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"You Know What I'm Saying?": A Socolinguistic Critique on Free Speech Theories and Tests

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"You know what I'm saying?"

A sociolinguistic critique on free speech theories and tests.

- *John was on his way to school last Friday. He was really worried about the math lesson.*
- *Last week he had been unable to control the class.*
- *It was unfair of the math teacher to leave him in charge.*
- *After all, it is not a normal part of a janitor's duties*[1]

I. INTRODUCTION

Communication: it is one of the most critical aspects of human development and necessary for society's flourishing. For almost all of human history the primary medium in which people have communicated is speech.[2] Whether it is accomplished through a stimulation of vocal cords coordinated with the movements of the mouth or the use of hands, it is the default tool individuals use to converse ideas.[3] Governments throughout the world have frequently punished thoughts and words deemed illegal.[4] Despite, and perhaps because of speech's omnipresence, the study of what constitutes speech and the units of language only began in earnest in the nineteenth century.[5] Thus, the genesis of modern linguistics occurred when Thomas Jefferson was in his second Presidential term. However, eighteen years earlier the

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[1] GEORGE YULE, THE STUDY OF LANGUAGE, 146-7 (2d 1996) (1985). This example shows how language relies on culturally held schemata to express itself. A schema is a cognitive frame, an organized body of information used to process and interpret incoming information. It enables us to quickly sort through large quantities of disparate data, to "separate the wheat from the chaff," selecting what is salient to understanding the situation, and ignoring what is judged not to be salient.

[2] R.L. TRASK, LANGUAGE THE BASICS, 2 (2d 2004). It has been estimated that there are 6,000-7,000 living languages presently. However, forty percent of all languages are in danger of extinction by 2100. Matt McGrath, *Goodbye Mother Tongue*, BBC (Jan. 24, 1999) http://news.bbc.co.uk/2/hi/sci/tech/specials/anaheim_99/262145.stm.

[3] In the twenty-first century about one fifth of the world's adult population, 770 million, is illiterate. EFA Global Monitoring Report, EDUCATION FOR ALL LITERACY IS LIFE (2006) available http://unesdoc.unesco.org/images/0014/001416/141639e.pdf.

[4] Socrates trial for failing to acknowledge the gods that the city acknowledges" and "introducing new deities" essentially punished his freedom of speech. In 1350s, King Edward signed an Act making it illegal to "compass or imagine the Death of our Lord the King." The Treason Act, 25 Edw. 3 Stat 5 c2 (1352) (Eng.).

[5] The examination of languages at the morphological level,, was not begun until the nineteenth century. JACOB GRIMM, DEUTSCHE GRAMMATIK (German Grammar) (2d ed. 1822). Before this language was often described descriptively and Hebrew often thought of as the "original" language. WINFRED P. LEHMANN, HISTORICAL LINGUISTICS, 26 (3d ed. 1992) (1962).

founding fathers enshrined in the Bill of Rights the words "Congress shall make no law…abridging the freedom of speech."[6] The shape and contour of what those few words mean[7] in context is an issue judicial opinions and academics have debated for generations. [8]

Several unique and conflicting free speech theories and tests have developed— each with drawbacks that cannot be reconciled with American free speech jurisprudence. For instance, in the early Republic the legal privileges associated with free speech were not clear and highly influenced by political affiliation.[9] Nonetheless, some academics and justices have tried to reconstruct an original understanding. The reconstructed originalist free speech jurisprudence, however, is incompatible with several "categories" of free speech liberties enjoyed today and consequently this model has not been widely accepted.[10] In contrast to the limited originalist free speech approach is the all-inclusive free speech absolutism. Here, market control forces would be the backbone of free speech jurisprudence and no speech would be *per se* limited.[11]

While many twentieth century free speech cases set forth grand visions of what free speech protects, the Court has never adopted a posture of absolute protection for speech. Seemingly by default, most twentieth and twentieth first century jurisprudence relies on a categorical approach or balancing approach where the protections afforded specific speech acts are determined by an evaluation and judgment of what the speech act is.[12] The categorical approach, where decisions on whether speech acts are protected or not is decided by a judicial system of categories, is neither a unifying free speech theory nor reliant on *stare decisis*. The

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[6] U.S. CONST. AMEND. 1 § 4.
[7] As will be discussed in detail all words are arbitrary and only have the meaning assigned to them by a person or group of people. The meaning of which changes over time because language itself is not a static entity.
[8] "Context" is an ambiguous word here encompassing many different "contexts" including word context, social context, the thoughts of the writer, the medium used, the thoughts of the reader in 1790, and the thoughts of the modern reader.
[9] See *infra* Part III A.
[10] *Id.*
[11] See *infra* Part III B.
[12] See *infra* Part III B, C.

categories are inherently arbitrary and created when the Court faces a speech act which is not perceived by the Court to comport with existing case law. The balancing test, where the interest in the speech act is tempered against state interests, is similarly subject to judicial arbitrariness. Those speech theories and tests cannot adequately describe American free speech ideas because they lack a component necessary to understand speech: culture.

The failure to create a viable, integrated free speech theory or test consistent with the entire body of case law has its roots in the shortcomings of the science of speech. The founding fathers and political theorists of that era were working with an incomplete and inaccurate definition of the most important word in the free speech clause—speech. In the founding era, the most scientific explanation of speech concentrated on the performance of speech and did not comprehend the many components of speech acts below the surface. Indeed, that explanation failed to recognize that:

> [speech is] the power of articulate utterance, the power of expressing thoughts by vocal cords; language, words considered as expressing thoughts; particular languages as distinct from others; anything spoken; talk, mention; oration, harangue.[13]

That definition does include a few of the basic linguistic features of speech as the locutionary act, *i.e.* the performance of speech,[14] and language as a medium of thought.[15]

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[13] Thomas Sheridan, *A complete dictionary of the English language, both with regard to sound and meaning One main Object of which is, to establish a plain and permanent standard of pronunciation*, Volume 2 (fourth edition, 2 volumes)(1797). The spellings have been modernized to make the definition more approachable for the modern reader. Generally, using a dictionary to define what a word meant in a given era is itself a flawed practice. Dictionary writers were prescriptionits, believers in true and correct word usage, and often were slow to record changes in word usage inconsistent with the 'true meaning.' Dictionary recorders often neglected slang and vulgar words. The subtitle to this dictionary includes this failing: Since the culture in the founding fathers lived in long extinct the dictionary is the best surviving record. For a comparison of this definition with the American Webster's first edition see *infra* n. 146 at 37.

[14] JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS, 101 (1962). Before J.L. Austin's work the study of linguistics was concerned with finding truth values. However that theory failed to consider a great range of speech performances.

[15] LEV VYGOTSKY, THOUGHT AND LANGUAGE, (1962) (genesis of the theory on inter-relationship of language development and thought); D Gentner, *Why we're so smart*, in LANGUAGE IN MIND ADVANCES IN THE STUDY OF LANGUAGE AND THOUGHT (eds. Genter & S. Goldin-Meadow) (195-236) (2003).

Nonetheless, the definition fails to recognize the prelocutionary act, *i.e*. the effect on the listener,[16] the sociolinguistic features, and the illocutionary effect.[17] While all of those missing features of speech are critical to the linguist, it is the missing sociolinguistic aspect which is of paramount importance to the legal field. Language and speech do not exist in a vacuum. The relationship of language to society is key to understanding free speech in America.

This paper attempts to foster a more complete understanding of speech in the First Amendment jurisprudence using modern linguistic theory as a catalyst for a new balancing test. By considering culture and societal expectations, the paper sets forth a unified test for free speech jurisprudence without the inconsistencies of other theories or tests. The proposed test puts the emphasis of free speech back on the speech act itself. Part II of the paper is a primer of the relevant linguistics studies, which briefly explains the components behind speech acts and why sociolinguistics is critical to American jurisprudence. Part III describes major existing theories and tests of free speech and discusses their weakness in practice. In Part IV the paper presents a new test for free speech jurisprudence which explains the present case law as consistent with perceived societal norms and recommends future free speech issues determine the cultural acceptance of the speech acts intention. Finally, Part V addresses potential weakness the proposed test may encounter and postulates on avenues a court may take to avoid such weaknesses.

II. WITHOUT AN UNDERSTANDING OF CULTURE SPEECH HAS LITTLE MEANING

A. SPEECH DEVELOPMENT IS INFLUENCED BY LANGUAGE AND CULTURE

[16] JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS, 101 (1962).

[17] The definition of an illocutionary act has vexed linguists for generations, but has several accepted examples. For instance, the sentence: "I bequeath my Alfa Romeo to my brother Matt" is not describing what has been done, but is used to perform the idea—a performative illocutionary act.

Speech and culture are distinct entities that are innately entwined and necessary for comprehension of the utterance. Before examining the effect of culture on speech acts a basic understanding of speech mechanics is necessary. Moreover, because some Justices have used originalsim in the First Amendment context, understanding the differences in linguistic understanding from the founding to the modern era is important. A modern definition of the speech act has several linguistics features unknown in 1790:

> Any of the acts that may be performed by a speaker in making an utterance, as stating, asking, requesting, advising, warning, or persuading, considered in terms of the content of the message, the intention of the speaker, and the effect on the listener.[18]

In other words, the speech act is utterance as behavior; the idea that talking is 'doing things with words.'[19] From its definition, the speech act can be divided into three main components. The first component is the locutionary act, the actual utterance and its ostensible meaning, comprising a phonetic act corresponding to the verbal, syntactic and semantic aspects of any meaningful utterance.[20] This is the aspect of speech commonly thought of as speech and consequently known in 1790.[21] The second is the illuctionary act, which can be further categorized as the illuctoinary point, the basic purpose or intent of the speaker,[22] and the particular schemata that must accompany that point.[23] Critically, schemata, which are of paramount importance to successful communication, were poorly understood until the twentieth

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[18] Random House, *Dictionary.com Unabridged* (Mar. 21 2013). <Dictionary.com http://dictionary.reference.com/browse/speech act> It should be noted the use of the more scientific speech act then the vernacular speech. A speech act is the first meaning given to vernacular speech in a dictionary. To avoid ambiguity with the alternative definitions of speech, speech act is used for precision. *Compare* modern definition to 1790s definition. See *supra* n. 14 at 4.

[19] The title of John Austin's legendary book.

[20] JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS, (1962).

[21] *See* n. 13 at 4.

[22] SEARLE, JOHN, AND DANIEL VANDERVEKEN. FOUNDATIONS OF ILLOCUTIONARY LOGIC, 13-15 (*1985).*

[23] DAVID CRYSTAL, A FIRST DICTIONARY OF LINGUISTICS AND PHONETICS, 152 (1980); SEARLE, JOHN, AND DANIEL VANDERVEKEN. FOUNDATIONS OF ILLOCUTIONARY LOGIC, 7-9, 20-1 (1985).

century.[24] Lastly, the third major component, which may not always be present, is the perlocutionary act, the accentual result of the utterance, which includes "persuading, convincing, scaring, enlightening, inspiring, or otherwise getting someone to do or realize something, whether intended or not."[25] A failure of the locutionary or illuctionary acts can cause undesired perlocutionary results and frustrate the purpose of communication. Together these three components in combination with the knowledge of whom the speaker, the hearer, and the context of the utterance is, create a speech act.

While the mechanics of speech may seem unfamiliar, the underlying tenets are already taught and used in legal work. The three mechanical speech components can be easily understood through analogy in American jurisprudence. Suppose that in the jurisdiction of Setonia aggravated murder is defined "to purposefully kill a person with a hammer." "Purposefully" would be the *mens rea* element, "killing" would be the *actus reus* element, and "with a hammer" would be the circumstantial element. Together these three elements complete the crime aggravated murder. In the analogy, the illocutionary act is akin to the *mens rea* element, the locutionary element the *actus reus*, and the perlocutioary act the circumstantial element. Thus, the speech act can easily be understood by the legal community. Like a criminal or civil offense, the background facts and assumptions surrounding the person's acts, intent, and circumstances alter our perception of the event. In the speech act context, the "facts and assumptions" that underpin a person's understanding of speech and ultimately "freedom of speech" are cultural.

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[24] WILLIAM LABOV, *Hypercorrection by the lower middle class as a factor in linguistic change, in* SOCIOLINGUISTICS: PROCEEDINGS OF THE UCLA SOCIOLINGUISTICS CONFERENCE 84-113 (ed. William Bright 1966).
[25] J.L. AUSTIN, HOW TO DO THINGS WITH WORDS, 3 (2d ed. 1975).

B. SOCIOLINGUISTICS IS CRITICAL TO FREE SPEECH JURISPRUDENCE BECAUSE CULTURE IS ESSENTIAL TO DECODNG LANGUAGE

Speech cannot be communicated and understood effectively without the speaker and recipient sharing common culture. While the components of a speech act are universal, the channels of speech acts—languages—employ startlingly different approaches to communication.[26] In short, a language is a "method of human communication, either spoken or written, consisting of the use of words in a structured and conventional way."[27] In any language the meaningful utterances[28] are relatively consistent[29] and shared by members of the speech community.[30] Nevertheless, if an individual were to memorize a dictionary and learn all the meaningful utterances in a specific language, that individual would not be successful in the given speech community. The reason, which is critical to free speech, is "language [or speech] cannot be understood if we do not have any idea of the conditions [by] which the people who use it

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[26] For instance, English is a Germanic language of the Indo-European language family. It has article words and relies on clusters of modifying words around a verb for clarification. This is in stark contrast to Cherokee where there are no articles and the verbs themselves contain a nucleus which is then modified by extra syllables to modify the root. So the English sentence, He was speaking (I heard him myself), can be said in Cherokee in one word, ka-me-gunh-gi. RUTH BRADLEY HOLMES & BETTY SHARP SMITH, BEGINNING CHEROKEE , v (2d. ed. 1976).

[27] MERRIAM-WEBSTER DICTIONARY (2013) *available* http://www.merriam-webster.com/dictionary/language;*accord* DAVID CRYSTAL, THE CAMBRIDGE ENCYCLOPEDIA OF THE ENGLISH LANGUAGE , 3 (1995).

[28] In two noteworthy studies, the manner in which North American mothers and Japanese mothers talk to their children in early development. The study found Japanese mothers, where the culture negatively views taking a great deal, do not ask for elaborations from their children when recalling past events. Japanese mothers' would also interrupt their children with brief acknowledgements from talking at length. Conversely, the North American mothers,' whose culture generally values articulate and verbally expressiveness, frequently asked questions to encourage their children to talk. The Japanese and North American mothers thus taught positive societal values to their children through language. M. Minami, A. McCabe, *Rice balls and bear hunts: Japanese and North American family narrative*, J. of Child Language, 22, 423-446; P. Clancy, *The acquisition of communicative style in Japanese*, *in* LANGUAGE ACQUISITION ACROSS CULTURES, 213-50 (eds B.B. Schieffelin & E. Ochs) (1986); see also P. Clancy The acquisition of Japanese in THE CROSSLINGUISTIC STUDY OF LANGUAGE ACQUISITION, 373-525 (ed. D. I. Slobin) (1985).

[29] The popular notion of language as a stable and universal instrument among a speck group is incorrect. For example there is no true proper English. There are dozens of different English dialects none of which are better than any other. The perception of one dialect *i.e.* American Standard English (ASE) being better than African American Vernacular English (AVVE) is a cultural issue. Robert A. Leonard, Black English Equals Any Other Language, January 22, 2003 A29 Newsday.

[30] Cheng Githiora, *Sheng: Peer language, Swahili dialect or emerging Creole?*, J. OF AFRICAN CULTURAL STUDIES, 159-181 (2002).

live."[31] When analyzing speech acts at the language level, studies have shown that culture and any language is inseparably linked studies have even shown language influences the way humans think.[32] This cultural aspect of speech has been frequently overlooked by the court.

The information structure of language is multifaceted, unapparent, and below the surface of normal analysis. Language is inherently arbitrary and a blunt instrument requiring the listener and speaker to accommodate one another for successful communication.[33] Thus, every language requires speech communities to use shared schemata to decipher inherit ambiguity.[34] For example, a North Korean who learned English and who heard the following joke would need to know several American schemata that are never taught in the classroom:

> Why are blonde jokes only one line long?
> So men can remember them.[35]

In order to understand the joke, the listener must understand several encoded cultural specific assumptions or schemata. First, the listener must know that "blonde" refers to women. Secondly, the listener must decode the schemata presuppositions for both "dumb blondes" and "dumb blond jokes." Finally, to understand the joke itself, the listener must recognize the challenge to the schema—*i.e.* men are actually the butt of the joke to understand the intent of the sender. All of these presumptions must be rapidly and readily understood by the receiver or the

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[31] ANTONIE MEILLET, LA METHODE COMPARATIVE EN LINGUISTIQUE HISTORIQUE, 10 (1925) translated by G.B. ford Jr (1967).
[32] Lera Boroditsky et al., *Sex, syntax and semantics*, in LANGUAGE IN MIND: ADVANCES IN THE STUDY OF LANGUAGE AND THOUGHT (61-80) (eds. D. Gentner & S. Goldin-Meadow 2003). (Study found that participants who spoke languages with grammatical genders were asked to describe certain objects that the adjectives they chose depended on the gendered category of the nouns in their native language.
[33] *See Generally* Language Accommodation Theory, which explores how people interact and adjust their speech, their vocal patterns and their gestures, context, and identity to accommodate to others. CYNDY GALLOIS, TANIA GILES, HOWARD JOHNSON, *Communication Accommodation Theory: A look back and a Look Ahead*, in WILLIAM B. GUDYKUNST, THEORIZING ABOUT INTERCULTRUAL COMMUNICATION, 122-148 (2010); LYNN H. TURNER, RICHARD WEST, INTRODUCING COMMUNICATION THEORY: ANALYSIS AND APPLICATION (4th 2010).
[34] Richard C. Anderson & P. David Pearson , *A Schema-Theoretic View Of Basic Processes In Reading Comprehension*, in HANDBOOK OF READING RESEARCH (eds P. David Pearson & Rebecca Barr) 255-289.
[35] Compare to the opening epigram *supra* n.1 at 1.

purpose of the speech act is defeated. Speech cannot be completely analyzed without the comprehension of culture.

What qualifies as good, i.e. a prestigious dialect, bad, i.e. a powerless dialect, and inappropriate speech, i.e. using language that is inappropriate for the social situation, is marked by cultural understandings.[36] Sociolinguistics examines language and its relation to social factors including class, occupation, gender, regionalization, pidgin languages, polyglots or the ability to speak multiple languages.[37] In language, acceptable (i.e., "protected") speech depends on a variety of factors including the person, place, and intent of the listener. Obviously, the language choices speakers make in a bar are not the same choices the speakers would make with their mother. Akin to the "blonde joke," the sociolinguistic choices involve more than mere word choice. Speech necessarily elicits certain schemata demonstrating the groups speakers belong to and the message itself.[38] Without knowing the speech acts cultural or subcultural substrata, categorizing the message's intent is dangerous. In the First Amendment context, most of the speech tests do not overtly consider the cultural underpinnings of speech. Yet, it is speech's cultural underpinnings that have caused most free speech cases and is the reason why speech is difficult to regulate.

The majority opinion in *Citizens United v. FEC*, did not consider the cultural speech act norms in the United States.[39] In *Citizens United*, the majority concluded that the Bipartisan

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[36] William Labov, *The effect of social mobility on linguistic behavior*, in EXPLORATIONS IN SOCIOLINGUISTICS 186-203 (ed. Stanley Lieberson 1966) (A landmark field-study on the effect of a place and social status on word and dialect choice).
[37] JANET HOLMES, AN INTRODUCTION TO SOCIOLINGUISTICS, 1 (2d. ed. 2002) (1992).
[38] William Labov, *The logic of non-standard English* in PIER PALO GIGLIOLI, LANGUAGE AND SOCIAL CONTEXT 179-215 (1972). For instance, in AAVE, a dialect of English primarily used by African Americans in northeaster cities, certain linguistic features deviate from Standard English. If a non-speaker were to try to imitate the dialect the person would almost certainly make several errors showing the listener they do not know the dialect. For code-switching, between, dialects and languages *see* John. J. Gumprez, *The Sociolinguist Significance of Code Switching*, RELC JOURNAL 8, 2: 1-34 (1977).
[39] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Campaign Reform Act of 2002's restriction prohibiting corporations, unions, and not-for-profit organizations from broadcasting electioneering communications within sixty days of a general election or thirty days of a primary election violated the free speech clause.[40] The majority opinion, written by Justice Kennedy, spent a majority of its time analyzing case law and the appellant's and respondent's legal arguments. While, the opinion briefly comments on the intent of the speech act, the identity of the speaker, and what medium is used, it fails to discuss American culture surrounding corporate speech.[41] Instead of examining the present sociolinguistic features of American speech, the Court discussed the culture of free speech in the founding era.[42]

The decision reached by the Court was not in accord with the general speech community in the United States. Immediately after the Court's decision was announced the public reaction to the central holding was overwhelmingly critical.[43] The reaction to the Court decision highlights the hazards faced when the court does not consider the present American culture surrounding speech acts. Speech cannot be understood without the markings and accepted schemata of the given culture, and culture must be analyzed in the free speech context. When a court fails to consider the contours of accepted speech in the community it risks conclusions which are incompatible with the commonly held expectations of the speech communities it serves.

III. EXISTING FREE SPEECH THEORIES FAIL TO COHESIVELY UNIFY CASE LAW AND INSTEAD CREATE AMBIGUITY

[40] *Id*. at 913.
[41] *Id*. at 890.
[42] *Id*. at 906. For analysis see *supra* III A at 11.
[43] Dan Eggan, THE WASHINGTON POST, *Large Majority opposes Supreme Court's decision on campaign financing*, available: http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html (finding 65% of Americans strongly disagree with Citizen's United and 72% are in favor of some restrictions on corporate money in elections).

A. ORIGINALIST FREE SPEECH JURISPRUDENCE FAILS TO RECOGNIZE MODERN SPEECH ACT STANDARDS AND CONSTRUCTS.

Creating a test from a free speech originalist understanding is a thorny proposition due to the variable opinion on the propriety of so doing, the lack of case law, and the poorly understood concept of speech in the founder's era. Before the American Revolution there were several different theories on what qualified as protected speech. One of the most influential legal influences on free speech was Judge Blackstone who stated:

> [t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restrains upon publication and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments' he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal he must take the consequences of his own temerity.[44]

Here, Blackstone formed vague and arbitrary categories of "improper," "mischievous," and "illegal" speech that would not be protected. Consequently, the limits on speech acts Judge Blackstone suggested were highly contingent on cultural schemata on what would be improper and would curtail speech protections in incalculable ways. However, the study of cultural schemata which underlay determinations of what is "improper" was not studied in the mid eighteenth century. For example, in English interactions with Native Americans, explorers frequently mistook Native American laws and customs as savage.[45] The explores had a

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[44] WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND ch. II, 150-153 (1765-1769). Significantly although not quoted nearly as much, Blackstone stated further "blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels" are not protected. This caveat is inconsistent with the First Amendment and demonstrates the difficulties of relying on textual information from a culture which does not comport to the present culture.

[45] A perfect illustration of the English and American difficulty in separating their analysis of other cultures from their own sociolinguistic culture in this era is in Sir Henry Timberlake's book on his time among the Cherokee in the early eighteenth century. Timberlake first described the Cherokee as "savage unacquainted with the laws of war nor nations" but also as a people to admire: "here is a lesson to Europe; two Indian chiefs, whom we call barbarians,

difficulty understanding Native American laws and customs for they could not separate their analysis from their deeply embedded cultural schemata on what was "good or improper." Blackstone's understanding of protected speech, cloaked in the aura of free press and determinations of cultural schemata he did not fully understand, cannot be said to have been universally held by the founding fathers.

The battle between federalists and anti-federalists over the Alien Sedition Act's constitutionality clearly shows the bitter divide over free speech protections.[46] Nowhere was the struggle to define free speech more pronounced than Virginia. There, three celebrated Americans offered contrasting free speech views in the Virginia House of Delegates. Writing for the Anti-Federalists majority, Madison and Jefferson stated that "the two last cases of the 'Alien and Sedition acts,' passed at the last session of Congress; the first of which exercises a power no where (sic) delegated to the Federal Government."[47] The legislative act shows that two of America's founding fathers did not share Blackstone's understanding of free speech—at least in

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rivals of power…yet these have no farther animosity, no family quarrels. HENRY TIMBERLAKE, THE MEMOIRS OF LT. HENRY TIMBERLAKE: THE STORY OF A SOLDIER, ADVENTURER, AND EMISSARY TO THE CHEROKEES, 1756-1765 8, 37 (Ed. Duane H. King. 2007) (1765). Timberland never contemplated that Native American cultures developed their own laws and *jus cogens* standards for he could not see past his cultural schemata. Thus, he could recognize the effects of Cherokee law on the actions of the Cherokee towards one another, but could not comprehend it came from their own laws. He assumed the attitudes they exhibited towards one another derived from the nature of man, not from any moral or legal code. Jason Curreri, Sins of Our Forefathers: How the Cherokee Efforts to Reform Their Property Laws Led To Their Removal at the Bayonet of Euro-Americans, 7 (May 2012) (unpublished J.D. thesis, Seton Hall Law) (on file with author). This deficiency in sociolinguistic analysis highlights one of the problems which come with an originalist test in the modern era.

[46] William T. Mayton, *Seditious Libel and the Lost Guarantee of A Freedom of Expression*, 84 COLUM. L. REV. 91, 123 (1984). The Alien and Sedition Act made it illegal to:

> write, print, utter or publish ... any false, scandalous and malicious writing or writings against the government of the United States, or either House of Congress ... or the President ... or to bring them ... into contempt or disrepute.

Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596, 596.

[47] *Virginia to Wit. In the House of Delegates Friday, December 21st, 1798. Resolved that the General Assembly of Virginia doth unequivocally express a firm resolution . . . .* Richmond, 1798. In Rare Book and Special Collections Division, Library of Congress available: http://www.myloc.gov/Exhibitions/creatingtheus/BillofRights/FormationofPoliticalParties/ExhibitObjects/VirginiaResolutionsOpposeAlienSeditionLaws.aspx

1798. Earlier in 1777, with Jefferson's support, Virginia passed a law to punish traitors in thought, but not in deed against the American cause.[48] Similarly, Madison switched his stance to supporting the Bill of Rights after two election losses.[49]

The liberty associated with free speech was equally unclear in the Virginian Federalist party. In response to the Anti-Federalists legislation, John Marshall, then a Virginian legislator, wrote that the Alien Sedition Acts were constitutional.[50] At first blush this does not seem irregular, but Marshall's actual opinion on the act may have been contrary to his response. In a Virginian newspaper the future Chief Justice wrote:

> I am not an advocate for the alien and sedition bills had I been in Congress when they passed I should…certainly opposed them because I think them useless; and because they are calculated to create unnecessary disconnects and jealousies.[51]

Thus, like Madison and Jefferson, Marshall altered his earlier position on the protections offered by the First Amendment. Moreover, the Marshall Court never addressed free speech in any cases leaving his jurisprudence on the issue unknown.

Due to the uncertainty surrounding speech and publishing liberties afforded in the early Republic reconstructed originalist position. In contemporary First Amendment context, Justice Thomas has been the largest proponent of an originalist perspective. Justice Thomas' concurrence in *Morse v. Frederick,* stated his conclusion that students in public schools have no

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[48] LEONARD LEVY, JEFFERSON AND CIVIL LIBERTIES 30 (1964). This law is reminiscent of King Edward's law see fn. 2.
[49] WILLIAM DUDLEY, THE BILL OF RIGHTS: OPPOSING VIEWPOINTS, 41 at n. 35 (1994) ; LEVY, *supra* note 43, at n. 10 at 255.
[50] Gregg Costa, *John Marshall, the Sedition Act, and Free Speech in the Early Republic*, 77 TEX. L. REV. 1011, 1013 (1999) citing John Marshall, Report of the Minority on the Virginia Resolutions (Jan. 22, 1799), reprinted in 5 THE FOUNDERS' CONSTITUTION, 136 (Philip B. Kurland & Ralph Lerner eds.,) (1987).
[51] Letter from John Marshall to a Freeholder (Sept. 20, 1798), in PHILIP KURLAND AND RALPH LERNER, 5 THE FOUNDERS' CONSTITUTION, *supra* note 14 at 131.

free speech rights.[52] In this case an 18 year old student at a school event unfurled a banner with the message "BONG HiTS 4 JESUS."[53] A 5-4 majority found that the speech was not protected under the First Amendment.[54] Justice Thomas' concurrence, not joined by any other members of the Court, tried to reconstruct an originalist "free speech" doctrine for students. As Vikram Amar has summarized, Justice Thomas' opinion asserts that the free student speech rights should be assessed as originally understood and that at the nation's founding schools were managed with an iron hand.[55] Ultimately, Justice Thomas concludes that "in my view…history does not suggest" students have a free speech right.[56] To reach this originalist conclusion, Justice Thomas did not cite any statements of the founding fathers.[57] Instead, he principally relied on 19th century historical analysis and cases, somewhat undermining the originalist position.[58]

The originalist reasoning exemplified in *Morse* is ultimately unconvincing and not a viable free speech theory. The methodology employed has two major shortcomings, which cannot be reconciled with linguistic principles. The first shortcoming is that to reach an originalist conclusion on whether a speech act is protected Justice Thomas does not rely on or discuss the founding fathers opinions. This omission is likely because the differing and changing opinions on free speech by men like Jefferson and Marshall undermine a definitive determination. To avoid confronting the diverging opinions, Justice Thomas frames the free

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[52] *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas J. Concurring).
[53] *Id*. at 397.
[54] Angie Fox, *Waiting to Exhale: How "Bong Hits 4 Jesus" Reduces Breathing Space for Student Speakers & Alters the Constitutional Limits on Schools' Disciplinary Actions Against Student Threats in the Light of Morse v. Frederick*, 25 GA. ST. U. L. REV. 435, 446 (2008) (Chief Justice Roberts concluded that school speech doctrine should apply at a school event, that the banner reasonably promoted illegal drug use, and that under existing case law schools have an important interest in deterring student drug use).
[55] Vikram David Amar, *Morse, School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 637, 644 (2009).
[56] *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (J. Thomas, Concurring).
[57] Justice Thomas concedes the public school system did not exist in the Founding Era.
[58] The cases cited by Justice Thomas have very little to do with free speech in classrooms. Vikram David Amar, *Morse, School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 639, 644 (2009).

speech issue very narrowly to only the public school system that did not exist at the founding. His reliance on historical observations of the era surrounding the 14th Amendment is equally problematic for the *in loci parentis* position of schools was not litigated as Justice Thomas suggests.[59] Thus, the concurrence's reasoning turns largely on the author's beliefs on a bygone and exemplifies the problem of relying on history only for modern social inventions. If Justice Thomas had placed his analysis into the larger sociolinguistic or cultural paradigm, there is no doubt that his analysis would have shown that at the founding or in the late nineteenth century what the First Amendment meant was not well understood. Thus, any conclusion of what a student's free speech liberties were under the First Amendment in earlier times is dubious.

The second shortcoming of originalism free speech jurisprudence is that it fails to realize sociolinguistic changes for speech acts in schools. The *in loco parentis* principle espoused in the concurrence was more than the legal doctrine Justice Thomas presupposes. It was a cultural code on speech acts. In this code students were restricted from certain speech acts in school. The critical problem here and with originalism in this field is that sociolinguistic speech act code of *in loci parentis* is as extinct as the Latin words used to describe the doctrine. Post *Tinker v. Des Moines Independent Community School District*, all municipalities have regulations based on students having a speech act right in school.[60] Moreover, this is consistent with North American culture as studies have shown that twentieth and twentieth-first century children are taught from birth to be self-expressive.[61] Simply put, the conclusion Justice Thomas reaches that students should not have protected speech rights in school is inconsistent with the underlying cultural

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[59] Vikram David Amar, *Morse, School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 639, 647 (2009).
[60] *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503 (1969) (Three students were suspended for wearing arm bracelets which protested the Vietnam War in violation of a school regulation prohibiting armbands. In the Justice Fortas majority opinion joined by five other Justices the Court opined the First Amendment protected a student's right to free speech when absent any evidence that a rule was necessary to avoid substantial interference with school discipline or the rights of others).
[61] See *supra* n. 30 at 12.

schemata of speech in America. Although, Justice Thomas does discursively examine the sociolinguistic features of the nineteenth century when reading academic work and case law, he never explicitly states a connection between culture and speech acceptability. The culture inspection Justice Thomas conducts is relevant for free speech jurisprudence, but he is confined by originalism to the distant past.

A potential third shortcoming of free speech originalism occurs when the court makes broad conclusions which are not supported by history. The inferences drawn by Justice Kennedy's opinion in *Citizens United* present that shortcoming.[62] Toward the end of the opinion, Justice Kennedy briefly discusses the founder's conclusions on the First Amendment protections.[63] While conceding that "the Framers may not have anticipated modern business and media corporation[s]," Justice Kennedy nevertheless concludes that there is no support that the founders would support suppression of political speech by media corporations.[64] In support of this conclusion the opinion cites primarily a dissent by Justice Scalia, two concurrences by Justice Thomas, and two books from the 1960s.[65] From these sources, the majority opinion reaches the conclusion that to the Framers culture "speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge."[66]

The great fault of Justice Kennedy's reasoning is that the history and speech culture of the Founders does not support it. The quarrel between Madison, Jefferson, and Marshall in the Virginia House of Delegates over the passage of the Alien and Sedition Acts demonstrates the

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[62] See *infra* n. 39 at 12 and accompanying text.
[63] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 907 (2010).
[64] *Id.*
[65] *Id.* citing (*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360–361 (1995); *McConnell v. Ohio Election Com'n ,* 540 U.S. 334, at 252–253, (Scalia, J., dissenting) B. BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 5 (1967); G. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776–1787, p. 6 (1969).)
[66] *Id.*

danger of sweeping conclusions on the Founders' Free Speech beliefs.[67] Moreover, the Alien Sedition Act was used to restrict speech acts in the press—contradicting Justice Kennedy's conclusions. Benjamin Franklin Bache,[68] the publisher of the Philadelphia Aurora, was arrested under the Alien and Sedition Act for his anti-federalists writings.[69] Benjamin Bache was not alone in his prosecution under the act and the arresting of publishers for political writings demonstrates the erroneous belief in Justice Kennedy's originalist conclusion.[70] In light of these three critical shortcomings, this theory cannot unify a modern understanding of speech act and case law as it is restricted to earlier periods disregards large cultural changes, and can be mistaken used to support positions which conflict with history.

B. FREE SPEECH ABSOLUTISM IGNORES A SPEECH ACTS' SOCIOLINGUISTIC ASPECTS

Free speech absolutism's reliance on a marketplace of ideas neglects the purpose of speech and is unrealistic in the present culture. No one person has had as great an impact on modern American Free speech jurisprudence as Justice Holmes. Many modern legal notions of what is speech and case law derive from his famous *Abrams v. United States* dissent.[71] In an oft quoted passage from *Abrams*, Justice Holmes set forth the framework for a marketplace of ideas:

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[67] See supra n. 45 at 13 and accompanying text.

[68] Benjamin Franklin Bache was the great grandson of Benjamin Franklin and inherited his printing presses. JEFFERY A. SMITH, FRANKLIN AND BACHE, ENVISIONING THE ENLIGHTENED EMPIRE, (1990).

[69] JOHN C. MILLER, CRIES IN FREEDOM: THE ALIEN AND SEDITION ACTS, 27-9, 65 (1951). Benjamin Bache died of yellow fervor before his trail in 1798. *Id*.

[70] ERIC FONER, 2 GIVE ME LIBERTY (2d. 2010).

[71] *Abrams v. United States*, 250 U.S. 616 (1919) at 630 (Holmes, J., dissenting) (During World War One congress passed the Espionage Act of 1917 and the Sedition Act of 1918 which prohibited "disloyal, profane, scurrilous, or abusive language" against the United States. The defendants in the case were charged under the 1918 act after throwing two pamphlets outside of a window in New York City. The pamphlets denounced the United State's support of the White Russian Army. In a 7-2 decision the Supreme Court found that the act did not violate the defendant's free speech rights. Justice Holmes' dissent argued for a "clear and present danger" standard and eventually became the genesis for modern Free Speech jurisprudence.) Melvin I. Urofsky, Melvin & Paul Finkelman, *Documents of American Constitutional and Legal History*, 666-7 (3d. 2008); See generally *Gibson Bell Smith*, Guarding the Railroad, Taming the Cossacks The U.S. Army in Russia, 1918–1920 PROLOGUE MAGAZINE WINTER 2002, Vol. 34, No. 4. *available* http://www.archives.gov/publications/prologue/2002/winter/us-army-in-russia-1.html.

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution[72]

This vision—that speech, as a channel of expression, is valuable because brings society to the truth-accepts the marketplace of ideas concept. Under this theory of communication, the truth will be tested under market conditions where all opinions are debated and vetted. The free speech absolutism this theory advocates would afford the courts little jurisdiction over speech acts leaving the market responsible for discourse.

American free speech jurisprudence occasionally uses bombastic language in accord with the market approaches, but it has never accepted absolutism. Since the principles asserted in Justice Holmes' dissent were first adopted by the Court, many restrictions have been placed on speech.[73] At no time in American jurisprudence, however, have all speech acts been permitted in every circumstance.[74] Thus, the marketplace of ideas, where truth is determined through discourse on all ideas, is a metaphor which does not comport to reality.

In the abstract, truth discovered through the marketplace would become the accepted reality when enough people agree that it is the truth only after inspecting all opinions. The ideal

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[72] *Abrams v.United States*, 250 U.S. 616 (1919) at 630 (Holmes, J., dissenting).
[73] *Morse v. Frederick*, 551 U.S. 393 (2007) (restricting student speech); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm*., 483 U.S. 522 (1987) (commercial speech limiting the use of the world Olympics).
[74] PA. CONST., 1790, Art. IX, s 7 (explicitly allowing for penalties when free speech rights are abused); CLYDE AUGUSTUS DUNIWAY, FREEDOM OF THE PRESS IN MASSACHUSETTS 144-146 (1906) (noting three convictions of political libel speech between 1799 and 1803). Available at http://books.google.com/books?id=9JAoAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false

would function similar to the mechanics of the scientific community where all hypotheses are subjected to rigorous testing and only then accepted. As Lawrence Solcum has noted there is a critical distinction between the general populace and scientists: "it is one thing to contend that open debate leads to truth among a select community of scientists and academicians, trained for rational discourse, and quite another thing to contend that this is also true among the general public."[75] In other words, a single parent working two jobs will have less time to muse the truths of speech acts than a law professor. America's recent history demonstrates that in certain issues the market place has chosen ideas inconsistent with now accepted truths.[76] Moreover, when external forces such as wealth and control over the conduits to spread speech are consider the idealistic presuppositions of the marketplace become obvious.

Free speech absolutism is inconsistent with the American jurisprudence and cultural understanding of speech acts. From the country's nascence to contemporary times, speech acts under the ambit of common law slander and libel have been regulated. Abstractly, intellectual property speech acts have also been regulated since 1790.[77] These accepted interests contradict the marketplace metaphor by hindering the free exchange of ideas. Furthermore, since the founding, the American speech community has altered it perception on certain cultural speech acts.[78]

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[75] Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 70 (1989). *But see* JONATHAN RAUCH, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 8,51 (1995) (Arguing that all people engage in the culture of liberal inquiry and commenting on the populaces adoption of intelligent design even though it has been dismissed by the scientific community).

[76] In 1958, when the Gallup Poll first asked whether Americans supported interracial marriage only four percent approved. Only in 1983, did support for interracial marriage pass the fifty percent threshold. http://www.gallup.com/poll/149390/record-high-approve-black-white-marriages.aspx. When Alabama lifted its interracial marriage ban in 2000, forty percent of voters wanted to maintain it. http://www.nytimes.com/2000/11/12/weekinreview/november-5-11-marry-at-will.html.

[77] Copyright Act of 1790, ch. 15, 1 Stat. 124.

[78] Acts and Laws of the Province of Mass. Bay, c. CV, s 8 (1712) (prohibiting any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services). *Ex parte Jackson*, 96 U.S. 727, 735, 6 Otto 727 (1877) (assuming no 1st Amendment right to utter obscenities).

The Court's shift in protecting speech acts once considered obscene in certain circumstances, but still not other speech acts, contradicts free market absolutism. The test adopted from *Miller v. California*, although far from perfect, evokes speech community determinations on the acceptability of certain speech acts. [79] The famous test requires courts to determine:

> 1) Whether "the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
> 2) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
> 3) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[80]

The *Miller* test, and particularly the "contemporary community standards," requirement is an adaptable concession to both culture and the inherent ambiguity of obscenity. Critically it is the only free speech test used by the court which infers sociolinguistics ideas about speech acts. The reason this standard is employed in obscenity cases and consequently speech absolutism has never been adapted is because speech acts cannot be divorced from culture.[81] Thus, free speech absolutism and reliance on the marketplace of ideas, while a tempting theory, is not culturally acceptable. It cannot be implemented with American jurisprudence or culture which has always and likely will always deems certain acts unprotected.

Justice Holmes' position assumes truth seeking is the purpose of discourse. Modern studies of speech, unknown when Justice Holmes wrote the *Abrams* dissent, show speech acts actually serve a variety of purposes. In fact, the primary purpose of speech acts is far baser than

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[79] *Miller v. California*, 415 U.S. 15 (1973) (The owner of a mail order pornography was arrested after sending out brochures which depicted sexually explicit acts between males and females. The court opined that obscenity is not protected by the First Amendment, while it created a broader test to define what qualifies as an obscenity.)
[80] *Miller*, 413 U.S. at 24-5.
[81] Edward P. Lazear, *Culture and Language*. JOURNAL OF POLITICAL ECONOMY 107, 110 (S6) (1998) *available at* http://faculty-gsb.stanford.edu/lazear/personal/PDFs/culture%20and%20language.pdf.

truth seeking discourse. The main objective is simply communication.[82] Truth-seeking speech acts are a subsection of linguistic communication. Indeed, many speech acts have nothing to do with truth seeking.[83] Thus, the underlying notion that truth and marketplace are the foundations of free speech is flawed. In essence, proponents of the marketplace of ideas are defining the first floor of the house as if it was the foundation. When inspecting the most basic purpose of speech acts it becomes clear that discourse for truth seeking is only a subsidiary goal and explains why certain speech acts are prohibited even after Holmes' *Abrams* dissent.

C. THE CATEGORICAL APPROACH IS INHERENTLY ARBITRARY CREATING LITIGATION AROUND THE GENUS OF SPEECH ACTS

The presently favored test applied to speech acts is the categorical approach. Under this method, decisions are reached through a system of classifications or categories. This model does have a historical rationale since at common law certain speech acts were granted protection or not depending on a determination on speech's species.[84] In theory, the categorical approach protects speech and limits "ideological predispositions"[85] as outcomes can be determined at the threshold categorical determination.[86] The ACLU has concisely summarized and illustrated the mechanisms of the classification system:

> Classification systems are applied to evaluate the nature of the speech being restricted by government, the setting where the speech would occur, and the nature of the speech restriction. Thus, in resolving a free speech case, a judge would determine first

[82] David Crystal, THE CAMBRIDGE ENCYCLOPEDIA OF THE ENGLISH LANGUAGE (2nd) (1995); R.L. TRASK, LANGUAGE THE BASICS, 47 (2d. 2004) (noting that the function of language is more than the expression and communication of meanings, however the study the detailed study of semantic he proposes is more in depth than necessary for First Amendment purposes).
[83] For a legal example, the speech act at issue in *Miller v. California* primary intent was persuasion to purchase an item. *See supra* n. 76 at 19 and accompanying text. The direct language function in Miller is not considered with the truth merely making the listener conduct an overt act.
[84] WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND ch. II, 150-153 (1765-1769).
[85] John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500-01 (1975).
[86] Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992).

> whether the speech at issue is ‘‘protected’’ or ‘‘unprotected’’ by the First Amendment. Categories of ‘‘unprotected’’ speech include obscenity, defamation, incitement, and child pornography produced with real children. If the speech were in the ‘‘protected’’ category, the judge would classify the setting of the speech as either some type of ‘‘public forum’’ or else a ‘‘non-public forum.’’ The judge would also classify the type of governmental speech restriction as either ‘‘content based’’ or ‘‘content neutral.’’ Depending on the outcome of that sequence of categorical moves, the judge would choose which category of ‘‘scrutiny’’ levels to apply to the speech restriction, whether ‘‘strict’’ or ‘‘rational basis’’ or a possible intermediate category.[87]

This system is by its very nature dependent on existing case law and the ability of judges to relate or distinguish previous generations' ideas on free speech.

The application of the categorical method is thus heavily dependent on a rigid application of tests within tests. Threshold questions are designed to funnel the judiciary into a set pattern, and portend a certain outcome. Still, the path is frequently altered. New distinctions and tests are frequently invented to distinguish speech acts.[88] Thus, what are supposed to be clear and fixed points are malleable and susceptible to manipulation. As Kathleen Sullivan has shown, the categorical approach and the attitude of liberal and conservative judges to it varies over time.[89] The shift in the merits of the categorical approach occurs when the test begins to favor positions which are inconsistent with the minority's opinion.[90] Above all else, the ambiguity associated with tests within tests creates litigation concerning the categories of speech—relegating the speech act at issue to a subsidiary concern.

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[87] Irene Segal Ayers, *Categorical Approach to Free Speech*, (Jan. 16, 2012), http://american-civil-liberties.com/themes/3309-categorical-approach-to-free-speech.html.
[88] Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917 (2009).
[89] Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 308 (1992).
[90] *Id*.

The categorical approach does not deal with the underlying cultural assumptions that attend the perception of speech, and does not substantially delve into the rationale behind the categories it creates. Moreover, the approach does not explain the underlying assumptions of categorical creation. For instance, there is a cultural speech act assumption behind Justice Thomas's rejection of the student free speech category, and the one behind his acceptance of the political speech doctrine. The underlying assumptions are the sociolinguistic attitudes of the judiciary. Therefore, in controversial issues a liberal justice is more likely to categorize laws regulating abortion protesters as ''content-neutral,'' where a conservative justice would assign them to the ''content-based' category of speech restrictions. Determining whether a speech act is content-neutral or content-based speech does not comport to the complete linguistic understanding of a speech act, yet the determination of this factor is crucial to the categorical test.

D. THE PRESENT BALANCE APPROACH LACKS A SOCIOLINGUISTIC ANALYSIS

The alternative test used post-*Abrams* is the balancing test. Like the categorical approach, balancing has been subject to much criticism from both liberal and conservative forces over the past hundred years.[91] A historical basis for balancing can be found in Judge Blackstone's amorphous and broad description of protected speech acts balanced against speech acts affecting the states which are not protected.[92] The balancing tests used by the Court have two major shortcomings. The first shortcoming is that when the balancing test has been used by courts its determining factors have not been uniformly applied to different types of speech.

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[91] Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. at 321-23 (1992); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 307 (1992) (discussing the Warren Court's rejection of the balancing approach to speech cases predominant in the McCarthy era in favor of greater categorization).

[92] As is often the case historical evidence can be used to support contradictory tests.

Despite the variance between balancing tests, the public speech test set forth in *Pickering v. Board of Education* shows the general characteristics shared by the various free speech balancing tests.[93] There, a public school teacher was dismissed after writing a letter to newspaper which criticized how the Township Board of Education and the district superintendent had handled past proposals to raise new revenue for the school system.[94] The Court opined that the teacher's first amendment rights were violated. The test conducted by the Court required that the employee's free speech rights be balanced against the public employer's interest in operational efficiency.[95]

The free speech balancing approach factors the interests of the speaker against any legitimate government interests, however the test does not necessitate an analysis of the speech act in each case. The balancing approach, which rose to prevalence in the twentieth century, generally did not require courts to inspect the sociolinguistic components of speech.[96] For example, *Pickering* began its analysis of the speech act at issue by inspecting the school regulation which was violated—not what the speech itself.[97] There, the Court's touchstone of speech analysis was "the public interest in having free and unhindered debate on matters of public importance-the core value of the Free Speech Clause."[98] Thus, the court presupposed a cultural schema on which to balance the public and private interests. That presupposition permitted the court to balance the speech act in question without analyzing the particularities of

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[93] *Pickering v. Board of Education*, 391 U.S. 563 (1968).
[94] *Id*. at 567.
[95] Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133 (2008).
[96] The *Miller* Test is the exception. This too has been subject to manipulation through statute. OWEN M. FISS, STATE ACTIVISM AND STATE CENSORSHIP, 100 YALE L.J. 2087, 2093 (1991) (describing the Helms Amendment to the National Endowment of the Arts, which limited the ability of museums to display certain types of controversial art while incorporating the third prong of the Miller test into the amendment).
[97] *Pickering* at 568.
[98] *Id*. at 573.

the speech act itself. In parts III and IV of the opinion, where the Court made its determination that the speech is protected under the First Amendment, its inspection of the speech act is limited to its veracity.[99] Balancing tests such as this are too shallow in the analysis of the speech act and can be as arbitrary as the categorical approach.

The second shortcoming of the balancing test is the propensity to find that the government interests overwhelm speech acts which would normally be protected under a categorical approach. Political speech which is fiercely protected under the categorical approach, can be overwhelmed by government interests under the balancing approach.[100] The case to epitomize the potential danger of balancing free speech against a government interest is *Dennis v. United States*.[101] There, in a political speech case, the Court balked at protecting the rights of an extreme minority. The *Dennis* defendants were leading members of the Communist Party in the United States, during the height of the Red Scare.[102] They were found guilty of "assembl[ing] persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."[103] However, at trial no evidence was proffered showing an active plot to overthrow the government.[104] The plurality opined that through case law the government had a "substantial enough interest" in protecting itself that it can limit speech which engenders armed internal attack.[105]

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[99] *Id*. at 569-575.
[100] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).
[101] *Dennis v. United States*, 341 U.S. 494 (1951). The evidence the defendants were involved in an active plot to overthrow the government was scant. MICHAL R. BELKNAP, *Foley Square Trial, in* AMERICAN POLITICAL TRIALS *207-232-,214* (1994).
[102] ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR,160-3 (2011).
[103] *Id*. at 497.
[104] MICHAL R. BELKNAP, *Foley Square Trial, in* AMERICAN POLITICAL TRIALS *207-232-,214* (1994).
[105] *Id.* at 509.

Without using the word balance, the plurality found that the government interest warranted the guilty verdict even though there was no overt act of insurrection proved at the Trial Court.[106] The majority's decision to find such speech unprotected highlights the danger of using balancing tests which do not have set factors.[107] It gives courts expansive power to determine what interests are to be balanced, and in times of war allows judges to bend to increased pressure to weigh the government interests' substantially.[108] As a result of this power, the balancing test which prescribed lets the court succumb to external pressures.[109]

IV. CONTEMPORY SOCIOLINGUISTIC CULTURAL UNDERSTANDINGS MUST BE REVIEWED WHEN ANALYZING FREE SPEECH

All of the previously discussed theories are in tension with and cannot adequately explain American free speech jurisprudence. While earlier theories and tests have failed to satisfactorily elucidate why certain speech acts are protected and others are not, that should not be taken to mean one is impossible or unnecessary. The underlying concern those theories face is a failure to realize the purpose of speech acts and the science that can now support them. The primary function of speech is communication. A speech act includes the speaker, the hearer, and the context of the utterance.[110] Under those basic tenets a speech act has a locutionary act, prelocutionary act, illocutionary effect, and the culture groups unwritten sociolinguistic codes on what is appropriate in a given context. It is essential that courts take notice of those three functions in context if they are to do justice to an assessment of a given form of expressions meaning.

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[106] *Id*. at 510.

[107] ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR, 146-150, 160-170 (2011) (Comparing the Court's decision in *Schneiderman v. United States* to *Dennis v. United States*).

[108] *Ex parte Milligan*, 71 U.S. 2, 109(1866) (noting the problem of judicial opinions in wartime: "[the law] can be discussed and decided without passion or the admixture of any element not required to form a legal judgment."

[109] The proposed factor based balancing test has built in safety-checks to hinder such an outcome. *See infra* IV at 37.

[110] K. BACH & R. HARNISH, LINGUISTIC COMMUNICATION AND SPEECH ACTS, 3 (1979).

Against a lens of sociolinguistic inquiry, originalism fails to present a convincing free speech jurisprudence for three reasons. First, the framers did not have access to the sociolinguistics science. They could not agree on what free speech was, and did not build in cultural referents. For instance, the founders' culture would not have permitted deception of a obscene pornographic speech act, but the present American culture and its jurisprudence does. Similarly, free market absolutism has never been adopted for it is incompatible with basic American sociolinguistic norms. Namely, American culture groups do not want the government to use its voice to discriminate on speech[111] or allow people to shout fire in a crowded theater.[112] Because of these cultural distinctions the categorical approach, which does not protect these speech acts, at first blush appears wise. However, the categorical system creates arbitrarily created levels of protection for different speech acts, and forces litigants to debate whether a speech act is in a particular subcategory. The balancing approach is equally unavailing as it can easily find a state interest that overwhelms a speech act that would normally be protected and could produce results contra to American sociolinguistic cues. All of these failures need to be addressed by any theory or test which purports to cover American free speech. Any test or theory which would accomplish this task must analysis the underlying sociolinguistic components of speech.

A modified factor-based balancing test is the best approach to add a sociolinguistic component to free speech jurisprudence. The balancing approach is a better solution than the categorical approach for it does not suffer the arbitrary creation of subcategories and their related tests. The categorical approach encourages reliance on *stare decisis* to decide cultural norms. Moreover, it requires litigation on the species of category, which would detract from an analysis

[111] *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).
[112] *Schenck v. United States*, 249 U.S. 47, 52 (1919).

of the various features of speech acts below the surface. Conversely, a factor based balancing test requires an intense inspection of case's facts. When applying linguistic features to the balancing test, the Court will have greater discretion to review the individual speech act in its specific contexts. Using a balancing test for sociolinguistic factors also harkens back to Blackstone's conclusion that certain "blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels" would not be protected.[113] Unbeknownst to Blackstone, his ambiguous exceptions to free speech require interpretations of various sociolinguistic features of the speech community. This analysis in particular requires a careful approach, one in which a balancing test is uniquely suited.

To combat a ruling similar to *Dennis*, where political speech during a time of political strife was stifled, the factor based balancing test must overwhelmingly support free speech. The proposed test requires the court to find:

1) who conducted the speech act;
2) what the intent of the speech act was;
3) whether the medium used was the normal channel for such an act;
4) what speech act's effects were both intentional and unintentional;
5) whether contemporary society recognizes or is prepared to recognize all the components which comprise the act. There recognition would signal to the Court that the speech act should be protected;[114]
6) whether the speech act occurred in a subculture which recognized or is it prepared to recognize all the components which comprise the act, thereby signaling to the Court the speech act should receive at least intermediate scrutiny or deference when no overt act has occurred;

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[113] WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND ch. II, 150-153 (1765-1769).

[114] Like the second prong in the *Katz* test the Court must also protect citizens from acceptance of reality which limit their liberties. This situation was discussed in footnote 5 in *Smith v. Maryland*, 442 U.S. 735 (1979). The Court stated:

> that in a situation where individual subjective expectations had been conditioned out by influences alien to well recognized Fourth Amendment freedoms, those subjective expectations could obviously play no role in ascertaining what the Fourth Amendment protection was.

Here, the Court is in affect a guardian of the people's Constitution by not showing deference to a trend which has usurped their rights. Applying this to the proposed free speech test, this would protect minority rights in times of apparent strife such as the communist leaders in *Dennis*.

7) All these factors would then be balanced against any narrowly tailored state interests for prohibiting the speech act, which may exist. The burden would be on the government to overcome the presumed free speech right.

Under this multi-factored test, the court is required to closely examine the components which create a speech act. This is critical because examining the mechanisms of speech makes the court acknowledge the workings of speech which are often forgotten by courts. Basing the test on the components of speech is important because it makes the court carefully inspect the actual act and it brings the speech act to the forefront of free speech analysis. Furthermore, the test brings sociolinguistics to free speech analysis for the first time and ties speech acts with the community itself. By limiting the cultural factor to contemporary communities and sub-communities the court is required to examine present currents in American society and its various subcultures. This protects the majority from subjugation to moral or cultural attitudes from distant periods.

This analysis also protects minority subcultures from being examined under the penumbra of the majority culture. Assuming *arguendo,* that *Citizens United* would remain good law, the Court's recent rejection of Montana's argument to maintain its campaign laws in *American Trade Partnership, Inc. v. Bullock*, may have been decided differently under the proposed test.[115] After the Supreme Court's decision in *Citizens United,* Montana went to great lengths to preserve a 100 year old statute on campaign donor restrictions.[116] The Montana Supreme Court noted that before the law the government had only "a mere shell of legal authority," and the state was controlled by corporations.[117] The Montana Supreme Court believed the state with its sparse population and large geographic size had unique and compelling interests which distinguished

[115] *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).
[116] *W. Tradition P'ship, Inc. v. Attorney Gen. of State*, 2011 MT 328, 363 Mont. 220, 235, 271 P.3d 1, 11 *cert. granted, judgment rev'd sub nom. Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (U.S. 2012).
[117] *Id*.

the Montana statute from *Citizens United*.[118] In a one paragraph *per curiam* opinion, the United States Supreme Court disagreed ,opining there is no "serious doubt" that Montana' arguments were rejected in *Citizens United* or failed to meaningfully distinguish that case.[119]

Under the proposed test Montana's arguments would be more availing because it directly inspects minority speech communities. The sixth factor of the test, whether the speech act occurred in a subculture which recognized the right, which would require at least intermediate scrutiny would be applied. Several factors would weigh in favor of Montana. First, the statute was originally enacted in 1912, and reenacted several times thereafter. [120] This demonstrates a long and held belief of Montanans that certain campaign restrictions in the state are important. Secondly, Montana's unique cultural history shows the difficulties a large state with a small population can have when corporations have unfettered access to political speech. Montanan's present political speech culture had grown under this law for a multiple generations. In essence, these critical facts demonstrate that Montana has unique and long held limitations on political speech by corporations as "bad speech." This determination by Montanans is a distinctive sociolinguistic feature of political speech in Montana. In light of these critical facts that distinguish Montana from states such as California or New Jersey, and under the proposed test a unique ruling could be crafted which respected Montana's sociolinguistic features where some limitations on corporate political speech could be upheld. In the very least under the proposed test Montana would have been afforded a higher level of scrutiny and the Court would have to examine the features of political speech in the Montana speech community.

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[118] *Id*.
[119] *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012).
[120] Mont. Code Ann. § 13-35-227 (2011) (held unconstitutional by *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012)).

The proposed test makes the government's burden to restrain free speech high even under a balancing test. In order to sustain a restriction on speech, the government interest would have to be both substantial and legitimate. In American free speech, restrictions in the political arena have often been upheld against minority political positions.[121] Those decisions have often faced considerable criticism. Under the substantial government interest test the state would face sufficient judicial scrutiny making cases akin to *Dennis* likely to go the other way.

A hypothetical application of *Dennis* under the proposed test under would protect the speech act. In *Dennis*, the defendant was alleged to be a leader of the Communists Political Association and involved, although there was no evidence of a direct plan, with plotting to overthrow the United States government.[122] Applying those facts to the proposed test the government would not have sustained its burden to curtail his free speech. The Court would consider several factors relating to the actual speech act: First, Dennis was the speaker of a political speech act which threatened to overthrow the government via his oral statements and written publications. Second that his intent was to communicate his message that the government of the United States must be over thrown. Thirdly, that speech acts which try to persuade people to a political point normally use oral and printed means as Dennis did. Additionally the Court would acknowledge that the effects of his speech acts have been minimal as he had relatively few listeners and there was no active plan to overthrow the American government. Finally, the court would consider that contemporary American society accepts political discourse it does not agree with. All of these factors would then be balanced against the alleged government's narrowly tailored state interests. Under the facts of *Dennis*, the government has a substantial interest in self preservation. It also has an interest in protecting the

[121] *Schenck v. United States*, 249 U.S. 47 (1919); *Dennis v. United States*, 341 U.S. 494 (1951).
[122] *Id.* at 498.

public interest.[123] But the government maintains a burden to show how this particular speech act is dangerous and that the prohibition of speech is narrowly tailored to its action. The government's interest in stifling Dennis' and his compatriots' speech liberties would likely lost against their speech liberty as the threat of insurrection posed by the group is minimal and the restraint of speech acts is extreme in American culture.

Conversely, under this test speech acts such as child pornography still would not be protected. In *New York v. Ferber*, the Court wisely found that distributing child pornography was not protected under the First Amendment.[124] The Court balanced the speech issue involved with child pornography and the government's interest in protecting children finding the government's interest "heav[y] and persuasiv[e]."[125] Specifically, the Court found that the *Miller* test did not apply, advertising encourages the act, the distribution has little if any value, and the government's interest clearly balanced against the defendant's speech act right.[126]

Under the proposed test the Court would reach the same result, but would consider the rationale behind the Court's dismissal. Thus, the Court would establish that Ferber as a distributor was communicating a speech act, his intent was to make a profit through the distribution of the speech act, the medium employed is commonly used to distribute such goods, the effects of the speech are the profiting from the endangerment of children. Then the court would find that in American speech communities the majority and minority do not recognize the act as acceptable. These factors would be balanced against the narrowly tailored but critical state interest in protecting children. If there was a minor perverse community that did recognize the act as acceptable, the heavy and persuasive government interests would overcome the minority

[123] *Id*. at 553.
[124] *New York v. Ferber*, 458 U.S. 747 (1982).
[125] *Id*. at 749.
[126] *New York v. Ferber*, 458 U.S. 747, 764 (1982).

interest. Thus under this test, the Court would reach the same conclusion as the *Ferber* Court. The underlying reason behind the Court dismissal of Ferber's claim is American culture never accepted this speech act as appropriate.

The areas in which a factor based balancing test would be more effective in protecting speech rights are in perilous times and outrageous speech acts. Often criticized cases like *Dennis* and *Abrams* occurred during moments of internal and external discord in America.[127] Since the September 11th terrorist attacks, several scholars have noted the impact of the war on terror has had on civil liberties.[128] The proposed multifactor balancing test would better protect civil liberties for it is less deferential to previous assessments and requires an in-depth analysis of the speech act at issue and the speech community.

Foe example, *Holder v. Humanitarian Law Project* dealt with the conflict between American free speech values and legislation amended after September 11th terrorist attacks.[129] The Court, in a 6-3 decision, found that the restrictions placed on speech and association by 18 U.S.C. § 2339B[130] did not violate the First Amendment.[131] Before examining the speech acts at issue the Court cast the question narrowly as "whether the Government may prohibit what

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[127]Marjorie Heins, *The Supreme Court and Political Speech in the 21st Century: The Implications of Holder v. Humanitarian Law Project*, 76 ALB. L. REV. 561, 564 (2013) (summarizing jurisprudence during the Red Scare and connecting it to post September 11th cases).

[128] Judith Resnik, *Detention, the War on Terror, and the Federal Courts an Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579 (2010); Kim Lane Scheppele, *Law in A Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004).

[129] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

[130] 18 U.S.C.A. § 2339B (a) (1) is violated by anyone who:

> knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d) (2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

18 U.S.C.A. § 2339B (West).

[131] *Id*. at 2730.

plaintiffs want to do—provide material support to the PKK[132] and LTTE[133] in the form of speech."[134] Defining the issue in such a manner where the intent of the speaker is predetermined by the adjudicator, here that the plaintiff wanted to provide material support when that was at issue, defeats the analysis of the speech act. The question as framed presupposes both the government's interest in stopping the speech and the Humanitarian Law Projections purpose in their challenge to the law.

Applying the proposed test to that case, the speech was conducted by United States citizens, which have well established First Amendment rights.[135] The intent of the act was to facilitate lawful nonviolent purposes for groups deemed foreign terrorist organizations, the legality and scope of which are at issue. The medium to be used by the citizens was "in the form of monetary contributions, other tangible aid, legal training, and political advocacy," channels of speech which would normally be protected.[136] The effects of the speech in that case are difficult to ascertain, as the plaintiffs never actually did the speech acts at issue in the case.[137] Assuming that the Humanitarian Law Projects had helped the organizations at issue, it could have affected the groups' political status. Similarly, the unintended effect of money's fungibility must also be accounted for here to be later balanced against the speech act.[138]

The question of whether contemporary society or a subculture recognizes or is prepared to recognize all the components which comprise the act would next be analyzed. Here, all the

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[132] MICHAEL M. GUNTER, THE KURDS AND THE FUTURE OF TURKEY (1997).
[133] ECONOMY, CULTURE, AND CIVIL WAR IN SRI LANKA, 133-192 (eds. Deborah Winslow & Michael D Woost) (2004).
[134] The majority expressly rejected that the issues was whether the "government may prohibit pure political speech, or may prohibit material support in the form of conduct." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010).
[135] Assuming *arrguendo* a facial challenge to 18 U.S.C. § 2339B would be unsuccessful; the factor based speech act test would have the court inspect the speech act first before determining its purpose or defining the government's interests.
[136] *Holder*, 130 S.Ct. 2714.
[137] *Id*.
[138] *Id*. at 2725.

aforementioned factors and any evidence of cultural norms concerning the speech acts in question would be considered. This would be the most difficult determination for the Court to make as a finding that no American cultural groups recognize the speech act at issue as acceptable would likely doom plaintiff's case. In this instance, the fact that several groups filed *amici currae* briefs supporting both parties shows that at least some groups supported the speech act.[139] Likely the speech at issue would be afforded strict scrutiny because the underlying culture surrounding political speech is strong.[140] The speech act would then be balanced against the state's legitimate interests which in this case include: the government's interest in combating terrorism; how legitimacy makes it easier for these groups to persist; the fungibility of money; and the potential damage to the relationship between the United States and its allies.[141]

The various facts and competing interests in *Holder v. Humanitarian Aid* make it one of the more difficult fact patterns to apply the factor based balancing test. If the factor balancing test were used it would likely afford the speaker a greater right of association than the holding in the case. Under this test, the Court could find a middle road and protect the culture of communication while restricting the flow of money to the organizations. This could be a better result than the holding in *Holder v. Humanitarian Aid* because it would not allow the government to arrest citizens for engaging in coordinated teaching and advocacy which furthers the designated organizations' lawful political objectives. Arresting United States citizens for

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[139] Brief Amicus Curiae of the Carter Center, et al. in Support of Humanitarian Law Project, et al. (arguing broad bans on nonmonetary support would hinder peace talks) Humanitarian Law Project v.Holder, 130 S. Ct. 2705 (Nos. 08-1498, 09-89) (2010); *contra* Brief of Amicus Curiae the Anti-Defamation League in Support of Petitioners, Holder, 130 S. Ct. at 2705 (Nos. 08-1498, 09-89) (2010) (arguing the severe threat Hamas is to Israel).

[140] As Marjorie Heins noted , in the Court's opinion the majority states they are using a more demanding standard than intermediate scrutiny but never use the word strict in the opinion. Marjorie Heins, *The Supreme Court and Political Speech in the 21st Century: The Implications of Holder v. Humanitarian Law Project*, 76 ALB. L. REV. 561, 596 (2013).

[141] *Holder*, 130 S. Ct. 2726.

teaching members of groups like the PKK to petition the UN, an entity which exists so groups can settle their differences peacefully, maybe more aligned with American sociolinguistic features.

This test would not overrule most existing case law; rather it explicitly states the underlying cultural evaluations beneath existing case law. Judges are equipped to make such determinations because the wealth of information available to them in the twenty-first century affords courts the opportunity to examine details of American culture that were not possible before.[142] Furthermore, Courts have effectively made cultural determinations based on the species of speech worthy of protection in the categorical approach. For example, the Court has stated that political speech is culturally important for democracy and receives the highest levels of protection.[143] Conversely, child pornography is not protected because the speech community has determined that it is wrong in all circumstances and a dialogue, outside academia, is not welcomed. Similarly, American speech communities do not accept libel or slander of individuals while at the same time acknowledging a limited protection from deformation for newspapers.[144] While conversely, speech actors like the Westborough Baptist Church receive protection despite the vast majority of the speech community condemning the action itself. The proposed test does compel the Court to review present conditions in society instead of interpreting the conflicting and ambiguous opinions of the founding fathers—whose cultural experience no longer exists. Alleviating the confines of speech communities which are extinct would likely lower the hold of precedent and instead focus the determination on the speech act

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[142] Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807 (2004) (inspecting the reasons why amicus briefs can aid a party).

[143] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (laws that burden political speech are subject to strict scrutiny).

[144] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

before them. The factors in the proposed test oblige the court to fully analyze the speech act at issue in each case on its own merits. This is well beyond what the current approaches requires and allows the court to concentrate on the speech act instead of a judicially created category and its associated tests. In perilous times, when speech cases are the most difficult, a cultural evaluation would reinforce a broader analysis of the First Amendment.

IV. POTENTIAL SHORTCOMINGS OF THE PROPOSED TEST AND A SHIFT TO LINGUISTIC-ORIENTED ANALYSIS

Any test for free speech and its underlying theory will undoubtedly have certain drawbacks. Unlike the existing theories and tests, the shortcomings of the factored balancing and sociolinguistic approach are not its inability to explain the contours of present American jurisprudence like the market theory or the ambiguities of originalsim. The scientific understanding to inform a linguistics' speech act approach did not exist in 1790. Webster's dictionary, the oft-cited American dictionary, was still relying on Scripture to explain speech and language in the nineteenth century.[145] Moreover, the sociolinguistic aspects of speech were not truly studied until the 1960s. Therefore, it cannot be said this test reflects anything close to what the founding fathers consciously understood speech to be. This should not be determinative though for science is critical to understanding what speech is, and to hold jurisprudence to a eighteenth century understanding or rationale is nonsensical in this context.

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[145] Webster's original dictionary begins with a definition and origin of language. It uses the Bible to describe the origin of language:

> Language or speech is the utterance of articulate sounds or voices, rendered significant by usage, for the expression and communication of thoughts. While this understands several linguistic concepts he goes on to say on the origin of language: that "vocal sounds or words were used in these communications between God and the progenitors of the human race."

I WEBSTER'S DICTIONARY, i (1828).

A criticism that warrants more attention is the power the proposed test gives the Court to make partially subjective determinations on culture.[146] As Justice O'Connor stated about the second prong of the *Katz* test, which also examines what American culture is willing to accept, "We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." The test this paper proposes asks the Court to make a similar determination; however, the talisman does exist in the speech act context. What is and is not protected speech is often marked by the speech community. The wrong use of words or topic inside a speech community marks an individual as either not belonging to the community or challenging the community's schema on what is acceptable speech. In order to get a satisfying conclusion, the Court must also consider the speech act broadly, i.e. does the community accept speech acts concerning government—not whether the community accepts the speech acts of a disfavored group.

In order for the Court to determine what the speech community accepts, it can accept evidence via judicial notice for larger determinations and experts for more nuanced issue. Judicial notice is an ancient doctrine of common law and one that "promotes judicial efficiency by avoiding the expenditure of time and effort involved in adducing unnecessary evidence."[147] In fact, the United States Supreme Court has used judicial notice in the past for cultural events and the impact of those events on citizens.[148] Furthermore, the Court has opined that its application of judicial notice does not preclude an opposing party from proffering evidence to

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[146] *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (O'Connor, J., plurality opinion).
[147] Murl A. Larkin, *Article II: Judicial Notice*, 30 HOUS. L. REV. 193 (1993).
[148] *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 301-02 (1937) (taking judicial notice of the depression and its repercussions on Americans).

counter that fact.[149] For a case like *American Trade Partnership, Inc. v. Bullock*, the Court should, as the Montana Supreme Court did, look to several sources which show the attitudes of the speech community.[150] When doing this analysis the Court can also rely on expert witness testimony and amicus briefs which analyses how speech is actually being used in American communities and the mediums being used to communicate.

Another aspect of cultural protections which has been addressed in criminal defense is the potential for schisms in protections. An issue could arise where a minority group protects a certain speech act and the majority does not.[151] For example in the criminal context, in *People v. Aphaylath*, a Laotian refugee, who was convicted of killing his wife, was permitted to use evidence of culture for his defendant's extreme emotional disturbance defense.[152] The New York Court of Appeals, allowed cultural evidence that because the man's wife had received calls from a single man it could have "[brought] shame on defendant and his family sufficient to trigger defendant's loss of control."[153] Because culture has been used as a mitigating defense for crimes its application in criminal law has been controversial.[154]

In the First Amendment context, under the proposed test a court could face an issue where a member of the majority conducts the same speech act that is protected for a minority or where a minority conducts a speech act which is not protected for the majority but is respected by the minority. The later issue has been addressed in the analysis of *American Trade*

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[149] *Id. But see* E.F. Roberts, *Preliminary Notes Toward a Study of Judicial Notice*,52 Cornell L.Q. 210, 219 (1967) (arguing that if the opponent can introduce evidence that counters the judicially noticeable facts, then those facts become another "litany sung to judicial notice.").

[150] *supra* n 121 at 30.

[151] *People v. Wu*, 235 Cal. App. 3d 614, 286 Cal. Rptr. 868 (Ct. App. 1991) (depublished) (culture used as a defense to the mother's strangling of her child).

[152] *People v. Aphaylath*, 68 N.Y.2d 945 (1986).

[153] *Id*. at 999.

[154] Elizabeth Martin, *All Men Are (or Should Be) Created Equal: An Argument Against the Use of the Cultural Defense in A Post-Booker World*, 15 Wm. & Mary Bill Rts. J. 1305 (2007) *contra* Kelly M. Neff, *Removing the Blinders in Federal Sentencing: Cultural Difference As A Proper Departure Ground*, 78 Chi.-Kent L. Rev. 445 (2003).

Partnership, Inc. v. Bullock, but the former is a different situation where a court would have to determine if the majority could make use of the protection afforded to the minority.[155] This is a legitimate concern, but one which can be overcome. In this situation, when the court initially finds minority speech community's act protected, the court may provide the majority the lower level of protection which was given to the minority.[156] Hypothetically, if the Court had accepted Montana's argument it was a unique area and that because its laws still allowed political committees to be formed and maintained by filing its law was constitutional, New Jersey could draft a similar law and attempt to get the same deference.[157] Here, if the Court were to give New Jersey the same deference as Montana, the protection would work similarly to a downgrade in a criminal offense.

The proposed multi-factored balancing test overcomes the deficiencies of previous balancing tests because the new tests factors are set and purposely favor speech protection. As the criticism of *Dennis* suggests, in a balancing test a government interest could be held so overwhelming as to override any particular speech act. Moreover because the test used in *Dennis* did not have definitive factors, the factors of the test were ill-defined and subject to manipulation. To address this problem, the proposed test is designed to weigh heavily in favor of allowing speech and not restricting it. The factors used to determine the speech act are purposely inclusive, requiring the court to determine several features which support the protection of the speech act. Americans generally favor free speech. Thus the balancing of these factors against the required substantial government creates a significant hurdle for speech restriction. Moreover,

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[155] *supra* n 121 at 30.

[156] Intermediate scrutiny, of course, would present its own challenges. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007).

[157] In this hypothetical New Jersey's statute would not have the same historical weight behind its claim. This could be another potential avenue for courts to stop majority communities from evoking a speech act liberty from a minority community.

the critical benefit of this test is that the cultural elements it addresses help to explain of the given speech like no existing test, and will allow the growth of future free speech cases to be informed by the current understandings of American communities.

V. CONCLUSION

The components of speech were poorly understood in the founding era. Consequently, the theories derived from the limited knowledge of speech were misinformed. The present study of linguistics shows that speech is a much larger field than the founding fathers understood. Speech acts comprise both mechanical and social components which are marked as relevant by the speech communities. The social aspect of speech is critical to free speech jurisprudence and helps to explains the disparate and sometimes conflicting reasoning of American case law.

American free speech jurisprudence has defied a theory and test which adequately explains the various case law doctrines. Originalism fails for there was no consensus on free speech in the 1790s, and its application fails to consider cultural changes in the past two hundred years. Free speech absolutism and the market place of ideas has never been accepted in all areas. The categorical approach also fails for it creates arbitrary groupings of speech and adjudicates speech acts in relation to precedent rather than the speech act at issues own merits. Finally, the present balancing approach is too malleable with ill defined contours and subject to the same issue as the categorical approach.

Using linguistic theory, this paper demonstrates the worthiness of a factor based balancing test that examines the components of speech acts to explain the underlying rationale of current case law. The proposed test requires courts to inspect the "speech" component of free speech jurisprudence in great detail. The test necessitates an inspection of whether contemporary community standards acknowledge the speech act. Only after the speech act has been understood

in its context and the context of the larger community itself does the court balance the speech act against any narrowly tailored state interests that may exist. The purpose of speech is communication and this test brings that key component of language where it belongs at the forefront of American free speech jurisprudence.