonwealth v. Morris*, 3 Va. 176 (1811) (affirming criminal conviction for libel). Such prosecutions were authorized by the criminal statutes or the common law of almost all the original states. See *Roth v. United States*, 354 U.S. 476, 482 n.11 (1957) (listing provisions).

<sup>107</sup> See *COOLEY*, *supra* note 97, at 420–26 (maintaining that constitutional speech and press liberties did not preclude civil and criminal punishment for common law libels).

libelous utterances were outside “the area of constitutionally protected speech.”<sup>108</sup> Nevertheless, twelve years later, in *New York Times Co. v. Sullivan*, the Court reversed course and proclaimed that “libel can claim no talismanic immunity from constitutional limitations.”<sup>109</sup> *Sullivan* emphasized the First Amendment’s overarching aspiration to ensure the government’s responsiveness to the people through “uninhibited, robust, and wide-open” debate and the unfettered exchange of ideas.<sup>110</sup> In light of this aspiration, even erroneous or defamatory statements about public officials cannot be wholly withdrawn from the First Amendment’s scope without squelching the “breathing room” essential to a frank, unrestrained, and vigorous civic discourse.<sup>111</sup> The Court has accordingly developed, in *Sullivan* and its progeny, a complex set of constitutional protections for defamatory utterances that safeguard all but the truly malicious contributions to the public debate while preserving reputational interests (especially those of private citizens) to the extent possible.<sup>112</sup> Further discussion of these newfound constraints on traditional libel sanctions is not necessary to the lesson from their very existence—based on contemporary insights regarding the need to protect even false and defamatory statements to achieve the First Amendment’s fundamental objectives, constitutional coverage was extended to a historical categorical exclusion.

The same lesson is evident from the narrowing of the categorical exclusion for obscenity. While statutory provisions against and common law prosecutions of obscenity were absent in the first few decades following American independence,<sup>113</sup> by 1815 American courts began to recognize the English common law crime for morally corruptive exhibitions or publications of obscene and indecent materials.<sup>114</sup> The states and the federal government soon thereafter introduced distinct statutory crimes for publishing sexual materials,<sup>115</sup>

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<sup>108</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 254–57, 266 (1952). The Court noted that every American jurisdiction at the time criminalized libels directed at individuals. *Id.* at 255 n.5.

<sup>109</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

<sup>110</sup> *Id.* at 269–70.

<sup>111</sup> *Id.* at 271–73.

<sup>112</sup> See CHEMERINSKY, *supra* note 10, at 1078–79.

<sup>113</sup> See, e.g., Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1863 (2007) [hereinafter Stone, *Sex*].

<sup>114</sup> See, e.g., *Commonwealth v. Holmes*, 17 Mass. 336, 337 (1821) (upholding common law prosecution against publisher of “Memoirs of a Woman of Pleasure”); *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815) (upholding common law prosecution against exhibitor of pornographic drawings).

<sup>115</sup> See, e.g., Comstock Act, ch. 258, 17 Stat. 598 (1873); Tariff Act, ch. 270, § 28, 5

with twenty of the then-existing thirty-five states enacting prohibitions on publishing or circulating obscene materials by the Civil War's conclusion.<sup>116</sup> Courts in the nineteenth and early twentieth century not only failed to mention any constitutional difficulty with these statutes,<sup>117</sup> but also upheld convictions under them based solely on whether an isolated excerpt from the work could deprave and corrupt those susceptible to immoral influences.<sup>118</sup> But despite the Supreme Court's continued adherence today to a categorical exclusion for obscenity, the breadth of the obscenity exception has been narrowed significantly from these earlier cases.

Modern precedents demand that a work is only obscene if it contains patently offensive depictions or descriptions of specifically defined sexual conduct, appeals in its entirety to the prurient interest in sex under contemporary community standards as adjudged by the average person, and lacks serious artistic, literary, political, or scientific value when viewed in its entirety.<sup>119</sup> This standard prevents materials from being categorically excluded from First Amendment coverage simply because some passage or depiction might deprave the morals of a particularly susceptible individual, as was the case in the nineteenth and early twentieth centuries. Today, even works depicting patently offensive sexual conduct proscribed by law are covered by the First Amendment, unless the government establishes both that the work appeals to a "shameful" or "morbid" interest in sex,<sup>120</sup> and that the reasonable person would find that the work has no serious value.<sup>121</sup> In this manner, obscenity now partially depends upon the potential societal harms from, and the redeeming value of,

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Stat. 548, 566 (1842); Act of May, 1821, ch. 22, § 69, Conn. Stat. Laws 165; Act of Nov. 15, 1821, ch. 12, § 23, Laws of Vt. 271.

<sup>116</sup> See Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 LAW & SOC. INQUIRY 369, 384 (2002).

<sup>117</sup> See, e.g., *In re Rapier*, 143 U.S. 110, 134–35 (1892) (indicating that circulating obscene books and papers does not fall within freedom of communication); *Ex parte Jackson*, 96 U.S. 727, 736–37 (1878) (upholding the Comstock Act, which prohibited the transportation through the mail of various immoral items, against First Amendment challenge).

<sup>118</sup> See, e.g., *MacFadden v. United States*, 165 F. 51, 52 (3d Cir. 1908) (affirming an obscenity conviction despite portions of the magazine being unobjectionable); *United States v. Kennerly*, 209 F. 119, 120 (S.D.N.Y. 1913) (Hand, J.) (reluctantly refusing to dismiss an indictment under binding precedent as some isolated parts of the book might have a corrupting influence); *United States v. Bennett*, 24 F. Cas. 1093, 1103–05 (C.C.S.D.N.Y. 1879) (finding no error in an obscenity jury charge focusing on tendency to suggest impure thoughts to susceptible individuals).

<sup>119</sup> See, e.g., *Miller v. California*, 413 U.S. 15, 24–25 (1973).

<sup>120</sup> See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).

<sup>121</sup> See, e.g., *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).

the work.

The exclusion for advocating illegal activity has also been appropriately narrowed based on contemporary understandings of its societal benefits and harms. Seditious utterances were prosecuted as criminal offenses under founding-era state common law, notwithstanding state constitutional free expression guarantees.<sup>122</sup> While the *federal* government's authority to prosecute seditious libel was vigorously contested in America's formative years due to the Constitution's enumeration of limited federal powers and the First Amendment's prohibition on congressional speech legislation, many of those challenging the Sedition Act of 1798 acknowledged the constitutionality of state sedition prosecutions.<sup>123</sup> Moreover, not only were seditious communications punished, but, as a general rule, any communicative attempt that had a "bad tendency" to cause crime, disorder, or immoral acts could be punished,<sup>124</sup> a view which continued until early in the twentieth century.<sup>125</sup> But in the mid-

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<sup>122</sup> See, e.g., David J. Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 171–78 (2001) (describing common law prosecutions for seditious libel in Pennsylvania, Massachusetts, and Virginia, despite state constitutional press guarantees); JAMES KENT, COMMENTARIES ON AMERICAN LAW 2:13-22 (1826) (recognizing that defamatory publications against the government were punishable both by the civil and criminal law). But see COOLEY, *supra* note 97, at 429–30 (urging English common-law rule on seditious libel was not adopted by the states).

<sup>123</sup> See, e.g., 2 Annals of Cong. 2106 (statement of Representative Macon) (arguing against the Sedition Act because "persons might be prosecuted for a libel under the State Governments"); Ky. Resolutions ¶ 3 (Nov. 1798) (urging the states retain "the right of judging how far the licentiousness of speech and of the press may be abridged."). See also LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 307–08 (1985) (opining that the Jeffersonians, while objecting to a sedition act by the national government, did not object to similar restrictions imposed by the states). Accord Jenkins, *supra* note 122, at 180 (noting that the opponents of the Sedition Act "were primarily concerned with preserving states' rights and, therefore, failed to discredit the underlying principles of common-law seditious libel").

<sup>124</sup> See MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 10–12 (2000). The origins of the "bad tendency" test are traceable to Blackstone, who urged that the state could punish "dangerous or offensive writings" with a "pernicious tendency" against good order. See Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 432–33.

<sup>125</sup> See, e.g., *Whitney v. California*, 274 U.S. 357, 371 (1927) (holding the state could constitutionally punish those "utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means"), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Fox v. Washington*, 236 U.S. 273, 277 (1915) (upholding a conviction for publishing an article encouraging a boycott against those harassing nudists on the basis that the article encouraged and incited "a breach of the state laws against indecent exposure"); *Turner v. Williams*, 194 U.S. 279, 294 (1904) (upholding the deportation of an alien on basis of anarchist views

twentieth century, the Supreme Court began to recognize a distinction between the “mere abstract teaching” of the need for lawlessness or violence and the actual preparing or exhorting of a group into violent or unlawful action.<sup>126</sup> *Brandenburg v. Ohio* held that the government could not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.”<sup>127</sup> *Brandenburg’s* holding, rendering such advocacy unprotected only in the face of the dire societal costs arising from imminent lawlessness, at least implicitly acknowledged the value of expression advocating unlawful activities or civil disobedience, which is, of course, a uniquely powerful communicative message. Based on its contemporary understanding of the benefits and costs of such advocacy, the Supreme Court thus narrowed the historical scope of this exclusion, just as it did for the fighting words, defamation, and obscenity exclusions.

A more in-depth evaluation would uncover an analogous progression in other excluded speech categories, but my purpose here is not to provide a full historical treatment of all the categories outside the First Amendment’s coverage, nor even to mark their present boundaries with precision, matters deserving their own separate treatment. Rather, my aims are to illustrate the modern judicial constriction of the founding-era scope of utterances outside constitutional expressive protections and to demonstrate that this expansion of First Amendment coverage depended on contemporary perspectives regarding the utility of such communications balanced against their societal costs. This progressive expansion confirms that, while a historical tradition is a necessary component of unprotected speech categories, it is not sufficient. The lessons learned and knowledge gained from the ongoing American experience may propel the judiciary to extend First Amendment coverage to historically uncovered expressive messages.

A linguistic communication thus falls within the First Amendment’s scope unless excluded by both a longstanding, ongoing historical tradition and the judiciary’s contemporary valuation of relative benefits and costs, or unless, as discussed below, the communication is attributed, for First Amendment purposes, to

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against First Amendment challenge because “he contemplated the ultimate realization of his ideal by the use of force or . . . his speeches were incitements to that end” having a dangerous “tendency”).

<sup>126</sup> *Brandenburg*, 395 U.S. at 447–48 (citing prior cases).

<sup>127</sup> *Id.* at 447.

the government or the polity.

## 2. Government Speech and Other Attributions

First Amendment coverage typically extends beyond expression's originators to encompass publishers, distributors, disseminators, and even audiences.<sup>128</sup> But a significant exception is that no private individual or entity can seek protection under the First Amendment when the speech at issue is attributed to the government or polity.<sup>129</sup>

Unlike the categories of unprotected speech discussed in the previous subsection, however, this exclusion has not been fully integrated into Supreme Court doctrine. The Court's approach to date has been piecemeal, resolving the presented issues in each case with undertheorized conclusions. Decisions during the last decade are illustrative. The Court, without identifying or proposing any unifying framework, held in separate cases that a legislator does not exercise a personal First Amendment right when casting an official vote,<sup>130</sup> that a private group is not covered by the First Amendment when requesting placement of a permanent monument in a city park with other donated monuments,<sup>131</sup> and that beef producers are not covered by the First Amendment when objecting to compelled assessments for disfavored government-sponsored promotional advertising.<sup>132</sup>

Yet such exclusions from the First Amendment's scope are too consequential to entrust to these offhanded appraisals. The Court in these cases denied any First Amendment coverage. These denials implicate the same concerns underlying *Stevens's* rejection of a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."<sup>133</sup> Just as the First Amendment forecloses creating new categorical exclusions "simply on the basis that some speech is not worth it,"<sup>134</sup> government immunity from First Amendment challenges should not be based solely on ad hoc judicial judgments regarding attributing expression. This is especially true because the consequences of an imputed exclusion often exceed

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<sup>128</sup> See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (recognizing First Amendment coverage for distribution and receipt of expression); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (holding that the First Amendment covers distribution as well as publication).

<sup>129</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560–66 (2005).

<sup>130</sup> *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2348–51 (2011).

<sup>131</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009).

<sup>132</sup> *Johanns*, 544 U.S. at 560–62.

<sup>133</sup> *United States v. Stevens*, 559 U.S. 460, 472 (2010).

<sup>134</sup> *Id.* at 1585.



those of a categorical exclusion, as the government may not regulate a categorical exclusion based on the idea, viewpoint, or message expressed,<sup>135</sup> while such discrimination is typically permitted when speech is attributed to the government.<sup>136</sup> Since the ramifications are at least as severe, if not more so, than for a categorical exclusion, governmental attribution should require circumstances analogous to those warranting a categorical exclusion. A speaker should thus only be denied First Amendment coverage for linguistic communications in situations corresponding with historical traditions and continued contemporary insights regarding the appropriate attribution of the communication in light of the communicative interests at stake and the availability of alternative channels of communication.

This structure reconciles the Supreme Court's holdings and integrates aspects of its decisional rationales. Take *Nevada Commission on Ethics v. Carrigan*, which held that legislative recusal rules are not subject to First Amendment challenge because a legislative vote is not a personal expressive right of a legislator.<sup>137</sup> In reaching this holding, the Court first highlighted that courts had not previously invalidated any generally applicable legislative recusal rules despite their widespread use in America since the founding.<sup>138</sup> This tradition established, according to the Court, that recusal rules do not touch upon covered First Amendment speech "because such laws existed in 1791 and have been in place ever since."<sup>139</sup> The Court viewed this historical tradition as comporting with the principle that a legislative vote is an apportionment of legislative power from the people rather than the expression of an individual legislator.<sup>140</sup> In regards to its expressive value, the Court reasoned, a legislative vote "symbolizes nothing. It *discloses* . . . that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication."<sup>141</sup> Plus,

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<sup>135</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992).

<sup>136</sup> *See, e.g., Sumnum*, 555 U.S. at 467–68.

<sup>137</sup> *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2347 (2011).

<sup>138</sup> *Id.* at 2347–48. The House of Representatives adopted its legislative recusal rule on April 7, 1789, 1 *Annals of Cong.* 98–99 (1789), and the Senate adopted its rule in 1801. THOMAS JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES* 31 (1801). The Court also detailed that the states likewise had a longstanding tradition of recusal rules. *Carrigan*, 131 S. Ct. at 2349.

<sup>139</sup> *Carrigan*, 131 S. Ct. at 2348.

<sup>140</sup> *Id.* at 2350.

<sup>141</sup> *Id.*

the Court continued, even when a personal message exists, the legislator has no First Amendment right to use the government mechanics of voting to convey it.<sup>142</sup> *Carrigan* thereby evaluated historical traditions, the utterance's ascribed source, and the communicative interests at stake in holding that the typically linguistic act of legislative voting was not First Amendment covered expression attributable to a legislator.

*Carrigan*'s solitary shortcoming was describing legislative voting as a "nonsymbolic act" or "nonsymbolic conduct,"<sup>143</sup> rather than viewing the frequently linguistic element involved—stating "aye" or "nay" or recording an "aye" or "nay" in the printed records—as implicating "speech."<sup>144</sup> The potential pitfalls of dismissing spoken or printed words as merely "conduct" are well documented.<sup>145</sup> *Carrigan* had no need to navigate this perilous terrain; indeed, the Court's foray leaves troublesome issues regarding expressive coverage for other types of voting or linguistic utterances with legislative consequences.<sup>146</sup> A preferable approach would have been to begin with the presumptive First Amendment coverage for linguistic communications, but then exclude legislative voting based on both

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<sup>142</sup> *Id.* at 2351.

<sup>143</sup> *Id.* at 2350–51.

<sup>144</sup> *See id.* at 2354 (Alito, J., concurring) ("The Court's strange understanding of the concept of speech is shown by its suggestion that the symbolic act of burning the flag is speech but John Quincy Adams calling out 'yea' on the Embargo Act was not.").

<sup>145</sup> *See, e.g.,* Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 906 ("[S]imply labeling speech 'conduct' is an analytical nonstarter."); Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 110 (1989) (arguing attempt to distinguish between speech and conduct is "doomed to failure"); Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 242 (1978) (viewing the survival of the "empty speech-conduct distinction . . . in a world without extrasensory communication" as a "mystery"); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 114 (1982) (urging "one should not take recourse to verbal subterfuge, *e.g.*, that it is 'speech-brigaded-with-action' or 'conduct' alone that is curtailed" when a verbal utterance is regulated); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284–85, 1347–48 (2005) [hereinafter Volokh, *Speech as Conduct*] (arguing that speech as conduct doctrines "require courts to focus on the wrong questions, and would often lead courts . . . to reach the wrong results"). *But see* KENT GREENWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 57–58 (1989) (maintaining that limited kinds of speech involve "situation-altering utterances" not covered by the First Amendment).

<sup>146</sup> *See Carrigan*, 131 S. Ct. at 2354 (Alito, J., concurring). Such issues, though, may not be troubling to *Carrigan*'s author, Justice Scalia, who believes that linguistic legislative acts are not covered by the First Amendment. *See Doe v. Reed*, 130 S. Ct. 2811, 2832 (Scalia, J., concurring).

(1) the ongoing historical tradition of attributing the legislative power to the constituency and (2) the contemporary understandings that the communicative aspect of a vote is minimal to both the legislator and the intended audience and that ample alternative methods exist to convey any desired message.

A similar analysis also harmonizes the Court's government speech cases. The current doctrinal significance of government speech is not creating a free speech right that the government can assert against itself,<sup>147</sup> but instead providing the government a defense to a First Amendment claim when the particular forum or communicative avenue a person is attempting to access has been reserved for the government's use.<sup>148</sup> In other words, the government speech doctrine treats a specified communicative forum as reserved for the government's transmission of messages, precluding the putative speaker from employing that channel to transmit speech that would otherwise fall within the First Amendment. And while the Court has been obtuse in defining the contours of government speech other than discussing the need for government control,<sup>149</sup> the decisions often highlight both historical traditions and the interests of speakers and audiences.

Consider *Pleasant Grove City v. Summum*, which held that the government could choose to accept or reject privately donated permanent monuments for exhibition in a public park without any scrutiny under the Free Speech Clause.<sup>150</sup> This result effectively

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<sup>147</sup> See, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1501–08 (2001) (detailing the textual, historical, and prudential arguments against the government being a First Amendment rights holder). But see David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1640–41 (2006) (contending that in some situations a public entity should have constitutional protection for its speech).

<sup>148</sup> See Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 956 (1998) (highlighting that the government's own speech may limit the freedom of others to speak under the idea of a "government speech forum"); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 708 (2011) [hereinafter Blocher, *Viewpoint Neutrality*] ("[G]overnment speech doctrine provides a defense to First Amendment challenges brought by private individuals whose speech has been limited by the government").

<sup>149</sup> See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (contending that the Court's government speech doctrine is "relatively new, and correspondingly imprecise").

<sup>150</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009). The rejected monument was a stone inscribed with the tenets of the Summum religion, the Seven Aphorisms of Summum. *Id.* at 465. Because the linguistic elements in the monument served an essential expressive purpose, this monument can be classified as linguistic, even though many monuments are nonlinguistic. See *infra* Part II.B.

grants public officials unfettered discretion to display only those monuments comporting with their preferences and favored themes (unless doing so violates another constitutional prohibition, such as the Establishment Clause). To support its holding, the Court began with the longstanding practice, dating back to ancient times, of governments expressing messages or beliefs through monuments.<sup>151</sup> Throughout American history, government entities have selectively received and exhibited thousands of privately funded or donated monuments, while retaining editorial control over their content and public display.<sup>152</sup> The city in this case had exercised such selective control, accepting only those privately donated monuments comporting with the image it desired to project.<sup>153</sup> As a result, the Court determined that the city had “‘effectively controlled’ the messages conveyed by the monuments in the park by exercising ‘final approval authority’ over their selection.”<sup>154</sup>

In the course of this discussion, the Court highlighted several additional considerations. Observers, the Court reasoned, “routinely” and “reasonably” interpret monuments as expressing a message on behalf of a property owner (whether private or public), indicating that the property owner is viewed as “speaking” through the monument.<sup>155</sup> The Court further noticed the financial benefit the government (and its citizens) obtain by accepting privately funded or donated monuments rather than relying on public financing,<sup>156</sup> as well as the practical necessity for government selectivity to avert a “monumental” inundation of public property.<sup>157</sup> And the city’s regulation at issue was limited to this need, the Court observed, without inhibiting other protected expressive activities in the park.<sup>158</sup>

These considerations fit comfortably within a framework based on historical traditions and contemporary communicative impact. An ongoing historical tradition exists of governments selectively choosing monuments to display on public property, a tradition never successfully challenged on free speech grounds. The historical

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<sup>151</sup> *Summum*, 555 U.S. at 470.

<sup>152</sup> *Id.* at 471–72.

<sup>153</sup> *Id.* at 472–73. The city had also established criteria for future selections of monuments and obtained ownership of most of the monuments in the park. *Id.*

<sup>154</sup> *Id.* (quoting *Johanns*, 544 U.S. at 560–61).

<sup>155</sup> *Id.* at 471.

<sup>156</sup> *Id.*

<sup>157</sup> See *Summum*, 555 U.S. at 479–80.

<sup>158</sup> *Id.* at 474 (“And the City has made no effort to abridge the traditional free speech rights—the right to speak, distribute leaflets, etc.—that may be exercised by respondent and others in Pioneer Park.”).

understanding that the government is “speaking” when the monument is on public property comports with the contemporary perspectives of the modern observer and the government’s need to manage public property while being able to continue this time-honored form of government expression. Public property cannot provide a forum for the permanent display of every privately donated monument.<sup>159</sup> And speakers, such as the *Summum*, have numerous other methods to transmit their expression to their intended audiences without employing this traditionally exclusive government forum. *Summum*’s holding that the public display of privately donated monuments is not subject to First Amendment scrutiny thus corresponds with historical traditions and continued contemporary insights regarding the appropriate attribution of the monument’s expression in light of the communicative interests at stake and the availability of alternative channels of communication.

*Summum*’s stated rationale, however, also emphasized a problematic construct. While the Court acknowledged the “legitimate concern” that the government speech doctrine should not be employed “as a subterfuge for favoring certain private speakers over others based on viewpoint,” its focus on the government’s control of the message did nothing to alleviate it.<sup>160</sup> An ad hoc judgment regarding the government’s “control” over a particular message is no more constraining than an ad hoc judgment on the value of speech in light of its associated harms.<sup>161</sup> If control is the only criterion, why couldn’t the government assert the necessary control over public libraries to remove materials based on viewpoint,<sup>162</sup> over public broadcasting stations to ban editorializing,<sup>163</sup> over public university student groups to bar any objectionable

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<sup>159</sup> Cf. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 811 (1995) (Stevens, J., dissenting) (recounting the battle over symbols when the capitol grounds in Ohio were opened to temporary monuments during the holiday season).

<sup>160</sup> *Summum*, 555 U.S. at 472–73. While I agree with Professor Blocher that the government speech doctrine by its very nature “encourages government to be open, consistent, and sincere” in favoring certain private speakers over others, I view the Court’s expressed concern as focused on the doctrine’s scope. See Blocher, *supra* note 148 at 717.

<sup>161</sup> See *United States v. Stevens*, 599 U.S. 460, 469–72 (2010).

<sup>162</sup> *But see Bd. of Educ. v. Pico*, 457 U.S. 853, 870–72 (1982) (plurality opinion) (concluding that books could not be removed from a school library due to partisan or ideological ideas).

<sup>163</sup> *But see FCC v. League of Women Voters*, 468 U.S. 364, 399–401 (1984) (holding ban on editorializing on publicly funded television stations unconstitutional).

perspectives,<sup>164</sup> over public university professors to prohibit unorthodox viewpoints,<sup>165</sup> over government-funded attorneys to preclude specified arguments from being presented in court,<sup>166</sup> or over nongovernmental organizations participating in a federal program to compel their pledges to support government policies.<sup>167</sup> Indeed, as the government stressed in *Summum*, control as the criterion would generally authorize the government, once it “takes control of something, says this is our speech,” to be immune from judicial scrutiny because “then it’s the Government speaking.”<sup>168</sup>

Yet a needed constraint would exist by further limiting the government speech doctrine to traditional situations in which the government has expressed itself without providing an opportunity for contrary viewpoints. This historical prerequisite would preclude the government from attempting to assert control over existing mediums of communication to immunize itself from compliance with First Amendment limitations.<sup>169</sup> Government speech, then, could not be extended to venues traditionally open to a variety of viewpoints, such as government public forums, the U.S. Postal Service, public broadcast editorials, publicly funded adversarial advocacy, or public university student groups.<sup>170</sup> In these traditional “domains of public discourse,” the government’s asserted control, even over those receiving subsidies or other government benefits, would not allow the

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<sup>164</sup> *But see* *Healy v. James*, 408 U.S. 169, 187–88 (1972) (holding that a public university could not deny school affiliation to a student group because the school found “the views expressed by [the] group to be abhorrent”).

<sup>165</sup> *But see* *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (recognizing that a university is a “traditional sphere of free expression so fundamental to the functioning of our society” that First Amendment freedoms limit the government’s ability to constrain speech); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (holding that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom”).

<sup>166</sup> *But see* *Legal Serv. Corp. v. Velazquez*, 531 U.S. 531, 533, 547–49 (2001) (invalidating a funding condition that prohibited attorney recipients from addressing the validity of welfare laws).

<sup>167</sup> *But see* *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (invalidating a funding condition requiring affirmation of a belief outside the government program’s scope).

<sup>168</sup> Transcript of Oral Argument at 32, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (No. 07-665).

<sup>169</sup> *Cf. Velazquez*, 531 U.S. at 543 (“Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program’s purposes and limitations.”).

<sup>170</sup> *Cf. Charles W. “Rocky” Rhodes, Speech, Subsidies, and Traditions: AID v. AOSI and the First Amendment*, 2012–13 CATO SUP. CT. REV. 363, 381–88 (highlighting the importance of such venues to expressive freedoms).

government to dispense with typical First Amendment protections.<sup>171</sup> Instead, only in cases of a historic “baseline,” in which the government has traditionally asserted control over the expression at issue to accomplish government objectives, could the government speech doctrine potentially bar a First Amendment challenge.<sup>172</sup>

The Court’s prior holdings attributing speech to the government could all be defended under this requirement. The government traditionally has, for example, exercised managerial control over its employees and those compensated to engage in a government-funded enterprise to project certain messages to the populace. The government’s authority to control the expression of its employees to ensure the accomplishment of government objectives has long been recognized by the judiciary (despite the controversy regarding the contemporary boundaries of such authority).<sup>173</sup> Moreover, public entities have enacted conditions on funding allocations since the founding of our nation to ensure the achievement of prescribed directives, including in fields such as public health.<sup>174</sup>

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<sup>171</sup> See Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 157–58 (1996) (explaining that government funding is not determinative of First Amendment protection when the speech is within “the domain of public discourse”). Dean Post envisions identifying public discourse domains through case-by-case “complex and contextual normative judgments” regarding social characterization, instead of a traditional account supplemented by contemporary imputation insights considering communicative utility and available alternative channels. See *id.* at 152. Although his account offers additional flexibility and contextual nuance, the results should not differ significantly, as American historical traditions and contemporary insights presumably would often encompass the relevant social characterizations.

<sup>172</sup> Cf. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359–63 (1984) (discussing the use of history as a baseline in ascertaining allocation sanctions).

<sup>173</sup> See, e.g., *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517–18 (Mass. 1892) (Holmes, J.) (holding that the government may constitutionally impose reasonable conditions on its employees, including preventing police officers from soliciting money for or being a member of a political committee). While *McAuliffe’s* broad dictum that a government employee “may have a constitutional right to talk politics, but he has no constitutional right to be a [public employee]” has been disavowed, see generally *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716–17 (1996), the government still retains the authority to regulate employee speech to ensure the efficient promotion of its public mission. See *Garcetti v. Ceballos*, 547 U.S. 410, 422–23 (2006). For commentary on public employee speech rights, see Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009); Charles W. “Rocky” Rhodes, *Public Employee Free Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173 (2007); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008); George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129 (2008).

<sup>174</sup> See, e.g., Act for the Relief of Sick and Disabled Seamen, 1 Stat. 605 (July 16,

The funding conditions challenged in *Rust v. Sullivan* thus fell within a longstanding tradition authorizing the government to ascertain the scope of publicly funded health projects, at least to the extent the family planning projects were limited to preconception counseling (rather than post-conception services).<sup>175</sup> The more difficult issue in *Rust* involved the extension of the regulations to prohibit physicians in the project from delivering abortion-related advice, even upon specific request.<sup>176</sup> Although government funding for specifically defined public health services extends back to before the Revolution,<sup>177</sup> there is no indication that such programs ever limited physicians' advice to patients. Moreover, in light of the nature of the physician-patient relationship and the practical obstacles to alternative communicative channels, attributing physicians' speech to the government appears problematic. Yet *Rust* did respond to some of these concerns. The Court reasoned that the regulations did not "significantly impinge upon the doctor-patient relationship" because the patient had no justifiable expectation of receiving comprehensive medical advice in light of the limited nature of the program.<sup>178</sup> The regulations also only precluded abortion counseling as a method of family planning, thereby allowing abortion referral or counseling when medically necessary.<sup>179</sup> Other avenues to disseminate the message existed, as the health care organization receiving the funds could still provide abortion counseling and even abortion services—it just had to do so through programs separate and independent from the funded project.<sup>180</sup> The Court therefore held (while leaving open the potential of a different result for more significant intrusions on physicians' advice) that the government was free to bar funding recipients from counseling abortion and to convey its own undistorted message preferring childbirth.

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1798) (establishing tax on seamen entering into American ports to be used by the President to provide for temporary relief of sick or disabled seamen either at existing marine hospitals or "in such other manner as he shall direct" and under his "general instructions"). In smaller communities, the "hospital" consisted of contracted local physicians working in private boarding residences, who were obligated to abide by the program's "instructions" regarding qualifying seamen, permissible stay lengths, and treatable conditions. See Gautham Rao, *Sailors' Health and National Wealth*, 9 Common-place (Oct. 2008) (available at <http://www.common-place.org/vol-09/no-01/rao/www/common-place.org/vol-09/no-01/>).

<sup>175</sup> *Rust v. Sullivan*, 500 U.S. 173, 179–80, 192–200 (1991).

<sup>176</sup> *Id.* at 180.

<sup>177</sup> See STEVEN RATHGEB SMITH & MICHAEL A. LIPSKY, *NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING* 47–48 (1993).

<sup>178</sup> *Rust*, 500 U.S. at 200.

<sup>179</sup> *Id.* at 195.

<sup>180</sup> *Id.* at 196.



The government likewise may engage in promotional advertising to serve public interests. A longstanding tradition supports government advertising; indeed, the success of national government bond sales made through newspaper advertisements during the Civil War has been credited with exhibiting advertising's power, which launched other national ad campaigns and eventually the advertising industry.<sup>181</sup> Many government-sponsored advertisement campaigns have become iconic, including Uncle Sam's "I Want You for U.S. Army" and Smokey the Bear's "Only You Can Prevent Forest Fires."<sup>182</sup> Historical traditions thus underlie the Court's holding in *Johanns v. Livestock Marketing Association* that the government can direct a promotional advertising campaign (there, promoting beef consumption) to further objectives believed to be in the public interest.<sup>183</sup> The debatable aspect of *Johanns* is whether the government must be transparent in its involvement—rather than attributing the advertisements to "America's Beef Producers"—to ensure the government's accountability for the message.<sup>184</sup> But there is little doubt that the government, as a general matter, can use tax dollars from its citizens (or from some portion of its citizens) to fund promotional advertisements supporting objectives believed to be in the public interest (even over the contrary views of taxed objectors) under both historical traditions and contemporary attribution principles.

Of course, a traditions-based approach supplemented with attribution considerations will not always generate untroublesome solutions. Properly identifying the relevant tradition often is not a simple task. For instance, in a public university setting, different relevant traditions exist. Government viewpoint discrimination

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<sup>181</sup> See CHARLES A. GOODRUM & HELEN DALRYMPLE, *ADVERTISING IN AMERICA: THE FIRST TWO HUNDRED YEARS* 35 (2006).

<sup>182</sup> See *id.* at 158, 268.

<sup>183</sup> *Johanns v. Livestock, Mktg. Ass'n*, 544 U.S. 550, 560–65 (2005).

<sup>184</sup> Compare *id.* at 564 n.7 (concluding "no prior practice, no precedent, and no authority [exists] for this highly refined elaboration"), with *id.* at 571 (Souter, J., dissenting) (arguing that the government "must make itself politically accountable by indicating that the content actually is a government message"). My preliminary research indicates that the majority appears correct in its assertion that there has not been a uniform "prior practice" or any precedent requiring governmental transparency for its promotional advertisements. See *id.* at 564 n.7 (majority opinion). This should not end the matter, though, as such transparency might be necessary for correct attribution under contemporary standards. For persuasive arguments that the Court erred by not mandating transparency, see Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 988 (2005); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 597 (2008).

regarding student advocacy groups and the pursuit of intellectual freedom is taboo,<sup>185</sup> but government control over other aspects of the university, such as educational content and resource allocation, is common.<sup>186</sup> A particular expressive undertaking by a university thus must be categorized into the appropriate traditional analogue. And such refined classifications will be necessary in other contexts as well to discern the appropriate tradition. Yet this is an inherent difficulty in all historical analyses, including those necessary for categorical exclusions after *Stevens*.<sup>187</sup>

Another wrinkle is that some government speech situations may address relevant “traditions” of relatively recent vintage. New forms or avenues of communication—and potentially government speech—are constantly emerging.<sup>188</sup> Even the longstanding traditions discussed previously regarding public universities and government advertisements are not traceable to the founding era, as such communicative avenues did not exist at that time in their present form. This means that the “tradition” in government speech cases may not always be a long one. If the government creates a new particular avenue of communication, the government should be allowed to assert control over that forum from its inception and preclude contrary viewpoints, assuming that the attribution of the speech appears appropriate and the government is not unduly abridging valuable communicative outlets.<sup>189</sup>

While a full account of the government speech doctrine is not feasible here, this overview demonstrates that the existing precedents are compatible with a structural framework considering traditions and relative worth. Admittedly, in this context, the framework is prescriptive, not merely descriptive. But the prescription comports

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<sup>185</sup> See, e.g., *Healy v. James*, 408 U.S. 169, 187–88 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>186</sup> See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

<sup>187</sup> See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2544–47 (2012) (plurality opinion) (finding no historical warrant for a categorical exception from First Amendment coverage for false statements despite dissent’s contrary view); *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2735–36 n.3 (2011) (holding historical traditions did not support an exception for violence directed at minors despite dissent’s contrary argument).

<sup>188</sup> See Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 900–03 (2010) (highlighting government’s use of emerging expressive technologies).

<sup>189</sup> Cf. Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 111–18 (2004) (contending the government should be able to discriminate on the basis of viewpoint when creating a “special public purpose forum”).

with the Supreme Court's holdings and the considerations frequently employed to resolve such cases. And such a framework brings symmetry to the Court's treatment of both categorical and attributional exclusions to First Amendment coverage. No persuasive justification exists for a more stringent approach for categorical exclusions when imputed exclusions often allow the government to violate the cardinal principle against viewpoint discrimination.<sup>190</sup> As a result, both exceptions to the presumption of First Amendment coverage for linguistic communications depend on traditions and contemporary valuations.

*B. Coverage Presumptions for Nonlinguistic Expressive Conduct*

The remaining issue is ascertaining First Amendment coverage for those forms of conduct or action that are nonlinguistic in nature yet nevertheless may convey some message. The Court has long recognized that some forms of conduct must be within the *scope* of the First Amendment,<sup>191</sup> even though lesser *protection* is afforded to expressive conduct's nonspeech aspects.<sup>192</sup> Yet the Court has never proposed "a fully satisfactory test for demarcating speech from noncommunicative conduct."<sup>193</sup> The dilemma is defining when the "kernel of expression in almost every activity a person undertakes" burgeons sufficiently "to bring the activity within the protection of the First Amendment."<sup>194</sup> The Court has vacillated on the basic issue of whether the conduct must convey a particularized message, holding a particularized message is necessary for speech coverage in

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<sup>190</sup> Compare Blocher, *supra* note 54, at 717 (discussing "the many ways in which government speech [often] discriminates against private viewpoints"), with *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate . . . based on hostility—or favoritism—towards the underlying message expressed.").

<sup>191</sup> See *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (invalidating statute criminalizing displaying a red flag to oppose organized government on free speech grounds).

<sup>192</sup> See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (assuming burning a draft card was "sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity").

<sup>193</sup> Tiersma, *supra* note 12, at 1531; accord Dale Carpenter, *Unanimously Wrong*, 2005–06 CATO SUP. CT. REV. 217, 241 ("The Court has never had a satisfying theory of what conduct should get free-speech protection."); James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 4–5 (2008) (recognizing the difficulty in ascertaining "why some expressive conduct is speech and why other expressive conduct is not").

<sup>194</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

some situations,<sup>195</sup> but not in others.<sup>196</sup> Yet instead of confronting these discrepancies, the Court typically ignores them.<sup>197</sup>

This reticence is unnecessary, though, because the Court's holdings are reconcilable. The key, again, is historical traditions. For conduct that has been viewed as predominantly expressive since the founding, the Court applies the First Amendment regardless of the conveyance of a particularized message.<sup>198</sup> On the other hand, for contemporary nonlinguistic communicative acts and those involving conduct which is expressive only in certain circumstances, the Court undertakes a more searching evaluation requiring an understandable message.<sup>199</sup>

### 1. Presumptive Coverage for Traditional Forms

Some forms of conduct have been understood to be exclusively or at least predominantly expressive and within the ambit of speech and press guarantees since the birth of our nation. Parades, marches, music, art, monuments, certain displays of symbols, and even campaign contributions were protected means of conveying ideas, emotions, messages, and political beliefs at the founding. With respect to these predominantly expressive traditional forms, the Supreme Court has never required a particularized message for First Amendment coverage.

Marches, parades, processions, demonstrations, festivals, and other public gatherings for political and civic purposes were frequent events from the earliest days of America.<sup>200</sup> Such events often

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<sup>195</sup> See, e.g., *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011) (concluding that "the act of voting symbolizes nothing"); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64–66 (2006) (holding conduct of excluding or affording differential treatment to military recruiters not inherently expressive).

<sup>196</sup> See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 476–77 (2009) (holding acceptance of donated monuments expressive even though "it frequently is not possible to identify a single 'message' that is conveyed by an object or structure"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995) (determining that "a narrow, succinctly articulable message is not a condition of constitutional protection").

<sup>197</sup> Cf. Schauer, *Boundaries*, *supra* note 1, at 1767.

<sup>198</sup> See *infra* Part II.B.1.

<sup>199</sup> See *infra* Part II.B.2.

<sup>200</sup> See, e.g., Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 554–61 (2009) (discussing centrality of such public gatherings to founding-era democratic politics); SIMON P. NEWMAN, *PARADES AND POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC* 2 (1997) (highlighting the "extraordinarily diverse array" of parades and festivals in early America); MARY P. RYAN, *CIVIC WARS: DEMOCRACY AND PUBLIC LIFE IN THE AMERICAN CITY DURING THE*

included music, songs, flags, effigies, and other symbols to represent allegiances and sympathies.<sup>201</sup> These parades and marches were neither prohibited nor regulated during the founding era, unless degenerating sufficiently to implicate criminal law prohibitions against breaching the peace, public disturbance, public nuisance, libel, or slander.<sup>202</sup>

Modern Supreme Court decisions all recognize that parading and marching are covered by the First Amendment, even if a particularized message is not conveyed.<sup>203</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* explained that parades are “a form of expression, not just motion,” with “the inherent expressiveness of marching to make a point” underscoring the Court’s longstanding precedent affording constitutional protection to protest marches.<sup>204</sup> Parades and marches, the Court confirmed, do not need to be distilled to a “narrow, succinctly articulable message” to qualify for the First Amendment’s shield; constitutional coverage exists as long as there is any reason (or a multitude of reasons) for the group’s movement over merely reaching a particular destination.<sup>205</sup>

To support this proposition, *Hurley* observed that prior precedents had extended First Amendment coverage to displaying flags and saluting (or refusing to salute) flags, acts which also might not convey a succinct and particularized message.<sup>206</sup> Like parades and marches, displaying, waving, and saluting flags were common forms

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NINETEENTH CENTURY 58–131 (1997) (describing numerous nineteenth century examples).

<sup>201</sup> See NEWMAN, *supra* note 200, at 1–2, 98–99; Volokh, *Symbolic Expression*, *supra* note 24, at 1060–62.

<sup>202</sup> See Abu El-Haj, *supra* note 200, at 562; Volokh, *Symbolic Expression*, *supra* note 24, at 1067–68.

<sup>203</sup> See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 568–70 (1995) (discussing First Amendment protection for parades and marches even if a “narrow, succinctly articulable message” is not present); *Gregory v. Chicago*, 394 U.S. 111, 112 (1969) (holding peaceful march to protest segregation “falls well within the sphere of conduct protected by the First Amendment”); *Cox v. Louisiana*, 379 U.S. 536, 545–46 (1965) (holding peaceful assembly, march, singing, and protest against racial segregation protected by speech and assembly guarantees); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (determining protest march with placards and songs “reflect[ed] an exercise of [First Amendment] basic constitutional rights in their most pristine and classic form”).

<sup>204</sup> *Hurley*, 515 U.S. at 568.

<sup>205</sup> *Id.* at 568–69. The Court continued: “Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them,” with its cadre of spectators, costumes, flags, banners, music, and floats. *Id.* at 569.

<sup>206</sup> See *id.* (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632, 642 (1943); *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

of expression during the founding era. As the Supreme Court noted in *West Virginia State Board of Education v. Barnette*, the act of refusing to salute a flag is “an old one, well known to the framers of the Bill of Rights.”<sup>207</sup> This long-standing history could explain the Court’s failure to mention whether First Amendment coverage extended to displaying a flag in its first case invalidating a statute on free speech grounds, *Stromberg v. California*.<sup>208</sup> Even though Ms. Stromberg’s conviction was based on displaying a “red flag” used as “a sign, symbol or emblem of opposition to organized government,” the Court never discussed the necessary coverage prerequisite for holding flag displays protected by freedom of speech.<sup>209</sup> Rather, the Court apparently viewed this aspect of the First Amendment’s coverage as self-evident, which was warranted in light of the longstanding historical traditions of our nation. Other traditional symbols likewise have received presumptive First Amendment coverage, including students wearing black armbands (a sign of mourning since the Revolutionary period<sup>210</sup>) to oppose a war.<sup>211</sup>

The Court has similarly treated First Amendment coverage for nonlinguistic arts (such as instrumental music, painting, sculptures, and performance dance) as a largely self-evident proposition, irrespective of the comprehensibility of any message conveyed.<sup>212</sup>

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<sup>207</sup> *Barnette*, 319 U.S. at 633.

<sup>208</sup> *Stromberg*, 283 U.S. at 369.

<sup>209</sup> *Id.* at 369–70.

<sup>210</sup> See MARY CABLE, *AMERICAN MANNERS AND MORALS* 45 (1969). Since that time, black armbands have been used as a symbol of “mourning” in demonstrations and protests. See, e.g., David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055, 1101 (1994) (discussing black armbands used by IWW picketers).

<sup>211</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 399 U.S. 503, 505–06 (1969). The Court summarily concluded without analysis that “the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct” and was “closely akin to ‘pure speech’” that “is entitled to comprehensive protection under the First Amendment.” *Id.*

<sup>212</sup> See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 474–77 (2009) (reasoning the acceptance of a monument is expressive conduct although “it is frequently not possible to identify a single ‘message’ that is conveyed by an object or structure”); *Hurley*, 515 U.S. at 569 (discussing the “unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll”); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment.”); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (concluding nude dancing as a form of live entertainment “is not without its First Amendment protections from official regulation”); *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (recognizing that paintings, drawings, and engravings are protected by the First Amendment unless falling within an unprotected category of expression); *California v. LaRue*, 409 U.S. 109, 117–18 (1972) (discussing expressive protections

Many of these cases have highlighted the ancient historical roots of such forms of expression.<sup>213</sup> The American Revolutionary generation viewed expressive guarantees as protecting the “arts in general,”<sup>214</sup> and one of the earliest American state court cases regarding constitutional expressive freedoms equated the protections afforded to paintings to that afforded to books.<sup>215</sup> The arts have thus been included in the American conception of free expression since our beginnings.

Even First Amendment coverage for campaign contributions comports with founding historical traditions, as contributions to campaigns and political parties have been a part of the American political system since our nation’s creation.<sup>216</sup> The first congressional attempts to regulate contributions made through “assessments” on government employees were defeated in the first part of the nineteenth century, with opponents primarily arguing that the proposed bills violated the First Amendment.<sup>217</sup> The Supreme Court eventually confirmed that campaign contributions are covered by the

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afforded to a “scantly clad ballet troupe”).

<sup>213</sup> See, e.g., *Sumnum*, 555 U.S. at 470–72 (discussing ancient history of communication through monuments); *Ward*, 491 U.S. at 790 (“Music is one of the oldest forms of human expression.”). Cf. *Miller v. City of South Bend*, 904 F.2d 1081, 1089–90 (7th Cir. 1990) (en banc) (Posner, J., concurring) (tracing public performances by erotic dancers to ancient Greeks), *rev’d sub nom.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

<sup>214</sup> 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774).

<sup>215</sup> *Brandreth v. Lane*, 8 Paige Ch. 24, 26–27 (N.Y. Ch. 1839) (concluding liberty of the press applied to both an earlier case involving a painting and the case before it involving a book because both situations were “of the like nature”).

<sup>216</sup> See Robert E. Mutch, *The First Federal Campaign Finance Bills*, 14 J. POL’Y HIST. 30, 30–45 (2002). At the founding, the societal-elite candidate, his relatives, and his friends paid the expenses incurred in seeking elective office. *Id.* at 39. But the early nineteenth century witnessed a transition from this colonial political remnant to a more democratic system, which necessitated campaign contributions on a broader scale. *Id.* at 30. Early nineteenth century campaign contributions were first made by party members before a practice began around 1830 to “assess” the salaries of government employees for the support of their party’s political affairs. See *id.* at 30, 45.

<sup>217</sup> See *id.* Congress considered several proposed bills between 1837 and 1841 to prohibit assessments for political purposes on public employees, but none passed, with opponents consistently contending that prohibiting campaign contributions violated freedom of speech. See, e.g., Cong. Globe, 25th CONG., 3d sess., Appendix 157 (1839) (statement of Rep. Isaac Crary) (“It is a bill to circumscribe freedom of speech and action. . . it violates the constitution.”); *id.* at 204 (statement of Sen. James Buchanan) (“This bill is a gag law. . . The Constitution, in language so plain as to leave no room for misconstruction, declares that, ‘Congress shall make no law abridging the freedom of speech.’”). After the Civil War, however, the assessment practice was outlawed by federal legislation. See, e.g., Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883).

First Amendment without mentioning the need for a particularized or specific message, similar to its treatment of all the other forms of traditionally expressive conduct traceable to the founding.<sup>218</sup>

The Court's holdings thus confirm the centrality of historical traditions to First Amendment coverage for intended expressive acts (even when these traditions go unmentioned in the opinions). Consider the contrast between coverage for campaign contributions and the lack of coverage for legislative votes. *Carrigan* explained that a legislative vote "symbolizes nothing. It discloses . . . that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, [but it] is [not] an act of communication."<sup>219</sup> The Court illustrated with colorful examples: how does a legislator through a vote convey whether his or her position is based on personal views, the views of constituents, the views of big contributors, or the views of the party?<sup>220</sup> Yet these exact same arguments could be marshaled against the lack of an expressive element in campaign contributions. A campaign donor may make the contribution for a number of reasons, including overall support of the candidate, the candidate's view on a single issue, a desire to "buy influence" over the candidate, a personal friendship with the candidate, pressure from family, peer groups, the workplace, or a spiritual community, the urging of a celebrity or media personality, or a host of other potential reasons. The contribution itself "symbolizes nothing" other than the individual "wishes (for whatever reason)" to give money to the candidate—it does not even indicate that the individual desires the candidate's election, as some individuals contribute to opposing campaigns.<sup>221</sup> Yet the longstanding tradition of viewing contributions to political campaigns as falling within the First Amendment's coverage obviates the need to establish that the particularized message the Court deemed necessary for legislative voting exists in

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<sup>218</sup> See *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) ("A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.").

<sup>219</sup> *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011).

<sup>220</sup> See *id.*

<sup>221</sup> See, e.g., Ali Weinberg, *All Politics is Local: Colbert Busch Culls GOP Support from Friends*, FIRSTREAD ON NBCNEWS.COM (Mar. 21, 2013) available at: <http://firstread.nbcnews.com/news/2013/03/21/17403589-all-politics-is-local-colbert-busch-culls-gop-support-from-friends?lite> (discussing contributions to opposing candidates for same office). It is also not uncommon in Texas for lawyers or firms to contribute to opposing candidates in contested partisan state judicial races. See CHARLES W. "ROCKY" RHODES, *THE TEXAS CONSTITUTION IN STATE AND NATION: COMPARATIVE STATE CONSTITUTIONAL LAW IN THE FEDERAL SYSTEM* 130-34 (2014).



the campaign contribution context. Without such a tradition, though, establishing that actions in a nonlinguistic form are within the First Amendment's scope is a more formidable task.

## 2. Lesser Coverage for Nontraditional Forms

With respect to actions without a historical expressive pedigree or that are only expressive under certain circumstances, the Court has indicated that First Amendment coverage depends on whether the conduct at issue is "inherently expressive," demanding a more particularized message without the aid of explanatory speech.<sup>222</sup> This requires more than merely an intent to convey a message,<sup>223</sup> and more than engaging in conduct containing some "kernel of expression."<sup>224</sup> Rather, the conduct must be of a type that contemporary social norms recognize as articulating an apparent message that can be understood by observers.

The vast majority of our daily actions do not satisfy this standard. For instance, a gathering at a commercial establishment to engage in social recreational dancing is not covered by the First Amendment.<sup>225</sup> The differential treatment of military recruiters by law schools is also not sufficiently expressive for First Amendment coverage because an observer, according to the Court, could not ascertain (at least without the aid of explanatory speech) whether such an action resulted from disapproval of the military, the preferences of military recruiters, or the capacity of the interview rooms at the law school.<sup>226</sup> The Court has also indicated numerous other activities fall outside the First Amendment's coverage, such as refusing to pay income taxes as an expression of disapproval of the IRS,<sup>227</sup> being in a state of nudity,<sup>228</sup>

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<sup>222</sup> See, e.g., *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (holding First Amendment coverage extends "only to conduct that is inherently expressive" and viewing need for "explanatory speech" as "strong evidence" against satisfying this standard); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (concluding First Amendment coverage for conduct depends on the intent "to convey a particularized message" and the likelihood that observers would understand the message); *Spence v. Washington*, 418 U.S. 405, 409–11 (1974) (same).

<sup>223</sup> *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

<sup>224</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

<sup>225</sup> *Stanglin*, 490 U.S. at 25.

<sup>226</sup> *Rumsfeld*, 547 U.S. at 66.

<sup>227</sup> *Id.*

committing assaults or acts of violence,<sup>229</sup> using drugs,<sup>230</sup> meeting with friends at the mall,<sup>231</sup> or walking down the street.<sup>232</sup>

Yet sometimes this demanding standard is satisfied. Several cases have either held or assumed that burning a recognized symbol is covered by the First Amendment. Burning an item is a potential method to express a succinct, articulable message—indeed, the founding period was replete with instances of burning symbols (such as effigies, flags, publications, or copies of laws) as a means of expression.<sup>233</sup> But burning an item, unlike displaying a flag or marching in a parade, is not a *predominantly* expressive activity. In most instances, burning is simply a method to generate heat or dispose of a worn or discarded item. As a result, burning is only expressive conduct when performed with an intent to convey a message that is likely to be understood by observers.<sup>234</sup> This standard has been satisfied in cases like *Texas v. Johnson*, which held that flag burning as part of a political demonstration merited First Amendment coverage because its expressive nature was “both intentional and overwhelmingly apparent.”<sup>235</sup> Similarly, *Virginia v. Black* acknowledged the First Amendment covers burning a cross, “an effective and dramatic manner” of conveying a message of hate.<sup>236</sup> And the Court has also assumed that burning a draft card on the steps of a federal courthouse implicated First Amendment coverage, an assumption which appears inevitable in light of the clear intent to convey a particularized message against the draft that was likely to be understood (and indeed was) by onlookers.<sup>237</sup>

Other uses of symbols likewise fall within the First Amendment’s scope. *Spence v. Washington* extended First Amendment coverage to the display of a flag with a peace sign affixed by removable tape, with the Court reasoning that the combined symbolism was readily understandable in light of recent national and world events.<sup>238</sup> In *Clark v. Community for Creative Non-Violence*, the Court assumed

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<sup>228</sup> See *City of Erie v. Pap’s AM*, 529 U.S. 277, 289 (2000) (plurality opinion).

<sup>229</sup> See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

<sup>230</sup> See *Emp’t Div. v. Smith*, 494 U.S. 872, 882 (1990).

<sup>231</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

<sup>232</sup> *Id.*

<sup>233</sup> Volokh, *Symbolic Expression*, *supra* note 24, at 1060–62.

<sup>234</sup> *Texas v. Johnson*, 491 U.S. 397, 404–06 (1989).

<sup>235</sup> *Id.* at 406; *accord* *United States v. Eichman*, 496 U.S. 310, 315 (1990).

<sup>236</sup> *Virginia v. Black*, 538 U.S. 343, 360 (2003).

<sup>237</sup> *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

<sup>238</sup> *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

(without holding) that overnight sleeping in connection with a demonstration to call attention to the plight of the homeless was covered, at least to some extent, by the First Amendment.<sup>239</sup> These cases illustrate that First Amendment coverage typically extends to those actions involving symbols that have acquired a well-understood social meaning in contemporary society, even when the action is not predominantly expressive or the symbol is of recent origin.

The Court has also afforded First Amendment coverage to predominantly expressive contemporary activities comparable to traditional forms, such as picketing or sit-ins. Neither picketing nor sit-ins—both of which involve congregating in a defined geographic space to induce action by a targeted individual or entity—implicated expressive freedoms at the founding.<sup>240</sup> Indeed, until almost the middle of the twentieth century, such concerted actions often violated common law or statutory prohibitions.<sup>241</sup> Only in 1940 did the Supreme Court first afford constitutional protection to peaceful labor picketing, viewing it as a “practical, effective means” to “enlighten the public on the nature and causes of a labor dispute,” an undertaking “essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern.”<sup>242</sup> The Court analogized engaging in expressive conduct at a public locale near the employer to the historical use of the streets and public spaces for other expressive activities.<sup>243</sup> While its subsequent decisions have allowed the government to prohibit picketing targeted

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<sup>239</sup> Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

<sup>240</sup> See Joseph Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940*, 14 U. PITT. L. REV. 170, 171–72 (1953) (discussing the two known antebellum attempts by striking laborers to patrol their employers’ premises, both of which resulted in indictments for conspiracy).

<sup>241</sup> WILLIAM W. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953* 168–69 (Cambridge University Press 2006) (discussing prohibitions on picketing and targeted actions during the nineteenth and into the twentieth century). The courts viewed the term “picket” as indicating “a militant purpose, inconsistent with peaceable persuasion.” *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 205 (1921); accord *Edgar A. Jones, Jr., Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023, 1024 (1953) (describing the common law’s disdain for picketing). Despite some early twentieth century state court decisions upholding peaceful picketing when allowed (or at least not prohibited) by state statutory provisions, the Supreme Court held in 1921 that verbally abusive (even if nonviolent) labor picketing deprived the business owner of his property without due process of law, such that the Fourteenth Amendment required its proscription. *Truax v. Corrigan*, 257 U.S. 312, 328 (1921); see *id.* at 364–65 nn.28–31 (Brandeis, J., dissenting) (listing conflicting existing state authorities on picketing).

<sup>242</sup> *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940).

<sup>243</sup> *Id.* at 106.

outside the primary participants in a labor dispute,<sup>244</sup> the Court contemporaneously has extended constitutional coverage to picketing or focused protests in numerous other contexts involving issues of public concern.<sup>245</sup> Such cases recognize that, under contemporary social norms and understandings, an organized confinement to a defined geographic space may be an equally expressive method to convey a public message as a group parade, march, or other movement (even though both methods may be regulated to prevent noncommunicative harms).<sup>246</sup>

First Amendment coverage, then, is not limited to historical forms of predominantly expressive conduct, but also includes analogous contemporary forms of expressive conduct or modern symbolism conveying a particularized message that is likely to be

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<sup>244</sup> See, e.g., *NLRB v. Retail Store Emp. Union*, 447 U.S. 607, 616 (1980) (plurality opinion) (concluding ban on picketing of secondary business imposed “no impermissible restriction upon constitutionally protected speech”); *Am. Radio Ass’n v. Mobile Steamship Ass’n*, 419 U.S. 215, 229–30 (1974) (upholding injunction against American seamen picketing foreign-flag ships employing foreign crews); *Int’l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 705 (1951) (holding injunction against secondary picketing “carries no unconstitutional abridgement of free speech”); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498–502 (1949) (upholding injunction against picketing to pressure company to stop selling ice to non-union ice peddlers). The Court in these cases highlighted the coercive nature of picket lines when labor discord expands outside the primary labor dispute. See, e.g., *Retail Store*, 447 U.S. at 616; *Giboney*, 336 U.S. at 498–502. While labor apparently has a First Amendment right to engage in handbilling in the vicinity of a secondary dispute, the Court has held that picketing, which it views as mixing communication and conduct, may be banned in the same vicinity. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–76, 580 (1988).

<sup>245</sup> See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1218–19 (2011) (holding First Amendment shielded funeral protesters from tort liability for emotional distress when picketing at a public place on a matter of public concern); *United States v. Grace*, 461 U.S. 171, 176 (1983) (holding peaceful picketing on sidewalks around Supreme Court grounds covered by First Amendment); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–09 (1982) (holding nonviolent picketing supporting boycott of white merchants to obtain equality was a form of First Amendment conduct); *Carey v. Brown*, 447 U.S. 455, 459–61 (1980) (holding prohibition on all non-labor peaceful picketing on the public streets and sidewalks in residential neighborhoods infringed on protected expressive conduct); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–99 (1972) (concluding ordinance precluding all picketing within 150 feet of any school not involved in a labor dispute implicated First Amendment); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (plurality opinion) (concluding First Amendment embraces “appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be”).

<sup>246</sup> See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 479–83 (1988) (holding that, although public issue picketing on residential streets was covered by the First Amendment, an ordinance banning focused picketing in front of a particular residence was a constitutional time, place, and manner restriction).

understood by observers. As with the exceptions to presumptive constitutional coverage for linguistic communications highlighted previously, contemporary perspectives regarding the relative utility of the communicative thought conveyed thereby supplement historical expressive traditions. These oft-considered distinct inquiries—determining when words are not covered by the First Amendment and when expressive conduct is—thus share common underpinnings.

### III. THE STRUCTURAL FRAMEWORK

These shared underpinnings highlight the possibility of constructing a unitary structural framework to account for the Court's coverage doctrine. I will summarize the relevant considerations, the resulting framework, and its normative underpinnings first before applying it to test cases.

#### A. *Historical Traditions and Contemporary Communicative Value*

Words are not the sole component of the First Amendment's orbit. Rather, two parallel complications arise: (1) determining when the spoken, printed, or written word is not covered by the First Amendment; and (2) ascertaining when conduct without the use of words is constitutionally covered.<sup>247</sup> In resolving these issues, the Court's touchstones are prior judicial acquiescence in historical traditions and contemporary judicial insights on the value of the speech in relationship to its harm. Other than the cases in which the Court considered the coverage issue sufficiently self-evident to proceed via *ipse dixit*, the Court always highlighted one—and frequently both—of these considerations.<sup>248</sup> At the very minimum, then, these considerations are key tools in ascertaining the First Amendment's scope.

These two considerations are also capable of constructing a First Amendment architecture with systematic, ordered queries for adjudicating coverage issues. Under this structure, easy cases remain easy. While hard cases are still hard, the framework ensures the appropriate issues are addressed, in accord with past doctrine, even under vexing scenarios.

The first move is classifying the communicative attempt at issue as linguistic or nonlinguistic. Linguistic communicative efforts incorporate alphabetical usages of words or language—whether

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<sup>247</sup> See Schauer, *Categories*, *supra* note 11, at 268–73 (recognizing these two “parallel problem[s]” of First Amendment coverage).

<sup>248</sup> See *supra* Part II.

spoken, printed, written, or otherwise conveyed by audio or visual means (including sign language or Morse code). Such linguistic efforts are presumptively covered by the First Amendment.

There are two exceptions that can rebut this coverage presumption for linguistic expression, both of which consider traditions and contemporary valuation. The first exception is so-called “unprotected” categories of utterances, such as incitement, obscenity, fighting words, threats, fraud, and other “historic and traditional categories long familiar to the bar.”<sup>249</sup> These uncovered categories necessitate (1) an ongoing judicial acquiescence in laws prohibiting or regulating analogous utterances dating back to the founding, and (2) a continued contemporary evaluation that the harms associated with that type of utterance exceed its relative benefits.<sup>250</sup> The second exception concerns expressive efforts attributed to the government or polity.<sup>251</sup> This exception likewise has two elements: (1) an ongoing judicial acquiescence in denying expressive coverage to private speakers since the opening of that communicative channel, and (2) a continued contemporary evaluation that expressive coverage should be attributed to the government or polity in light of the communicative interests at stake and the availability of alternative communicative channels.<sup>252</sup> If neither one of these two exceptions applies, the linguistic communication falls within the First Amendment.<sup>253</sup>

On the other hand, for communicative attempts without linguistic elements, only those forms of predominantly communicative conduct that the founders considered expressive (such as parades, instrumental music, and art) are assumed to be covered by the First Amendment.<sup>254</sup> When the relevant form of

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<sup>249</sup> *United States v. Stevens*, 559 U.S. 460, 467–68 (2010) (quoting *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

<sup>250</sup> *See supra* Part II.A.1.

<sup>251</sup> *See supra* Part II.A.2.

<sup>252</sup> *See id.*

<sup>253</sup> Some dispute exists regarding whether these exceptions in fact predominate over the rule. *Cf. Weinstein, supra* note 14, at 665–66. As Professor Weinstein correctly notes, the Supreme Court’s prior enumerations of the unprotected categories of speech do not appear to cover all the linguistic expression outside the purview of the First Amendment. *See id.* But even accepting that there are additional uncovered forms of expression, I still believe that substantially more linguistic expression is covered than uncovered. I do not have empirical support for this belief but can offer a thought experiment: is most of your own linguistic expression subject to government regulation without implicating the First Amendment?

<sup>254</sup> *See supra* Part II.B.1.

conduct is of more recent origin, or involves an activity (such as burning) that in most instances is not expressive, First Amendment coverage necessitates that the undertaken conduct is inherently expressive enough to convey a particularized message without the aid of explanatory speech.<sup>255</sup> Those nonlinguistic communications satisfying either the historical traditions or inherent expressiveness standards are then subject to the same exceptions that exist for linguistic communications—that is, historical categorical exclusions and governmental attribution.<sup>256</sup>

This means that historical considerations and communicative utility are the dispositive considerations for both linguistic and nonlinguistic categorizations. The purpose of the linguistic/nonlinguistic classification is not to dispense with these concerns, but rather to establish the coverage presumption employed. Linguistic communications enjoy presumptive First Amendment coverage unless excluded by both expressive traditions and relative valuation. In other words (borrowed from Professor Schauer), the Court adopts a broad coverage presumption for linguistic communications and then “defines out” those subcategories of utterances with an ongoing tradition of exclusion.<sup>257</sup> With respect to nonlinguistic communicative efforts, however, the Court “defines in” First Amendment coverage for conduct based on either its traditional or inherent expressiveness.

These converse presumptions allocate the risks of overinclusion and underinclusion in defining the First Amendment’s scope. A broad coverage presumption that defines out specified subcategories tends to avoid errors of underinclusion.<sup>258</sup> This appears preferable with respect to linguistic communications, which, as discussed earlier, are the foremost concern of the expressive constitutional guarantees under textual, historical, and doctrinal modalities.<sup>259</sup> Affording First Amendment coverage to some words that should not be covered is a tolerable risk; the danger is failing to afford protection to words that should be covered, a threat which chills free expression and squelches the breathing room necessary for its survival. The Court’s doctrinal presumption in favor of linguistic coverage therefore

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<sup>255</sup> See *supra* Part II.B.2.

<sup>256</sup> See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 470–80 (2009); *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Miller v. California*, 413 U.S. 15, 24–25 (1973).

<sup>257</sup> Cf. Schauer, *Categories*, *supra* note 11, at 280 (distinguishing between “defining out” and “defining in” categorizations).

<sup>258</sup> *Id.* at 281.

<sup>259</sup> See *supra* Part II.

appears appropriate.

The use of the contrary presumption for nonlinguistic acts also appears preferable due to the dangers from overincluding conduct as covered expression. Although most activities contain some “kernel of expression,” not every action can implicate the First Amendment, at least not without either significantly diluting First Amendment protections or prohibiting government regulation of a wide swath of activities.<sup>260</sup> As a result, the Court has been cautious in extending First Amendment coverage to nonlinguistic conduct, especially in the absence of a historical expressive pedigree.<sup>261</sup> The Court thus appropriately employs historical traditions and expressive value to “define in” coverage for nonlinguistic communications, while using the same factors to “define out” coverage for linguistic communications.

The combined operation of these presumptions ensures that all expressive forms (whether linguistic or nonlinguistic) that fell within the scope of expressive constitutional guarantees at the founding are likewise covered today, irrespective of subsequent ad hoc judgments that a particular form is not deserving of continued coverage. In this manner, the First Amendment’s original public meaning, evidenced through the legislative practices and judicial holdings at the founding, serves as a baseline. This assures at least the continuation of speech coverage existing in 1791, similar to the Court’s recent holdings that the original understanding of the Fourth Amendment establishes a minimum baseline for implicating constitutional protections for searches and seizures.<sup>262</sup> This reliance on historical practices reduces the risk that courts may conflate unpopular with uncovered speech.<sup>263</sup>

Yet while ongoing traditions and contemporary understandings thus cannot diminish the First Amendment’s scope, they may (and frequently do) occasion its expansion. Subsequent judicial holdings and contemporary insights that additional forms hold relative communicative value may justify their inclusion within the First Amendment. We can thereby adhere to the original constitutional compact and past experiences while allowing the amplification of

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<sup>260</sup> Cf. *City of Dallas v. Stranglin*, 490 U.S. 19, 25 (1989).

<sup>261</sup> See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming—but not holding—that camping in that case merited First Amendment coverage).

<sup>262</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013); *United States v. Jones*, 132 S. Ct. 945, 950 (2012).

<sup>263</sup> See Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 284 (2009) [hereinafter Stone, *Lessons*].



expressive liberty as new philosophical and moral understandings are integrated into the national consciousness.

This flexibility, however, sacrifices some predictability, especially in cases around the edges. The contemporary ad hoc valuation of the relative benefits and costs of traditionally uncovered expression may not be evident. Even historical traditions are not always clear, as well-documented difficulties arise in judicial historiography, including the appropriate level of generality to establish the tradition and courts' selectivity bias in examining the historical record.<sup>264</sup> While I cannot resolve these complexities here, perhaps the level of generality could be tailored to the tradition's use, requiring more specificity, for example, to exclude speech from coverage than necessary for a coverage inclusion. Selectivity bias might be ameliorated to some extent by examining actual historical legislative and judicial practices rather than searching for philosophical understandings or original intentions. Of course, these suggestions do not cure the potential of manipulation. Still, applying this outlined structure provides more constraint than just naked ad hoc balancing.

#### B. *The Framework's Application*

The just-described framework can reconcile the apparent contradictions highlighted in the beginning of Part I.<sup>265</sup> Take the dichotomy between First Amendment coverage for campaign contributions but not for legislative voting. While a campaign contribution is nonlinguistic, it has been considered predominantly expressive since the founding.<sup>266</sup> Contributions thus obtain the benefit of presumed First Amendment coverage, subject only to historical exclusions or governmental attribution, neither of which apply. On the other hand, while a legislative vote is linguistic, the presumption for First Amendment coverage is rebutted by attributing the speech to the polity, in accord with longstanding traditions and continued contemporary insights regarding the expressive value of a vote and the ample availability of alternative communicative channels.<sup>267</sup>

Next consider divergent coverage for the commercial sale of

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<sup>264</sup> For classic treatments of these general issues, see A.H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 and Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

<sup>265</sup> See *supra* notes 2–5 and accompanying text.

<sup>266</sup> See *supra* Part II.B.1.

<sup>267</sup> See *supra* Part II.A.2.

interactive violent video games and a law school's refusal to allow military recruiters on campus. Interactive video games contain linguistic elements and therefore obtain presumptive constitutional coverage. Neither coverage exception applies, because no longstanding tradition exists in this country of restricting children's access to depictions of violence or attributing the message to the government.<sup>268</sup> Conversely, a refusal to allow military recruiters on campus is nonlinguistic conduct that would require either a founding tradition of treating the conduct as expression or apparent expressiveness without accompanying explanatory speech. Because no tradition exists of viewing a refusal to allow access as equivalent to expression, and such an action is not inherently expressive, the First Amendment is not implicated.<sup>269</sup>

Other acknowledged but ill-defined First Amendment coverage exceptions likewise comport with the outlined structure. Take, for instance, the categorical exception the Court has recognized for speech integral to criminal conduct. Although this category was listed in *United States v. Stevens* as among the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,"<sup>270</sup> the uncertainty regarding its contours was apparent in *United States v. Alvarez*, which addressed a constitutional challenge to the Stolen Valor Act.<sup>271</sup> The government asserted that this Act, which criminalized false claims regarding military awards, could be sustained under a categorical First Amendment coverage exception for false factual statements. In order to establish a historical tradition of exclusion for such factual misrepresentations, the government provided several examples of proscriptions on false speech that the courts have traditionally upheld, including statutes preventing false representations of government authority or impersonating a government officer.<sup>272</sup> The plurality, though, rejected the government's assertion that these examples established an overarching exception for false factual statements, instead suggesting that the examples implicated the existing exceptions for fraud and for speech integral to criminal conduct.<sup>273</sup> Yet the plurality failed to

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<sup>268</sup> Cf. *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2734–35 (2011).

<sup>269</sup> Cf. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64–66 (2006).

<sup>270</sup> *United States v. Stevens*, 559 U.S. 460, 467–68 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

<sup>271</sup> *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>272</sup> *Id.* at 2544–46 (plurality opinion).

<sup>273</sup> *Id.* at 2546.

offer any further discussion or even indicate which examples fell under which exception, an understandable obfuscation considering the Court's prior precedent on this supposedly "well-defined" category.<sup>274</sup>

The Court first articulated a coverage exception for speech integral to criminal conduct in *Giboney v. Empire Storage and Ice Co.*<sup>275</sup> A union in that case, to induce nonunion retail ice peddlers to join, sought agreements from wholesale ice distributors to stop selling ice to nonunion peddlers, even though such agreements were illegal restraints of trade under state law.<sup>276</sup> When Empire refused, the union picketed; because union drivers refused to cross the picket line, Empire lost eighty-five percent of its business before the picketing was enjoined.<sup>277</sup> In upholding the injunction, the Court held that the activities of the union, including "their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union memberships, [and] their publicizing," all "constituted a single and integrated course of conduct" violating state law.<sup>278</sup> The Court then rejected the contention that constitutional coverage extended "to speech or writing used as an integral part of conduct in violation of a valid criminal statute."<sup>279</sup>

*Giboney's* scope, though, is susceptible to several potential interpretations,<sup>280</sup> and the Court's subsequent applications of this exception have not helped. The Court mentioned that distributing and possessing child pornography were "integral part[s]" of the illegal conduct of producing such materials in two cases holding child pornography outside the First Amendment's ambit.<sup>281</sup> Two other

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<sup>274</sup> See *id.* Neither the concurrence nor the dissent addressed speech integral to criminal conduct. Justice Breyer's concurrence employed intermediate scrutiny rather than a categorical approach. *Id.* at 2551–54 (Breyer, J., concurring). Justice Alito's dissent argued for a categorical exception for false factual statements. *Id.* at 2560–62 (Alito, J., dissenting).

<sup>275</sup> *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

<sup>276</sup> *Id.* at 492.

<sup>277</sup> *Id.* at 492–93.

<sup>278</sup> *Id.* at 498.

<sup>279</sup> *Id.*

<sup>280</sup> See Volokh, *Speech as Conduct*, *supra* note 145, at 1314–22 (discussing eight different interpretations of *Giboney* and rejecting each one).

<sup>281</sup> *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990) (upholding a ban on possessing child pornography); *New York v. Ferber*, 458 U.S. 747, 761–62 (1982) (upholding a ban on distributing child pornography). As discussed in Part II.A.1, *Ferber's* third (of five) considerations in recognizing a categorical exclusion for child pornography was that the market for child pornography was "an integral part of the [illegal] production of such materials," with the Court then quoting from *Giboney* as support.

Court decisions held that offers to engage in illegal transactions are not covered by the First Amendment, with one relying on *Giboney* as support.<sup>282</sup> But that has been the extent of the Court's prior illumination.

Perhaps more guidance is possible by using the identified coverage structure to evaluate the statutes discussed in *Alvarez* criminalizing falsely representing government authority and impersonating a government officer.<sup>283</sup> As an initial matter, some of the statutory proscriptions involve nonlinguistic conduct, such as "act[ing]" as a government officer or employee, examples of which could include seeking access to a restricted area or flashing a fake badge.<sup>284</sup> Such acts typically should not even obtain presumptive First Amendment coverage—founding historical traditions would not support the predominant expressiveness of the conduct, and such acts would not be inherently expressive enough in most instances to warrant First Amendment coverage.<sup>285</sup>

Yet undoubtedly certain aspects of these prohibitions extend to presumptively covered expressive conduct or even solely linguistic communications, such as claiming, for instance, official government authority in a letter or in an oral statement. Often, though, this presumptively covered expression will be part of a larger illicit scheme of conduct to obtain unlawful financial benefits, classified

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*Ferber*, 458 U.S. at 761–62. *Osborne* relied on the speech integral to criminal conduct discussion from *Ferber* as one of its several rationales for holding possession of child pornography likewise outside First Amendment coverage. *Osborne*, 495 U.S. at 109–10. For critiques of these decisions, see Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 291 (2001); Volokh, *Speech as Conduct*, *supra* note 145, at 1324–26.

<sup>282</sup> *United States v. Williams*, 553 U.S. 285, 297 (2008) (holding that, as "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection" in accord with *Giboney*, so are "offers to provide or requests to obtain child pornography"); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388–89 (1973) (holding that a newspaper could be prohibited under a sexual discrimination law from publishing help-wanted advertisements in sex-designated columns).

<sup>283</sup> See, e.g., 18 U.S.C. § 709 (prohibiting unauthorized use of the names of several listed federal agencies in a manner calculated to convey that the communication has official authorization or approval); 18 U.S.C. § 712 (prohibiting using "Federal," "national," or the "United States" to convey official authorization to collect private debts or perform investigative services); 18 U.S.C. § 912 (prohibiting impersonating an officer or employee of the United States).

<sup>284</sup> See 18 U.S.C. § 912.

<sup>285</sup> Cf. *United States v. Alvarez* 132 S. Ct. 2537, 2554 (2012) (Breyer, J., concurring). Although I agree that some of the proscriptions under the statute involve activities outside the First Amendment's scope, Justice Breyer's suggestion that the statute only reaches "acts of impersonation, not mere speech" is overinclusive. See *id.*

information, or some other outlawed advantage. These are the situations that are encompassed within the speech integral to criminal conduct exception, properly understood.

*Giboney*'s cited authority reveals that the speech integral to criminal conduct exception arose from the earlier "bad tendency" doctrine.<sup>286</sup> At the founding and into the twentieth century, as discussed in Part II.A.1, the judicially accepted bounds of this doctrine were quite broad, permitting a ban on any communicative attempt with a "bad tendency" to cause crime, disorder, or immoral acts.<sup>287</sup> Yet due to changing attitudes regarding the value of such speech, as well as the chilling effect of government censorship over such an extensive realm, the Court retreated from such a blanket exception in the mid-twentieth century.<sup>288</sup> In its place, the Court adopted much narrower categorical exclusions—including one for incitement of illegal activity and another for speech integral to criminal conduct.<sup>289</sup> Because advocacy of illegal activity is covered by the First Amendment unless intended and likely to incite imminent lawless action,<sup>290</sup> a comparable limitation is necessary for the speech integral to criminal conduct exception. Otherwise, the Court's circumscription of incitement would be meaningless, as the government could simply criminalize the linguistic communication itself as an independent illegal act and then assert that the advocacy constituted speech integral to criminal conduct. The speech integral to criminal conduct exception should accordingly require that the communication is in furtherance of the speaker's actual participation in a larger scheme or attempted scheme of illegal nonlinguistic conduct. Speech by a participant in the actual or attempted commission of a crime has little if any intrinsic value, and the harms are substantial, authorizing the government to continue to criminalize such speech as it has done since the founding.

On the other hand, speech that is neither part of an illegal scheme nor within another well-recognized category should not be removed from First Amendment coverage. Is there any way, then, that the statutory prohibitions against false representations of

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<sup>286</sup> *Giboney*, 336 U.S. at 502 (citing, *e.g.*, *Fox v. Washington*, 236 U.S. 273, 277 (1915) (upholding conviction for publishing an article that "encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure")).

<sup>287</sup> See CURTIS, *supra* note 124, at 10–12.

<sup>288</sup> See, *e.g.*, *Cohen v. California*, 403 U.S. 15, 23–26 (1971); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>289</sup> Cf. *United States v. Stevens*, 559 U.S. 460, 467–68 (2010) (listing categories).

<sup>290</sup> *Brandenburg*, 395 U.S. at 447.

government authority could be enforced against solely linguistic representations not seeking an illegal advantage or causing other cognizable harm? In these (I would imagine rare) circumstances, speech representing government authority in communications would appear to fall within the other exception to presumptive First Amendment coverage, for speech attributed to the government or polity. A false claim of government authority differs from a false claim of receipt of a government award or honor—it is the representation that the speech is *on behalf of the government* that implicates the speech attributed to the government exception, not the mere fact that the speaker is making a misrepresentation. Just as a legislative vote belongs to the constituents rather than the legislator, speech on the government's behalf belongs to the government to bestow as it sees fit, not to an individual.<sup>291</sup> When a person claims to be speaking on the government's behalf, those receiving the communication will reasonably attribute the message to the government, like the reasonable observer attributes a monument on government property to the government.<sup>292</sup> The government has the right to control the speech transmitted in its name, which is necessary to ensure both that its preferred messages are not distorted and that the public trust is not betrayed.<sup>293</sup> The judiciary has long acquiesced in these venerable prohibitions against impersonations and other false representations of official authority.<sup>294</sup> Moreover, the intrinsic value of falsely representing government authority is minimal when balanced against the harmful impact on government integrity and citizen confidence. Prohibiting such false representations does not foreclose numerous other avenues of communication—the only proscription is that the message cannot falsely be attributed to the government.

The *Alvarez* plurality thus reached the correct conclusion that these statutes fell within other existing First Amendment coverage exclusions and accordingly did not evidence a broader exception for false factual statements. Nevertheless, its superficial evaluation belied the complexity of the presented questions. The doctrinal structure I have discussed here, on the other hand, establishes a context for resolving these difficult issues, ensuring the appropriate questions are being considered. Although I cannot address its application to all

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<sup>291</sup> *Cf. Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2347–51 (2011).

<sup>292</sup> *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009).

<sup>293</sup> *See Rust v. Sullivan*, 500 U.S. 173, 192–200 (1991).

<sup>294</sup> *See, e.g., United States v. Barnow*, 239 U.S. 74, 77–78 (1915) (upholding a predecessor statute).

potential iterations of speech and speaker coverage issues here, the foregoing examples indicate its analytical utility.

#### IV. CONCLUSIONS FROM THE FIRST AMENDMENT'S RANGE

This Article has explored the Supreme Court's doctrine on the dimensions of the First Amendment, the initial query in free speech cases. I have omitted subsequent speech issues, examining neither the appropriate scrutiny for evaluating the varieties of expression nor the application of these standards to ascertain the expression that the First Amendment *protects* (rather than merely *covers*). Yet insights from this project are nonetheless of some consequence.

The Supreme Court's coverage doctrine fundamentally depends on prior judicial acquiescence in historical traditions and contemporary judicial perceptions of the expression's relative valuation. At least one of these considerations—and frequently both—appeared in the cases in which the Court considered the First Amendment's scope at any length.<sup>295</sup> And this was whether the Court was determining when word usage was outside the First Amendment's coverage, or when communicative attempts without words fell within its coverage. These historical traditions and contemporary insights are the foundations for the described coverage structure, which envelops all communicative attempts that were viewed as within constitutional expressive guarantees at the founding, plus all additional forms recognized since that time holding relative communicative value. The assurance that all traditionally expressive forms continue to maintain coverage has normative appeal in constraining ad hoc judicial experimentation with the First Amendment's reach. The framework, though, is not chained to the past, but allows the expansion of First Amendment coverage as new philosophical and moral understandings emerge.

Yet acceptance of this structural framework is not necessary to infer other lessons from the Supreme Court's First Amendment coverage doctrine. The First Amendment, in addition to its cherished allure, has a constitutional function in our democratic system to protect expression from government censorship and overreaching. Judicial decisions and legal traditions related to this function reveal “our historical commitments and principles” necessary to divine the underlying purposes of the expressive guarantee.<sup>296</sup> My overview at a minimum reveals the key combination

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<sup>295</sup> See *supra* Part II.

<sup>296</sup> Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L.

of historical understandings and contemporary valuation in the judiciary's demarcation of the First Amendment's coverage, which holds some broader implications for free speech theory.

One implication is the often overlooked significance of original meanings in the First Amendment context. It is frequently asserted that originalism is of minimal value in First Amendment analysis, as ascertaining a coherent theory of expression from the founding generation is unrealizable, and, in any event, founding views are too provincial to govern modern First Amendment controversies.<sup>297</sup> And certainly these objections are undeniable with respect to employing an original meaning theory as the *sole* determinant of First Amendment protection—or even coverage—today. Yet I have illustrated that the original public meaning of expressive protections, indicated by founding judicial traditions and laws, is frequently viewed by the Supreme Court as a key ingredient in discerning the contemporary *minimum scope*, or baseline, of First Amendment coverage. Because the laws and judicial decisions from early America are at least strong evidence (if not determinative) of this minimal radius, the original understandings of free expression—as indicated by the practices of early American generations—are worth examining.<sup>298</sup>

Yet the fact that founding practices must be explored, rather than seeking to obtain a coherent First Amendment theoretical understanding from the framers, highlights the impasse in identifying a “metatheory” of the First Amendment.<sup>299</sup> The free speech practices during the founding and subsequent early American generations did not result from a singular theoretical conception, but rather from the influences of several different political, philosophical, and social strands, including Blackstonian legal maxims, Enlightenment philosophy, the English Radical Whig

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REV. 617, 618 (2011).

<sup>297</sup> See, e.g., CHEMERINSKY, *supra* note 10, at 952; Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596 n.27 (1982); 1 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1–17 (1994); Stone, *Sex*, *supra* note 113, at 1863 n.38; DAVID A. STRAUSS, THE LIVING CONSTITUTION 52–62 (2010); Wright, *supra* note 1, at 1221–22.

<sup>298</sup> For recent examples of an original meaning investigation of First Amendment issues, see Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 12–32 (2011); Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 250–59 (2010); Eugene Volokh, *Symbolic Expression*, *supra* note 24, at 1057–63.

<sup>299</sup> Cf. Tribe, *supra* note 145, at 238 (comparing “wholly satisfying free speech theories” to “unicorns” that “evidently do not exist”).



tradition, revolutionary upheavals, and American conceptions of popular sovereignty and republican government.<sup>300</sup> These various strands, even though never coalescing into a coherent theory, influenced legal traditions and practices that allowed, at least for the times, substantial expressive freedoms.<sup>301</sup> As these historical practices influence the Supreme Court's modern coverage doctrine, a contemporary unifying theory has to integrate these traditional commitments, even with their multifarious origins.

A further complication to a satisfactory substantive theory is that the expansion in expressive coverage since the founding has not arisen from a common underpinning, but rather in response to various national and local episodes challenging our commitments to and understandings of the First Amendment. The intersection of judicial, political, media, and public responses to some of these consequential episodes—including the Sedition Act controversy, antebellum abolitionist speech, labor protests, war dissent, the Red Scare, and civil rights protests—have had profound influence on the dimensions of the First Amendment.<sup>302</sup> As Professor Stone has suggested, these crises and other American experiences have led to a modern First Amendment doctrine that “is largely the product of practical experience rather than philosophical reasoning.”<sup>303</sup>

The import of these practical experiences has been debated, not just within the judiciary, but also among the political branches, the media, dissidents, public interest groups, litigants, the public at large, and the academy. The participants in these debates, despite their

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<sup>300</sup> See David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 821–54 (1985) (describing influences on the founding generation).

<sup>301</sup> See *id.* at 799–800; accord LEVY, FREE PRESS, *supra* note 123, at xvi–xvii (expressing surprise at the relatively liberal press freedoms at the founding in the absence of a theoretical justification).

<sup>302</sup> For noteworthy books recounting these episodes and their impact on free speech principles, see CURTIS, *supra* note 124 (focusing on antebellum free speech controversies regarding the Sedition Act, abolition, and the Civil War); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920 (Cambridge University Press 1990) (detailing free speech disputes between 1870–1920 involving labor issues, political issues, electoral reform, sexual radicalism, and advertising that were addressed by judges, law professors, government officials, activists, philosophers, and the general public); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004) (discussing political, judicial, public, and dissident reactions to American wartime speech restrictions).

<sup>303</sup> Stone, *Lessons*, *supra* note 263, at 276–78; accord Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 460–62 (1985) (describing First Amendment commitments being formed through “political experience” gradually leading to new understandings).

disparate conceptions of the First Amendment, have all influenced our free expressive traditions.<sup>304</sup> Our traditions thus encapsulate a multitude of views on the substantive underpinnings of expressive freedom. Participatory democracy and self-government,<sup>305</sup> public constraints on institutional government,<sup>306</sup> the marketplace of ideas and search for truth and knowledge,<sup>307</sup> individual self-realization and autonomy,<sup>308</sup> and other conceptions have all been integrated to some extent.<sup>309</sup> A “generous range” of values underlies the First Amendment, as indicated by the Supreme Court’s consistent refusal to confine expressive freedom to a singular, or even predominant, conception.<sup>310</sup>

But I do not mean to suggest that identifying “the bundle of interrelated principles”<sup>311</sup> or the “hierarchy of values”<sup>312</sup> undergirding

<sup>304</sup> Cf. Schauer, *Boundaries*, *supra* note 1, at 1788.

<sup>305</sup> See, e.g., Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (contending First Amendment produces an informed and responsible democratic electorate through both political and non-political communications); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482–83 (2011) (highlighting First Amendment “value of democratic self-governance,” which encompasses the “necessary and proper means of participating in the formation of public opinion”); Weinstein, *Participatory Democracy*, *supra* note 14, at 491 (urging primary speech justification is opportunity “for individuals to participate in the speech by which we govern ourselves”). This listing is not intended to imply agreement among these scholars. See Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1114–19 (1993).

<sup>306</sup> See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529–44 (contending First Amendment is valuable in part as a check on official abuse of power).

<sup>307</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (urging that First Amendment furthers “the best test of truth,” which is acceptance of the thought “in the competition of the marketplace”); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 38–39 (1995) (explaining that the “search for the truth suggests that what is valuable in human conduct is more than only the political” and more “than pursuing self-interest,” but includes the “ability to freely choose . . . ideas and beliefs and that beliefs and ideas have value”).

<sup>308</sup> See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 992 (1978) (contending speech is important to define, develop, or express “the self”); Redish, *supra* note 297, at 594 (urging First Amendment serves a single ultimate value of individual self-realization that is broader than Baker’s conception); Seana Valentine Shreffin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 287 (2011) (proposing a thinker-based autonomy theory protecting the mind’s free development and operation).

<sup>309</sup> See CHEMERINSKY, *supra* note 10, at 952–59.

<sup>310</sup> Steven Shreffin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1252 (1983).

<sup>311</sup> Schauer, *Categories*, *supra* note 11, at 277.

<sup>312</sup> James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493, 512 (2007).

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the First Amendment is unimportant. Our continued dialectic influences—and will continue to influence—judicial, political, media, and public attitudes toward the First Amendment. These attitudes help shape the scope of the First Amendment, as the other key factor in the Supreme Court’s coverage doctrine is its perspective on the value of the underlying speech in relation to its harms. I have not attempted here to adopt a theory (or a combination of theories) for the substantive valuation of speech, an undertaking far afield from my focus here on the structure of the Court’s coverage doctrine. But I nonetheless recognize the importance of the theoretical underpinnings of the First Amendment in giving life to the structure I have described. For now, I must leave this vital issue to our continued evolution of First Amendment traditions, which will inform expressive coverage for both the speaker and the speech.