HARM AND THE FIRST AMENDMENT: EVOLVING STANDARDS FOR “PROVING” SPEECH-BASED INJURIES IN U.S. SUPREME COURT OPINIONS

By

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To Mom and Dad
ACKNOWLEDGMENTS

I thank my parents for their love and support and for always challenging and believing in me. I thank my friends and family members, academic advisors, colleagues and others who have served as my support system along the way, for their continual feedback and guidance. Last but not least, I thank God, who has shown me through this process that all things are possible (Philippians 4:13).
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGMENTS</td>
<td>4</td>
</tr>
<tr>
<td>LIST OF FIGURES</td>
<td>9</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>10</td>
</tr>
<tr>
<td>CHAPTER</td>
<td></td>
</tr>
<tr>
<td>1 INTRODUCTION</td>
<td>12</td>
</tr>
<tr>
<td>2 LITERATURE REVIEW</td>
<td>29</td>
</tr>
<tr>
<td>A Harm Principle in First Amendment Doctrine</td>
<td>30</td>
</tr>
<tr>
<td>Three Key Free-Speech Rationales</td>
<td>34</td>
</tr>
<tr>
<td>Marketplace-of-Ideas Theory</td>
<td>35</td>
</tr>
<tr>
<td>Democratic Self-Governance</td>
<td>38</td>
</tr>
<tr>
<td>Personal-Autonomy Rationale</td>
<td>40</td>
</tr>
<tr>
<td>Social Research in Law</td>
<td>43</td>
</tr>
<tr>
<td>Law as an Autonomous Discipline</td>
<td>44</td>
</tr>
<tr>
<td>Trend Toward Greater Interdisciplinarity</td>
<td>45</td>
</tr>
<tr>
<td>What Counts as “Knowledge” in Social Science</td>
<td>48</td>
</tr>
<tr>
<td>Applicability of Social Science Findings in Legal Decisionmaking</td>
<td>50</td>
</tr>
<tr>
<td>Familiarity with Social Science in Other Jurisprudential Areas</td>
<td>55</td>
</tr>
<tr>
<td>Segregation</td>
<td>57</td>
</tr>
<tr>
<td>Juror Discrimination</td>
<td>60</td>
</tr>
<tr>
<td>Trend toward Constitutional Empiricism</td>
<td>63</td>
</tr>
<tr>
<td>What is Empiricism?</td>
<td>66</td>
</tr>
<tr>
<td>Benefits of an Empirical Perspective</td>
<td>68</td>
</tr>
<tr>
<td>Drawbacks or Setbacks of the Empirical Approach</td>
<td>69</td>
</tr>
<tr>
<td>Approaches to First Amendment Doctrine</td>
<td>71</td>
</tr>
<tr>
<td>Categoricalism</td>
<td>73</td>
</tr>
<tr>
<td>Ad-hoc Balancing</td>
<td>77</td>
</tr>
<tr>
<td>Preferred-position Balancing</td>
<td>79</td>
</tr>
<tr>
<td>Empirical Balancing</td>
<td>81</td>
</tr>
<tr>
<td>Third-Person Effect: An Explanation for Government Censorship</td>
<td>88</td>
</tr>
<tr>
<td>Perceptual Component</td>
<td>89</td>
</tr>
<tr>
<td>Behavioral Component</td>
<td>91</td>
</tr>
<tr>
<td>3 METHODOLOGY</td>
<td>94</td>
</tr>
<tr>
<td>Communication and Legal Resources</td>
<td>94</td>
</tr>
<tr>
<td>Selection of U.S. Supreme Court Cases</td>
<td>96</td>
</tr>
<tr>
<td>On the Relationship between Speech and Harm</td>
<td>100</td>
</tr>
<tr>
<td>Typologies and Rubrics as Analytic Tools</td>
<td>101</td>
</tr>
</tbody>
</table>
4 ANALYSIS .......................................................................................................................... 115

“Dangerous” Information ...................................................................................................... 115
Incitement to Unlawful Action/Violence ................................................................................ 117
Schenck v. United States ......................................................................................................... 117
Abrams v. United States .......................................................................................................... 121
Gitlow v. New York .................................................................................................................. 127
Whitney v. California ............................................................................................................... 131
Dennis v. United States ............................................................................................................ 134
Brandenburg v. Ohio ................................................................................................................ 138
Summary ................................................................................................................................. 141

Speech that Threatens .............................................................................................................. 145
Bridges v. California ................................................................................................................. 146
Watts v. United States .............................................................................................................. 149
NAACP v. Claiborne Hardware, Co. ......................................................................................... 152
Summary .................................................................................................................................. 158

Hostile-Audience Reaction ...................................................................................................... 160
Cantwell v. Connecticut ............................................................................................................ 160
Chaplinsky v. New Hampshire .................................................................................................. 163
Feiner v. New York .................................................................................................................... 166
Gooding v. Wilson .................................................................................................................... 170
Snyder v. Phelps ...................................................................................................................... 172
Summary .................................................................................................................................. 177

Disclosure of Dangerous Information ...................................................................................... 179
New York Times Co. v. United States ....................................................................................... 180
Nebraska Press Association v. Stuart ....................................................................................... 184
Landmark Communications, Inc. v. Virginia .......................................................................... 188
Summary .................................................................................................................................. 191

“Low-Value” Speech ............................................................................................................... 193
False Statements of Fact ........................................................................................................... 193
New York Times Co. v. Sullivan ............................................................................................... 194
Gertz v. Robert Welch, Inc. ...................................................................................................... 198
Hustler Magazine v. Falwell ...................................................................................................... 202
United States v. Alvarez ........................................................................................................... 204
Summary .................................................................................................................................. 207

Sexually Explicit and Violent Expression .................................................................................. 209
Roth v. United States ............................................................................................................... 210
Miller v. California ................................................................................................................... 212
5 CONCLUSIONS .................................................................................................................. 311

Proof-of-Harm Typology ................................................................................................. 311
  Nature of Legal Question ............................................................................................. 313
  Jurists’ Ideological Values .......................................................................................... 315
  Number of Government Interests .............................................................................. 318
  Weightiness of the Government Interest(s) ............................................................... 318
  Perceived Legitimacy of the Asserted Interest(s) ...................................................... 319
  Level of Legislative Deference ................................................................................... 321
  Availability of Evidence ............................................................................................... 323
  Strength of Evidence .................................................................................................. 324
  Difficulty of Gathering New Evidence of Harm ....................................................... 326

Normative Ranking / Ordering of Typological Factors .................................................. 327
  Tier 1 .......................................................................................................................... 328
  Tier 2 .......................................................................................................................... 328
  Tier 3 .......................................................................................................................... 329

Proof-of-Harm Rubric ....................................................................................................... 330

Application of Proof-of-Harm Tools to a Specific Factual Scenario ............................. 331
  Hypothetical Fact Pattern .......................................................................................... 332

Application of the Analytic Tools to the Fact Scenario ................................................ 335
  Speech provoking a hostile-audience reaction—emotional harm (1) ....................... 335
  Speech that threatens—emotional harm (3) ............................................................. 342
  Speech that threatens—physical harm (3) ............................................................... 350
  Speech that threatens—economic harm (1) ............................................................ 350
  Hate speech—emotional harm (2) ............................................................................ 352
Incitement to unlawful action—physical harm (1).......................... 354
Incitement to unlawful action—public health, safety, order, morals and welfare (1)............................................................................ 355
Sexually explicit and violent expression—physical harm (1).............. 356
Lewd, profane and indecent expression—urban planning and crime reduction (1)........................................................................ 357
Lewd, profane and indecent expression—jury to minors (2)................. 357
Effect of Third-Person Effect on Censorship of Expression..................... 360
Review of Research Questions.................................................................. 377

LIST OF REFERENCES ................................................................................. 385

Primary Sources .................................................................................... 385
Constitutions.......................................................................................... 385
Cases....................................................................................................... 385
Federal Statutes..................................................................................... 388
Legislative Materials............................................................................... 389
State Statutes.......................................................................................... 389
City and Municipal Ordinances............................................................... 389

Secondary Sources .................................................................................. 389
Books and Book Chapters..................................................................... 389
Court Filings........................................................................................... 393
Administrative Agency Reports............................................................... 393
Journal Articles...................................................................................... 394
Unpublished Material............................................................................. 405
News Articles......................................................................................... 405
Websites.................................................................................................. 406

BIOGRAPHICAL SKETCH........................................................................... 408
<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>G-1</td>
<td>“Dangerous” expression</td>
<td>112</td>
</tr>
<tr>
<td>G-2</td>
<td>“Low-value” expression</td>
<td>113</td>
</tr>
<tr>
<td>G-3</td>
<td>Selected U.S. Supreme Court cases (by decade)</td>
<td>114</td>
</tr>
<tr>
<td>G-4</td>
<td>Evolution of proof-of-harm in U.S. Supreme Court opinions (by decade)</td>
<td>297</td>
</tr>
<tr>
<td>G-5</td>
<td>Proof-of-harm typology</td>
<td>364</td>
</tr>
<tr>
<td>G-6</td>
<td>Proof-of-harm rubric</td>
<td>365</td>
</tr>
<tr>
<td>G-7</td>
<td>Normative ranking/ordering of typological factors</td>
<td>376</td>
</tr>
</tbody>
</table>
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By

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Major: Mass Communication

This study reviews the United States Supreme Court’s proof-of-harm doctrine in freedom of expression analysis. It analyzes thirty-eight Supreme Court cases beginning in 1919 and ending with discussion of its most recent free speech opinion in 2013.

Free speech jurisprudence has never adhered to a position of absolute protection for expression, a position that would render all laws restricting expression unconstitutional. Rather, the Court has more often engaged in a balancing approach that weighs the government’s interest in regulating potentially harmful speech against the value of the expression. Examination of more recent Supreme Court constitutional jurisprudence reveals a trend away from its historical balancing that deferred to legislative and congressional fact-finding to one that requires sufficient scientific evidence.

Alternatively, the Court’s free speech jurisprudence demonstrates it has not adopted an empirical approach across all brands of expression. In this sense, United States v. Alvarez and Brown v. Entertainment Merchants Association, two prominent opinions adopting stringent evidentiary burdens requiring empirical proof of harm, may more accurately represent outliers to its usual approach adopting much lower
evidentiary burdens. Until the Court has additional time to consider application of its empirical approach to a broader spectrum of expression, it is perhaps unclear whether Brown and Alvarez represent a “mini-trend” within the Court’s jurisprudence or are part of a lengthier trajectory.

This study proposes a typology of factors it found to have potentially affected the Court’s assessment of its requirement of proof-of-harm, including the specific evidentiary burden imposed. In this sense, “evidentiary” refers to the type and amount of evidence it required or evaluated to make its determination regarding the constitutionality of the allegedly harmful expression. It also proposes a rubric for helping courts assess the burden of proof-of-harm it should adopt when evaluating specific speech-based claims. The requirements of assessment of an evidentiary burden of proof of harm in specific factual scenarios set forth in the rubric in based on the Court’s own assessment of the nature of harm, types of speech and evidence, including the type and quantity, required or evaluated in its First Amendment opinion. The purpose of these tools—the typology and rubric—is to assist the development of a better understanding of the relationship between speech and harm in First Amendment jurisprudence.
CHAPTER 1
INTRODUCTION

In 2012, the United States Supreme Court considered in *United States v. Alvarez*\(^1\) whether a portion of the Stolen Valor Act\(^2\) that made it crime to lie about receiving a military medal violated the freedom of speech guaranteed by the First Amendment.\(^3\) A central issue in the case was whether the government could demonstrate “its claim that the public’s general perception of military awards is diluted by false claims”\(^4\) like those made in the case by Xavier Alvarez.\(^5\) The government

\(^1\) 132 S. Ct. 2537 (2012).

\(^2\) The section at issue of the Stolen Valor Act, which was signed into law by President George W. Bush in 2006, provides that:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.


\(^3\) The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law...abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).


> The aggregate effect of false claims undermines that purpose, not by harming public opinion of the awards or true recipients, but by diluting the medals’ message of prestige and honor. By creating the misimpression that the claimant has received a medal for fictitious conduct that likely bears no relation to the government’s standards for awarding each medal, false claims undermine the government’s efforts to maintain selectivity and to convey information about recipients’ conduct. And because misappropriation may make the public skeptical of all claims, allowing false claims to go unchecked could cause actual recipients to face unjustified doubts and harmful consequences if their records are not readily discoverable through private research.

*Id.* (internal citations omitted).
asserted that dilution of the integrity and reputation of such awards constituted a compelling interest sufficient for the law to satisfy strict scrutiny.\(^6\)

Rather than accept the naked assertion that lying about military medals harms their integrity and the public’s perception of them,\(^7\) however, a plurality of the Court demanded the government prove the speech in question actually caused the alleged injuries. Specifically, Justice Anthony Kennedy explained:

> [T]o recite the Government’s compelling interests is not to end the matter. The First Amendment requires that the Government’s chosen restriction on the speech at issue be “actually necessary” to achieve its interest…. *There must be a direct causal link between the restriction imposed and the injury to be prevented.* The link between the Government’s interest in protecting the integrity of the military honors system and the Act’s restriction on the false claims of liars like respondent has not been shown.\(^8\)

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\(^6\) *Alvarez*, 132 U.S. at 2549.

\(^7\) The author does not dispute that lying about a military medal may well harm its integrity and value. Indeed, according to the Court:

> It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may offend the true holders of the Medal. From one perspective it insults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.

*Id.*

\(^8\) *Id.* (emphasis added).
In brief, harm was neither to be assumed nor presumed, as it sometimes was and still is in defamation law under the doctrine of presumed damages.\(^9\) Justice Kennedy demanded proof of direct causation of harm allegedly wrought by the speech in question, something for which the government, he observed, “points to no evidence.”\(^10\) In sharp contrast, \textit{Alvarez}’s dissent demanded no such direct, evidentiary proof-of-harm. Justice Samuel Alito, joined by Justices Antonin Scalia and Clarence Thomas, simply found that “Congress \textit{reasonably concluded}” that lies about medals “were undermining our country’s system of military honors and inflicting real harm on actual medal recipients and their families.”\(^11\) Their opinion seemed more focused on its belief that the speech in question was valueless rather than whether there was evidence that it caused harm.\(^12\)

\(^9\) Kevin P. Allen, \textit{The Oddity and Odyssey of “Presumed Damages” in Defamation Actions Under Pennsylvania Law}, 42 Duq. L. Rev. 495, 495 (2004) (explaining that presumed damages “permit[s] defamation plaintiffs to recover damages even if they could not prove that they actually suffered any harm”); Arlen W. Langvardt, \textit{A Principled Approach to Compensatory Damages in Corporate Defamation Cases}, 27 Am. Bus. J.L. 491, 498 (1990) (stating that, as opposed to special damages, “the plaintiff is not required to prove any injury to her reputation. Instead the reputational injury is legally presumed, and the trier of fact assesses the damages it regards as appropriate”).

\(^10\) \textit{Alvarez}, 132 S. Ct. at 2549.

\(^11\) \textit{Id.} at 2556 (Alito, J., dissenting) (emphasis added). Justice Alito elaborated that:

[M]uch damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or other tangible reward. Unless even a small financial loss—say, a dollar given to a homeless man falsely claiming to be a decorated veteran—as more important in the eyes of the First Amendment than the damage caused to the very integrity of the military awards system, there is no basis for distinguishing between the Stolen Valor Act and the alternative statutes that the plurality and concurrence appear willing to sustain.

\textit{Id.} at 2560.

\(^12\) Justice Alito described the speech in question as “entirely lacking in intrinsic value.” \textit{Id.} at 2564. He added that “[t]hese lies have no value in and of themselves, and proscribing them does not chill any valuable speech.” \textit{Id.} at 2557.
Ultimately, then, a fundamental question in First Amendment jurisprudence is whether or not there is sufficient evidence that speech causes harm such that its regulation or prohibition passes constitutional muster. 

Alvarez is not the only recent opinion in which the Court grappled with the question of whether speech causes harm and, in particular, what standard of proof-of-harm must be demonstrated by the government to justify a speech-restrictive statute. Certainly the speech at issue in the Court’s 2011 decision in *Brown v. Entertainment Merchants Association*\(^\text{13}\) — video games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being,”\(^\text{14}\) intuitively seems to have the *capacity* to cause harm.

In fact, a Joint Statement filed in *Brown* and issued by six professional health organizations on the Impact of Entertainment Violent on Children cited to “well over 1,000 studies” that “point overwhelmingly to a causal connection between media violence and aggressive behavior in some children.”\(^\text{15}\) The Joint Statement noted “the conclusion of the health community, based on over 30 years of research, is that viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children.”\(^\text{16}\) A summary statement by Dr. Craig Anderson,\(^\text{17}\)

\(^\text{13}\) 131 S. Ct. 2729 (2011).

\(^\text{14}\) *Id.* at 2733. The Court also noted Justice Alito's research into the video games, which states that he found that “victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces…. ” *Id.* at 2738.


\(^\text{16}\) *Id.*

\(^\text{17}\) Dr. Craig Anderson is a professor of psychology and director of the Center for the Study on Violence at Iowa State University. Craig Anderson—Iowa University, http://www.psychology.iastate.edu/~caa/ (last visited Sept. 16, 2013).
whose research was heavily relied upon by the government in *Brown*, and his colleagues in a 2003 study on children and media violence captures the consensus that perhaps currently exists among social science scholars about the effects of media violence:

Research on violent television and films, video games, and music reveals unequivocal evidence that media violence increases the likelihood of aggressive and violent behavior in both immediate and long-term contexts. The effects appear larger for milder than for more severe forms of aggression, but the effects on severe forms of violence are also substantial….\(^ {18}\)

Yet, the high court found that the California law restricting minors’ access to such games\(^ {19}\) was an unconstitutional, content-based restriction devoid of a compelling government interest.\(^ {20}\) Why?

According to the majority opinion authored by Justice Scalia, “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”\(^ {21}\) “Because the Act imposes a restriction on the content of protected speech,” Justice Scalia wrote, “it is invalid unless California can demonstrate that it passes strict scrutiny….The State must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution.”\(^ {22}\) Although the Court acknowledged that states possess an interest in

\(^ {18}\) Craig A. Anderson et al., *The Influence of Media Violence on Youth*, 4 PSYCHOL. SCI. PUB. 81, 81 (2003).

\(^ {19}\) CAL. CIV. CODE §§ 1746-1746.5 (2009).


\(^ {21}\) Id. at 2735.

\(^ {22}\) Id. at 2739 (internal citations omitted).
protecting children from harm, California could not satisfy strict scrutiny because it failed to demonstrate a “direct causal link” between violent video games and the harm allegedly caused to minors, i.e., that it “causes minors to act aggressively.”

It may be fair to say that sufficient controversy still exists regarding the claim of causality, which is often difficult to define. Despite apparent research conclusions, California acknowledged in its brief it could not “show a direct link between violent video games and harm to minors.” Anticipating the possible reaction that such a claim might lead some to view the consensus of the research community as erroneous, the Joint Statement contextualized its conclusions: “We in no way mean to imply that entertainment violence is the sole, or even necessarily the most important factor contributing to youth aggression, antisocial attitudes, and violence. Family breakdown,

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23 Id. at 2736 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-23 (1975)). Indeed, according to the Court, the government even “acknowledge[d] that it [could not] show a direct causal link between violent video games and harm to minors.” Id. at 2738. Rather, it relied on Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994), to claim that it did not need to “produce such proof because the legislature [could] make a predictive judgment that such a link exists, based on competing psychological studies.” Id. As this paper discusses, however, the Court was neither persuaded by this argument.

Although the Court acknowledged it is doubtless a “state possesses legitimate power to protect children from harm,” the Court that it did not “include a free-floating power to restrict the ideas to which children may be exposed.” Id. at 2736. Relying on prior Supreme Court precedent involving the regulation of media artifacts to children, Scalia noted, “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” Id. (quoting Erznoznik, 422 U.S. at 213-14). Cf. Ginsberg v. New York, 390 U.S. 629 (1986) (prohibiting the sale of sexually explicit material to children).

24 Brown, 131 S. Ct. at 2739.


26 Brown, 131 S. Ct. at 2738.
peer influences, the availability of weapons, and numerous other factors may well all contribute to these problems."  

Clarification that media violence may be only one of many different causes of aggression, however, was not enough for Justice Scalia. He found the research conclusions to be nothing more than “ambiguous proof,” lacking of a “degree of certitude that strict scrutiny requires.” California’s reliance on experimental studies in laboratories, longitudinal studies, surveys of eighth and ninth graders, cutting edge neuroscience and meta-analyses, or studies of all the studies—which the majority concluded were “based on correlation, [and] not evidence of causation”—was not enough, according to Justice Scalia, to justify a content-based restriction on speech. Rather, he found the state’s evidence was “not compelling,” showing “at best some correlation between exposure to violent entertainment and miniscule real-world effects.”

In contrast, Justice Stephen Breyer rejected the majority’s view in his dissent in *Brown*. Acknowledging his “lack of social science expertise,” Justice Breyer stated that

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28 *Brown*, 131 S. Ct. at 2739.

29 *Id*., n.8.

30 *Id*.

31 *Id*. Thus, as the concurrence stated, California’s law was “not framed with the precision that the Constitution demands.” *Id*. at 2742 (Alito, J., concurring). Although the majority did not invite rewrite of the law, Justice Samuel Alito noted in his concurrence with Chief Justice Roberts that he “would not squelch legislative efforts” to come up with a law that is less vague. *Id*. at 2751. See also Adam Liptak, *Minors can Buy Violent Games, Justices Decide*, N.Y. TIMES, June 28, 2011, at 1; Robert Barnes, *Limits on Video Games Rejected*, WASH. POST, June 28, 2011, at A01; *Court Zaps California Ban*, USA TODAY, June 28, 2011, at 18A (describing the outcome of the Court’s decision).

32 *Id*. at 2739.

33 *Id*. at 2761-72 (Breyer, J., dissenting).
he would instead defer to the public health professionals who found that there did exist a “significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.”\textsuperscript{34} Although cognizant of the conclusions reached by the studies referenced by the majority, these professionals, according to Justice Breyer “possess[ed] that expertise” needed to properly assess the outcomes of the research.\textsuperscript{35}

Unlike the majority, Justice Breyer held that he would “find sufficient grounds in these studies and expert opinions for this Court to defer\textsuperscript{36} to an elected legislature’s

\textsuperscript{34} \textit{Id.} at 2768 (Breyer, J., dissenting).

\textsuperscript{35} \textit{Id.} (Breyer, J., dissenting). \textit{See also}, e.g., Deanna Pollard Sacks et al., \textit{Do Violent Video Games Harm Children? Comparing the Scientific Amicus Curiae “Experts” in Brown v. Entertainment Merchants Association}, 106 N.W. U. L. REV. COLLOQUIY 1 (2011) (providing a retrospective examination of the credentials of the amicus curiae experts that testified before the Court). According to Sacks and colleagues:

\[T\]he Court should exercise its judgment critically and cautiously, considering that the vast majority of violent media experts concur that violent video games can cause serious harm to children...An objective comparison of the experts’ knowledge concerning the effects of violent video games on children demonstrates that the experts supporting California are far more qualified to offer opinions that the experts supporting the violent video game merchants. Given the obvious disparity in the two briefs’ credibility, the Court should...uphold the California law because the scientific evidence clearly supports the findings on which the legislature relied.

\textit{Sacks, supra} note 35, at 12.

\textsuperscript{36} At least since \textit{Marbury v. Madison}, the role of the judicial branch has been to “say what the law is.” 5 U.S. 137, 137 (1803). In keeping with this role, most federal courts have generally been reluctant and often disavowed the fact-finding role, preferring instead to “defer” to congressional and state legislative fact-finding, Caitlin E. Borgmann, \textit{Rethinking Judicial Deference to Legislative Fact-Finding}, 84 IND. L.J. 1, 6 (2000). Deference to legislative fact-finding has largely been based on two different theories: 1) “the widely accepted view that legislative bodies are better than courts at fact-finding”; and 2) that “courts lack the authority or legitimacy to question legislative fact-finding.” \textit{Id.} As noted by Borgmann:

A close examination of the cases addressing judicial deference to legislative fact-finding, and of the circumstances under which such deference has been accorded or denied, reveals...[that] the Supreme Court has been unclear about the role facts should play in its constitutional decisions. At times the Court treats facts as a decisive factor in determining the constitutionality of legislation, while at other times, it treats facts as largely irrelevant to that inquiry.

\textit{Id.} at 7. On the other hand, legislatures may have often do a “poor job of gathering and assessing the facts in important cases....” \textit{Id.} at 4. Borgmann suggests that courts should not blindly defer to legislative
conclusion that the video games in question are particularly likely to harm children.”

“This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind,” Justice Breyer wrote, “particularly when they involve technical matters that are beyond our competence, even in First Amendment cases.”

Justice Breyer’s dissent thus emphasizes his deference to legislative fact-finding, at least in the context of social science research proving harm to minors. It also indicates perhaps a greater willingness than the other justices to tolerate ambiguity in “technical matters that are beyond [the Court’s] competence.” Although Justice Breyer’s dissent did not articulate a specific standard of proof—other than deference to legislative decision-making—before it would allow a speech-based-harm restriction, it does appear to require less than empirical proof, which the majority found was insufficient. According to Justice Breyer, the social scientific studies offered by the deference, but should engage in greater social fact-finding when basic individual rights and liberties are at stake. See id. generally. For other scholarly approaches, see e.g., Ruth Colker & James J. Brudney, Dissenting Congress, 100 Mich. L. Rev. 80 (2001) (criticizing the Court’s close scrutiny of congressional fact-finding); see also generally John O. McGinnis & Charles W. Mulaney, Judging Facts Like Law: The Courts Versus Congress in Social Fact-finding, 25 Const. Comment. 69 (2008) (arguing legislature has no advantage over the judiciary in conducting fact-finding).

37 Brown, 131 S. Ct. at 2770 (Breyer, J., dissenting).

38 Id. (Breyer, J., dissenting).

39 See supra note 36 (discussing legislative deference).

40 Brown, 131 U.S. at 2770 (Breyer, J., dissenting).

41 See BLACK’S LAW DICTIONARY (9th ed. Bryan A. Gardner ed., 2009) (defining “empirical” as “of or relating to, or based on experience, experiment or observation”). STANLEY J. BARAN & DENNIS K. DAVIS, MASS COMMUNICATION THEORY: FOUNDATIONS, FERMENT, AND FUTURE at Kindle Location 901 (6th ed., 2012) (defining empirical as “capable of being verified or disproved by observation”). See also infra Part 2.E. for a definition of empirical as used in this study and the Court’s growing reliance on empiricism.
government provided “considerable evidence” or “substantial (though controverted) evidence supporting the expert associations of public health professionals.”

In analyzing other First Amendment opinions involving speech-based harm, the Court has not always imposed such a high standard of proof before permitting restriction of expression. Although proving unsuccessful, the government in Alvarez cited the Court’s 1974 decision in Gertz v. Robert Welch, Inc. to support restricting false speech. In Gertz, an attorney brought a libel action against a magazine publisher for an article in which statements were made about the attorney. Gertz noted the absolute liability imposed upon individuals for defamatory statements under the longstanding common law tradition in defamation. Under the “traditional rules

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42 Brown, 131 S. Ct. at 2767, 2772 (Breyer, J., dissenting).


44 United States v. Alvarez, 132 S. Ct. 2537, 2544-45 (2012). For instance, the government cited the Court’s precedent, including key language from Gertz that “there is no constitutional value in false statements of fact,” to support its contention that lies about military medals should not be protected. Id. at 2545 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)). This was the argument likewise supported by Amici, Constitutional Professors Eugene Volokh and James Weinstein, in their brief, when they argued in favor of “treat[ing] knowing falsehoods as categorically constituting a First Amendment exception, with some limitation...” Brief of Professors Eugene Volokh and James Weinstein as Amici Curiae in Support of Petitioner, United States v. Alvarez, 123 S. Ct. 2537 (2012) (No. 11-210) 2011 WL 6179424, at *22. However, this argument was struck down by the Court when it noted that:

These quotations [from the Court’s earlier opinions] all derive from cases discussing defamation, fraud or some other legally cognizable harm associated with a false statement...[i]n those decisions the falsity of the speech at issues was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule that Government advances: that false statements receive no First Amendment protection.

Alvarez, 123 S. Ct. at 2545. According to the Court, “[t]hese isolated statements in some earlier decisions do not support the Government’s submission that false statements, as a general rule, are beyond constitutional protection. That conclusion would take the quoted language far from its proper context.” Id. at 2344-45 (emphasis added).

45 Gertz, 418 U.S. at 325-27.

46 Id. at 341-42. See also id. at 349 (stating that, “[t]he common law system of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss”).
pertaining to actions for libel...the existence of injury in defamation is *presumed* from the fact of publication."\(^{47}\)

*Gertz*, however, attempted to reconcile the presumption given to private plaintiffs in defamation law with competing First Amendment interests.\(^{48}\) It held that it would no longer permit states to allow recovery of presumed or punitive damages, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."\(^{49}\) Stated differently, although defamation plaintiffs could still recover damages for actual injury where there was "competent evidence concerning the injury,"\(^{50}\) they could not recover presumed or punitive damages without proof of actual malice.\(^{51}\) The standard applied demanded a lesser showing of proof than that imposed by the *New York Times Co. v. Sullivan*\(^{52}\) standard, which prevents public-figure and public-official plaintiffs from recovering any damages—whether actual or presumed—without proof of actual malice.\(^{53}\)

Interestingly, while the Court's opinions in both *United States v. Schenck*\(^{54}\) and *United States v. Abrams*\(^{55}\)—foundational First Amendment cases involving speech-

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\(^{47}\) Id. at 349 (emphasis added).

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Id. at 350.

\(^{51}\) Id. at 348-49.

\(^{52}\) 376 U.S. 254 (1964).

\(^{53}\) Id. ("Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publishers or broadcaster of defamatory falsehood on a less demanding showing than that required by New York Times.") (emphasis added).

\(^{54}\) 249 U.S. 47 (1919).

\(^{55}\) 250 U.S. 616 (1919).
based harm—involved a determination whether the defendants’ speech caused injury, neither Abrams nor Schenck specifically mention harm. In both cases, the defendants were found sentenced to prison for violating the Espionage Act of 1917, a piece of congressional World War I legislation, upon only a production of circumstantial and testimonial evidence that they engaged in speech opposing U.S. war efforts and without any evidence it would have produced the harm the government alleged.

In Schenck v. United States, the Court applied the “clear and present danger”—often thought of as allowing the Court to make its own ad-hoc determinations whether the speech actually caused the harm alleged—to curtail the speech challenged in the case. Specifically, the clear-and-present-danger test asks, “whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Justice Oliver Wendell Holmes Jr. delivered the opinion for a unanimous


57 Schenck, 249 U.S. at 52. When Holmes first used the clear and present danger test in Schenck, he limited government authority to suppress speech advocating unlawful conduct to circumstances where it could show that the speech was a “clear and present danger” to the public welfare.

58 Although the language of the clear-and-present-danger test “appears to express a judicial attitude that it is highly protective of free speech,” its initial use was to “ratify suppression of speech that could hardly be said to create any actual danger to anyone.” See Martin H. Redish, Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger, 70 CALIF. L. REV. 1159, 1160, 1162 (1982). Advocates of the test argue it is the best available judicial test for striking a balance between protection of the marketplace of ideas and the need to protect national security and public order. On the other hand, it has been criticized as being “insufficiently protective of free speech interests.” Id. at 1160. Opponents argue it is open to widely varying interpretations and provides little or no protection to radical speech in times of political stress. See, e.g., MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 173 (1984).

59 Schenck, 249 at 52 (adding that “[i]t is a question of proximity and degree”).
Court. He upheld the conviction of individuals for circulating a leaflet arguing that a draft violated the Thirteenth Amendment as a form of involuntary servitude.\textsuperscript{60}

Although there was no evidence that the leaflet had caused a single person to resist the draft,\textsuperscript{61} Holmes found that, “[w]hen a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”\textsuperscript{62} Applying this principle to Schenck’s involvement in publication and distribution of the circular, Holmes wrote: “Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.”\textsuperscript{63}

In \textit{Abrams},\textsuperscript{64} a seven justice majority eight months later affirmed the convictions of a group of Russian immigrants who circulated leaflets in English and Yiddish objecting to America sending troops to Eastern Europe after the Russian Revolution.\textsuperscript{65} Although the defendants’ speech had nothing to do with the draft or World War I, Justice John H. Clarke used Holmes’ reasoning in \textit{Schenck} to uphold the defendants’ twenty-year convictions for engaging in acts deemed potentially harmful to the war effort.\textsuperscript{66} This

\begin{footnotesize}
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\item \textsuperscript{60} \textit{Id.} at 47.
\item \textsuperscript{61} \textit{Id.} at 52 (stating that “if an actual obstruction to the recruiting service were proved, liability for words that produced that effect might be enforced”) (emphasis added).
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.} at 51.
\item \textsuperscript{64} 250 U.S. 616 (1919).
\item \textsuperscript{65} \textit{Id.} at 622.
\item \textsuperscript{66} \textit{Id.} at 622, 624.
\end{itemize}
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time, however, the Court applied the “bad tendency” test, established in the 1907 case of *Patterson v. Colorado*, establishing liability on the “tendency of the words used.” Under the bad-tendency test, a defendant was "presumed to have intended the natural and probable consequences of what he knowingly did.” Although the Court seemingly overturned the bad-tendency test in *Schenck*, it permitted the restriction of speech by the government in *Abrams* if the speech had any tendency to incite or cause illegal activity.

Justice Holmes, who authored the majority opinion in *Schenck*, dissented in *Abrams*, an opinion that has been the center of speculation and controversy ever since. In his dissent, Holmes reaffirmed his vote in earlier cases, and also his belief that congressional power to restrict speech “undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.” In stark contrast to his majority opinion in *Schenck*, however, Holmes then reasoned, “now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder

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67 205 U.S. 454 (1907). The bad tendency test was the predominant standard used by the Court in speech cases during the era, during and immediately following World War I, for determining whether criticism of the war was protected by the Constitution. Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 411.


69 *See, e.g.*, Grubl v. United States, 264 F. 44 (8th Cir. 1920).

70 250 U.S. 616, 624 (Holmes, J., dissenting).


72 *Schenck*, 250 U.S. 627 (Holmes, J., dissenting) (stating that “I have never seen any reason to doubt that the questions of law that alone were before this Court in the Cases of Schenck, Frohwerk, and Debs were rightly decided”).

73 *Id.* at 627-28 (Holmes, J., dissenting).
the success of the government arms or have any appreciable tendency to do so.”

Simply put, he now seemed to doubt the ability of the pamphlets to result in any immediate “clear” or “present” danger.

The Court has not always imposed a stringent evidentiary burden on speech restrictions. Yet, its more recent jurisprudence appears to place “harm more squarely on the free speech agenda than we have typically seen in the past.”

Cases such as *Alvarez* and *Brown*—perhaps signaling a shift, or at least a step forward, in the Court’s First Amendment proof-of-harm principle to a nearly insurmountable hurdle (“direct causal link” between the speech and alleged harm) before speech can be abridged—thus call for an evaluation of its approach. This study addresses the following research questions:

1. Do recent opinions such as *Alvarez* and *Brown* signal a shift toward a heightened standard of proof of harm stemming from speech as compared with earlier cases?

2. How does the nature of the alleged harm (physical, psychological or financial) and/or the type of speech involved (incitement, libel) affect the level of proof of harm—the type of evidence and the quantity of evidence—required by the Court?

In analyzing these queries, it performs an in-depth review of U.S. Supreme Court opinions on proof of harm stemming from speech. It seeks to determine whether, or to what extent, there has been an evolution of the Court’s First Amendment harm doctrine.

This study is comprised of five chapters. Chapter 1 has examined recent incidents giving rise to renewed evaluation of the Court’s proof-of-harm jurisprudence. Chapter 2 sets forth a literature review of legal and communications scholarship on

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74 *Id.* (Holmes, J., dissenting) (arguing in favor of the clear-and-present-danger test, rather than the bad-tendency test applied, to overturn Abrams’ conviction).

75 Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 81.
speech-based harm. Chapter 3 describes this work’s methodology for locating the communication and legal resources and selecting the U.S. Supreme Court cases underlying its proof-of-harm analysis.

Chapter 4 analyses thirty-eight U.S. Supreme Court opinions, specifically focusing on the relationship between speech and harm to the determination of the evidentiary burden imposed to uphold the government’s speech-based restrictions. Chapter 5 draws on findings from its analysis to propose two evidentiary tools—a typology and rubric—for assessing the burden of proof a court might impose when evaluating claims involving speech-based injuries. It applies these instruments to a hypothetical fact pattern to demonstrate their use. It reviews the third-person effect, including its specific relevance to judicial decisionmaking, and identifies areas for future research.

While constitutional law has witnessed a broad trend toward empiricism, First Amendment doctrine is inherently lacking of appropriate measures for empirically evaluating harm stemming from speech. In certain instances, the Court has rejected evidence believed to be relevant by the social scientific community to demonstrate a proximate speech-harm connection. The refusal to find even empirical scientific research adequate within the certain varieties of expression it has been applied may be reflective of a general disconnect between social science and law, including proper understanding of language and terminology; the relevance of social science findings in legal decisionmaking; and ability of judges and lawyers to properly evaluate the evidence.
Until the Court has additional time to evaluate the application, or—in certain circumstance—the appropriateness of empirical evidence to speech-based claims, *Alvarez* and *Brown*, two of the Court’s more recent cases imposing stringent empirical evidentiary burdens, may be more akin to outliers within free speech jurisprudence. Ultimately, the goal of the study is to provide enhanced clarity to jurists in cases involving speech-based injuries. Specifically, it strives to help judges better focus on the relationship between the nature of the harm in question to justify speech restrictions. In doing so, it proposes not only a typology, but a rubric for assessing the evidentiary burden to be applied in instances involving specific types of speech and natures of harm. It applies these evidentiary instruments to a hypothetical fact pattern involving speech-based causes of action to illustrate how they might work.
CHAPTER 2
LITERATURE REVIEW

This Chapter has five parts. Part A examines the relationship between speech and harm stemming from philosopher John Stuart Mill’s seminal enunciation of the harm principle in his 1869 work, *On Liberty*. Part B describes and analyzes three key free-speech theories—the marketplace of ideas, democratic self-governance, and personal autonomy/self-fulfillment—that may be used by courts in determining whether ostensibly harmful speech merits protection. Part C discusses and amalgamation of the social science and legal fields, including the use of social science evidence in other areas of jurisprudential analysis, demonstrating the Court’s familiarity with and reliance on social science evidence in evaluating claims that come before it.

Part D examines the Court’s trend toward empiricism, placing greater emphasis on scientific evidence, methods and procedures in constitutional law, generally, and First Amendment law, specifically. In doing so, it also assesses the lack of standards largely governing the Court’s reliance on scientific and empirical evidence in speech-based claims. Finally, Part E analyzes the mass communication concept known as the third-person effect to potentially explain the fulcrum of government regulations aimed at allegedly harmful expression and why this legislation may be unnecessary. While numerous authors have addressed topics broadly covered by this study, none have performed an in-depth review of the evolution of the Supreme Court’s proof-of-harm principle across multiple spectrums of speech and only very few publications are specifically on point.¹

A Harm Principle in First Amendment Doctrine

Speech and the harm allegedly wrought by it have a long, complicated relationship. Although the Court has never endorsed an absolute right to engage in free speech, it has stated, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.” Put differently, the right of free expression protects speech that merely causes the kind of mental unpleasantness that stems from hearing a disquieting viewpoint or belief. In turn, it generally requires proof of something greater than harm in the form of emotional disgust or umbrage before it can be extinguished.

Although the Court recognizes speech-related harm in some situations—and indeed, most legislative restrictions focus on preventing or prohibiting harm to the

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2 Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis J., concurring) (stating that “the Supreme Court has refused to confer absolute protection upon freedom of expression....”); Virginia v. Black, 538 U.S. 343, 358 (2003) (opining that “[t]he protections afforded by the First Amendment...are not absolute....”); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”) (citing Schenck v. United States, 249 U.S. 47 (1919)). See also OWEN FISS, THE IRONY OF FREE SPEECH 5 (1996) [hereinafter FISS, IRONY] (stating that “the Supreme Court has read [the free speech guarantee of the First Amendment] not as an absolute bar to state regulation of speech but more in the nature of a mandate to draw a narrow boundary around the state’s authority”).


4 Although plaintiffs can recover for emotional harm caused by speech under the theory of intentional infliction of emotional distress (IIED), that distress must be severe, and the Supreme Court has imposed high hurdles on recovery under the IIED tort when the speech relates to a matter of public concern, as it did in Snyder v. Phelps, 131 S. Ct. 1207 (2011), and in cases filed by public figures, such as Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

5 See, e.g., Hill v. Colorado, 530 U.S. 703 (2000) and Frisby v. Schultz, 487 U.S. 474 (1988) (recognizing the harm caused by targeted picketing); Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (acknowledging the harm caused from commercial defamation). In a few of these cases, the Court...
public, institutions, individuals or societal interests—very little of its First Amendment doctrine directly addresses speech-based injuries. Only in more recent cases, such as *Alvarez*\(^6\) and *Brown*,\(^7\) has the Court taken an approach in which it more fully analyzes speech’s harm-producing capacity. Yet, a society dedicated to an open and uninhibited free speech principle must be willing to protect at least some forms of harm-causing speech, despite the resulting injury.\(^8\)

John Stuart Mill,\(^9\) long regarded as one of the most influential philosophers on free speech, conceptualized a “harm principle” when he wrote that “the only purpose for which power can be rightfully exercised over any member of civilized community, against his will, is to prevent harm to others.”\(^10\) Although some read Mill as rejecting has refused the government’s ability to restrict the speech causing harm. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (protecting “reprehensible” hate speech in the form of cross burning); Ocala Star-Banner v. Damron, 401 U.S. 295, 301 (1971) (White J., concurring) (recognizing the harm caused by defamation of public officials, but refusing to grant a cause of action).

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\(^7\) 131 S. Ct. 2729 (2011).

\(^8\) Schauer, *Harm(s)*, supra note 1, at 81. For a zealous approach to protection of speech despite the harm it may result, see C. Edwin Baker, *Harm, Liberty and Free Speech*, 70 S. CALIF. L. REV. 979, 980-81 (1997) [hereinafter Baker, *Harm, Liberty and Free Speech*] (arguing that “the harmfulness of a person’s speech itself never justifies a legal limitation on the person’s freedom of speech” because of its basis in liberty). According to Baker, “the key to whether particular behavior should be subject to legal restriction depends not on whether it causes harm, but on *how* it causes harm” (emphasis added). Id. at 981. He defines harm narrowly to include only “wrongful” injuries,” concluding that the best way of understanding the term “wrongful” “turns on whether restricting the harm causing activity is a restriction on liberty.” Id. at 993-97.

\(^9\) John Stuart Mill was born in London in 1806. Under the tutelage of his father, James Mill, he began his education at an early age, learning Greek by age three, and Latin by age eight. He embraced his father’s philosophy of Unitarianism in his teens, but later had a change of heart. This led to his expansion of Jeremy Bentham’s Unitarian thought, as well as his development of the harm principle, discussed in-depth in his book *On Liberty*. JOHN STUART MILL (1806-1873), ENCYCLOPEDIA OF PHILOSOPHY 220-232 (2d ed. Donald M. Borchert, ed., MacMillian 2006) [hereinafter Borchert, JOHN STUART MILL]; see also, JOHN STUART MILL, AUTOBIOGRAPHY OF JOHN STUART MILL 3-11 (Columbia Univ. Press 1924).

limits on potentially harmful speech, others interpret him as providing a broad defense to freedom of speech, or what Mill refers to as “liberty of thought or discussion.”\textsuperscript{11}

Mill sought to challenge the type of speech society would recognize as legally cognizable harm, noting that even the relatively tolerant England that existed in the first half of the nineteenth century in which he lived still punished people for atheism, heresy and seditious libel.\textsuperscript{12} Mill, who viewed man’s opinion as the dominant influence of social change,\textsuperscript{13} rejected such bans on opinions.\textsuperscript{14} He believed the state should have no authority to restrict individual conduct. Yet, he never rejected some limits on speech.\textsuperscript{15}

Mill envisioned the harm principle as constructing the boundary between the state and individual liberty,\textsuperscript{16} where the state would have the authority to restrict only conduct that was “calculated to produce evil to someone else,”\textsuperscript{17} or, in other words, to individuals other than the one causing the harm.\textsuperscript{18} His conception required “definite damage, or definite risk of damage, to an individual or to the public,”\textsuperscript{19} as opposed to

\begin{footnotesize}
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\item Id. at 80.
\item Borchert, JOHN STUART MILL, supra note 9, at 220-232.
\item Borchert, JOHN STUART MILL, supra note 9, at 220-232.
\item Borchert, JOHN STUART MILL, supra note 9, at 220-232.
\item In fact, Mill advocated for tolerance of opinions for several reasons. First, Mill wrote that censorship might inadvertently ban true opinions. Second, even if an opinion is mostly false, it may be, and often is, partly true. Third, even a wholly true orthodox opinion must be vigorously and earnestly contested for it to be properly understood and appreciated. Fourth and finally, if left unchallenged, an opinion’s meaning may be lost or result in “dead dogma, not a living truth.” Id. at 77-97.
\item MILL, ON LIBERTY, supra note 10, at 80.
\item Schauer, On the Relation, supra note 16, at 574-75.
\item MILL, ON LIBERTY, supra note 10, at 79.
\end{enumerate}
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“constructive injury,” which required no further proof of harm to the individual. In this sense, Mill distinguished “self-regarding” conduct as intrinsically different from “other-regarding” conduct.

Yet, today’s conception of harm is undoubtedly “a rather ambiguous and elastic concept.” It “encompass[es] a wide array of evils, from concrete ones, such as bodily injury and property damage, to more diffuse and intangible ones, such as damage to public institutions or policies and affronts to individual dignities and sensibilities.” Although there are certain well-settled areas of the law—for instance, defamation and intentional inflection of emotional distress (IIED)—that require no specific evidence of physical harm before an individual can be compensated, many legal scholars agree

20 MILL, ON LIBERTY, supra note 10, at 80. Regarding constructive injury, Mill stated:

But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable injury except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom. MILL, ON LIBERTY, supra note 10, at 80.

21 Ofseyer, supra note 14, at 404.

22 Schauer, On the Relation, supra note 16, at 575. According to Professor Schauer, the opening chapter of On Liberty has come to “stand for the proposition that both government and public opinion are used to prevent harm to others, but that self-regarding conduct, whether because harmless or harmful but only to the agent, is the domain of the individual.” Schauer, On the Relation, supra note 16, at 575. See also R.J. Halliday, Some Recent Interpretations of John Stuart Mill, 43 PHIL. 1, 1 (1968) (providing greater discussion on the distinction Mill makes between these two types of conduct).

23 Ofseyer, supra note 14, at 403.

24 Ofseyer, supra note 14, at 403. See also Baker, Harm, Liberty and Free Speech, supra note 8 and accompanying text (discussing another conception of harm).

25 See supra note 9 and accompanying text (describing conditions for, and limitations upon, recovery of emotional distress in the IIED tort).
that harm should constitute a necessary condition for governmental regulation of speech.²⁶

Part A has discussed a harm principle in First Amendment doctrine. Part B next discusses three key free-speech rationales underlying many of the Court’s First Amendment opinions for protecting even speech causing harmful effects.

**Three Key Free-Speech Rationales**

Part A details three key rationales for protecting free expression: the marketplace of ideas, democratic self-governance, and personal autonomy/human dignity theories.²⁷

In analyzing each theory, it is important to consider, as noted by First Amendment philosopher Thomas Emerson, that “[i]n constructing and maintaining a system of freedom of expression the major controversies have not arisen over acceptance of the basic theory, but in attempting to fit its values and functions into a more comprehensive scheme of social goals.”²⁸ Here, the difficulty involves reconciling limits placed upon an individual’s expression with other interests, such as preventing individual or societal harm.²⁹ While no single rationale fully explains the complexity of the Court’s free speech

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²⁷ Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011) [hereinafter Post, *Participatory Democracy*] (explaining that it is sometime difficult to determine what speech the first amendment protects and thus, its scope extends to “those forms of speech (or regulation) that implicate constitutional values:” largely defined as: 1) the creation of new knowledge (marketplace of ideas); 2) individual autonomy; and 3) democratic self-governance).

²⁸ THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 9 (1970) [hereinafter EMERSON, SYSTEM],

²⁹ According to Emerson, the problem is that “most of our efforts in the past to formulate rules for limiting freedom of expression have been seriously defective through failure to take into consideration the realistic context in which such limitations are administered.” *Id.* Individuals tend to want to eliminate opposition and limitations on expression are difficult to frame. *Id.* While the goal may not be to suppress the actual expression, only its “feared consequences,” the limitations end up “cut[ting] for more wide and deep than is necessary to control the ensuring conduct.” *Id.* at 9-10.
jurisprudence, a discussion of the concepts underlying each of these three main principles may lead to a greater understanding of the Court’s opinions in certain cases.

**Marketplace-of-Ideas Theory**

Perhaps the Supreme Court’s central and most powerful rationale for protecting freedom of expression is the marketplace-of-ideas theory. The theory derives from Justice Holmes’ famous pronouncement in *Abrams v. United States* that “the best test of truth is the power of the thought to get itself accepted in the competition of the market....” Philosopher Mill expressed a similar view when he wrote: “The peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it....” He offered four rationales for protecting expression, as follows:

1) the opinion attempted to be suppressed may possibly be true; 2) even false statements contain a portion of truth; 3) “true” opinions, if not “vigorously and earnestly contested” will lose its character; 4) or they may be held for “dead dogma.”

The marketplace-of-ideas principle is often associated with the “search for truth” and the advancement of knowledge. It holds that only through vigorous and unrestricted debate can the best ideas emerge in the market. For an individual to seek truth, according to the metaphor, he must “hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition and make full use of different minds.”

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33 *Emerson, System*, supra note 28, at 6-7.
opinion may seem”34 because, for instance, even some statements that have been taken as entirely true have turned out to be false.35 The theory does not assume the infallibility of expression,36 but seeks to remedy false speech with “more speech, not enforced silence.”37

Yet, the theory itself is not infallible38 and has received much criticism over the years.39 Scholars argue it is wrong to assume all ideas will enter the marketplace, and that even if they do that they will have an equal chance to be heard.40 Professor James Weinstein has debated, “[o]ne serious problem with the marketplace-of-ideas rationale is that the premise that a completely unregulated market of ideas will lead to the discovery of truth is highly contestable.”41 Furthermore, Rodney C. Smolla, former president of Furman University, contests the marketplace will “inevitably be biased in favor of those with the resources to ply their wares.”42 “Especially when the wealthy have more access to the most potent media of communication than the poor,” Harvard

35 Id.
38 As Smolla has quipped, “not even the marketplace metaphor should escape the marketplace metaphor.” Smolla, Free Speech, supra note 36, at 6.
41 Id.
42 Smolla, Free Speech, supra note 36, at 6 (explaining that “the ideas of the wealthy and powerful will have greater access to the market than the ideas of the poor and disenfranchised”).
Professor Laurence Tribe queries, “how sure can we be that ‘free trade in ideas’ is likely to generate truth?”

Other critics argue it is wrong to assume truth will necessarily prevail over falsehood. Professor C. Edwin Baker, former professor at the University of Pennsylvania Law School, notes people respond to emotion and do not always use “their rationale capabilities” to “eliminate distortion” in the marketplace. Professor Smolla concurs, “irrational appeals to hate and prejudice have, throughout the experience of man, often overwhelmed thoughtful tolerance and understanding, leading to orgies of violence and destruction.” Professor Harry Wellington, former dean of Yale and New York Law Schools, observes, even if “true ideas do tend to drive out false ones...the problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive, false ideas.”

Fortunately, the theory does not rest on the principle that what actually emerges from the marketplace is “truth.” Justice Holmes, one of the leading proponents of the marketplace of ideas theory, did not actually believe in truth himself. The beneficial

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43 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988).
44 Id.
45 BAKER, HUMAN LIBERTY, supra note 39, at 12.
46 SMOLLA, FREE SPEECH, supra note 36, at 7. According to Smolla, “Nazis and Ku Klux Klan continue to parade in America, and radical separatism in South Africa...remains as a still-pervasive reality.” Id.
47 Harry Wellington, On Freedom of Expression, 88 YALE L.J. 1105, 1130 (1979) (“The problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive, false ideas.”).
48 SMOLLA, FREE SPEECH, supra note 36, at 7.
49 SMOLLA, FREE SPEECH, supra note 36, at 7.
aspect of the marketplace metaphor for Holmes was “not the end by the quest,” but rather, believing in the capacity of the market to provide for the “best test of truth….\textsuperscript{50}

As First Amendment scholar and UCLA Professor Eugene Volokh discerns, “ample regulation of truth and falsehood already goes on without legal coercion.”\textsuperscript{51} Allowing the government to regulate speech it believes is false or harmful, thus, impedes “the constant process of questioning, testing, updating, and sometimes replacing received wisdom,”—a “hallmark of good science and good history.”\textsuperscript{52}

Section 1 reviewed the First Amendment marketplace of ideas rationale for freedom of expression. Section 2 discusses the democratic self-governance rationale.

**Democratic Self-Governance**

It is doubtless political speech, crucial to democracy and democratic decisionmaking, is at the core of freedom of expression. In fact, Alexander Meiklejohn, the theory’s primary proponent, argued political expression is the only type of speech deserving of First Amendment protection.\textsuperscript{53} The theory proceeds on the notion government authority is derived from the consent of the governed. According to Meiklejohn, “freedom of speech is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”\textsuperscript{54} Professor Steven H. Shriffrin

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\textsuperscript{50} SMOLLA, FREE SPEECH, supra note 36, at 7 (emphasis added).


\textsuperscript{52} Id. at 597.

\textsuperscript{53} See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) [hereinafter MEIKLEJOHN, FREE SPEECH].

\textsuperscript{54} Id. at 27.
chimes, “the Constitution’s commitment to freedom of speech is nothing more than a reflection of our commitment to self-government.”

Yet, Meiklejohn also believed individual political participation was the true value behind the rationale. He viewed voting as the purest form of all speech. Professor Emerson agreed with this notion when he wrote, individuals must have “full freedom of expression both in forming individual judgments and in forming the common judgment.” Columbia Law School Professor Vincent Blasi offered a slightly different conception in his “checking value” theory of the First Amendment. Although still focusing on the power of individual expression, it placed emphasis on the individual’s “veto power[,] to be employed when the decisions of officials pass certain bounds.”

The democratic self-governance rationale thus advances two distinct perspectives: 1) the social value of an informed citizenry; and 2) the individual value, “stress[ing] the importance of a decisionmaking process open to an entire citizenry.”

The Supreme Court, however, has never adopted a solitary rationale for protecting expression or an exclusive type of speech protected by the First Amendment. It has insisted, instead, the “guarantees for speech and press are not the preserve of political expression or comment upon public affairs…. They extend beyond self-

56 Alexander Meiklejohn, First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245, 255 [hereinafter Meiklejohn, Absolute].
57 Emerson, System, supra note 36, at 7.
59 Id.
60 Ingber, supra note 39, at 9.
government to encompass religion, literature, art, science and “all areas of human learning and knowledge.”\[^{62}\] Although Meiklejohn initially rejected protection of speech that did not relate to self-government, he was later forced to recognize the inherent difficulty of distinguishing political from non-political expression.\[^{63}\]

Alternatively, at least one scholar has remained loyal to Meiklejohn’s original theoretical conceptions. Judge Robert H. Bork maintains that the “notion that all valuable types of speech must be protected by the First Amendment confuses the constitutionality of laws with their wisdom.”\[^{64}\] According to Judge Bork, “[c]onstitutional protection should be accorded only to speech that is explicitly political.”\[^{65}\] He concluded that “[t]here is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic,” if a court is to make principled decisions, uninhibited by value-laden judgments.\[^{66}\]

Section 2 summarized the democratic self-governance rationale for freedom of expression. Section 3 discusses the personal-autonomy rationale.

**Personal-Autonomy Rationale**

The third and final rationale discussed by this work is the personal-autonomy rationale. It treats freedom of speech as promoting individual autonomy and self-

\[^{62}\] Emerson, System, supra note 36, at 7.

\[^{63}\] Erwin Chemerinsky, Constitutional Law 926 (Aspen Publishers 3d ed. 2006) (stating that “comic strips to commercials advertisements to even pornography” can possess a “political dimension”).

\[^{64}\] Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 29 (1971) [hereinafter Bork, Neutral Principles].

\[^{65}\] Id. at 20.

\[^{66}\] Id.
fulfillment. Professor Martin H. Redish at Northwestern University School of Law has contended the theory—also referred to as the individual self-realization rationale—is the primary value protected by the First Amendment because Legal theorists Thomas I. Emerson has added that an individual’s thought and communication is so important to his development that “[t]o cut off his search for truth is to elevate society and the state to a despotic command over him and to place him under the arbitrary control of others.”

The self-realization/personal autonomy rationale protects speech contributing to the individual’s development and personal attainment. It views individual speech as intrinsically valuable, separate and distinct from its other values. As former Justice Thurgood Marshall observed, “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self expression.”

Through self-realization, an individual realizes his or her own potential and takes “control of his or her own destiny through making life-affecting decisions.” It supports “a right defiantly, robustly, and irreverently to speak one’s mind just because it is one’s mind.”

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68 Id. at 591. According to Redish, “[t]hat the First Amendment serves only one ultimate value, however, does not mean that the majority of values thought by others to be protected by free speech—the “political process,” “checking,” and “marketplace-of-ideas” values—are invalid...My contention is that these other values, though perfectly legitimate, are subvalues of self-realization.” Id.

69 EMERSON, SYSTEM, supra note 36, at 6. Emerson reiterates, “[t]o cut off the flow at the source is to dry up the whole stream.” Id. at 9.


71 Redish, Value of Free Speech, supra note 67, at 591.

72 SMOLLA, FREE SPEECH, supra note 36, at 9.
Comparatively, commentators argue the theory is internally inconsistent where it favors one individual’s autonomy over another’s. Professor Cass Sunstein has conjectured that not only does the theory suffer intrinsically but also, overemphasis of autonomy distorts public debate. Judge Bork has criticized the rationale’s inefficiency to distinguish activities that advance personal autonomy from “any other human activity. According to Judge Bork:

An individual may develop his faculties or derive pleasure from trading on the stock market, working as a barmaid, engaging in sexual activity, or in any thousands of other endeavors...One cannot, [however] on neutral grounds, choose to protect speech on this basis more than one protects any other claimed freedom.”

73 See Cass R. Sunstein, Democracy and the Problem of Free Speech 93 (1993) (stating that “autonomy, guaranteed as it is by law, may itself be an abridgement of the free speech right...My special concern is that the First Amendment (can be interpreted in such a manner as) to undermine democracy”). Similar to Sunstein, Fiss de-emphasizes autonomy as a way to promote enhancement of the quality of public debate in deliberative democracy. See Owen M. Fiss, Liberalism Divided: Freedom of Speech and the Many Uses of State Power (1996) [hereinafter Fiss, Liberalism Divided]; Fiss, Irony, supra note 2. The shift Fiss proposes from a focus on autonomy to an approach placing greater emphasis on the balancing public discourse approach represents what is known as the public debate approach in First Amendment jurisprudence.


A fourth, or perhaps fifth, rationale (if you count the check value rationale independently), not mentioned above, but recognized by scholars including Professor Lee Bollinger, is promoting tolerance. Perhaps the leading advocate of the perspective, Bollinger argues that freedom of expression likewise “involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters, the value placed on developing ‘the intellectual character of the society.’” Lee Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America 9-10 (1986); see also Lee Bollinger, The Tolerant Society: A Response to Critics, 90 COLUM. L. REV. 979 (1990). The opposite argument, however, it that preventing harm is much more important than preserving tolerance. See, e.g., David Strauss, Why Be Tolerant? 53 U. CHI. L. REV. 1485 (1992).

74 Bork, Neutral Principles, supra note 64, at 25.

75 Bork, Neutral Principles, supra note 64, at 25.
The above sections have described three main rationales for protecting freedom of expression. Yet, defining the boundaries between freedom of expression and other societal and individuals needs or values, that may conflict with these rationales, is often a contentious process and may result in a lack of adequate protection given expression, especially when there are powerful arguments against restricting it when it causes sufficient harm to these needs.\textsuperscript{76}

Part B reviewed three key free-speech rationales for protecting expression. Part C discusses the interaction between the legal and social science fields, including a trend within the legal realm toward greater interdisciplinarity.

**Social Research in Law**

Legal scholar and judge Richard Posner once said that law is “not a field with a distinct methodology, but an amalgam of applied logic, rhetoric, economics and familiarity with a specialized vocabulary and a particular body of texts, practices, and institutions….\textsuperscript{77} While it was once thought law was autonomous from all other disciplines, legal scholars increasingly borrow from a variety of fields including history, philosophy, sociology, economics, linguistics and psychology.\textsuperscript{78} In fact, Judge Posner observed that, "[a]fter a century as an autonomous discipline, academic law in America


\textsuperscript{78} Donald M. Gillmor & Everette E. Dennis, *Legal Research in Mass Communication*, in RESEARCH METHODS IN MASS COMMUNICATION 320 (Guido H. Stempel III & Bruce Westley eds., 1981); see also Jonathan R. Macey, *Legal Scholarship: A Corporate Scholar’s Perspective*, 41 SAN DIEGO L. REV. 1759, 1762 (2004) ("The ‘Law and..." approach to legal scholarship has clear and unambiguous connections to the rest of the university. Simply put, the phrase 'law and' is completed by academic disciplines such as economics, philosophy, history, psychology, literature, anthropology, or ‘any other field or combinations of fields of study for guidance in developing a scholarly critique of the current legal landscape or of particular parts of it.”). Id.
is busily ransacking the social sciences and the humanities for insights and approaches with which to enrich our understanding of the legal system.”

Law, after all, must “rely on other methodologies, particularly social science, to provide an understanding of the forces that act upon the legal system and of the impact of legal decisions.” Some of these disciplines (e.g., philosophy, economics, sociology) employ methods commonly relied upon by legal analysts, such as logical reasoning. Others (e.g., psychology, economic, sociology) claim “objective” understanding of human behavior through application of methodologies that go beyond what “standard legal analysis” can provide.

**Law as an Autonomous Discipline**

Harvard Law School Dean Christopher Columbus Langdell, a leading advocate of formalism, once viewed law as an autonomous science. He developed a “case law methodology to study law” that “identified fundamental legal principles from the vast corpus of reported cases.” Yet it wasn’t long before formalism, and specifically “Langdellian formalism,” came under attack by the bench and bar. In a 1908 *Columbia Law Review* article, distinguished American legal scholar and former dean of Harvard

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82 Id.

Law School Roscoe Pound criticized what he called a “mechanical jurisprudence” that did not recognize the relation of law to society, nor accurately reflect the process of judicial decisionmaking.  

**Trend Toward Greater Interdisciplinarity**

The shift from legal formalism to greater interdisciplinarity in the legal realm has done much to transform the landscape of legal scholarship and education in the last few decades. According to Matthew Bunker, University of Alabama professor and scholar in First Amendment law, it has not only “deepened the understanding of law and legal theory,” but permitted legal researchers to “deploy new models of vocabularies that allow us to look at legal phenomena in new and intellectually fruitful ways.” It has “open[ed] up a new space for debating the merits of established approaches,” and allowed legal scholars to “develop important insights about law by delving into social scientific and humanistic disciplines that intersect with legal studies.”

In their book on social science research published in 1990, Jeremy Cohen and Timothy Gleason called for continued interdisciplinary efforts at the intersection of “communication and law” that would raise “basic questions about communication assumptions inherent in law” and attempt “to find suitable means for identifying those

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85 BUNKER, supra note 83, at 18.

86 BUNKER, supra note 83, at 18.

87 BUNKER, supra note 83, at 18.

88 BUNKER, supra note 83, at xii.

assumptions and for testing both their scientific and their legal validity."90 Now both deans at prestigious research universities,91 they also provided a description of what they saw as the process of performing research at the intersection of “communication and law” as well as identified potential benefits and setbacks facing researchers in this unique subdivision of research.

Social research at the intersection of “communication and law” undoubtedly involves legal questions “quite different from traditional legal research.”92 According to Cohen and Gleason:

Social research in communication and law implies an inquiry that goes beyond traditional jurisprudential case analysis by recognizing the structure of jurisprudence and examining that structure with tools and theory normally associated with communication science, historiography, and critical studies…93

It “must apply existing communication research to concrete legal questions or to explorations of legal theory”94 while all-the-while maintaining fidelity to both the “philosophy of social science research” and the “advocacy-based structure of result-oriented jurisprudence.”95 The task of the communication-and-law researcher “is to fashion theory that will enable us to understand better the interactions of communication

90 Id.


92 COHEN & GLEASON, supra note 89, at 11.

93 COHEN & GLEASON, supra note 89, at 15.

94 COHEN & GLEASON, supra note 89, at 126.

95 COHEN & GLEASON, supra note 89, at 103.
and of law, using observations that go beyond legal cases analysis or use of the methodological tools borrowed from political science." Research at the intersection of communication-and-law does not compete with the goals of performing either type of research, but makes important contributions to the practice and study of both. It “raise[s] basic questions regarding communication assumptions inherent in law” and empirically tests those assumptions in a controlled setting. It can make important changes in social policy while also producing research findings “more in line with reality.”

The authors suggested that one of the areas in which communication and law particularly maintain shared interests is in freedom of expression. Law, after all, is considered normative in its prescription of proper patterns of behavior and frameworks for ordering society, and numerous laws that affect freedom of expression are also based on assumptions regarding communication and human behavior, bringing it well within the discipline of communication research. On the other hand, research in communication-and-law requires in-depth knowledge of both the fields of communication and law to prevent the misconstruing of legal documents and evidence,

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96 COHEN & GLEASON, supra note 89, at 134.
97 COHEN & GLEASON, supra note 89, at 11-16.
98 COHEN & GLEASON, supra note 89, at 12.
99 COHEN & GLEASON, supra note 89, at 19.
100 COHEN & GLEASON, supra note 89, at 15.
101 COHEN & GLEASON, supra note 89, at 14.
102 Communication, a subset of social science research, is “socially concerned” in its attempt to examine phenomena within a social setting. COHEN & GLEASON, supra note 89, at 14-15, 105.
likely to result in material that is at best irrelevant, and at worst, incorrect.\textsuperscript{103} The dearth of literature that has so far been conducted, furthermore, provides little conceptual map on which to build a strong foundation of literature.\textsuperscript{104} Former dean of Stanford Law School Kathleen Sullivan has also suggested that such interdisciplinary efforts have so far failed to adequately protect expression.\textsuperscript{105} It is perhaps for this reason scholars Bunker and Perry insist that continued efforts must do their “best to ensure that valuable First Amendment freedoms are respected.”\textsuperscript{106}

Before delving into the history of the Court’s familiarity with social science research and evidence in other areas of the law, it may be helpful to describe the process of conducting social science research, including the goals of the social scientist and the specific ways through which social scientists pursue “knowledge.”

**What Counts as “Knowledge” in Social Science**

Sir Karl Popper, generally regarded as one of the greatest twentieth century philosophers, is best known for his rejection of the classical inductive views of the scientific method.\textsuperscript{107} He devoted much of his philosophical efforts to articulating the epistemology of “empirical falsification.”\textsuperscript{108} Popper stressed the difficulty of distinguishing scientific from unscientific statements ("problem of demarcation"\textsuperscript{109}).

\textsuperscript{103} COHEN & GLEASON, \textit{supra} note 89, at 24-25.

\textsuperscript{104} COHEN & GLEASON, \textit{supra} note 89, at 103.

\textsuperscript{105} Kathleen L. Sullivan, \textit{Free Speech Wars}, 48 SMU L. REV. 203 (1994) (stating that the studies so far seem to “deploy arguments in favor of greater limits on speech” and providing examples of those studies).

\textsuperscript{106} Bunker & Perry, \textit{supra} note 79, at 25.

\textsuperscript{107} Steven Thornton, \textit{Karl Popper, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY} (Edward N. Zalta ed. 2009).

\textsuperscript{108} Faigman, \textit{Value of Social Science, supra} note 81, at 1014-15.

identifying “falsifiability,” or the extent to which a statement is “vulnerable to refutation,” as the central criterion.\textsuperscript{110}

Social science seeks “objective” knowledge, through systematic empirical testing of theories or hypothesis in controlled settings or conditions. Theories or hypotheses obtain objectivity through systematic tests, sometimes referred to synonymously under Popper’s epistemology as “attempts to falsify.”\textsuperscript{111} The strength of a particular statement, or its “merit,” depends on the extent to which it has been tested appropriately and survived attempts at falsification.\textsuperscript{112} As opposed to the natural sciences, however, generally viewed as testing phenomena with extraordinary precision and producing replicable results, critics have doubted the reliability of current social science research to pursue objective measures.\textsuperscript{113} Indeed, because of its history of imprecision and bending to subjective values, some have questioned whether social inquiry can ever be scientific.\textsuperscript{114} Social scientists are viewed as unable to separate their personal biases from their “selection of problems”—the type of research questions pursued by the

\textsuperscript{110} Faigman, \textit{Value of Social Science}, supra note 81, at 1016-17. \textsc{Karl Popper, Realism and The Aim of Science} xx [From the Postscript to \textit{The Logic of Scientific Discovery}] (W. Bartley, III ed. 1983). The criterion of falsifiability provides that “a statement or theory is...falsifiable if and only if there exists at least one potential falsifier—at least one possible basic statement that conflicts with it logically.” \textit{Id}.

\textsuperscript{111} Faigman, \textit{Value of Social Science}, supra note 81, at 1018, 1019. \textit{See also id.} at 1019 (stating that “the fact that scientific theories are vulnerable to falsification imparts a strength stemming from having taken the risk of refutation”).

\textsuperscript{112} Faigman, \textit{Value of Social Science}, supra note 81, at 1018.

\textsuperscript{113} Andrew Greeley, \textit{Debunking the Role of Social Scientists in Court}, 7 Hum. RTS. 34, 34, 50 (1978); David M. O’Brien, \textit{The Seduction of the Judiciary: Social Science and the Courts}, 64 \textit{Judicature} 8, 10-11 (1980).

\textsuperscript{114} Faigman, \textit{Value of Social Science}, supra note 81, at 1026.
research efforts—and also potentially incapable of preventing those biases from being grafted onto their research conclusions.\(^{116}\)

Thus, while the legal scholar uses legal theory to prescribe conditions that ought to exist in a legal system, the social scientist uses theory for the purposes of explaining and understanding social conditions and phenomena. Legal research "describes legal rules and institutions, explicates their internal logic and their relationship to other rules and institutions, and perhaps urges their reform or extension along certain lines."\(^{117}\) In contrast, social science, often thought of within its quantitative domain, involves methods of "producing knowledge in which general statements—hypotheses and theories—are tested empirically under controlled conditions with the goals of producing comprehensive explanations of the operation of some system."\(^{118}\)

**Applicability of Social Science Findings in Legal Decisionmaking**

It is perhaps not inconsequently that scholars have questioned the applicability of social science findings in the legal realm.\(^{119}\) Professor Geoffrey Hazard has questioned the "practical fit" between law and social science.\(^{120}\) According to Professor Hazard:

> In the end, as against the exigencies of the law’s processes, the uses of behavioral science are relatively remote, its methods relatively expensive, and its results relatively inconsequential. Its findings are, of course, more satisfying to the modern mind that the conclusions advanced from authority.

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119 Faigman, *Value of Social Science*, supra note 81, at 1025.

That, however, is not much consolation for law men, whose concerns are for immediate, cheap and significant decision making.\textsuperscript{121}

But Hazard is not alone.\textsuperscript{122}

Susan Haack, professor of law and philosophy, has offered several reasons for the clash between scientific inquiry and the legal system.\textsuperscript{123} Among those is that litigation is likely to arise in areas where commercially interested parties conduct the research, rather than academic researchers who perform the research independent of the industry.\textsuperscript{124} The promise of litigation may, furthermore, attract scientists who claim greater certainty than the science in their field justifies\textsuperscript{125} or who may otherwise be willing to give an opinion on the basis of “less-than-overwhelming” evidence.\textsuperscript{126}

Additionally, the legal system often demands “immediate answers of a kind science is not well-equipped to supply”\textsuperscript{127} or for which the evidence might not yet all be in.\textsuperscript{128}

William K. Ford has identified several limitations on the use of social science evidence in law and law’s reliance on such evidence to support its conclusions. First, is

\textsuperscript{121} Id. at 77.
\textsuperscript{122} See, e.g., Yorgo Pasadeos et al., \textit{Influences on the Media Law Literature: A Divergence of Mass Communication Scholars and Legal Scholars?}, 11 COMM. L. & POL’Y 179 (2006); Jeremy Cohen & Timothy Gleason, \textit{Charting the Future of Interdisciplinary Scholarship in Communication and Law, in AMY REYNOLDS & BROOKS BARNETT, COMMUNICATION AND LAW, MULTIDISCIPLINARY APPROACHES TO RESEARCH} 3 (2006) (“Law is a system of regulation. Its purpose is to set, interpret, and enforce rules of conduct by which people live—or, at least, be held accountable. Communication as an academic discipline, whether the scholarship of critical theorists, historians, or social scientists, is a search for understanding of individuals, events, institutions and other phenomena.”).
\textsuperscript{124} Id. at 15.
\textsuperscript{125} Id. at 16. \textit{See also} Ford, \textit{supra} note 1, at 308 (describing Haack’s list items).
\textsuperscript{126} Haack, \textit{supra} note 123, at 16. \textit{See also} Ford, \textit{supra} note 1, at 308 (describing Haack’s list items).
\textsuperscript{127} Haack, \textit{supra} note 123, at 16.
\textsuperscript{128} Haack, \textit{supra} note 123, at 16.
that law is adversarial. Rather than providing an uninterested statement of the literature, lawyers may only be interested in presenting a particular view or achieving a particular outcome. While this assumes attorneys have an agenda, Ford notes this is “part and parcel of litigation.”\textsuperscript{129} Alternatively, judges must beware of placing too much reliance on lawyers’ statements of the research conclusions.\textsuperscript{130}

Yet, even this assumes attorneys understand and can interpret the evidence underlying their arguments. As a second limitation, Ford observes attorneys and judges might not be properly trained to analyze and evaluate scientific research.\textsuperscript{131} Consider oral arguments before the Seventh Circuit Court of Appeals in \textit{Annex Books, Inc. v. City of Indianapolis}.\textsuperscript{132} \textit{Annex Books} involved the constitutionality of an Indianapolis ordinance regulating adult entertainment businesses.\textsuperscript{133} The plaintiffs presented a study by Professor Daniel Linz of U.C. Santa Barbara purporting to show—through a “hot spot”\textsuperscript{134} and a “before-after analysis”\textsuperscript{135}—that operation of the businesses had not resulted in increased crime.\textsuperscript{136} While Linz’s analysis did not solve the issue before the

\begin{itemize}
\item \textsuperscript{129} Ford, \textit{supra} note 1, at 300.
\item \textsuperscript{130} Ford, \textit{supra} note 1, at 300.
\item \textsuperscript{131} Ford, \textit{supra} note 1, at 300.
\item \textsuperscript{132} 581 F.3d 460 (7th Cir. 2009).
\item \textsuperscript{133} \textit{Id.} at 461-62.
\item \textsuperscript{134} Linz’s “hot spot” analysis compared the crimes rates at several adult businesses to other businesses in the same are of a five-year period, for the purpose of demonstrating whether the businesses were a significant source of crime within a neighborhood as compared to other businesses. \textit{Id}.
\item \textsuperscript{135} The “before-after” analysis examined crime rates with 250, 500 and 1,000 feet of the locations of two adult businesses and several control areas during the calendar year before and the calendar year after the businesses opened (but excluding the year the businesses opened). The purpose was to determine whether crime increased after the businesses opened. \textit{Id}.
\item \textsuperscript{136} See Separate Appendix for Appellants at 134, Annex Books, Inc. v. City of Indianapolis, No. 05-1926 (7th Cir. May 19, 2005). \textit{See also} Ford, \textit{supra} note 1, at 302 (discussing Linz’s study in connection to the 7th Circuit decision).
\end{itemize}
court, the discussion showed that both the judge and the attorneys “mixed up elements of the two analyses.”

According to Ford:

The attorney’s initial answer to [Judge Frank] Easterbrook’s question about the hotspot analysis was instead related to the before-after analysis, as indicated by his reference to the three different distances. Like the attorney, Easterbrook also appeared to confuse the different analyses when he referenced the circles in his comment on the hotspot analysis….

Although Easterbrook’s opinion, issued four years later, appeared to clear up confusion over the issue, attorneys must not rely on judges to do this. The attorney in the case, unable to address the basic methodological questions about evidence he offered before the court, may have been unprepared because such questions were unexpected. However, “the lack of training makes these types of questions difficult for lawyers to address even if they are expected.”

Related to this issue is the “problem of translation,” or a lack of clarity regarding meanings attached to the use of specific terminology between disciplines. For instance, research has shown “the meaning of falsification is unfamiliar to many judges.” Additionally, social science research is not written for a lay audience. But this also raises important questions about the type of evidence that may qualify as “causal” and

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137 Ford, supra note 1, at 302.
138 Ford, supra note 1, at 302.
139 Ford, supra note 1, at 302.
140 Ford, supra note 1, at 302-03.
141 Ford, supra note 1, at 303.
142 Ford, supra note 1, at 303.
144 Ford, supra note 1, at 338.
the certainty of conclusions based on such evidence.\textsuperscript{145} For example, “[s]cientists are sometimes accused of being so wary of the warning that ‘correlation is not causation’ that they will not state causal hypotheses or draw causal inferences even when causality is the real subject of investigation.”\textsuperscript{146} Although the level of certainty required depends on the circumstances, scientific conclusions certain enough to be useful today may present problems of uncertainty under new situations or problems tomorrow.\textsuperscript{147} In sum:

no matter how perfect the research design, no matter how much data we collect, no matter how perceptive the observers, no matter how diligent the research assistants, and no matter how much experimental control we have, we will never know a causal inference for certain.\textsuperscript{148}

Alternatively, Ford proposes, the problem may be reduced if lawyers resist substituting their own interpretations of the literature for the scientist’s, which may be brought before the court through cross-examination.\textsuperscript{149}

The distinctions between law and social science may, thus, appear quite stark. While law and legal scholarship use legal theory to prescribe conditions that ought to exist in a legal system, the social scientist uses theory for the purposes of explaining and understanding social conditions and phenomena. Legal research “describes legal rules and institutions, explicates their internal logic and their relationship to other rules

\textsuperscript{145} Ford, \textit{supra} note 1, at 335-36.

\textsuperscript{146} Ford, \textit{supra} note 1, at 335 (quoting \textsc{Gary King Et Al.}, \textit{Designing Social Inquiry} 75-76 (1994)) (internal punctuation omitted).

\textsuperscript{147} Ford, \textit{supra} note 1, at 336-37.

\textsuperscript{148} Ford, \textit{supra} note 1, at 337 (quoting \textsc{King Et Al.}, \textit{supra} note 148, at 790).

\textsuperscript{149} Ford, \textit{supra} note 1, at 336-40 (describing the benefits of live expert testimony).
and institutions...." In contrast, social science involves methods of "producing knowledge in which general statements—hypotheses and theories—are tested empirically under controlled conditions with the goals of producing comprehensive explanations of the operation of some system." 

Despite questions regarding the "practical fit" between law and social science, due at least in part to their "differences in institutional traditions and conventions," the increasing use of scientific findings and data more than 100 years later in cases such as Brown v. Entertainment Merchants Association, nonetheless, may signify the trend is continuing. Part C introduced social research in law, including the legal field’s trend toward interdisciplinarity. Part D next addresses the Court’s familiarity with social science evidence in other jurisprudential areas.

**Familiarity with Social Science in Other Jurisprudential Areas**

Even before jurists and lawyers were interested in the use of social science research and evidence to support legal propositions, social scientists were conducting research and advocating its use in the legal system. Perhaps the first “successful”


152 Yorgo Pasadeos et al., *Influences on the Media Law Literature: A Divergence of Mass Communication Scholars and Legal Scholars?*, 11 COMM. L. & POL’Y 179 (2006). See also Jeremy Cohen & Timothy Gleason, *Charting the Future of Interdisciplinary Scholarship in Communication and Law, in AMY REYNOLDS & BROOKS BARNETT, COMMUNICATION AND LAW, MULTIDISCIPLINARY APPROACHES TO RESEARCH* 3 (2006) (“Law is a system of regulation. Its purpose is to set, interpret, and enforce rules of conduct by which people live—or, at least, be held accountable. Communication as an academic discipline, whether the scholarship of critical theorists, historians, or social scientists, is a search for understanding of individuals, events, institutions and other phenomena.”).

153 See Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L. J. 1, 1 (2002) (stating that “the use of social science...to inform legal theory and practice is fast becoming the latest craze in the pages of legal academia”).

154 See *id.* at 3.
use of social science data within the legal discipline was by Louis Brandeis in the 1908 case of *Muller v. Oregon*,\(^\text{155}\) involving a law forbidding women to work more than ten hours a day. The now famous “Brandeis brief,” comprised of more than 100 pages and only two of them devoted to legal argument,\(^\text{156}\) was “something entirely new” in U.S. legal practice.\(^\text{157}\) It collated examples of U.S. and foreign legislation as well as “extracts from over ninety reports of committees, bureau of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women.”\(^\text{158}\)

Eight decades later, questions remain whether *Muller’s* attempts to apply social science research were as successful as originally anticipated.\(^\text{159}\) “Rather than being a social science masterpiece, [the Brandeis brief has been criticized as] consist[ing] largely of a ‘hodgepodge’ of reports of factory or health inspectors, testimony before legislative investigating committees, statutes, and quotes from medical texts, among other miscellany.”\(^\text{160}\) The sociological data relied upon in the brief have been characterized as “nonsensical,” “biased” and “amateurish;”\(^\text{161}\) “do not appear to have

\(^\text{155}\) 208 U.S. 412 (1908). See also Blumenthal, *supra* note 153, at 10 (stating that the Brandeis Brief, submitted as to the U.S. Supreme Court in *Muller v. Oregon*, is “usually cited [in addition to other events described in the article] as another early beginning to the law-social science relationship”).


\(^\text{157}\) Dow, *supra* note 156, at 334.

\(^\text{158}\) *Muller*, 208 U.S. at 419 n.1.


\(^\text{161}\) Spillenger, *supra* note 159, at 5, 6.
been based on empirical work”; and arguably, “represented ‘evidence that no respected psychologist would consider as social science.’”\textsuperscript{162} For instance, “the brief reports that ‘there is more water’ in women’s than in men's blood and women therefore are ‘inferior to men’ in certain physical tasks, and that women's knees are constructed in such a way as to prevent them from engaging in difficult physical tasks.”\textsuperscript{163} In other words, the brief has been characterized as “more an instance of a resourceful attorney bringing to bear any information he can in a case, rather than a formal or unified movement by a social science discipline to influence the law.”\textsuperscript{164}

**Segregation**

*Brown v. Board of Education*,\textsuperscript{165} on the other hand, is perhaps the best-known example of the extent to which social science has been incorporated into Supreme Court jurisprudence.\textsuperscript{166} Famous footnote eleven cites several social-scientific examples—including work by Dr. Kenneth Clark, a psychologist who studied the self-image of black and white students living in segregated conditions—as supporting segregation’s detrimental effects.\textsuperscript{167} The case challenged the “separate but equal” doctrine established in the 1896 decision of *Plessy v. Ferguson*.\textsuperscript{168}

\textsuperscript{162} Blumenthal, *supra* note 153, at 10-11.

\textsuperscript{163} Bernstein, *supra* note 160, at 9, 12.

\textsuperscript{164} Blumenthal, *supra* note 153, at 11.

\textsuperscript{165} 347 U.S. 483 (1954).


\textsuperscript{167} Brown, 347 U.S. at 494 n.11.

\textsuperscript{168} 163 U.S. 537 (1896).
Prior to the Supreme Court’s review, the National Association for the Advancement of Colored People’s (NAACP) litigation team had been uncertain about the use of “dubious psychological data” to support its campaign against public school segregation.\textsuperscript{169} Some attorney briefs were drafted without reference to the social science findings, believing Clark’s research to be irrelevant to the constitutional question presented by segregation.\textsuperscript{170} Others, including attorneys Robert Clark and Thurgood Marshall, however, did not give up on the significance of this type of research to pursue legal transformation, believing it would be part of the decision’s legacy.\textsuperscript{171} Clark persuaded Marshall to use the social science evidence at trial, and at the Supreme Court, they relied upon an approach used in \textit{Sweatt v. Painter},\textsuperscript{172} a lawsuit that successfully challenged segregation at the University of Texas Law School.\textsuperscript{173}

A single sentence distills the Supreme Court’s core conclusion in \textit{Brown}:

\begin{quote}
To separate [schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.\textsuperscript{174}
\end{quote}

Having buttressed its conclusion in a psychological argument and favorably citing a lower court decision linking state-sanctioned segregation and psychological harm, Chief Justice Warren Burger dropped a footnote referencing a list of social science sources,

\begin{footnotes}
\item[170] \textit{Id.} This was the belief of one member of the litigation team’s inner circle, James Nabrit.
\item[171] \textit{Id.}
\item[172] 339 U.S. 620 (1950).
\item[173] Moran, \textit{supra} note 169, at 521.
\item[174] \textit{Brown}, 347 U.S. 483, 494.
\end{footnotes}
including Clark’s research, purporting to support a finding of psychological harm arising from the “separate but equal” policy. 175 It relied on the social science evidence to strike down state-mandated segregation. 176

Brown ushered in a “new partnership between law and social science.” 177 More than fifty years later, scholars have suggested Brown is notable for its contribution to “law’s increasingly multidisciplinary character,” 178 a transformation that has greatly expanded “what counts as knowledge in the courtroom.” 179 It raised important questions concerning the role of social science evidence in constitutional litigation, 180 and also “reinforced scholars’ belief that research findings could be a powerful force for reform.” 181 Yet, even those scholars most optimistic about Brown’s promotion of social science evidence in law have admitted its continued multidisciplinary legacy is a mixed bag. According to Michael Heise, the decision “narrowed the doctrine, diluted the

175 Id. See also n.11.

176 Moran, supra note 169, at 521. In a 1956 article, NAACP attorney Jack Greenberg concluded that “the school segregation cases suggest an entirely different way in which the testimony of social scientists can be made useful to the courts.” Jack Greenberg, Social Scientists Take the Standard: A Review and Appraisal of Their Testimony in Litigation, 54 MICH. L. REV. 953, 962 (1956).

177 Moran, supra note 169, at 518.

178 Michael Heise, Brown v. Board of Education, Footnote 11, and Multidisciplinarity, 90 CORNELL L. REV. 279, 280 (2005) (“A review of what Brown accomplished, however, suggests that it fell far short of its goal of integrating public schools. To put the point more precisely, although Brown succeeded in launching a desegregation movement, both the decision and movement failed to adequately integrate public schools. Despite this failure, however, the Brown decision continues to profoundly influence education litigation.”).

179 Moran, supra note 169, at 524.

180 Moran, supra note 169, at 524.

181 Moran, supra note 169, at 521.
influence of broader notions of justice, and risked privileging social science evidence over background constitutional values."\(^{182}\)

**Juror Discrimination**

Desegregation is not the only area in which the Court has used—or potentially misused—social science evidence to draw conclusions. In other areas, “the Court has inconsistently adopted...[or] even refused to consider relevant social science data, instead choosing to rely on guidance from the ‘pages of human experience.’”\(^{183}\) At least one scholar has observed a “disjunction” between the Court’s knowledge of social science evidence and its reliance on it within juror procedure.\(^{184}\)

J. Alexander Tanford, Professor at the University of Indiana-Bloomington College of Law, determined, despite the justices’ awareness of scientific literature because it was cited in one of the opinions or presented in the briefs, they have “consistently ignore[d], distort[ed] and display[ed] hostility towards the empirical research, preferring to trust their own intuitions.”\(^{186}\) Tanford notes:

The Court’s refusal to base its trial process decision on psychology cannot be dismissed with the familiar claim that social science is inconclusive


\(^{184}\) Tanford, *supra* note 166, at 140.

\(^{185}\) See, e.g., *Burch v. Louisiana*, 441 U.S. 130 (1979) (determining the constitutionality of a five-out-of-six verdict in criminal case, sans mention of jury size or unanimity studies); *Marshall v. Lonberger*, 459 U.S. at 438 n.6 (deciding the effect of limiting instruction without reference to empirical research).

\(^{186}\) Tanford, *supra* note 166, at 140-41.
because there are always experts on both sides. With respect to some issues that have reached the Court, psychologists have arrived at a clear consensus about the effect that a procedure would have on the jury and the trial.\textsuperscript{187}

The Court’s most explicit and detailed examination of social scientific research within its juror discrimination jurisprudence occurred in \textit{Lockhart v. McCree}.\textsuperscript{188} That case involved a claim that death qualification—a procedure in capital cases allowing the prosecution to remove any juror opposed to the death penalty for cause—produces a jury in favor of the prosecution, thus violating a defendant’s right to a fair trial.\textsuperscript{189} The American Psychological Association (APA) filed an amicus brief concluding, “without credible exception, the research studies show that qualified juries are prosecution prone, unrepresentative of the community, and that death qualification impairs proper juror functioning….\textsuperscript{190} It also acknowledged, however, that “[t]he research clearly satisfies the criteria for evaluating the methodological soundness, reliability, and utility of empirical research.”\textsuperscript{191}

In his majority opinion for the Court, Justice William Rehnquist assailed the methodologies used in the social science evidence offered by the APA, finding there were “what we believe to be several serious flaws in the evidence upon which the courts

\begin{itemize}
\item \textsuperscript{187} Tanford, \textit{supra} note 166, at 139.
\item \textsuperscript{188} 476 U.S. 162 (1986).
\item \textsuperscript{189} Tanford, \textit{supra} note 166, at 145 (discussing death qualification).
\item \textsuperscript{190} Brief for Amicus Curiae the American Psychological Association in Support of Respondent, Lockhart v. McCree, 476 U.S. 162 (1986) (No. 84-1865) 1985 WL 669161 [hereinafter \textit{Lockhart Brief}].
\item \textsuperscript{191} \textit{Id.}
\end{itemize}
below reached the conclusion that ‘death qualification’ produces ‘conviction-prone juries’ …”\textsuperscript{192} According to Rehnquist:

McCree introduced into evidence some 15 social science studies in support of his constitutional claims, but only 6 of these studies even purported to measure the potential effects on the guilt-innocence determination...Eight of the remaining nine studies dealt solely with generalized attitudes and beliefs about the death penalty and others aspects of the criminal justice system, and were thus, only marginally relevant to the constitutionality of McCree’s conviction.\textsuperscript{193} 

Furthermore, Rehnquist contended, of the six relevant studies, three had been previously presented to the Court in connection with another case, and, at that point, they were described as “too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt....”\textsuperscript{194} The remaining three, Justice Rehnquist argued, “were based on the responses of individuals randomly selected from some segment of the population, but who were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant” and thus “did not even attempt to simulate the process of jury deliberation....”\textsuperscript{195} 

Anticipating these arguments, the APA acknowledged in its brief that, although some of these criticisms could not be ignored, the “variety of conditions under which the death-qualification experiments were conducted, the safeguards used, the number of replications and the complete absence of any data to the contrary justified the

\textsuperscript{192} \textit{Lockhart}, 476 U.S. at 168. 
\textsuperscript{193} \textit{Id.} at 170. 
\textsuperscript{194} \textit{Id.} 
\textsuperscript{195} \textit{Id.} at 171.
conclusion that death-qualified juries are in fact conviction-prone."\textsuperscript{196} However, Rehnquist concluded to the contrary that the studies were of no value because they were subject to criticism.\textsuperscript{197} He posited that even if the studies were methodologically sound, the psychologists’ interpretation of the data that death-qualification juries are significantly conviction-prone should be rejected.\textsuperscript{198} He substituted his own conclusion for that of the psychologists, holding “‘death qualification’ in fact produces juries somewhat more ‘conviction prone’ than ‘non-death-qualified juries.’”\textsuperscript{199}

Tanford suggests Rehnquist’s \textit{Lockhart} opinion “exaggerates the significance of the criticisms”:

\begin{quote}
[M]ost Justices [that] are hostile towards social psychology[] do not understand it, believe that empirical research on juror behavior is no more reliable than intuition and anecdotal evidence, and ultimately that the science of psychology has little or no place in the jurisprudence of trial procedure.\textsuperscript{200}
\end{quote}

Part D discussed the Court’s familiarity with social science evidence in other jurisprudential areas. Part D examines the Court’s trend toward constitutional empiricism.

\textbf{Trend toward Constitutional Empiricism}

Constitutional law is now in the “throes of a widespread empirical turn,” a “quantitative mood swing” consistent with a more general societal trend toward “all

\textsuperscript{196} \textit{Lockhart} Brief, \textit{supra} note 190, at 3.
\textsuperscript{197} \textit{Lockhart}, 476 U.S. at 173.
\textsuperscript{198} \textit{Id}.
\textsuperscript{199} Tanford, \textit{supra} note 166, at 147.
\textsuperscript{200} Tanford, \textit{supra} note 166, at 147.
things scientific.” While constitutional empiricism historically operated in the background of judicial “fact-finding,” empirical scientific research has begun to change the “posture of judicial fact-finding in constitutional theory.” It has created a growth of opinions filled with “judicial attempts to quantify” everything from “legislative purposes and predicates, constitutional powers, and even explicitly normative constitutional concepts.” However, “when standard doctrine turns from a categorical to a balancing approach, the courts necessarily assume the responsibility to make a more intensive investigation of the underlying facts.” The transformation toward becoming a finder-of-fact, rather than solely a determiner of law, may be just as Justice Antonin Scalia predicted more than twenty years ago.


202 Zick, supra note 201, at 119.


204 Zick, supra note 201, at 117.


Judge Richard Posner, an advocate of pragmatic legal philosophy, once criticized the Court’s historical lack of an “empirical dimension”: “Constitutional scholarship...is preoccupied on the one hand with Supreme Court decisions that are notably lacking in an empirical dimension and on the other hand with normative theories...that have no empirical dimension either....” He blamed what he saw as a deficiency in the legal academy on its proclivity toward discussion of theory to the exclusion of the building of empirical knowledge. According to Posner, “[c]onstitutional theory today circulates in a medium that is largely opaque to the judge and the practicing lawyer...It is the lack of an empirical footing that is and always has been the Achilles heel of constitutional law, not the lack of a good constitutional theory.”

the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law.” He does not necessarily agree with this development.

207 Richard A. Posner, Pragmatism versus Purposivism in First Amendment Analysis, 54 STAN. L. REV. 737, 738 (2002). Posner describes pragmatism as “a complex philosophical movement” concerned with established the “conditions under which scientific, moral and political beliefs can said to be true.” According pragmatism, “the test for knowledge should not be whether it puts us in touch with an ultimate reality (whether scientific, aesthetic, moral, or political) but whether it is useful in helping us to achieve our ends.” Id.


Yet, constitutional empiricism is “more than a judicial reliance on data,” it is increasingly the process through which “constitutional law is being made.”\(^{211}\) While it was once thought “unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique,”\(^{212}\) the shift in judicial attitude toward empiricism requires judges to maintain “proper scientific and technical understanding so that the law can respect the needs of the public.”\(^{213}\)

As reflected by these statements, both made by Justice William Brennan within a quarter-century, knowledge of scientific methods and principles now appears to be an “unavoidable judicial necessity in a variety of constitutional contexts.”\(^{214}\)

**What is Empiricism?**

Empiricism is one of several epistemologies or theories of knowledge.\(^{215}\) It holds that knowledge comes primarily from direct observation and experience.\(^{216}\) As contrasted with rationality, which “rests on the belief that people can understand through reason and intuition alone,”\(^{217}\) empiricism emphasizes the role of social science

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\(^{211}\) Zick, *supra* note 201, at 118 (continuing that “constitutional empiricism is both a method of constitutional interpretation and a judicial perspective on the proper mission of the courts in constitutional cases”).


\(^{214}\) Zick, *supra* note 201, at 141.

\(^{215}\) Robert Audi, Empiricism, *in Epistemology: A Contemporary Introduction to the Theory of Knowledge* 115 (3d ed. 1998) (discussing theories of knowledge). Mill held that ultimately there were only empirical truths. *Id.* at 116.


\(^{217}\) Id. *See also* Martyn Hammersley, Empiricism, *in Encyclopedia of Social Science Research Methods* 306 (Michael S. Lewis-Beck et al., eds., SAGE Pub. 2004).
evidence in the formation of ideas.\textsuperscript{218} Empirical and quasi-scientific methods include data compilations, hypothesis testing, falsification of causal claims, equations, ratios, and arguments over the nuances of sampling methodology and results.\textsuperscript{219} Data “run the gamut from rigorous social science and medical research, to lighter survey fare and data compilations, to collections of anecdotal accounts.”\textsuperscript{220}

Although resembling, in some aspects, its earlier form of constitutional balancing,\textsuperscript{221} the Court’s new empirical approach is a method of constitutional interpretation that “seeks to imitate scientific inquiry.”\textsuperscript{222} The trend toward constitutional empiricism places greater emphasis on empirical data, scientific methods and other scientific processes as a way to “inject neutrality and objectivity into constitutional decisionmaking.”\textsuperscript{223} Indeed, “courts appear to be attempting, through empiricism, to objectify the process of constitutional decisionmaking.”\textsuperscript{224} According to Professor Timothy Zick, “[q]uestions that in the past were answered conceptually or even with purportedly judicial common sense are not routinely addressed empirically.”\textsuperscript{225}

\textsuperscript{218} Sandra Mathison, Empiricism, in ENCYCLOPEDIA OF EVALUATION 125 (Sage Pub. 2005) (stating that empiricism “acknowledges only sensory knowledge as legitimate”); LARRY E. SULLIVAN, THE SAGE GLOSSARY OF SOCIAL AND BEHAVIORAL SCIENCES 177 (Sage Pub. 2009) (stating that empiricism is “[t]he epistemological view that knowledge must originate in sensory experience. Empiricists deny that knowledge may originate through nonsensory channels such as intuition and innateness”).

\textsuperscript{219} Zick, supra note 201, at 117, 123.

\textsuperscript{220} Zick, supra note 201, at 117.

\textsuperscript{221} Zick, supra note 201, at 121-22 (stating that this new form of empiricism, constitutional empiricism, is the Court’s “second empirical turn in constitutional law,” the first being the use of constitutional balancing, and describing some of the similarities between the two).

\textsuperscript{222} Zick, supra note 201, at 116.

\textsuperscript{223} Zick, supra note 201, at 120.

\textsuperscript{224} Zick, supra note 201, at 135.

\textsuperscript{225} Zick, supra note 201, at 120.
Benefits of an Empirical Perspective

An approach of this sort offers many benefits. Historically, and to this day, the Court relied on its own fact-finding as authority for its constitutional decisionmaking. It often equated its fact-finding process with more traditional sources of authority, “rarely recogniz[ing] any need to verify its factual suppositions” underlying its constitutional interpretations. 226 The Court, however, is now being confronted with “empirical data far richer and more accurate than the suppositions thoughtful reflection can provide.” 227 The increasing availability of empirical data provides the opportunity for commentators, litigants and others to “check the modern Court’s fact-finding” on the basis of empirical research that “sometimes supports, but more often contradicts the Court’s normative desires and ‘best guesses about the world.’” 228

Interaction between law and empirical science, thus, not only seeks to guide and restrain its constitutional discretion by holding the Court more accountable for its “normative judgments underlying its constitutionally based factual suppositions,” 229 it challenges the heightened sense of judicial deference once given to legislative judgments. 230 While legislatures were once given broad deference, under an empirical approach, they may now be required to confirm purported harms empirically. 231 Courts must not only examine the means chosen by the government to achieve its purpose, but

226 Faigman, Normative Constitutional Fact-Finding, supra note 203, at 549.
227 Faigman, Normative Constitutional Fact-Finding, supra note 203, at 545.
228 Faigman, Normative Constitutional Fact-Finding, supra note 203, at 545.
229 Zick, supra note 201, at 135.
230 Zick, supra note 201, at 166.
231 Zick, supra note 201, at 147-48.
perform in-depth judicial assessments of legislative materials such as legislative histories, committee reports, floor statements and even evidence gathered through committee and subcommittee hearings.\textsuperscript{232} They must make increasing use of the fulcrum of scientific, technical and other data now available, and also take an increasingly “more aggressive gatekeeping role” with respect to their assessments of it.\textsuperscript{233}

It is perhaps easy, then, to understand why a trend toward constitutional empiricism is attractive to federal judges, including members of the Supreme Court. Most jurists, after all, do not adhere to “overarching normative theory of constitutional interpretation,”\textsuperscript{234} but are in search of some “objective grounding as they ponder highly divisive, moral, and social issues.”\textsuperscript{235} The scientific precepts and conventions often associated with empiricism seem to provide judges with the “neutral principles” and “objective measures” that constitutional interpretation requires.\textsuperscript{236}

\textbf{Drawbacks or Setbacks of the Empirical Approach}

On the other hand, empiricism as a form of constitutional interpretation is not always favored. It has been characterized as “ill-suited to the discovery of constitutional

\textsuperscript{232} Zick, supra note 201, at 166.

\textsuperscript{233} Zick, supra note 201, at 120.

\textsuperscript{234} Zick, supra note 201, at 119.


\textsuperscript{236} Zick, supra note 201, at 120.
meaning.”\textsuperscript{237} Not only has empiricism been criticized for being “blind to the external influences on both the data being examined and the methods by which the courts are performing empirical functions,”\textsuperscript{238} it has also been censured for failing to contribute to the development of constitutional knowledge “in the same manner that empirical methods advance scientific knowledge.”\textsuperscript{239} It not only “filters evidence,” but “fails to provide standards for separating ‘good’ empirical results from ‘bad’ results and demands that hypotheses be legally ‘correct.’”\textsuperscript{240} The courts’ failures to distinguish between distinctively normative empirical propositions, additionally, may also result in their analyzing of empirical research much as they would more traditional sources of constitutional interpretation.\textsuperscript{241}

Moreover, Professor David Faigman has contended an empirical approach or the availability of empirical data does not ensure courts will make an empirical attempt.\textsuperscript{242} Additionally, it has been suggested there are instances when “the cost in time or in resources makes scientific data undesirable;” or “the uncertainty of scientific data

\textsuperscript{237} Zick, supra note 201, at 116.

\textsuperscript{238} Zick, supra note 201, at 116.

\textsuperscript{239} Zick, supra note 201, at 116.

\textsuperscript{240} Zick, supra note 201, at 117.

\textsuperscript{241} Zick, supra note 201, at 117. But see Faigman, Normative Constitutional Fact-Finding, supra note 203, at 549 (stating that “the principle reason for the Court’s inconsistent use of science is that it continues to approach factual questions as a matter of normative legal judgment rather than a separate inquiry aimed at information gathering”).

\textsuperscript{242} Faigman, Normative Constitutional Fact-Finding, supra note 203, at 612.
provides limited benefit.” Finally, as previously suggested, a court may not be “equipped to understand the esoteric presentations of the sciences.”

Part D has examined the Court’s trend toward constitutional empiricism. Part E analyzes the Court’s approaches to First Amendment doctrine, including the more recent suggestion of an approach requiring empirical proof-of-harm.

**Approaches to First Amendment Doctrine**

Most of First Amendment doctrine has centered on determining where the line should be drawn between the “countervales” of expression and the state’s regulation of it. Sometimes “the accommodation of conflicting interests has been achieved through the promulgation of a number of categories of speech that may be subject to regulation….In other cases, the Court [has] engaged in a more open and explicit balancing process in weighing the state’s interest against that of free speech.”

These statements, taken from Harvard Law Professor Owen Fiss’ famous tome, *The Irony of Free Speech*, demonstrate the variety of approaches the Court has taken when assessing the constitutionality of a government regulation. The distinction between these approaches is the subject of many scholarly articles.

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243 COHEN & GLEASON, supra note 89, at 110.

244 COHEN & GLEASON, supra note 89, at 110.

245 FISS, IRONY, supra note 2, at 5.

246 FISS, IRONY, supra note 2, at 5.

247 FISS, IRONY, supra note 2, at 5-6.

First Amendment doctrine has neither "settled on a consistent analytic approach"\(^ {249} \) nor adhered "to any consistent and clear set of doctrinal principles when analyzing content-based regulation of speech."\(^ {250} \) None may illuminate the muddle so well as Dean of Yale Law School Robert Post when he writes:

Constitutional law inhabits the tension between doctrine and decision. Courts must decide cases correctly, but they must also explain their decision in the language of doctrine….In recent years[, however,] something seems to have gone seriously amiss with the Supreme Court’s ability to elucidate its First Amendment decisions….\(^ {251} \)

“Although the pattern of the Court’s recent First Amendment decisions may well be (roughly) defensible,” Post continues, “contemporary doctrine is nevertheless striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech."\(^ {252} \) Perhaps the Court’s closest attempt at “articulating a unified First Amendment doctrine, "is achieved by categoricalism.\(^ {253} \) Through its categorical approach, the Court, first, determine whether a law is content-neutral or content-based


\(^{250}\) Id.


\(^{252}\) Id. at 1250. See also Robert Post, Understanding the First Amendment, 87 WASH. L. REV. 549, 549 (2012) [hereinafter Post, Understanding Doctrine] (asserting that "[w]e suffer from First Amendment hypertrophy").

and, then, assesses its constitutionality based on the category of speech being regulated.\textsuperscript{254}

**Categoricalism**

The Court’s most famous embracement of its categorical approach occurred in its “fighting words” case of *Chaplinsky v. New Hampshire*.\textsuperscript{255} In his opinion for the Court, Justice Frank Murphy wrote, “[t]here are certain well-defined and narrowly limited classes of speech...the prevention and punishment of which have never been thought to raise constitutional problems.”\textsuperscript{256} The rationale the Court employed from prohibiting the expression was that it constituted “no essential part of any exposition of ideas, and are such slight social value as a step to the truth that any benefit derived from them is clearly outweighed by the social interest in order and morality.”\textsuperscript{257}

Although the Court had never addressed the category known as “fighting words” that could be jettisoned from the First Amendment free zone, it appeared to find Walter Chaplinsky’s speech could be categorically banned because it was “valueless.” Since *Chaplinsky*, the list of unprotected categories of expression has been extended to encompass a variety of speech, and now includes obscenity, defamation, fraud, incitement to violence and fighting words and “speech integral to criminal conduct.”\textsuperscript{258}

\textsuperscript{254} *Id.*

\textsuperscript{255} 315 U.S. 568 (1942).

\textsuperscript{256} *Id.* at 571-72.

\textsuperscript{257} *Id.* at 572.

\textsuperscript{258} See Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-46 (2002) (stating that “freedom of speech has its limits” and “does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children”). Similarly, the Court in *United States v. Stevens* wrote that “the First Amendment has permitted restrictions upon the content of speech in a few limited areas,” including obscenity, defamation, fraud, incitement and speech integral to criminal conduct. 559 U.S. 460, 468 (2010).
More recent jurisprudence demonstrates the Court may not always immediately jettison low-value speech from First Amendment protection as *Chaplinsky* suggested.

*United States v. Stevens*,259 decided in 2010, had the opportunity to assess the validity of the Court’s historical categorical approach. It involved a challenge to a law prohibiting “crush videos,”260 portraying the “torture and killing of helpless animals,” said to “appeal to persons with a specific sexual fetish.”261 Defendant Robert J. Stevens was convicted for selling videos through his website, some of which depicted “pit bulls engaging in dogfights and attacking other animals,” or “the use of pit bull attacking a domestic farm pig.”262 The government argued in *Stevens* that “depictions of animal cruelty” that are “made, sold, or possessed for commercial gain” should be added to the categories of unprotected expression because they lacked the necessary “expressive value.”263

But the Court, led by Chief Justice John Robert, rejected this argument. It acknowledged, while there might be “some categories of speech that have been historically unprotected” that “have not yet been specifically identified or discussed,”264

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261 *Stevens*, 559 U.S. at 465.

262 *Id.* at 466.

263 *Id.* at 469. Quoting from the statute, the Court said that a depiction of animal cruelty was defined as “one ‘in which a living animal in intentionally maimed, mutilated, tortured, wounded or killed.’” *Id.* at 474. Tracking the *Miller v. California* test, involving regulation of obscenity, the law also exempted from prohibition “any depiction ‘that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.’” *Id.* Animals the videos may include are: cats, dogs, monkeys, mice and hamsters. *Id.* (citing H.R. REP. No. 106-397, at 2 (1999)).

264 *Id.* at 472.
depictions of animal cruelty were not among them. The decision to uphold an outright ban on expression in other cases could “not now be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.” It held the law was unconstitutional. Although Stevens may signify the Court’s general reluctance to carving out new categories of unprotected expression, it did not outright reject the potential that new categories of unprotected expression may be identified.

Professor Harry Kalven first fully enunciated what he perceived as a “two-level” theory of speech following the Court’s decision in Chaplinsky. It says that speech is given protection (or lack thereof) based on its relative “value.” While the categorical methodology has most often turned on the historical granting of protection to certain types of expression, First Amendment scholar Clay Calvert and his colleague suggest the recent judicial focus on “the direct nexus (if any) between the speech and the alleged harms to humans” in cases such as Alvarez and Stevens, illustrates the

265 **Id.**


268 In Stevens, Brown and Alvarez, for instance, the Court refused to extend the categories of unprotected speech to new types of content.


271 **Id.** at 4.
alleged “worthlessness” of expression, in and of itself, will not suffice moving forward “to render it outside the ambit of First Amendment protection.” They propose a new approach to categorical may emerge amid the Court’s jurisprudence as the Court looks for “additional ways to strengthen its constitutional decisionmaking” that will involve a “harm + history” analysis.

Most scholars have tended to criticize categoricalism as either being “too rigid to adequately explain the complexity of First Amendment law,” or unnecessarily stifling because it prohibits the weighing of interests, asking only “whether the case falls inside certain predetermined, outcome-determinative lines.” First Amendment scholar and President of Furman University Rodney Smolla wrote a has derisively contended that most of modern First Amendment law has been “plagued” by “the ghost of Chaplinsky.” According to Smolla: “[p]urely as a description of contemporary First Amendment case outcomes, the Chaplinsky standard is all but worthless...” At least scholar has praised the categorical approach for providing “tools of systematic thinking” that allow scholars and jurists to “think clearly about a number of hard problems in First Amendment methodology.”

272 Id. at 4 (quoting the Court’s majority opinion in Stevens). According to the Stevens Court, the government may not “imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.” United States v. Stevens, 559 U.S. 460, 471 (2010).


274 Huhn, Scienter, supra note 205, at 194.

275 Blocher, supra note 248, at 383.

276 Smolla, Roiling Sea, supra note 249, at 500.

277 Id.

Unlike categorization, which “binds a decisionmaking to respond in a determinative way to the presence of delimited facts,” some scholars suggest that a balancing approach—which begins by weighing an individual’s interest in asserting a right against the government’s interest in regulating it—and then asks which is weightier—better serves and respects First Amendment interests. Indeed, some have suggested the apparent progression from categorization to increasing use of balancing in the First Amendment jurisprudence may relate to the failure of such a “clear-cut doctrine” to take into account the complexities and nuances arising within free speech cases.

Ad-hoc Balancing

The Court’s use of a balancing approach, which began as early as the 1930s, had a “respectable intellectual pedigree” with proponents such as Justice Oliver Wendell Holmes and former Harvard Law School dean and legal philosopher Roscoe Pound, and was also consistent with other intellectual movements of the time.

279 Blocher, supra note 248, at 381.

280 Id. at 802-03 (describing the justices’ frustration with First Amendment doctrine).

281 Aleinikoff, supra note 248, at 960.

282 Aleinikoff, supra note 248, at 959-60.

283 Aleinikoff, supra note 248, at 961 (explaining that “[t]he attractiveness of balancing went beyond its practical utility”). According to Aleinikoff:

[B]alancing “was the manifestation in legal studies of a far broader intellectual movement that dominated the first half of the twentieth century. Darwinism, non-Euclidian geometry, and relativity theory had shaken the foundations of formalism in the traditional sciences; the impact in the social sciences was dramatic. Universals, logically deducted from fixed categories, gave way to culturally-based small ‘t’ truths. The new science demanded empirical observation of the ways in which societies functioned. The balancing judge could assume the role of a social scientist, trading deductive logic for inductive investigation of interests in a social context.

Aleinikoff, supra note 248, at 961.
Under the approach, the Court did not need to “commit to any overall theory of a constitutional provision,” but had “unbounded discretion to weigh the universe of interests” through a “case-by-case, common law approach that accommodated gradual change and rejected absolutes.”

Frustrated with standard First Amendment doctrine, including categoricalism, to address the “multi-dimensional contours of First Amendment problems” Justice John Paul Stevens wrote, in his 1992 concurring opinion in R.A.V. v. City of St. Paul, that “whatever the allure of absolute doctrines, it is just too simple to declare expression ‘protected’ or ‘unprotected,’ or to proclaim a regulation ‘content-based’ or ‘content-neutral.’” Yet, even a relative balancing of interests in First Amendment law, some argue, may not provide sufficient speech protection because it “treats free expression as an ordinary interest to be weighed like any other.” At least some scholars have criticized the application ad-hoc balancing in First Amendment doctrine.

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284 Aleinikoff, supra note 248, at 961.
285 Aleinikoff, supra note 248, at 961 (asserting that “[t]he outcome of the case would turn on a careful analysis of the particular interests at stake”).
286 Wilson Huhn, Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus, 79 Ind. L.J. 801, 802-03 (2004) [hereinafter Huhn, Assessing the Constitutionality] (“Over the past decade a number of Justices—in particular, John Paul Stevens, Stephen Breyer, David Souter, and to a lesser extent, Sandra Day O’Connor and Anthony Kennedy—have expressed dissatisfaction with standard First Amendment doctrine” that “relies heavily on categorical analysis.”).
288 Id. at 431 (Stevens, J., concurring).
290 Aleinikoff, supra note 248, at 943. Schauer, Categories, supra note 278, at 299 (describing the “spectrum” of discretion afforded judges by different forms of first amendment analysis in favor of a categorical approach); Laurence Tribe, Constitutional Calculus: Equal Justice of Economic Efficiency?, 98 Harv. L. Rev. 592, 607-08 (1985) (criticizing the Supreme Court’s cost-benefit analysis generally and as applied in the context of the Fourth Amendment specifically).
J. Alexander Aleinikoff, former dean at Georgetown University Law Center, has questioned the form and implications of balancing as a method of constitutional interpretation. According to Aleinikoff:

The Court, under any of the version of the balancing metaphor, has not adequately explored the “mathematics” of the balancing. As a way to avoid problems in calculation, it has generally—with little theoretical justification—adopted scaled-down equations that do not take into account all the possible interests. Furthermore, recognizing the difficulty of developing credible and external standards of evaluation, the Court has moved to even more stylized versions of balancing in an attempt to demonstrate “objectivity.”

Professor Laurent B. Frantz has likewise observed, not only does balancing “fail to protect freedom of speech, but it becomes a mechanism for rationalizing and validating the kinds of governmental action intended to be prohibited...[it] does not permit the First Amendment to perform its function as a constitutional limitation...” In contrast, others have suggested that only a weighted or a preferred-position approach to judicial review properly respects First Amendment values.

Preferred-position Balancing

The origins of the preferred position doctrine are usually traced to Chief Justice Harlan Stone’s suggestion in United States v. Carolene Products Co. that “there may be a ‘narrower scope’ for operation of the presumption of constitutionality, when

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291 Aleinikoff, supra note 248, at 1003.


293 See DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 42-47 (2011-12) (reviewing First Amendment theories including the absolutist theory, ad-hoc balancing theory and the preferred position balancing theory). Justice Hugo Black was perhaps the most prominent advocate of an absolutist approach to the First Amendment, rejecting any abridgement of freedom of speech. See e.g., Barenblatt v. United States, 360 U.S. 109, 141 (1949) (Black J., dissenting) (opining that “I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process”).

294 304 U.S. 144 (1938).
legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments.” Under a preferred position approach, a government regulation of speech is presumed unconstitutional unless the government can show that the censorship is justified. Numerous courts have upheld this position.

Chief Justice John Roberts criticized application, in his majority opinion in Stevens, of what he called “a free-floating test for First Amendment coverage” based on an “ad hoc balancing of relative costs and benefits.” The Court proffered what appeared, instead, to be a more speech-protective approach, weighting the scale in favor of freedom of expression. It wrote, “[t]he First Amendment itself reflects a judgment by the American people that the benefits of restriction on the Government outweigh the costs.”

The Court’s adherence to a preferred position of the First Amendment was also highly visible in Alvarez. According to Professor Smolla, the Court’s plurality in Alvarez presented “three very different judicial sensibilities regarding the preferred position of freedom of speech in the constitutional hierarchy.”

1. “the view, represented by Justice [Anthony] Kennedy’s plurality opinion, that freedom of speech occupies an exalted position, rarely trumped by societal values;”

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295 Id. at 152 n.4.


297 Stevens, 559 U.S. at 470.

298 Id. According to Justice Roberts, although the Court has “identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.” Id. at 471.


300 Id. at 500-501 (referencing Alvarez, 132 S. Ct. at 2551-56) (Breyer, J., concurring).
2. “the view, represented by Justice [Stephen] Breyer’s concurrence, that freedom of speech deserves some elevated stature in the constitutional scheme, but not a stature so elevated that it cannot be overtaken by other well-crafted laws vindicating other significant society values;” and

3. “the view, represented by Justice’s [Samuel] Alito’s dissent, that speech may be divided into that speech that serves some plausible positive purpose, which is deserving of constitutional protection, and that speech which advances no legitimate end worth crediting, yet is highly offense to good order and morality, which it not deserving of any protection.”

Yet, the inability of the Court to agree on a single rationale such as in *Alvarez*, according to Smolla, creates “instability and unpredictability for courts tasked with judicial review of speech regulations.” It also poorly serves “legislative bodies in drafting laws that have any potential of being upheld.” Questions continue to abound regarding whether a specific approach is appropriate in a particular type of case, and if not, specifically to what type of cases it applies. Yet, despite these “difficult analytic and operational problems,” courts appear to show no sign of abandoning balancing.

**Empirical Balancing**

Similar to the evolution felt generally by American legal doctrine throughout the nineteenth and twentieth centuries, so too is First Amendment doctrine now undergoing a sea change from a “formalistic categorical approach” to an empirical balancing in its

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301 *Id.* at 501 (referencing *Alvarez*, 132 S. Ct. at 2556-65) (Alito, J., dissenting).


304 Frantz, *First Amendment in the Balance*, *supra* note 248, at 1424.

305 Aleinikoff, *supra* note 248, at 972.

306 Wilson Huhn, *Assessing the Constitutionality*, *supra* note 248, at 802 (stating that “American legal doctrine evolved from a formalistic categorical approach that dominated legal thinking during the nineteenth century to a realistic balancing approach that developed over the course of the twentieth century”) (emphasis added). According to Huhn, “A similar process is now occurring in the constitutional doctrine governing freedom of expression—a process that may culminate in the adoption of what United States Supreme Court Justice John Paul Stevens calls a ‘constitutional calculus.’” *Id.*
determination of a law’s unconstitutionality.\textsuperscript{307} Professor Wilson Huhn of the University of Akron Law has poignantly described the transformation this way:

Over the last decade there has emerged a simple and striking trend in the reasoning of the Supreme Court regarding freedom of expression. Instead of focusing on the right to freedom of expression, the Court is increasingly turning its attention to an analysis of harm that may result from allowing the speech to remain unregulated. In place of analyzing what the law is, the Court is attempting to determine the facts that would justify regulation of speech. Rather than conducting a legal analysis, the Court is engaging in an empirical inquiry.\textsuperscript{308}

In this instance, it may be said the Court is “replacing categories with evidence.”\textsuperscript{309}

Although “First Amendment jurisprudence has developed to the point where complex factual assessments are necessary for making determinations of constitutionality,”\textsuperscript{310} it is only likely, given the suggested trend toward empiricism, the Court will continue to confront difficult questions regarding the admissibility and sufficiency of evidence to support or reject arguments of constitutionality.\textsuperscript{311} These questions have most often involved the assessment of the injury and the evidence required by the government to squelch the speech in question. Obfuscating the approach, however, “is the absence of standards governing the nature of the evidence and the quantum of proof necessary to sustain the constitutionality of laws regulating

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\textsuperscript{307} See id. See also infra Part 2.E. (discussing empiricism).
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\textsuperscript{308} Huhn, \textit{Scienter}, supra note 205, at 194 (describing the Court’s trend toward an “empirical inquiry,” as opposed basic legal analysis).
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\textsuperscript{309} Huhn, \textit{Assessing the Constitutionality}, supra note 248, at 851.
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\textsuperscript{310} Huhn, \textit{Scienter}, supra note 205, at 200.
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\textsuperscript{311} Id. at 194, 201; see also Paul Horwitz, \textit{The First Amendment’s Epistemological Problem}, 87 WASH. L. REV. 445, 446-47 (2012) (discussing some of the difficult questions regarding the “nature, legitimacy and sources of knowledge” confronted by First Amendment theory and doctrine due to emerging epistemological themes).
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speech.” Obfuscating the approach, however, “is the absence of standards governing the nature of the evidence and the quantum of proof necessary to sustain the constitutionality of laws regulating speech.” The situation in the Turner Broadcasting Systems I and II paints the picture clearly.

In Turner Broadcasting Systems, Inc. v. Federal Communications Commission I and II, the Court was asked to determine whether Congress had sufficient evidence to support its prediction that the “must carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992 imposed on cable operators were necessary to preserve local broadcasting. The Court had no trouble accepting Congress’s asserted interests were substantial, but a plurality would not accept Congress’s prediction that the must-carry rules would in fact advance any or all of the government’s stated interests. Rather, the Court found that under its “independent

312 Huhn, Scienter, supra note 205, at 195.
313 Huhn, Scienter, supra note 205, at 195.
316 Turner I, 512 U.S. 632-34 (summarizing detailed congressional findings).
317 Id. at 662-63. According to the Court’s opinion, the government’s stated interest were: “preserving the benefits of free local broadcast television,” “promoting the widespread dissemination of information from a multiplicity of sources” and “promoting fair competition in the market for television programming.” Id. at 662.
318 See id. at 667.
319 See id. (“Without a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty, we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions made by these appellants.”).
judgment of the facts bearing on an issue of constitutional law,\textsuperscript{320} its requirement of “substantial evidence” was not supported by the voluminous testimony, statistics and studies on the record to support its legislative predictions.\textsuperscript{321} It was not until upon remand in \textit{Turner II}—as well as an additional eighteen months of legislative fact-finding “yielding a record of tens of thousands of pages” of evidence—that the Court said it was convinced of the merits of Congress’s prediction.\textsuperscript{322}

In \textit{City of Erie v. Pap’s A.M.},\textsuperscript{323} former Justice David Souter identified the problem of establishing a standard for measuring the quantum of proof the government must adduce to support legislation restricting expression. Justice Souter’s concurrence in \textit{Pap’s A.M.} found that several recent cases had “confronted a need for factual justification” to satisfy the burden of proof, but that the Court had not identified “with any specificity the particular quantum of evidence” that would be required.\textsuperscript{324} He became dissatisfied with the sufficiency of the evidence the government had offered in \textit{City of Los Angeles v. Alameda Books}\textsuperscript{325} to support a zoning ordinance dispersing adult businesses.\textsuperscript{326} Finding that the type and burden of proof often “varies with the point that

\begin{itemize}
\item \textsuperscript{320} \textit{Id.} at 666 (asserting that a judicial role in cases implicating First Amendment rights is “to assure that in formulating its judgments Congress has drawn reasonable inferences based on substantial evidence”).
\item \textsuperscript{321} \textit{Id.} at 664-68.
\item \textsuperscript{322} \textit{Turner II}, 520 U.S. at 182 (1997). The Court thus concluded that the “expanded record contains substantial evidence to support Congress’ conclusion that enactment of must carry was justified by a real threat to local broadcasting’s economic health.” \textit{Id.} at 187.
\item \textsuperscript{323} 529 U.S. 277 (2000) (Souter, J., concurring in part and dissenting in part).
\item \textsuperscript{324} \textit{Id.} at 311.
\item \textsuperscript{325} 535 U.S. 425 (2002).
\item \textsuperscript{326} \textit{Id.} at 458-59.
\end{itemize}
has to be established” as well as its availability, he expressed the concern that the Court “must be careful about substituting common assumptions for evidence.”

In response to the greater intrusions upon freedom of expression demonstrated by government regulations targeting “harming” speech, Professor Huhn has asserted, “courts must insist that the government prove high levels of scienter, more immediate connections between the speech and harm, and more serious harms before laws suppressing speech may be upheld.”

Professor Huhn has proposed multi-factor balancing analysis that expounds upon Justice Stevens’ approach in R.A.V. In R.A.V., Justice Stevens’ proposed a “constitutional calculus” under which the Court would analyze a number of factors—including content, character, context, nature and scope—to determine the value of the expression. On the opposite scale, Professor Huhn suggests the “quantum of proof” balanced against the “value of expression”—reached by assessing the expression under Stevens’ multi-factor approach—comprises three elements: 1) scienter (“the state of mind that a speaker must have before he or she may be punished for expressing a certain idea or using a medium of expression”); 2) causation (“the likelihood that harm

327 Id. at 458.
328 Id. at 459.
329 Id.
330 Huhn, Scienter, supra note 205, at 127.
332 Id. at 431 (Stevens J., concurring).
will result from the speaker’s actions”); and 3) harm (consisting of the nature and degree of the injury the government is seeking to prevent).\textsuperscript{333}

Professor Michael Hoefges of the University of North Carolina-Chapel Hill examined the level of proof of causation required by the Court in the relatively narrow commercial speech doctrine.\textsuperscript{334} In his article on causation of harm, he traces the evolution of the third factor of a test established by \textit{Central Hudson Gas & Electric v. Public Service}\textsuperscript{335} for determining when such restrictions violate the First Amendment.\textsuperscript{336} The third \textit{Central Hudson} factor requires “the government to demonstrate that its regulation \textit{directly advances} a substantial regulatory goal in a direct and material way.”\textsuperscript{337} Professor Hoefges observes, the Supreme Court has considered the extent of the evidentiary record under the third \textit{Central Hudson} factor in more recent commercial speech cases such as \textit{Rubin v. Coors Brewing},\textsuperscript{338} \textit{Liquormart v. Rhode Island},\textsuperscript{339} \textit{Greater New Orleans Broadcasting v. United States}\textsuperscript{340} and \textit{Lorillard Tobacco Co. v. Reilly}.\textsuperscript{341} Yet, he notes, the Court in each of these cases abandoned its deferential

\begin{thebibliography}{1}
  \bibitem{333} Huhn, \textit{Scienter, supra} note 205, at 127-28.
  \bibitem{335} 447 U.S. 557 (1980).
  \bibitem{336} The four-part \textit{Central Hudson} test asks: 1) whether the speech at issue concerns lawful activity and is not misleading; 2) whether the asserted government interest served by the restriction is substantial; and if so, 3) whether the regulation \textit{directly advances} the governmental interest asserted; and 4) whether it is not more extensive than is necessary to serve that interest. \textit{Id.} at 566 (emphasis added).
  \bibitem{337} \textit{Id.} at 306 (emphasis added).
  \bibitem{338} 514 U.S. 476 (1995).
  \bibitem{339} 517 U.S. 484 (1996).
  \bibitem{340} 527 U.S. 173 (1999).
  \bibitem{341} 533 U.S. 525 (2001).
\end{thebibliography}
approach in which it had “accepted the government’s claim of direct advancement with little or no evidence” at all.342 “Even so,” Hoefges continues, “the Court’s approach in all of these cases is mitigated by the rather loose evidentiary standard it has taken when determining the sufficiency of evidence supporting claims of direct advancement under the third factor.”343

Although Hoefges questions the quality and sufficiency of evidence presented by the government to satisfy its interest, Professor Paul Horwitz takes the opposite perspective, criticizing the Court’s requirement of substantial proof that advertising increases consumption of harmful products such as alcohol, tobacco and gambling.344 He suggests the Court is seemingly “dismissive” of government justifications for commercial speech regulation of such harmful products, despite “the empirical and psychological research showing the preference-altering effects of that speech.”345 He queries whether the assessment of the speech-harm risk might not be better placed in the hands of “legislators and regulators.”346

Part E has described approaches to First Amendment doctrine, including a recent suggestion of a trend toward empiricism imposing greater evidentiary burdens of injury-producing speech before it may be squelched. Part F describes the interdisciplinary construct of the mass third-person effect: what it is, how it can be used

342 Hoefges, supra note 334, at 306 (emphasis added).
343 Horwitz, Risk Analysis, supra note 208, at 56.
344 Horwitz, Risk Analysis, supra note 208, at 56-61.
345 Horwitz, Risk Analysis, supra note 208, at 59.
346 Horwitz, Risk Analysis, supra note 208, at 61.
to explain government regulation of potentially harmful speech and why this sort of legislation is perhaps unwarranted.

**Third-Person Effect: An Explanation for Government Censorship**

In his seminal article *The Third Person Effect in Communication*, sociologist W. Phillips Davison first described what he perceived as the third-person effect. Davison cited a number of historical accounts, including a controversy during World War II in which the Japanese dropped leaflets over U.S. locations in Iwo Jima declaring it a “white man’s” war. He alleged the reason the troops pulled out the following day was due to the white officers’ perception that the black troops would desert.

In an article detailing his observations, Davison wrote, “individuals who are members of an audience that if exposed to a persuasive communication...will expect the communication to have a greater effect on others than on themselves.” According to Davison, “[i]n the view of those trying to evaluate the effects of communication, its greater impact will not be on ‘me’ or ‘you’ but on ‘them’—the third persons.”

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348 Others include his study of the role of the West German press in forming Bonn’s foreign policy; Davison; television’s ability to make children ask parents to buy commercial products; effect of political campaigns on the voting habits in the New Hampshire primary before the 1980 election. *Id.* at 4-7.

349 *Id.* at 1.

350 *Id.*

351 *Id.* at 3.

352 *Id.*
Perceptual Component

The third-person perception occurs when perceived media effects are greater for others than for oneself. Specifically, the theory holds, “people will tend to overestimate the influence that mass communications have on the attitudes and behaviors of others.” According to Richard Perloff, professor of communication at Cleveland State University and who has published widely on the topic, “third-person perceptions are rooted in observers' beliefs that audience members are exposed to media content, coupled with the assumption that with greater exposure comes stronger effects.” Professor James Tiedge and colleagues observed, “most people appear to be willing to subscribe to the logical inconsistency inherent in maintaining that the mass media influence others considerably more than themselves.” The third-person effect, thus, “[t]urns conventional media effects theorizing on its head:”

Instead of looking at media effects on beliefs, it examines beliefs about media effects...Indeed, it paradoxically posits that one of the strongest influences of media is the presumption that they have influences, stipulating that this presumption can itself engender a series of actions that would have been unthinkable in the absence of mediated communications.

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354 Id. at 252. See also, e.g., Richard M. Perloff, Perceptions and Conceptions of Political Media Impact: The Third-Person Effect and Beyond, in THE PSYCHOLOGY OF POLITICAL COMMUNICATION 77 (Ann N. Crigler ed. 1996) [hereinafter, Perloff, Perceptions] (positing that the third-person effect is a result of a tendency to underestimate media effects on oneself, overestimate effects on others, or some combination of the two).

355 Perloff, Mass Media, supra note 353, at 258.


357 Perloff, Mass Media, supra note 353, at 252.

358 Perloff, Mass Media, supra note 353, at 252.
The third-person effect is a cross-disciplinary construct that is “root[ed] in venerable communication concepts and respected research traditions.”\(^\text{359}\) By focusing on the intersection between public opinion, communication and psychological processes, it bridges the gap between sociology, psychology and perceptions of social reality.\(^\text{360}\) Not only does there appear to be historical precedent for the effect, but extensive modern research gives it credence.\(^\text{361}\) In fact, in only a very short time, it has become the fifth most popular theory in contemporary communication research.\(^\text{362}\)

While support for the effect involving messages with positive attributes (where an effect is linked with a positive message) is unclear, research had demonstrated a third-person effect exists whether the message was explicitly intended to be persuasive.\(^\text{363}\) Perhaps the strongest indicator of an effect occurs where the message is “negative”—in that it is considered to have a bad influence or be less socially desirable. For instance,


\(^{361}\) See Vincent Price et al., *Third-Person Effects of News Coverage: Orientations Toward Media*, 74 JOURNALISM & MASS COMM. Q. 525, 525 (1997) (writing that “the effects have been well documented by more than a decade of empirical study”). A recent review of the studies of the third-person perception has shown that fifteen out of sixteen found that people perceived greater media effects on others than on themselves. Perloff, *Perceptions*, supra note 354, at 342.


Eveland and McLeod found the more negative a message is perceived, the wider the gap between its perceived influence on self and others.  

**Behavioral Component**

Not only did Davison perceive perceptual implications of media effects, he believed it could have behavioral ramifications. According to Davison:

> [T]he impact that they expected this communication to have on others may lead them to take some action. Any effect that the communication achieves may thus be due not to reaction of the ostensible audience but rather to the behavior or those who anticipate, or think they perceive, some reason on the part of others.

The behavioral component of the third-person perception, thus, takes the hypothesis one-step further. It holds that “individuals’ expectations of media impact can induce them to consider action to thwart anticipated effects.”

A majority of research on the behavioral component, however, has failed to measure actual behavior. Instead, much of the research has operationalized the behavior as an individual’s *willingness* to censor the negative effects of certain types of

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365 Id.

366 Davison, supra note 347, at 3 (emphasis added).


content. This may be for several reasons, including: 1) the difficulty of proving causality between a message and an individual’s behavioral reactions; 2) the path from message to attitude can be complex and multi-layered; and 3) speculation over censors’ failure to admit they have been adversely affected by the content.

Professor Albert Gunther, professor at the University of Wisconsin-Madison, observed that people who perceived a greater self-other disparity in the impact of X-rated films and pornographic magazines were more likely to support censoring them. Douglas M. McLeod and colleagues identified, in a study on the relationship between the third-person perception and rap lyrics, that support for censorship “was strong despite controlling for several correlates of censorship (gender, conservatism, social desirability of the content and knowledge of and liking of the content in question).” Additionally, a study by communication professor Jennifer Lambe at the University of Delaware similarly found support for a correlation between censorship and a variety of media content. But she identified an additional caveat: it is possible that people hold

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371 Gunther, X-Rating, supra note 363, at 27, 35; see also McLeod et al., Rap Lyrics, supra note 363, at 165 (indicating that larger third-person perceptions were positively associated with support for censorship of certain types of rap music); Rojas et al., supra note 355; Michael B. Salwen, Perceptions of Media Influence and Support for Censorship: The Third-Person Effect in the 1996 Presidential Election, 25 COMM. RES. 259 (1998).

372 McLeod et al., Rap Lyrics, supra note 363, at 168.

373 Lambe, supra note 76, at 217-19.
inconsistent views regarding regulation of expression, and, thus, it is important to conceptualize censorship attitudes as “multifaceted.”  

A major criticism of the third-person effect, on the other hand, is that it may be more of a “hypothesis” rather than a “full-blown theory.”  

Despite the “myth” of massive media effects, evidence accumulated to date has provided little indication of a sizable impact of media content on viewers’ thoughts, feelings, or actions.  

Research on the third-person effect has also been monished for failing to provide an “explanatory mechanism.”  

Namely, it has been “primarily concerned with relations between input variables (e.g., media information and its characteristics) and output variables (e.g., attitudes, beliefs, behavior), with little consideration of the cognitive processes that might mediate these relations.”

Part F has reviewed the third person effect. It sets the foundation for discussion, following review of Supreme Court proof-of-harm doctrine, of ways in which knowledge of the mass communication concept might better help judges evaluate legislative claims of speech-based harm. Chapter 3 provides a description of the methodology used to select cases included in its analysis.

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374 According to Lambe, although “it is possible that people truly do not hold consistent attitudes about free expression,” what is clear that “the examination of relationships with predictor variables supports the notion that it is important to conceptualize censorship attitudes as multifaceted in nature.” Lambe, supra note 76, at 219.

375 Perloff, Mass Media, supra note 353, at 252.


CHAPTER 3
METHODOLOGY

Chapter 3 is comprised of three parts. Part A describes this study’s process of locating relevant manual and electronic legal and communication resources. Part B summarizes methodology employed for selecting the U.S. Supreme Court cases underlying its proof-of-harm analysis. Part C examines the use of typologies and rubrics as analytic tools and makes some initial observations the ones it proposes in Chapter 5.

Communication and Legal Resources

This study relies upon both electronic and manual resources in communication and law. The databases include WestLaw Next, LexisNexis, the communication research databases of Ebsochost Discovery Service, Communications and Mass Media, and Communications & Mass Media Complete located through the University of Florida online library portal, University of Florida library catalog and web engine searches.

Journal articles and other relevant secondary materials on First Amendment, constitutional law and other legal issues were located using the primary legal research databases of Westlaw (WestLaw Next) and LexisNexis, as well as University of Florida library catalog and databases for journal publications and books. Within WestLaw, primary and secondary material was found by running searches within the “Cases” and “Journals and Law Reviews” search functions.

Research on the third-person effect and other communication-related topics were located through the Ebsochost Discovery Service, Communications and Mass Media and, Communications & Mass Media Complete databases on the University of Florida online library portal. A search for third-person-effect-related communications articles
was performed within particular publications geared toward journalism and mass communications—specifically, *Journalism & Mass Communication Quarterly* and *Journal of Communication*, known for being leading publishers of research in the field of journalism and communications. Searches within these publications were performed using the EbscohostEJS (Electronic Journal Service) database, allowing a researcher to search a particular journal by name. Following the search, the author browsed the results for material of potential relevance to the research question.

Given that at least a few legal scholars have written on the impact of the third-person effect to produce censorship legislation, a search of the Westlaw and LexisNexis Secondary Source Journals and Law Reviews database was also conducted using the third-person effect keywords of “third-person effect” AND “communication;” and “third-person effect” AND “censorship” to identify legal scholarship on the topic, although the search yielded fewer articles of relevance.

Books on the First Amendment, free speech, free speech theory, and speech and harm, including those published by well-known First Amendment scholars, such as Cass Sunstein, Lee Bollinger, Owen Fiss and Robert Post; as well as books published on the third-person effect, including those related to the broader topic of media effects studies, were located using the University of Florida library catalog. Books further related to the specific topics of scholarly interest were found by scanning the library’s shelves surrounding identified catalog numbers.

Part A discussed the legal and communication resources used to conduct this research. Part B describes the methodology for selecting the U.S. Supreme Court First Amendment cases examined in Chapter 4.
Selection of U.S. Supreme Court Cases

A search on Westlaw Next, a premier legal research database, for “First Amendment” within the U.S. Supreme Court database of “Federal Cases by Court” produced 6,511 results. Comparatively, a similar search on the competitive legal research database of LexisNexis for cases by the U.S. Supreme Court related to the First Amendment produced 1,427 results.¹ These search results are too large to effectively achieve the goals of this work. Alternatively, casebooks provide a workable list of cases providing foundational knowledge on case law of a specific topic. They “introduce students to the main lines of [] doctrine, [] place that doctrine in its historical setting...and its social setting...and [] ensure that students connect particular doctrines and lines of doctrinal development with more general approaches to [] interpretation....”²

There are a number of casebooks published on First Amendment law, including:


¹ The researcher went to the LexisNexis database, selected “Cases” under the “Look Up a Legal Case” headline, set the parameters to search only U.S. Supreme Court cases and entered the keyword “First Amendment,” including the restrictive use of the quotation marks around First Amendment, into the search box.


³ See id. at xi-xx for a list of those cases.

⁴ KATHLEEN SULLIVAN & NOAH FELDMAN, FIRST AMENDMENT LAW (5th ed. Foundation Press 2013).

Russell Weaver, Catherine Hancock, Donald Lively and John Knechtle. This list presents those casebooks published most recently, including two published in 2013. Consequently, they will provide the most current discussion of First Amendment case law.


The part of Krotoszynski and colleagues’ book, The First Amendment: Cases and Theory, on freedom of expression is apportioned into twelve chapters: 1) The History, Values and Content of the First Amendment; 2) Setting the Modern Stage—Incitement and the “Clear and Present Danger” Test; 3) Content-Based Discrimination; 4) Content Neutrality and the Regulation of Speech on Government Property; 5) Symbolic Speech

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Chapters within casebooks may then be divided into subparts. For instance, Chapter 1 within Sullivan and Feldman’s casebook is divided into eight sections, encompassing: 1) Free Speech: An Overview; 2) Incitement to Violence; 3) Fighting Words; 4) Injury by Speech—Group; 5) Injury by Speech—Individuals; 6) Sexually Explicit Expression; 7) Speech and New Media; 8) Commercial Speech.

To help narrow the cases selected for analysis, the author browsed the selection of cases included in the First Amendment casebooks mentioned above; deployed a survey of books published on the intersection of speech and harm; and performed a more targeted search of the legal databases using identified keywords to select those cases most on point to the topic of this paper. The cases chosen for analysis appeared most repetitively within relevant sections of the selected casebooks, combined and cross-verified with a search for specific keywords in the “Supreme Court Cases” search function within the legal databases mentioned above.

This study adopts the classification structure adopted by Stone and colleagues. According to Stone and colleagues, the government pursues regulation of expression under one of two rationales: its “dangerousness” or “low value.” Each rationale is divided into four subparts. Under the rationale of targeting expression because of its dangerousness are the categories known as: 1) incitement to violence/unlawful action;
2) speech that threatens 3) speech provoking a hostile audience reaction; and 4) the disclosure of “dangerous” information. The cases falling under each one of these categories appears in Table 3-1. Speech the government may attempt to regulate because of its alleged “low value,” additionally, comprises four categories: 1) false statements of fact; 2) obscenity; 4) the lewd, profane and indecent; and 5) hate speech and pornography. Each of the cases related to these categories is represented in Table 3-2.

Opinions on a broad spectrum of other First Amendment and constitutional issues appear in the casebooks but were exempted from discussion as beyond the purview of this study. These cases may involve challenges: due to vagueness and overbreadth; on prior restraints; the free exercise and establishment clauses; speech falling under the commercial speech doctrine; or on intellectual property issues. Other cases likewise exempted from discussion implicate the First Amendment

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8 An example of such a case is Gooding v. Wilson, 405 U.S. 518 (1972) (involving a challenge to a statute punishing “any [opprobrious] words or abusive language, tending to cause a breach of the peace”).


12 For a discussion of those harms, see, e.g., Pamela Samuelson & Krzysztof Bebenek, Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases, 6 I/S J.L. & POL’Y INFO. SOC’Y (2010).
within the context of restricted environments, such as in the military, on school grounds, and in prisons.\footnote{13 See STONE ET AL., supra note 2, at xvii for a listing of those cases.}

Overall, the list of cases adopted from those casebooks produced a list of thirty-eight U.S. Supreme Court cases. The cases chosen through this methodology encompass a wide range of the types and the natures of harm that arise under the First Amendment. The selected cases stem from \textit{Schenck v. United States} and \textit{Abrams v. United States}—some of the earliest U.S. Supreme Court First Amendment opinions—to the modern day, \textit{United States v. Alvarez} and \textit{Brown v. Entertainment Merchants Association}. Most categories include an opinion decided within the last decade.

In addition to analysis of cases along “categorical” lines, this study examines the Court’s opinions using a chronological approach to determine whether there has been a more general evolution of the First Amendment proof-of-harm doctrine over time. Table 3-3 illustrates the number of cases decided in each decade—from 1919 to 2013—supporting examination of opinions over multiple decades.

Part B discussed the process of selecting U.S. Supreme Court cases for its proof-of-harm analysis. Part C examines the use of typologies and rubrics as analytic devices and provides some initial observations regarding the tools for judicial analysis it proposes in Chapter 5.

\textbf{On the Relationship between Speech and Harm}

Part C has three sections. Section 1 discusses typologies and rubrics as analytic tools. Section 2 reviews an example of typology analyzing First Amendment harms. Section 3 makes some observations regarding elements of Supreme Court opinions.
that could potentially impact its assessment and establishment of an evidentiary burden. These are factors it will pay close attention to when reviewing the Court’s jurisprudence on proof-of-harm.

**Typologies and Rubrics as Analytic Tools**

Typologies and rubrics provide judges with useful analytic tools for simplifying otherwise complex legal issues. Although they have been used in legal scholarship, courts have yet to embrace such models in legal analysis.\(^{14}\)

Typologies, defined as an “organized system of types,” are well-established analytic tools in the social sciences.\(^ {15}\) They can make fundamental contributions to research by “forming and refining concepts, drawing out underlying dimensions, creating categories for classification and measurement and sorting cases.”\(^ {16}\)

Classification” involves an “intellectual operational whereby the extension of a concept at a given level of generality is subdivided into several (two or more) extensions corresponding to as many concepts at a lower level of generality.”\(^ {17}\) According to Marradi, “this subdivision is obtained by stating that an aspect of the intension,” or the internal content of a concept, “of each of the latter concepts is a different partial articulation of the corresponding aspect of the intension of the higher concept.”\(^ {18}\) Thus, “intensional [classification] may be seen as a process of conceptual elaboration. The


\(^{16}\) *Id.*


\(^{18}\) *Id.* at 130.
concept whose intension is articulated in one of its aspects is 'explicated' or 'unpacked'...."\(^{19}\)

Additionally, "[c]oncepts corresponding to individual classes are either formed or clarified by the definition of their boundaries with contiguous concepts...[O]nce the intension of each class concept has been defined clearly (also by opposition with the intensions of each other class concept), it specifies the 'necessary and sufficient conditions of membership' in the class, 'by stating certain characteristics which all and only the members of the class possess.'\(^{20}\) Types, therefore, are the categories to which the objects or events have previously been assigned, with the complete set of types constituting the typology.\(^{21}\)

Similarly, rubrics provide a similarly helpful tool with the social sciences for engaging in analytic analysis. Indeed,

social scientists have adopted a variety of models to organize and analyze everything from probabilistic network models used in handling survey data to ‘reaction-diffusion’ systems targeted at understanding how crime ‘hotspots’ can be policed effectively to creating a typology to study entertainment television and politics....\(^{22}\)

While most of the literature has focused on the development of rubrics within the educational system, the principles can be extrapolated to provide useful analytic tools for analysis.\(^{23}\)

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id. at 131.

\(^{22}\) Peter Carrington et al., Models and Methods in Social Network Analysis (Cambridge University Press 2005).

\(^{23}\) Wesner, supra note 14, at 91.
Schauer’s First Amendment “Trilogy of Harm(s)”: An Example

In his articles on the First Amendment, Schauer proposes a typology of speech-based harms. It provides a “useful vehicle for understanding both the existence of speech-associated harm” as well as “the fact that not all speech-related harms are the same.”24 Utilizing the recent high court opinions in Stevens,25 Snyder v. Phelps26 and Brown27 as the guidepost of the discussion, Schauer proposes a “trilogy of harms,” which Schauer broadly classifies as the harms of:

- advocacy (or third-person harms);
- verbal assault (or second-person harms); and
- participant harms (first-person harms).28

These next sections describe the types of harm encapsulated by each of the elements falling under Schauer’s typology.

Harms of advocacy (third-person harm)

Schauer defines the “classic speech-related harm of advocacy,”—which he clarifies is “ordinarily not one that is itself defined by or necessarily even connected to speech,”29—as that which exists “when a speaker is heard (or read) by a sympathetic listener, who then proceeds to commit some nonspeech act as a result of the intentional or unintentional urging or inspiration or assistance by the speaker.”30 Stated differently,

24 Frederick Schauer, Harm(s) and the First Amendment, 2011 SUP. CT. REV. 81, 105 [hereinafter Schauer, Harm(s)].
28 Schauer, Harm(s), supra note 24, at 97-103.
29 Schauer, Harm(s), supra note 24, at 97.
30 Schauer, Harm(s), supra note 24, at 98.
it “emanates from the reader or viewer or listener who then proceeds to do something as a result of what she has read, seen, or heard.”

Thus, the harm occurs not to the first-persons (the speakers themselves) or the second-persons (the listeners of the speech), but by the acts of the listeners to third persons.

In *Schenck*, the third-person harm constituted the failure of draft-eligible men to report for the draft as a result of Charles Schenck’s fliers. In *Brandenburg*, it was the probability of a violent reaction occurring against Jews and African-Americans as result of Clarence Brandenburg’s speech.

*Brown v. Entertainment Merchants Association*, the most recent Supreme Court case falling in this category, fits this same mold in that the harm the government attempted to prevent was not the injury resulting to viewers of the games (*i.e.*, the video game players), but the harmful acts of the players to others as a result of the what the players had viewed.

**Harms of verbal assault (second-person harm)**

Second-person harms, or the harms of verbal assault, occur in the “uttering of the utterance rather than what the hearer might do to someone else as result of hearing it.…” It is “the effect that the words are expected to have on the mental state of those who hear (or see) them under certain circumstances.”

Even though the statement in *Chaplinisky* banning words “which by their very utterance inflict injury” may conjure up an image of the type of expression banned by this category, in all reality, Schauer

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31 Schauer, *Harm(s)*, *supra* note 24, at 98.
32 Schauer, *Harm(s)*, *supra* note 24, at 98.
33 Schauer, *Harm(s)*, *supra* note 24, at 98.
34 Schauer, *Harm(s)*, *supra* note 24, at 101.
35 Schauer, *Harm(s)*, *supra* note 24, at 101.
explains the category “is far wider than just the ‘fighting words’ category spawned in *Chaplinsky.*”

In *R.A.V. v. City of St. Paul* and *Virginia v. Black*, for example, the speaker communicated threats of harm absent Chaplinsky’s face-to-face requirement. Moreover, Schauer suggests the harm occurring in *Cohen v. California, Erznoznik v. City of Jacksonville, FCC v. Pacifica Foundation* and *Hustler Magazine v. Falwell* can each be characterized as each involving a harm that is structurally similar to second-person harms, even if one is skeptical about the harm actually resulting from the disputed expression. In each of those cases, Schauer suggests the “claim of direct and harmful effects” at issue in each of the cases, stems from the “involuntary exposure to allegedly indecent words and images and ideas.”

More recently, the type of harm caused to a military officer’s family members by the WBC members’ anti-homosexuality speech in *Snyder v. Phelps* is characteristic of what Schauer classifies as a “second-person harm.” Indeed, Schauer notes “the very name of the tort—intentional infliction of emotional distress—makes it clear that these are listener harms and not third-party harms.” Although it is arguable that the method through which the Snyder family learned about the WBC members’ words was much less direct than through many of the hate speech cases, Schauer suggests that, distinctions aside, the:

36 Schauer, *Harm(s)*, supra note 24, at 101.
37 Schauer, *Harm(s)*, supra note 24, at 101.
38 Schauer, *Harm(s)*, supra note 24, at 102.
39 Schauer, *Harm(s)*, supra note 24, at 101-02.
40 Schauer, *Harm(s)*, supra note 24, at 102.
distress caused to the Snyder family is of the same structural nature as the distress allegedly caused in *Cohen*, *Erznoznik*, and *Falwell*, and almost certainly caused in... *R.A.V. v. St. Paul* and *Virginia v. Black*... in which the victims are not the people who are hurt by what the listeners might do to others, but the listeners themselves.  

**Participant harms (first-person harm)**

Schauer explains that participant harms, though “nearly as prominent in the history of speech regulation and the First Amendment have been third-party or listener harms... are at the heart of concern about child pornography, and the Supreme Court’s special approach to it.”  

Although *New York v. Ferber* and subsequent opinions involving child pornography concern a variety of harms, including those stemming from the images “being permanently available for perpetual public consumption,” Schauer explains, “the primary harm the Court stressed was that done to the child participants in the process of production.”  

According to Schauer:

> [T]he subsequent litigation about the important difference between child pornography and using actual children and so-called virtual pornography makes it clear that the primary harms are the harms done to *actual participants* in the process of production, harms that, at least in a direct sense, do not require viewers at all.

As another example, the animals crushed in the making of the fetish pornography videos in *United States v. Stevens* constitute the type of *unwilling* participant harms that traditionally fall under this category.

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41 Schauer, *Harm(s)*, supra note 24, at 102.

42 Schauer, *Harm(s)*, supra note 24, at 103.

43 Schauer, *Harm(s)*, supra note 24, at 103.

44 Schauer, *Harm(s)*, supra note 24, at 103-04 (emphasis added).

45 Schauer, *Harm(s)*, supra note 24, at 97.
According to Schauer, only when courts begin to understand the nature of harms can they begin to “evaluate (or generate) the data that would enable [them] to determine the extent of the harms involved, and whether the doctrine should allow any redress against them.”

46 Id. at 107.

Initial Observations

Schauer’s typology proves a useful mechanism for developing an understanding of the nature of harm stemming from expression in First Amendment opinions. This study attempts to build on Schauer’s typology of speech-based harms by focusing on the nature of harm alleged by the government, in addition to the type of expression involved, to develop its analysis on how these two factors may affect the Court’s assessment of the evidentiary burden of proof. As such, it also reviews different types of evidence the Court may weigh in making its constitutional assessment. These observations are based on the preliminary review of certain First Amendment opinions, discussed in the Introduction.

Nature of harm

Lochner v. New York, 47 decided in 1905, is perhaps the first Supreme Court case to discuss the various government interests that may be at stake when a government decides to legislate. A case of significant constitutional import, although not on First Amendment grounds, Lochner featured a challenge to a New York labor law forbidding bakers to work more than sixty hours a week or ten hours a day. 48 Although the decision

47 198 U.S. 45 (1905).

48 Lochner’s holding has been given much negative treatment. Id., overruled in part by Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421 (1952); Ferguson v. Skrupa, 372 U.S. 726 (1963); overruling
held that New York’s law interfered with individuals’ freedom to contract, the Court wrote:

There are...certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.49

Lochner identified a few of the interests the government may allege to justify a law:

“safety, health, morals and general welfare of the public.” Yet, it may be safely concluded these are not the only interests that will justify a government interest. Indeed, review of the some of the opinions discussed earlier in this study reveal numerous other interests that may be alleged.

For instance, in United States v. Alvarez, Xavier Alvarez was punished under a federal statute prohibiting individuals from lying about receiving a military medal of honor. The harm the government aimed to prevent was dilution of the reputation military system of awarding medals to soldiers for their bravery. In this sense, the nature of harm could be characterized as harm to a government program.

In Gertz v. Robert Welch, Inc., the plaintiff brought a suit for libelous statement published in his magazine. Elmer Gertz was punished for his allegedly defamatory speech in the interest of compensating a private individual for damage to his reputation. In other words, the nature of the harm involves an individual’s reputational injury.

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49 Lochner, 198 U.S. at 53 (emphasis added).
The government’s interest in punishing allegedly injury-producing speech—or the nature of harm—may not always be asserted in isolation from each other. For instance, in Brown v. Entertainment Merchants Association, the government aimed to prevent the sale or rental of violent video games to minors. The nature of the harm sought to be prevented in Brown could fall into several categories, including: 1) preventing *psychological harm*, caused to the minors by their interaction with the violent video games, as well as 2) *physical harm*, potentially caused to an innocent person as result of the minors’ learned aggressive behavior. In these of these instances, the government sought to prevent injury to minors, which may sometimes appears as its own independent government interest in regulating harm from expression. Thus, Brown involves three natures of harm: 1) an individual’s psychological harm; 2) an individual’s physical harm; and 3) injury to minors.

The natures-of-harm so far identified by this study’s initial review of the First Amendment cases thus far include, but may not be limited to: 1) the health, safety, morals and general welfare of the public; 2) harm to a government program; 3) reputational harm; 4) psychological harm; or 5) physical harm; and 6) injury to minors.

**Variety of speech**

Much of the Court’s First Amendment jurisprudence centers on identifying the specific variety or category of expression conveyed. In fact, within several lines of cases, suppression or protection of the expression depends on the classification of the speech involved. The categorical prohibition of expression in such instances was often premised solely on the history or tradition of finding that such expression was without social importance or value. For instance, within the obscenity doctrine, the Court upheld the prohibition of obscene material, without providing much clarification of the type of
expression that fell within this category, based on the number of laws that had previously been enacted banning such material.

However, the Court has not always held tight to this imperative. Despite dicta in several of the Court’s opinions indicating that false statements are without value, it created an actual malice test when defamatory statements are made about public and private figures about matters of public concern. The test removes the outright ban placed on libelous utterances that previously existed under common law. It adopted an even more stringent test in *United States v. Alvarez*, to be applied when false statements are made concerning receipt of a military medal of honor without purpose of monetary or pecuniary gain.

These two examples illustrate the Court's tendency to address specific varieties or types of expression in different ways. The emphasis placed by the Court in making its determinations regarding the constitutionality of the expression indicates it will likely have some effect on the assessment of the evidentiary burden of proof-of-harm in First Amendment analysis. As such, this study focuses on the specific type of expression employed to determine its impact on development of an evidentiary burden.

The categories used by the Court for labeling expression beyond the First Amendment protected zone do not include all First Amendment opinions. Indeed, in Snyder v. Phelps, the Court chose not to address the category of “fighting words,” derived from the Court’s *Chaplinsky v. New Hampshire* opinion, choosing instead to focus on the more prominent issues regarding the Court’s “public concern” doctrine. Yet, in an effort to include opinions where the result is not only the banning of expression, this study has adopted a classification system that encompasses those
categories of speech the Court has identified as going beyond the First Amendment free zone to include opinions favorable to the First Amendment. Chapter 3 further discusses the classification structure adopted by this study to perform its analysis.\textsuperscript{50}

**Types of evidence**

A third factor involves the burden of proof established by the Court for squelching expression. For instance, in *Schenck*, the Court found that circumstantial and testimonial evidence of Schenck’s involvement in the printing of the fliers advocating obstruction of the war draft was sufficient to uphold his conviction. However, in *Brown*, the majority found that the *quantitative/empirical* evidence offered by the social science research studies was not sufficient to prove that violent video games caused harm to minors. Other types of evidence may include: qualitative or anecdotal evidence, which may include unscientific observations or a few real-world incidents. For instance, anecdotal evidence of harm allegedly caused by playing violent video games might simply entail a list of school shootings from the past decade that were committed by minors who alleged played violent video games. It would seem to require little direct proof before the speech can be restricted.

Ultimately, the goal of this study is to provide clarity to judges in cases involving speech-based harms. Specifically, it strives to help judges better focus on the relationship between the nature of the harm in question and the type of evidence and quantity of evidence that must be proved by the government to justify restricting the speech. Chapter 4 examines the thirty-eight Supreme Court cases selected for analysis.

\textsuperscript{50} See infra Part 3.B.
<table>
<thead>
<tr>
<th>Incitement to Violence/Unlawful Action</th>
<th>Speech that Threatens</th>
<th>Hostile Audience Reaction</th>
<th>Disclosure of Dangerous Information</th>
</tr>
</thead>
</table>

Figure G-1. "Dangerous" expression
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<thead>
<tr>
<th>False Statements of Fact</th>
<th>Sexually Explicit and Violent Expression</th>
<th>Lewd, Profane and Indecent Expression</th>
<th>Hate Speech</th>
</tr>
</thead>
</table>

Figure G-2. “Low-value” expression
<table>
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<th>Decade</th>
<th>Number of cases per decade</th>
<th>List of cases decided in that decade</th>
</tr>
</thead>
<tbody>
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<td>1910-1919</td>
<td>2</td>
<td>Schenck v. United States, Abrams v. United States</td>
</tr>
<tr>
<td>1920-1929</td>
<td>2</td>
<td>Gitlow v. United States, Whitney v. United States</td>
</tr>
<tr>
<td>1930-1939</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>1990-1999</td>
<td>1</td>
<td>R.A.V. v. City of St. Paul</td>
</tr>
</tbody>
</table>

Total: 38

Figure G-3. Selected U.S. Supreme Court cases (by decade)
CHAPTER 4
ANALYSIS

Chapter 4 is divided into two parts. Part A examines Supreme Court opinions involving “dangerous” expression. Part B reviews cases involving government challenges to expression it has deemed of “low-value.” The division of the cases into dangerous and low value expression stems from the classification structure adopted by Stone and colleagues in his First Amendment textbook, *The First Amendment*, discussed in Chapter 3.

“Dangerous” Information

While the seminal standard enunciated by the Court under its incitement doctrine—the clear-and-present-danger test—initially applied only to speech advocating unlawful action, it was later utilized across a broad spectrum of its free speech jurisprudence. The clear-and-present-danger test initially permitted the Court to determine whether the speech posed a sufficient danger on an ad-hoc basis. Ultimately, it reformulated the test to require a greater burden of proof.

The current version of the clear-and-present-danger test remains prevalent in the areas of subversive advocacy and incitement to unlawful action. The Court eventually moved away from it, however, in the context of both “threatening speech” and “speech invoking a hostile audience reaction.” It transitioned toward a categorical approach that simply places certain brands of speech beyond First Amendment protection. More modern jurisprudence demonstrates, at least within these categories, the Court may be evolving beyond such categorical exceptions to more sophisticated examinations of the factual circumstances underlying the government’s attempted speech restrictions, as well as, increased standards of proof-of-harm.
Part A addresses standards the Court used in four areas of expression: 1) incitement to unlawful action; 2) speech that threatens; 3) hostile audience reaction; and 4) disclosure of dangerous information. Section 1 summarizes the Court’s jurisprudence from *Schenck v. United States*, which established the test for subversive advocacy, to *Brandenburg v. Ohio*, which sets forth the Court’s modern statement of the clear-and-present-danger test. Section 2 reviews threatening speech in the context of: 1) a common law restriction on contempt statements to ensure the fair administration of justice; 2) a federal criminal statute prohibiting physical threats against the President; and 3) a state law imposing civil liability for economic losses suffered as a result of a peaceful, political boycott. Although the facts appear dissimilar, each involving a distinct government interest, a general principle that emerges involves the Court’s protection of the expression *despite* such asserted compelling interests.

Section 3 discusses the Court’s hostile-audience doctrine from early dicta in *Cantwell v. Connecticut*, establishing the foundation of a two-tier speech valuation, to the Court’s recently more narrowly limited and confined application of the First Amendment “fighting words” exception. The Court’s later hostile-audience doctrine not only recognized but established specific standards of proof to be met before speech could be squelched. The cases encompassed within Section 4, involving the disclosure of dangerous information—all decided within the same decade—each weigh the heavy presumption of unconstitutionality placed on prior restraints against the government’s stated interests in: 1) national security; 2) a right to fair trial; or 3) the orderly administration of justice. While it is fair to say each of these interests existed at the time
the First Amendment was ratified, each of these opinions appears to take the First Amendment’s injunction against laws that interfere with such freedoms seriously.

Incitement to Unlawful Action/Violence

When discussing harm and the limits to free speech, a statement that perhaps first comes to mind is Justice Oliver Wendell Holmes’s example of the type of harmful expression exempt from First Amendment protection: “The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing panic.” After all, Schenck v. United States, the case explicating this famous maxim, has been called the first important decision involving free speech.

Schenck v. United States

Schenck involved the conviction of an individual for mailing circulars under a statute prohibiting “obstruction of the war draft.” The evidence consisted of Schenck’s testimony, as well as a book found at the headquarters of the Socialist party, of which Schenck was a member. The book revealed a resolution that 15,000 leaflets asserting a right to oppose the draft would be printed for distribution; that additional leaflets had already been mailed to drafted men; and that Schenck had personally attended to the printing. Although the Court acknowledged there was no evidence indicating “actual

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1 Schenck v. United States, 249 U.S. 47, 52 (1919).

2 Dennis v. United States, 341 U.S. 494, 503 (1951). In Dennis, Justice Clark noted “[i]t was not until the classic dictum of Justice Holmes in the Schenck case that speech per se received that emphasis in a majority opinion.” Id.

3 Schenck, 249 U.S. at 52-53 (1919).

4 Id. at 49 (emphasis added).

5 Id. at 49-50. According to the Court, the first printed side of the flier said “[i]n impassioned language...that construction was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few.” On the other side of the flier was the heading, “Assert Your
obstruction” of the draft due to publication of the leaflet,\(^6\) nor any real harm resulting from its distribution, it upheld the conviction. It found there was no question that Schenck’s involvement in printing the circulars clearly fit within the statute’s definitions.\(^7\)

In a unanimous opinion, Chief Justice Holmes wrote, “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”\(^8\) The Court acknowledged, in any other context—such as during peacetime—the defendant’s speech may well have been protected, but “[w]hen a nation is at war many things that might be said...are such a hindrance to its effort that their utterance will not be endured....”\(^9\) The Court viewed the nation’s interest in the war—in the recruiting of forces, as well as the securing of fresh supplies—as tantamount in importance to protecting the defendant’s freedom of speech.

The only question left for the Court was whether the defendant possessed the requisite mens rea to find him guilty of conspiracy to obstruct the draft. On this question, Justice Holmes summarily reasoned, “[o]f course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to

\(^6\) Id. at 52.
\(^7\) Id. at 52-53.
\(^8\) Id.
\(^9\) Id.
obstruct the carrying of it out.”\textsuperscript{10} The Court’s rationale in \emph{Schenck}\textemdash allowing the government to punish the defendant on the basis of mere testimonial evidence, combined with a relaxed inference of intent\textemdash was seemingly used in a number of subsequent Supreme Court opinions to suppress expression.

Since the early twentieth century, the Court has grappled with the problem of determining the bounds of protection afforded to speech advocating unlawful conduct.\textsuperscript{11} As this section shows, “[o]n the one hand, speech urging criminal conduct appears to be of limited social value and may well lead to significant social harm. On the other hand, regulation of unlawful advocacy has often been employed as a means of suppressing unpopular social ideas and political groups...”\textsuperscript{12} In \emph{Schenck}, the Court established the clear-and-present-danger test to measure the limits of speech that advocates anti-government action.\textsuperscript{13} It allowed the government to punish criminal conduct on the basis of mere testimonial evidence and a relaxed inference of intent, despite a lack of evidence of actual harm arising from publication of the fliers. While the test has largely been constricted to subversive advocacy, it was once referred to as “the general all-purpose First Amendment test”\textsuperscript{14} and considered “the measure by which all content-based speech restrictions were judged.”\textsuperscript{15}

\textsuperscript{10} \textit{Id.} at 51.


\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} HARRY KALVEN, JR., A WORTHY TRADITION 180 (1988).

\textsuperscript{15} \textit{Id.} (emphasis added).
Following the Court’s pronouncement of the clear-and-present-danger test, the standard gained prominence as a rationale for prohibiting expression in a number of substantive areas, including obscenity, commercial speech, defamation and offensive speech.\textsuperscript{16} While preference of the clear-and-present-danger test in such diverse areas has receded, today it continues to reach into categories such as general advocacy of ideas, speech that provokes a hostile audience reaction,\textsuperscript{17} and, in some circumstances, release of information interfering with the judicial process.\textsuperscript{18}

The language of the test announced by Schenck “express[es] a judicial attitude that is highly protective of free speech.”\textsuperscript{19} After all, Schenck includes “some of the most

\footnotesize{\textsuperscript{16} Redish, Advocacy of Unlawful Conduct, supra note 11, at 1172 (emphasis added).

\textsuperscript{17} This includes the cases involving a hostile audience reaction by the audience against the speaker, such as Cantwell v. Connecticut, 310 U.S. 296 (1940), or by different members of the audience against each other, the so-called “heckler’s veto” line of cases, such as in Feiner v. New York, 340 U.S. 315 (1951).


Both Bridges and Nebraska Press Association could be said to involve speech that interferes with the judicial process. In Bridges, the Court acknowledged the government’s ability to restrict out-of-court contempt statements under a longstanding common law presumption that could prevent the “disorderly and unfair administration of justice,” but rejected that such a presumption existed in the case. The Court applied Holmes and Brandeis’s version of the clear-and-present-danger test, requiring imminence. The Nebraska Press decision involved speech critical of judicial conduct but failed to adopt a test that required imminence.

In Landmark Communications, Inc. v. Virginia, involving the release of information about a murder suspect, the Court similarly applied the Dennis standard, but questioned the appropriateness of the test in the context of fair trial rights of the accused. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 849 (1978). In New York Times Co. v. United States, the Court did not invoke Brandenburg, nor did it adopt the clear-and-present-danger test in the context of the release of true information that causes other harms. The decision produced nine separate opinions, only three of which adopted a standard that would allow suppress speech only on a showing of “grave and imminent harm.” New York Times Co. v. United States, 403 U.S. 713, 716-17 (1971) (Brennan, J. concurring); id. at 730 (Stewart, & White, JJ., concurring). See Tom Hentoff, Note, Speech, Harm, and Self-Government, Understanding the Ambit of the Clear and Present Danger Test, 91 COLUM. L. REV. 1453, 1459-61 (1991) (discussing the types of speech to which the clear-and-present-danger test and its various formulations have been applied).

\textsuperscript{19} Redish, Advocacy of Unlawful Conduct, supra note 11, at 1166 (“[T]he test was used to ratify suppression of speech that could hardly be said to create any danger to anyone.”).}
famous words ever written about the importance of free speech.” 20 Yet, at the time
Schenck was decided, Holmes had not envisioned clear-and-present danger as a
speech-protective doctrine. 21 As demonstrated by Schenck and its progeny, the test
was “originally used to justify results highly restrictive of free speech interests.” 22 It was
not until Abrams v. United States, 23 decided just a few months later, that Holmes and
Justice Louis Brandeis applied the test in a fashion placing greater limits on government
authority to extinguish speech. 24

**Abrams v. United States**

Holmes and Brandeis painted a picture in their dissent in Abrams of the clear-
and-present-danger test as imposing a stringent standard of proof against which speech
should be measured: “It is only the present danger of immediate evil or an intent to bring
it about that warrants Congress in setting a limit to the expression of opinion....” 25 Yet,
the majority in Abrams, led by Justice John Clarke, failed to apply the clear-and-
present-danger test and, instead, upheld the defendants’ imprisonment. 26

Defendant Jacob Abrams was indicted for violating an amendment to the
Espionage Act prohibiting conspiracy to advocate curtailment of the production of

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22 Redish, *Advocacy of Unlawful Conduct*, supra note 11, at 1166 (“[T]he test was used to ratify
suppression of speech that could hardly be said to create any danger to anyone.”).

23 250 U.S. 616 (1919).

24 Id. at 624-31 (Holmes, J., dissenting). See also Gunther, supra note 21, at 720 (“[I]t was not until the
fall of 1919, with his famous dissent in *Abrams v. United States*, that Holmes put some teeth into the clear
and present danger formula at least partly as a result of probing criticism by acquaintances such as
Learned Hand.”).

25 Abrams, 250 U.S. at 628 (Holmes, J., dissenting) (emphasis added).

26 Id. at 624 (majority opinion).
materials necessary to the war.\textsuperscript{27} The evidence consisted of copies of two circulars, one printed in English and one in Yiddish, condemning American intervention in Russia and calling for a general strike.\textsuperscript{28} According to portions of the leaflets quoted by Justice Clarke, Abrams had advocated Russian emigrants to “spit in the face” of “the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war,” and demanded that ammunition factory workers strike against the production of “bullets, bayonets, [and] cannon,” which it stated would be used to “murder” the Germans, but “also your dearest, best, who are in Russia and are fighting for freedom.”\textsuperscript{29}

The Abrams majority refused to apply the clear-and-present-danger test, instead holding the defendant guilty under a “bad tendency” test established in the Court’s 1907 opinion in \textit{Patterson v. Colorado},\textsuperscript{30} based only on the circumstantial evidence of the printing of the brochures advocating anti-military efforts. Although the bad tendency test was presumably overturned by Justice Holmes’ pronouncement of the clear-and-present-danger test in \textit{Schenck}, Justice Clarke applied the bad tendency test in

\textsuperscript{27} According to the opinion, the defendants were charged in the language of the statute with “conspiring...unlawfully to utter print, write and publish: In the first count, ‘disloyal, scurrilous and abusive language about the form of government of the United States;’ in the second count, language ‘intended to bring the form of government into contempt, scorn, contumely, and disrepute;’ and in the third count, language ‘intended to incite, provoke and encourage resistance to the United States in the said war.’” \textit{Id.} at 617.

\textsuperscript{28} \textit{Id.} at 618.

\textsuperscript{29} \textit{Id.} at 621.

\textsuperscript{30} 205 U.S. 454 (1907) (involving application of the bad tendency to uphold contempt charges against a newspaper publisher who accused Colorado judges of acting on behalf of local utility companies).
Abrams, finding that “[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.”\(^{31}\)

Under the bad tendency test, a restriction on freedom of expression is permitted if it is believed that speech has a sole tendency to incite or cause illegal activity. A defendant is “presumed to have intended the natural and probable consequences of what he knowingly did.”\(^{32}\) The test presumes a connection between the defendant’s speech and any harm stemming from the speech based on only a single, if even tangential, likelihood of the expression to result in a negative consequence. Intent is inferred from the tendency of the speech itself, on a theory that one intends the natural and foreseeable consequences of one’s acts.

The defendants in Abrams argued their intent was only to “prevent injury to the Russian cause,” but the Court rejected this claim. Even if the defendant’s primary purpose and intent was only to aid in the Russian Revolution, it satisfied the majority’s lackadaisical “bad tendency” standard. The Court reasoned the plan of action the defendant’s adopted “necessarily involved, before it could be realized, defeat of the war program of the United States.”\(^{33}\) Under the test, there was no conclusion but for the Court to hold that, “obviously [the defendant’s plan was] to persuade the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the

\(^{31}\) *Id.* (emphasis added).

\(^{32}\) *See, e.g.*, Schaefer v. United States, 251 U.S. 466 (1920). *Schaefer* reflects the then-prevailing view of the lower federal courts that speech could constitutionally be punished as an attempt to cause some forbidden or otherwise undesirable conduct under the bad tendency test if the natural and reasonable tendency of the expression might be to bring about the conduct, and if the speaker intended such a result. *Id.*

\(^{33}\) Abrams, 250 U.S. at 621.
government of the United States, and to cease to render it assistance in the prosecution of the war.”

Upon such a conclusion, the Court found the remaining question of law was whether there was “some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict,” to which it responded there was not only “some evidence” but “much persuasive evidence...tending to prove that the defendants were guilty as charged.” The combination of the constructive intent and bad tendency doctrines in decisions like Abrams was routinely used in cases involving attempts to cause insubordination and obstruction of recruiting throughout the era of Espionage Act prosecutions.

Holmes and Brandeis’ apparent apostasy from Schenck to Abrams is the subject of much speculation. Although their dissenting statement of the clear-and-present-

34 Id. at 620.
35 Id.
36 Id. at 624.
37 For detailed accounts of this era, see, e.g., GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 135-234 (2004); ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 36-108 (1941); and David Rabban, The Emergence of Modern First Amendment Theory, 50 U. CHI. L. REV. 1205 (1983). As opposed to the test proposed in Schenck, the bad tendency test has been said to focus on the content of the speech rather than the intent of the speaker. Under the Hand/bad tendency test, the dispositive factor was whether the speaker employed direct words of incitement. See Gunther, supra note 21, at 720. However, as argued by Judge Bork and as perhaps demonstrated by the Court’s opinions in Abrams, Whitney and Gallow, the bad tendency test affords little to no protection to express advocacy of criminal conduct.

38 Most commentators have concluded Justice Holmes moved from a narrow construction of the First Amendment in Schenck to a more civil libertarian position in his dissent in Abrams following a summer of “lively exchanges” with Learned Hand, Zechariah Chafee and Harold Laski. See e.g., STONE, PERILOUS TIMES, supra note 37, at 198-211; Rabban, supra note 37, at 1208-09. Judge Learned Hand, however, admitted he was not “in love with Holmesey’s test,” preferring instead a more “qualitative test,” “based upon the nature of the utterance itself.” Gunther, supra note 21, at 749. For a defense of the clear-and-present-danger test, see generally Martin Redish, Advocacy of Unlawful Conduct, supra note 11. While Judge Learned Hand viewed express advocacy of law violation as outside First Amendment protection, Justice Holmes clearly thought otherwise. See Vincent Blasi, Holmes and the Marketplace of Ideas, 2004 SUP. CT. REV. 1, 39.
danger test appeared unequivocal, commentators have conjectured Holmes and Brandeis actually questioned “the probable effectiveness of the puny efforts towards subversion.” Interestingly, both the majority and the Holmes-Brandeis’ dissent in *Abrams* relied on *Schenck*, but seemed divided on their views of the evidence. Unlike the majority, Holmes seemed to believe that specific intent and probable effect could not be reasonably inferred from the content of the articles.

In *Abrams*, the dissent thought only “expressions of opinions and exhortations” were involved and that such “puny anonymities” were simply “impotent” to produce the evil against which the statute aimed:

> When words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed...he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

According to Holmes, only sufficient evidence of “actual intent” could satisfy the requirements of the statute prohibiting obstruction of the draft. The opinion also suggests Holmes would require the speech to be the “proximate motive” behind the specific act, and not some tangential motive as was accepted by the majority. Apparently, Holmes thought this standard was not satisfied by the facts of the case, writing: “now nobody [could] suppose that the surreptitious publishing of a silly leaflet by

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40 Id. at 535.

41 *Abrams*, 250 U.S. at 629 (Holmes J., dissenting) (“To say that two phrases literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.”).

42 Id. at 627 (Holmes, J., dissenting) (emphasis added).

43 Id. at 628 (Holmes, J., dissenting).

44 Id. at 627 (Holmes, J., dissenting).
an unknown man, without more, would present any immediate danger that its opinions
would hinder the success of the government arms or have any appreciable tendency to
do so.”\textsuperscript{45} In doing so, the dissent rejected the sufficiency of the circumstantial evidence
on which the majority relied.

Yet, even this statement—that a “silly leaflet” would have no “appreciable
tendency” to hinder the war effort—according to Professor Martin Redish, “may imply
that had the circulars been less ‘silly,’ or had Holmes found some ‘appreciable
tendency,’ he might have agreed with the majority that upheld the defendants’
convictions.”\textsuperscript{46} Moreover, Redish continues, Holmes’ assertion that although

he did not find present the very specific intent that he thought was required
for a violation of the statement[, it] nonetheless reveals both his willingness
to equate the exercise of pure speech with a criminal attempt and his
unsupported equation of the presence of an intent to accomplish a harm
with an increase in the likelihood of that harm.\textsuperscript{47}

In sum, even after it appeared Holmes began to take the meaning of the test he had
formulated seriously, his Abrams dissent indicated a standard that would likely protect
speech more often than the majority’s rule, but that nonetheless might still allow for
widespread suppression of expression under a showing of only a mere possibility of
harm.\textsuperscript{48}

It was not until several decades later, in the context of Communists’ trials, that
the clear-and-present-danger test regained majority acceptance. Even then, critics
heavily contest whether it provided a stringent enough First Amendment standard for

\textsuperscript{45} Id. at 628 (Holmes, J., dissenting).
\textsuperscript{46} Redish, Advocacy of Unlawful Conduct, supra note 11, at 1169.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
speech posing no immediate, direct threat to the government’s stated interest or merely afforded the Court the opportunity to judge the constitutionality of speech on an ad-hoc basis.

**Gitlow v. New York**

The Court revisited the “bad tendency” test in *Gitlow v. New York*.\(^4^9\) *Gitlow* involved a conviction for distributing a radical manifesto under a New York law directly prohibiting advocacy of “criminal anarchy.”\(^5^0\) Benjamin Gitlow, a member of the Left Wing of the Socialist Part, was arrested and indicted by the trial court for publishing and “knowingly” distributing copies of the Revolutionary Age, the “official organ” of the Left Wing.\(^5^1\) It contained a “Manifesto,” which attacked the government and capitalism.\(^5^2\) Gitlow argued because there was *no evidence* of any effect resulting from the publication and circulation of the Manifesto, the statute punished utterances without propensity to incite to concrete unlawful action.\(^5^3\) The New York courts had determined

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\(^4^9\) 268 U.S. 652 (1925).

\(^5^0\) *Id.* at 654.

\(^5^1\) *Id.* at 655.

\(^5^2\) *Id.* at 655-56.

\(^5^3\) *Id.* at 664. A summary of the defendant’s argument as described by the Court was that because

[T]here was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute...penalizes the mere utterance, as such, of ‘doctrine’ having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable ‘in circumstances involving likelihood of substantive evil,’ the statute contravenes the due process clause of the Fourteenth Amendment.

*Id.*
anyone who advocated violent revolution, absent any evidence of actual violent reaction, violated the law.  

While Schenck applied of the clear-and-present-danger test to words themselves under an admittedly valid law, there was no claim in Gitlow, decided six years later, the law itself was invalid. The majority found the facts in Gitlow posed a different question: whether the legislature acted reasonably in prohibiting a certain type of speech it alleged was harmful and unlawful. It failed to apply the clear-and-present-danger test to a statute aimed expressly at speech where the legislature determined the danger of a substantive evil arising from utterances of a specific character. Instead, the Court

\[54\] Id. at 662-63. According to one court’s ruling, as quoted by the Court in its opinion:

‘To advocate * * * the commission of this conspiracy or action by mass strike whereby government is crippled, the administration of justice paralyzed, and the health, morals and welfare of a community endangered, and this for the purpose of bringing about a revolution in the state, is to advocate the overthrow of organized government by unlawful means.’

\[Id.\] at 663. The Court continued by quoting another appellate court opinion:

‘[W]e feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism and in regarding it as a justification and advocacy of action by one class which would destroy (sic) the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes. It is true that there is no advocacy in specific terms of the use of * * * force or violence. There was no need to be. Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described.’

\[Id.\]

\[55\] The Court observed, statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interests.” \[Id.\] at 668.

\[56\] Id. at 670-71. According to the Court:

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases, it has been held that the general provisions of the statute may be constitutionally applied to the specific
deferred to legislative judgment of the harmful potential of the proscribed words, framing the debate in terms of “reasonableness”:\textsuperscript{57}

The State cannot be \textit{reasonably} required to measure the danger from every such utterance in the nice balance of a jeweler’s scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration...It \textit{cannot reasonably} be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent or immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.\textsuperscript{58}

Under such a standard, there was no choice but to uphold the defendant’s conviction.

In \textit{Gitlow}, the Court applied a standard of broad deference to the state to determine the type of speech that could be worthy of criminal sanction. The test adopted by the majority required even \textit{less} evidence of an individual’s intent to incite unlawful action than circumstantial evidence of a printed flier. As construed by the New York courts, defendant Gitlow could have been convicted without the publication of any Communists manifesto; he had only to advocate violent revolution through the use of speech to be convicted.

\underline{utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent...And the general statement in the Schenck Case that the “question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils”—upon which great reliance is placed in the defendant’s argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.}\textsuperscript{57}

\textit{Id.}\textsuperscript{57} at 657.

\textit{Id.} at 669 (emphasis added).
Meanwhile, Justices Holmes and Brandeis continued to adhere to a more speech-protective view than the majority in Gitlow.\textsuperscript{59} They refused to defer to legislative judgment, insisting it was for the judiciary to determine in each and every instance whether the expression created a “clear and present danger.”\textsuperscript{60} This dictum represents the first time the Court acknowledged its ability to review the facts of a case to determine whether state penalties pose an affront to an individual’s First Amendment freedoms guaranteed to individuals under the Fourteenth Amendment.\textsuperscript{61}

In their concise dissent, Holmes and Brandeis found the facts alleged nothing more than “publication”\textsuperscript{62} that certainly possessed “no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s views.”\textsuperscript{63} Paying homage to the protection of freedoms guaranteed under the First Amendment, the dissent contended:

> Every idea is an incitement. It offers itself for belief and if believed it acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result. Eloquence may set fire to reason. But whenever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.\textsuperscript{64}

\textsuperscript{59} Id. at 672-73 (Holmes, J., dissenting).

\textsuperscript{60} Id. at 672 (Holmes, J., dissenting).

\textsuperscript{61} Id. (Holmes, J., dissenting).

\textsuperscript{62} Id. at 673 (Holmes, J., dissenting).

\textsuperscript{63} Id. (Holmes, J., dissenting). According to Holmes, “[i]f the publication of this document had been laid as an attempt to induce an uprising against government at once and no at some indefinite time in the future it would have presented a different question.” \textit{Id}. This once against supports Holmes’ requirement of immediacy of harm, required in prior opinions.

\textsuperscript{64} Id. (Holmes, J., dissenting).
They found the evidence presented in *Gitlow*—the mere language of the Manifesto, criticizing the government and calling for a revolution—was insufficient to support a conviction.\(^{65}\)

**Whitney v. California**

Two years later the Court again analyzed speech under a bad-tendency standard in *Whitney v. California*.\(^{66}\) Anita Whitney was charged and convicted under a California Syndicalism Act that made it a felony for any person to knowingly be a member of any organization that engages in unlawful activity.\(^{67}\) Unlike prior cases, which punished individuals for personally engaging in prohibited expression, California now attempted to punish Whitney for association.

The Court held, “a State in the exercise of its police power may punish those who abuse [the freedom of expression] by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means....”\(^{68}\) Under a standard of legislative deference, it wrote, “a state may properly direct its legislation against what it deems an existing evil...where experience shows it to be most felt....”\(^{69}\) According to Justice Edward Sanford, who wrote for the majority:

By enacting the provisions of the Syndicalism Act the State declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or

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\(^{65}\) *Id.* at 672. (Holmes, J., dissenting).

\(^{66}\) 274 U.S. 357 (1927).

\(^{67}\) *Id.*

\(^{68}\) *Id.* at 371.

\(^{69}\) *Id.* at 370.
terrorism...involves such danger to the public peace and the security of the State, that these acts should be penalized in exercise of its police power. That determination must be given great weight.\textsuperscript{70}

Although Whitney argued she had no knowledge of the unlawful character and purpose of the organization, the Court permitted the legislature to punish Whitney on an inference of the connection between Whitney’s association with an organization and the cumulative danger posed by the group’s expression.

*Whitney* is perhaps most notable for its concurrence in which Justice Brandeis gave a strong defense of free speech.\textsuperscript{71} According to Brandeis, “this court has not yet fixed the standard by which to determine when a danger shall be deemed ‘clear’ or how remote the danger may be and yet be deemed ‘present.’”\textsuperscript{72} Yet he acknowledged, “[f]ear of serious injury cannot alone justify suppression of free speech and assembly...To justify suppression of free speech there must be reasonable ground to fear that serious evil will result....”\textsuperscript{73}

Although Brandeis recognized the rights of free speech and assembly are not absolute, he argued their exercise is subject to restriction only when “a particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.”\textsuperscript{74} According to Brandeis, only clear, present and imminent threats of “serious evils” could justify suppression of speech:

Even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively

\textsuperscript{70} *Id.* at 371.

\textsuperscript{71} *Id.* at 372 (Brandeis J., concurring).

\textsuperscript{72} *Id.* at 374 (Brandeis J., concurring).

\textsuperscript{73} *Id.* at 376 (Brandeis J., concurring).

\textsuperscript{74} *Id.* at 373 (Brandeis J., concurring) (emphasis added).
serious...The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State.\textsuperscript{75}

When it came to expression deemed dangerous, threatening or harmful, much less than an “emergency” situation, to Holmes and Brandeis, simply would not suffice.\textsuperscript{76}

Justices Holmes and Brandeis concurred in Whitney, but apparently only because the defendant failed to argue her activity did not pose a clear-and-present-danger of harm.\textsuperscript{77} They found the record, contrary to earlier opinions, contained at least some evidence that organization of the Communist Labor Party might result in conspiracy to commit “present serious crimes.”\textsuperscript{78}

In the present cases, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of the members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed.\textsuperscript{79}

Upon that evidence, they agreed Whitney’s criminal sentence could be upheld.

\textsuperscript{75} Id. at 378 (emphasis added).

\textsuperscript{76} Id. at 377 (stating “[o]nly an emergency can justify repression”).

\textsuperscript{77} Id. at 372-74 (Brandeis & Holmes, JJ., concurring). The concurrence recognized that while the legislative declaration satisfies the requirement of the Constitution of the state emergency legislation...it does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the federal Constitution...whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction imposed by the Legislature.

\textsuperscript{78} Id. at 379 (Brandeis & Holmes, JJ., concurring).

\textsuperscript{79} Id. (Brandeis, J., concurring).
In the quarter-century between *Whitney* and *Dennis v. United States*, the Court veered away from its use of a “bad tendency” or “dangerous tendency” test, instead embracing clear-and-present-danger as the appropriate standard for a wide range of First Amendment issues. These included speech provoking a hostile-audience reaction and contempt by publication. In the cases that followed, the clear-and-present-danger test garnered majority acceptance, but it had been so altered in its application, it is questionable whether it remained the same test, except in name only.

*Dennis v. United States*

Fears over national security arose during the Cold War era, resulting in several prosecutions under the Espionage Act and the Smith Act of 1940 in the 1950s, a period during which protection for First Amendment free speech was arguably at its nadir. The first of these cases was *Dennis*, decided in 1951.

In *Dennis*, the defendants, leaders of the Communist Party of America, were arrested and indicted under the Smith Act, which made it a felony to conspire to advocate overthrow of the federal government by force or violence. The trial lasted more than nine months, “six of which were devoted to the taking of evidence, resulting

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80 341 U.S. 494 (1951).
84 Hentoff, *supra* note 18, at 1456 (“Because *Dennis* abandoned the key imminence requirement, a strong case can be made that the *Dennis* formulation was a clear and present danger test in name only.”).
85 See *TRIBE*, *supra* note 43, at 854.
86 *Id.*
87 *Dennis*, 341 U.S. at 497.
in a record of 16,000 pages.” The judge instructed the jury not to hold the defendants guilty unless they found the leaders of the Communist party had specific, unlawful intent to overthrow the government of the United States “as speedily as circumstances would permit.” The appellate court ruled the record “amply support[ed] the jury’s finding that the defendant Communists intended a violent revolution whenever the propitious occasion appeared.”

The Supreme Court upheld the convictions, despite the dissent’s contention whether sufficient—or, indeed, any—evidence of criminal wrongdoing had been introduced at trial. Although the Court noted the prevention of acts intended to overthrow the government by force and violence was certainly a “substantial enough interest” to warrant a restriction on speech, it found the repudiation of its opinions in Whitney and Gitlow required it to apply the clear-and-present-danger test rather than defer to legislative judgment.

88 Id.
89 Id. at 499.
90 Id. at 497.
91 Id. at 581 (Douglas, J., dissenting). According to Douglas:

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts [that the defendant’s could be found guilty under the statute]. But the fact is that no such evidence was introduced at the trial.

Id. (emphasis added). See also Marc Rohr, Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era, 28 SAN DIEGO L. REV. 1, 47-48 (1991) (discussing the lack of evidence in Dennis under which the defendants were convicted).

92 Dennis, 341 U.S. at 509 (majority opinion).
93 See id. at 507 (“Although no case subsequent to Whitney and Gitlow have expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.”).
Justice Fred Vinson, writing for the plurality, applied the clear-and-present-danger test but questioned whether Holmes and Brandeis had “ever envisioned that a shorthand phrase...be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances in each case.”\textsuperscript{94} According to Vinson, “[o]bviously the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited.”\textsuperscript{95}

Justice Vinson applied Judge Learned Hand’s statement of the clear-and-present-danger test from Hand’s opinion below, finding the proper interpretation required, “in each case (courts) must ask whether the gravity of the ‘evil’ discounted by its improbability, justifies such invasion of free speech as it necessary to avoid the danger.”\textsuperscript{96} The Court determined the mere fact that the defendants’ activities had not resulted in an actual attempt to overthrow the government was of “no answer to the fact that there was a group that was ready to make an attempt:”\textsuperscript{97}

The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflamable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.\textsuperscript{98}

The Court held that a “clear and present danger” was created where a group is “attempting to indoctrinate its members and to commit them to a course whereby they

\textsuperscript{94} ld. at 508.
\textsuperscript{95} ld. at 509.
\textsuperscript{96} ld. at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).
\textsuperscript{97} ld.
\textsuperscript{98} ld. at 511.
will strike when the leaders feel the circumstances permit.”\footnote{99}{Id. at 509.} Whether such a danger existed was not based on the success or probability of success of the attempt, but it was the “existence of the conspiracy itself which creates the danger.”\footnote{100}{Id. at 511.} The Court reasoned, even an attempt to overthrow the government, “though doomed from the outset because of inadequate numbers or power of the revolutionists,” was within the state’s power to regulate.\footnote{101}{Id. at 509.} It conclusively turned to “the inflammable nature of world conditions”\footnote{102}{Id. at 511.} to justify the restriction on defendants’ speech.\footnote{103}{Id. at 517.}

Following *Dennis*, many First Amendment scholars and jurists thought the clear-and-present-danger test was obsolete or no longer protected speech.\footnote{104}{See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 454 (1969) (Douglas, J., concurring) (*Dennis* “so twisted and perverted” the test “as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.”); Alan E. Fuchs, *Steps Toward A General Theory of the First Amendment*, 18 WM. & MARY L. REV. 347, 366 n.71 (1976) (*Dennis* “emasculated the formula and led its defenders to desert it”); Benno C. Schmidt, Jr., Nebraska Press Association: *An Expansion of Freedom and Contraction Theory*, 29 STAN. L. REV. 431, 431 (1977) (*Dennis* is “widely thought to represent the nadir of First Amendment’ protection).} *Dennis* had so diluted the Holmes/Brandeis formulation of the clear-and-present-danger test that a “threat of a great evil, even a nonimminent one, would justify suppression of the speech.”\footnote{105}{Redish, *Advocacy of Unlawful Conduct*, supra note 11, at 1172.} Under the plurality’s interpretation, the Court was exempted from satisfying the independent requirements of imminence and probability. It replaced that formula...
with one measuring the gravity of the harm against its likelihood of occurring, so that the
“gravity” and “improbability” elements worked in an inverse, balancing relationship.\textsuperscript{106}

\textit{Brandenburg v. Ohio}

Eventually, calmer times prevailed and the Court backed away from its \textit{Dennis} standard until it reformulated the test in its 1969 \textit{Brandenburg v. Ohio}\textsuperscript{107} opinion. \textit{Brandenburg}, decided eighteen years after \textit{Dennis}, involved a Ku Klux Klan rally, featuring hooded figures gathered around a burning cross.\textsuperscript{108} Clarence Brandenburg, dressed in full Klan regalia, gave a speech that included derogatory comments against blacks and Jews.\textsuperscript{109} Brandenburg said:

\begin{quote}
This is an organizers’ meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the state of Ohio than does any other organization. We’re not a revengent (sic) organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance (sic) taken. We’re marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, on group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.\textsuperscript{110}
\end{quote}

With the cooperation of the organizers, portions of the film were broadcast on the local television station and on a national network.\textsuperscript{111}

\textsuperscript{106} Redish, \textit{Advocacy of Unlawful Conduct}, supra note 11, at 1172.


\textsuperscript{108} \textit{Id.} at 446.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id.} at 445.
Brandenburg was convicted under an Ohio criminal syndicalism statute that looked much like the one in Whitney. This time, however, the Court found the statute failed to distinguish mere advocacy, such as the teaching of adverse doctrine, from true incitement to imminent lawless action. The Court applied a two-pronged test for evaluating speech acts, holding that speech can be prohibited only when it is:

1. “directed to inciting or producing imminent lawless action;” and
2. “is likely to incite and produce such action.”

In a per curium opinion, the Court overturned Clarence Brandenburg’s conviction, finding despite the offensiveness of his expression, he had engaged only in protected speech.

Although Brandenburg mysteriously cited to Dennis to support its understanding of proper analysis, the new test appeared nothing like the one in Dennis. Central to the Brandenburg test is a requirement that the harmful consequences arising from

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112 Clarence Brandenburg was convicted under the Ohio Syndicalism statute in the words of the statute, for “‘advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful means of terrorism as a means of accomplishing industrial or political reform’ and for ‘voluntarily assembl(ing) with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism,’” id. at 445 (quoting OHIO REV. CODE ANN. § 2923.13 (1919)). As the Court acknowledged, “[t]he Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical and quite similar laws were adopted by 20 States and two territories…But Whitney has been thoroughly discredited by later decisions….” Id. at 447.

113 Id. at 447-49. “The Act punishes persons who ‘advocate or teach the duty, necessity or propriety’ of violence ‘as a means of accomplishing industrial or political reform’;…Neither the indictment nor the trial judge’s instructions to the jury in any way refined the statute’s bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.” Id. at 448-49.

114 Id. at 447 (“[T]he principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”). See also, Redish, Advocacy of Unlawful Action, supra note 11, at 1174 (“At no point did not opinion refer to the clear and present danger test by name, but is appeared to incorporate its meaning by finding” this to be the standard.).

115 Id. at 448-49.

116 Redish, Advocacy of Unlawful Conduct, supra note 11, at 1175 (stating that “the difference in the two decisions’ treatment of the imminence requirement rendered it doubtful that Brandenburg followed the Dennis rationale”).
speech be both: 1) imminent; and 2) grave before the speech can be restricted.\textsuperscript{117} The *Brandenburg* imminence element has been interpreted to require not only that the threat of harm be “imminent,” but also that the degree of imminence be “extremely high” before the speech may be abridged.\textsuperscript{118}

While numerous varieties of speech may constitute a “grave” harm, gravity as a threshold requirement compels speech to rise to a certain level before the clear-and-present-danger test can be invoked to restrict speech.\textsuperscript{119} While Holmes and Brandeis would seemingly require that violence, and only serious violence, could satisfy the test,\textsuperscript{120} the *Brandenburg* gravity element is satisfied by “lawless action.”\textsuperscript{121} It is unclear, however, whether harm short of violence would justify speech restriction under the *Brandenburg* test.\textsuperscript{122}

As to intent, early proponents of the clear-and-present-danger test appeared willing to replace a finding of the speaker’s intent to bring about unlawful conduct with a reduced showing the harm would actually come about.\textsuperscript{123} In other words, either a finding of “clear-and-present-danger” or intent to bring it about would justify suppression of expression. *Brandenburg* ratcheted up the First Amendment standard by adding an

\begin{footnotesize}
\begin{enumerate}
\item The relationship between speech and violence is complex, and many cases have involved threats of violence that were not actually carried out.
\item Hentoff, *supra* note 18, at 1455.
\item Bridges v. California, 314 U.S. 252, 263 (1941).
\item Hentoff, *supra* note 18, at 1458.
\item In *Abrams*, for instance, Holmes declared that advocacy of dangerous ideas can be suppressed only when “immediate check is required to save the country.” *Abrams*, 250 U.S. 616, 630 (Holmes, J. dissenting) (emphasis added).
\item Hentoff, *supra* note 18, at 1459.
\item Hentoff, *supra* note 18, at 1459 n.41 (citing Hess v. Indiana, 414 U.S. 105, 109 (1973), as supporting the contention that simple “disorder” satisfies *Brandenburg* gravity element).
\item Redish, *Advocacy of Unlawful Conduct*, *supra* note 11, at 1177.
\end{enumerate}
\end{footnotesize}
intent requirement, ensuring only speech “directed” to inciting lawless action could be punished.\textsuperscript{124} This means that even if both requirements of imminence and gravity of harm are met, the state must also prove intent.\textsuperscript{125} The independent requirement of a finding of intent provides greater speech protection since it is only actual harm that justifies such suppression.

**Summary**

The incitement doctrine can largely be divided into cases concerning two varieties of expression: 1) speech advocating overthrow of military operations during wartime conditions, such as targeted by the Espionage and Smith Act convictions; and 2) speech inciting violence, force or lawless action to bring out political and government reform, at the heart of criminal syndicalism statutes. The test applied to both of these areas is the clear-and-present-danger test, announced by Justice Holmes in *Schenck*. Although the test enunciated by Holmes and Brandeis did not initially provide a rigorous standard against which First Amendment speech should be judged, they switched sides to advocate a more stringent level of First Amendment protection for speech advocating overthrow of organized government.


\textsuperscript{125} Although the *Brandenburg* formulation adds a requirement of a finding of intent and does not use the standard of “clear and present danger” by name, it contains the key elements of the test and thus can be treated as such. See, e.g., Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 436 (1980); Martin H. Redish, *Advocacy of Unlawful Conduct*, supra note 11, at 1185 (“[M]any have viewed *Brandenburg*—and it is a view that seems entirely correct—as simply a protectionist version of clear and present danger.”). But see Greer v. Spock, 424 U.S. 828, 863 (1976) (Brennan, J., dissenting) (citing *Brandenburg* for the proposition that the Court had “long ago departed from 'clear and present danger' as a test for limiting free expression”); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1490-93 (1975) (arguing that *Brandenburg*'s categorical test is different from the clear-and-present-danger test).
In *Schenck*, the Court upheld an Espionage Act conviction under the clear-and-present-danger test. It found the evidence, in the form of a book recording Schenck’s participation in printing of a circular asserting a “right” to oppose the war effort, was sufficient, despite a lack of evidence of “actual obstruction of the recruiting service” from which intent could be inferred. In *Abrams*, the Court upheld a criminal conviction under an amendment to the Espionage Act prohibiting incitement of resistance to the war effort based on language used in the pamphlets. The Court found, under a bad tendency standard, the record presented at least some evidence with which to uphold the conviction and that the individuals could be presumed to have intended and be held accountable for the consequences of their acts.

In *Gitlow*, the question was not one of sufficiency of evidence, but whether the legislature had properly enacted a statute prohibiting speech it appraised to be a “substantive evil.” Under the Court’s deferential standard, it found the state was within its police power to punish the publication of a manifesto advocating fascist principles, despite a lack of a finding of any evidence of harm originating from the manifesto. The same legislative presumption was provided to the California’s restriction on association in *Whitney*.

Although *Dennis* applied the clear-and-present-danger test by name, the “Hand sliding-scale” standard actually applied appeared to require much less than a clear-and-present-danger standard. Under *Dennis*, the Court did not make any detailed findings.¹²⁶ Despite Justice Vinson’s suggestion that any question of fact underlying a conviction based on speech would be reviewed “with the scrupulous care demanded by

our Constitution,” he cited only the “inflammable nature of the world conditions” to hold there was “ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security.” Furthermore, despite the trial judge’s requirement of evidence of specific, unlawful intent, it is questionable whether the Court required such a requirement given the uncertainty that any evidence of intent—or more generally, any evidence at all of criminal misfeasance—had been produced at trial.

In the cases involving advocacy of criminal anarchy or overthrow of government operation discussed above, the Court upheld the convictions under a standard akin to strict liability, without any real evidence of the “clear” or “present” danger of harm flowing from the expression. The content of the speech, such as the language used, was often sufficient to justify restrictions even under a “clear-and-present-danger” test. The Court appeared to set a standard that advocacy of overthrow of organized government in wartime—and specifically, advocacy of Communist and fascist principles—is so dangerous that it would always outweigh any First Amendment arguments for its protection.

On the opposing side, the Court applied a highly speech-protective standard for First Amendment expression in *Brandenburg*, involving expression inducing unlawful conduct. *Brandenburg* resurrected the clear-and-present-danger test, while also providing the most speech protective means for determining the level of constitutional protection.

\[^{127}\text{Id. at 587.}\]

\[^{128}\text{Id. at 542. But see id. at 580 (Black, J., dissenting) (“So long as this Court exercises the power of judicial review of legislative, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress’ or our own notions of mere ‘reasonableness.’ Such a doctrine waters down the First Amendment so that it amounts to littler more than admonition to Congress.”).}\]
protection afforded to incitement to unlawful action. It is the version of test that is applied today. Although the original formulation of the clear-and-present-danger test did not distinguish "evils," Brandenburg's differentiation between mere advocacy and immediate unlawful action, combined with its pre-Dennis standard of punishing only evils deemed "substantial" and "extremely" or "relatively serious," establishes a difficult standard by which government can justify regulation of speech. The Court's requirement of an imminent and serious evil decreases the chances a court could substitute "seriousness" for "imminence," as Hand's sliding-scale test would presumably allow.

The Dennis convictions were eventually overturned. But the Court has not since applied Brandenburg to speech advocating overthrow of government during wartime. This raises the inquiry whether Brandenburg would apply in such a situation or

129 Gunther, supra note 11, at 755 ("Brandenburg is the most protective standard yet evolved by the Supreme Court."). See also Hentoff, supra note 18, at 1457 ("The Court has never invoked Brandenburg to restrict speech."); Diane Zimmerman, Requiem of a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort, 68 CORNELL L. REV. 291, 318 (1983) (describing the Brandenburg standard as a "nearly impossible" standard to meet).


131 Bridges v. California, 314 U.S. 252, 263 (1941).

132 Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring) ("[E]ven imminent danger cannot justify resort to prohibition of these functions essential effective democracy, unless the evil apprehended is relatively serious.").

133 Redish, Advocacy of Unlawful Conduct, supra note 11, at 1177.

134 See Hentoff, supra note 18, at 1458-49 (explaining that the gravity of the harm element of the Brandenburg test is perhaps the most undefined and inconsistent element, apparently allowing abridgement of speech if the speech causes a mere breach of the peace or if it interferes with the administration of justice, or even with traffic).

135 See Hentoff, supra note 18, at 1458 (explaining that "imminence" is not a factor to be balanced, but a "threshold requirement"—under the test, speech cannot be prohibited, no matter how serious the harm is, unless the harm is imminent).

whether the Court would revert to its historical sliding-scale formulation. It has also
never defined the circumstances constituting “wartime conditions,” such as were
present in the Court’s first incitement-to-unlawful-action cases, thus leaving the
boundaries of the doctrine open to uncertainty.

Section 1 has summarized the Supreme Court’s doctrine regarding incitement to
unlawful action, including its pronouncement of the clear-and-present-danger test. This
test appears several times throughout other areas of expression within the Supreme
Court’s free speech jurisprudence, such as within the doctrine of “threatening speech.”

**Speech that Threatens**

Incitement to illegal action, although central to the First Amendment, is only one
of the types of governmental efforts to suppress speech because it conflicts with
competing social, individual or governmental interests. The statutes at issue in this
sequence of cases involve attempts to regulate pure speech because of its tendency to
“threaten.” While it is perhaps unclear the extent to which principles from the subversive
advocacy context govern the doctrine of threatening speech, what seems clear is “a
statute...which makes criminal a form of pure speech must be interpreted with the
commands of the First Amendment clearly in mind.”\(^ {137} \)

The Court’s threatening speech doctrine demonstrates it has not so confined the
clear-and-present-danger test to subversive advocacy. Yet, its evolution away from
“clear and present danger” within the context of threatening speech perhaps makes
sense, given that by the time the threatening speech is uttered, the “crime” has already
been committed. This can be compared to incitement-to-unlawful action and speech

provoking a hostile-audience reaction, another variety of expression in which the Court first applied the clear-and-present-danger test. These brands depend on some immediate, violent reaction by the hearer: 1) against a third-party (incitement); or 2) back at the speaker (hostile audience reaction).

The Court first applied the clear-and-present-danger test within its threatening speech doctrine to publication of contempt statements.

*Bridges v. California*

*Bridges v. California*\(^{138}\) arose from litigation between two rival unions.\(^{139}\) While a motion for a new trial was pending, Harry Bridges, president of the union against whom the trial judge had ruled, published a copy of a telegram he had sent to the U.S. Secretary of Labor describing the judge’s decision as “outrageous” and suggesting that, if the decision was enforced, his union would call a strike that would tie up the port of Los Angeles.\(^{140}\) The trial judge found Bridges guilty of out-of-court contempt.\(^{141}\)

Declaring the clear-and-present-danger test had “afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue,”\(^{142}\) the U.S. Supreme Court applied the test for the first time in the context of “threatening speech.” Writing for the Court, Justice Hugo Black determined that statements made outside the courtroom were within the state’s power to punish if they tended to interfere with the fair and orderly administration of justice in a

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\(^{138}\) 314 U.S. 252 (1941).

\(^{139}\) *Id.* at 271-72.

\(^{140}\) *Id.* at 275-77.

\(^{141}\) *Id.* at 258.

\(^{142}\) *Id.* at 262.
pending case.\textsuperscript{143} Unlike both \textit{Whitney} and \textit{Dennis}, however, the Court found the legislature had not “appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance.”\textsuperscript{144} Instead, Bridges’ conviction had been enforced under a statute rooted in English common law.\textsuperscript{145} While the Court noted a statute comprising a legislative declaration that out-of-court contempt statements created a clear-and-present danger “would weigh heavily in any challenge of the law as infringing constitutional limitations,” it found the statute did not “come to [it] encased in the armor wrought by prior legislative deliberation.”\textsuperscript{146} The Court reasoned that, “under such circumstances...‘it must necessarily be found as an original question’ that the specified publications involved created ‘such a likelihood of bringing about the substantive evil as to deprive (them) of the constitutional protection.’”\textsuperscript{147}

Justice Black found the clear-and-present-danger test required not only that “the substantive evil must be \textit{extremely serious} and the degree of imminence \textit{extremely high} before the utterances can be punished.”\textsuperscript{148} He held, “even the expression of ‘legislative preferences or beliefs’ cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty

\begin{footnotesize}
\textsuperscript{143} \textit{Id.} at 259.

\textsuperscript{144} \textit{Id.} at 260-61.

\textsuperscript{145} \textit{Id.} at 260.

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.} at 263 (emphasis added).
\end{footnotesize}
of expression.” As applied, Justice Black concluded, “we are all of the opinion that, upon any fair construction, [its] possible influence on the course of justice can be dismissed as negligible, and that the Constitutional compels us to set aside the conviction as unpermissible (sic) exercise of the state’s power.”

The Court held, the Times editorials did not include threatening speech, they had done “no more than threaten future adverse criticism,” and could not be taken as a threat by Bridges or the union to follow an illegal course of action. Moreover, the dangers attributed to the telegram and the editorials by the trial court were neither “serious” nor “substantial” to pose a clear-and-present-danger. Bridges’ telegram, thus, was simply an exercise of his First Amendment right to petition the government.

Despite the Court’s general use of the clear-and-present-danger test within its incitement doctrine to suppress expression without any evidence of injury arising from the speech, Bridges applied a speech-protective test to protect the defendant’s expression. Yet, the decision demonstrates its disposition toward deference to judicial decisionmaking, had there been any, in determining whether a government speech restriction could be upheld.

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149 Id. (citing Schneider v. State, 308 U.S. 147 (1939)).
150 Id. at 274-75.
151 Id. at 274.
152 Id. at 277.
153 Id.
154 Id.
**Watts v. United States**

The next time the Court addressed threatening speech was after the Court established its two-tier valuing of free speech in *Chaplinsky v. New Hampshire*. Chaplinsky established “fighting words” as a category of expression outside First Amendment protection.

In *Watts v. United States*, Roberts Watts was convicted under a federal statute making it a felony offense to “knowingly and willfully...[make] any threat to take the life of or to inflict bodily harm upon the President of the United States.” He was indicted for making a statement at a public rally held in 1966 on Washington Monument grounds to discuss police brutality. Watts stated, “I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going...If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” Although Robert Watts argued the statement did not constitute a threat under the statute, the U.S. Court of Appeals for the District of Columbia rejected

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155 315 U.S. 568 (1942).

156 See infra notes 230-45 and accompanying text (discussing the Chaplinsky doctrine).


158 18 U.S.C. § 871 (1917) stated:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

159 Id.

160 *Watts*, 394 U.S. at 706.

161 Id.
this argument, finding the statement violated the statute even if Watts had no intention of carrying it out.\textsuperscript{162}

\textit{Watts} marked the first time the Court addressed “true threats” as a category of unprotected speech. Although it failed to cite \textit{Chaplinsky}, \textit{Watts} categorized “threats” as another exception. The Court observed, the government undoubtedly has a valid if not an overwhelming interest in protecting the physical safety of its Chief Executive,\textsuperscript{163} but a statute prohibiting threats against the President of the United States must distinguish unprotected speech “from what is constitutionally protected.”\textsuperscript{164} While \textit{Watts} determined the statement was a “crude offensive method of stating a political opposition to the President,”\textsuperscript{165} it held it did not constitute a “true” threat.\textsuperscript{166} Yet, it failed to clearly define the category of unprotected speech designated a “true threat,” ruling only that Watts’ “political hyperbole” was clearly not it.\textsuperscript{167}

\textit{Watts} neglected to provide much guidance for determining when speech could be jettisoned from the First Amendment-protected zone beyond identifying several factors. These factors, known as the “\textit{Watts} factors,” consist of: 1) whether the statement constitutes political hyperbole; 2) the context of the statement; 3) its conditional nature; and 4) the reaction of the listeners.\textsuperscript{168}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{162} Id. at 707.
\item\textsuperscript{163} Id.
\item\textsuperscript{164} Id.
\item\textsuperscript{165} Id. at 708.
\item\textsuperscript{166} Id.
\item\textsuperscript{167} Id.
\item\textsuperscript{168} Id. at 707-08.
\end{enumerate}
\end{footnotesize}
Applying those factors, the Court first recognized the political backdrop of the rally.\textsuperscript{169} It cited \textit{New York Times v. Sullivan}\textsuperscript{170} for the principle that “debate on public issues should be uninhibited, robust, and wide-open, and...may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”\textsuperscript{171} Given the expressly conditional nature of Watts’ statement and the crowd’s laughter after hearing it, the Court determined, however, that Watts’ statement was protected speech.\textsuperscript{172}

Interestingly, only months before the Court injected an “intent” requirement into \textit{Brandenburg}’s incitement test, it considered Robert Watts’ intent in light of the statute’s “willfulness” requirement, but rejected the need to determine intent.\textsuperscript{173} In a brief discussion, the Court acknowledged the appellate court’s interpretation of the “willfulness” requirement compelled only that the speaker had “voluntarily uttered the charged words with ‘an apparent determination to carry them into execution.’”\textsuperscript{174} Yet, it summarily suggested it doubted the lower court’s interpretation of the statute,\textsuperscript{175} holding only that Watts’ speech did not fall into the category of “unprotected” speech. The development of the “low-value” doctrine in \textit{Chaplinsky}, in which the Court rejected “intent,” would suggest a showing of intent is not needed before so-called fighting words can be categorically banned. The classification of “true threats” as an unprotected

\textsuperscript{169} Id.
\textsuperscript{170} 276 U.S. 254 (1964).
\textsuperscript{171} Id. at 270.
\textsuperscript{172} Watts, 394 U.S. at 707.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 707.
\textsuperscript{175} Id. at 708.
speech category is congruent with the latter’s rationale for regulating it because of its mere tendency “by its very utterance” to inflict injury.\footnote{Paul T. Crane, \textit{True Threats” and the Issue of Intent}, 92 VA. L. REV. 1125, 1130 (2006).}

While the Court has never explicitly applied the \textit{Watts} factors to any subsequent case involving examination of threatening speech, \textit{NAACP v. Claiborne Hardware, Co.},\footnote{458 U.S. 886 (1982).} the next case in this category, at least demonstrates an emphasis on the “context,”\footnote{Ely suggests that what distinguishes a categorization approach from “clear and present danger” is the extent to which “context” is considered. Ely, supra note 125, at 1493 n.44. While consideration of the message’s context undoubtedly figures into the initial determination of the unprotected category, a categorization approach asks only “What was he saying?”, a clear-and-present-danger or ad-hoc balancing depends on the actual or anticipated behavior of the audience in response to it. Ely, \textit{supra} note 125, at 1493 n.44.} or the circumstances surrounding the speech, to determine its meaning and, thus, whether it should be protected.

\textbf{NAACP v. Claiborne Hardware, Co.}

In \textit{Claiborne}, Charles Evers, field secretary of the NAACP in Mississippi, made several speeches before a group of supporters in Claiborne County, Mississippi.\footnote{\textit{Claiborne}, 458 U.S. at 902.} He threatened violence against NAACP members that shopped at stores owned by white merchants.\footnote{\textit{Id.} at 902.} The group had voted to boycott white merchants in the area after officials rejected a list of particularized demands for equality and integration.\footnote{\textit{Id.} at 900.}

In his speeches, Evers made several threatening comments to Claiborne County NAACP members, including that “any ‘Uncle Toms’ who broke the boycott would ‘have their necks broken’ by their own people,” and that “[i]f we catch any of you going in any
of them racist stores, we’re gonna break your damn neck.”\textsuperscript{182} The most prevalent way the group enforced the boycott was to have “store watchers” sit outside and record the names of individuals who entered the white merchants’ stores.\textsuperscript{183} The names were read in front of NAACP meetings and published in the “Black Times” newspaper.\textsuperscript{184} The trial court found evidence of ten instances in which “discipline” had been enforced against boycott violators during a five-year period.\textsuperscript{185} Several merchants filed suit to recover losses caused by the boycott and to enjoin future boycotts.\textsuperscript{186}

In a unanimous opinion, the Court reversed the heavy fines imposed on Evers, the NAACP and several other African-American citizens.\textsuperscript{187} \textit{Claiborne} held that while violence and threats of violence are not protected by the First Amendment, \textsuperscript{188} Evers could not be held personally liable for the merchants’ economic losses “simply because it may embarrass others or coerce them into action.”\textsuperscript{189} According to the Court, coercive

\textsuperscript{182} \textit{Id.} at 902.
\textsuperscript{183} \textit{Id.} at 903.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.} at 904-06.
\textsuperscript{186} \textit{Id.} at 899-901. The Court’s opinion says the trial court granted liability on three separate theories: 1) under the tort of malicious interference with business; 2) under a statute prohibiting secondary boycotts; and 3) under an antitrust statute. The district court rejected the imposition of liability under the statutes but upheld the tort claim. The Mississippi Supreme Court upheld liability for interference, but augmented the theory, that the individuals had “agreed” to use force and violence to effectuate the boycott, and thus that the entire boycott was unlawful, even though it did not cite the specific evidence linking the participants to the agreement. \textit{Id.} at 890-96, 895 n.15.
\textsuperscript{187} \textit{Id.} at 890-92, 934.
\textsuperscript{188} \textit{Id.} at 917-18, 925-26.
\textsuperscript{189} \textit{Id.} at 910.
and intimidating speech does not lose its protected character simply because somewhere down the line, it results in acts of violence.\footnote{190}

Despite several of Evers’ comments conveying a less-than-peaceful message, evidence produced at trial maintained that no NAACP supporters that heard Evers’ speeches were threatened by his speeches or that “Evers authorized, ratified, or directly threatened acts of violence.”\footnote{191} As proof, the Court cited the testimony of Julia Johnson, “although itself a small portion of the massive record,” as best illustrating that any losses sustained were because of people like Johnson who favored the ends of the boycott and wanted to honor it.\footnote{192} In fact, the Court’s review of the factual record underlying the lower courts’ judgments found that much of the language Evers used in his “lengthy addresses” included “impassion[ed] plea[s] for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them.”\footnote{193} The Court acknowledged in each instance Evers was making a “public address—which predominantly contained highly charged rhetoric lying at the core of the First Amendment.”\footnote{194}

Additionally, the Court found that “factors other than force and violence (by the petitioners) [also] figured prominently in the boycott’s success.”\footnote{195} Evidence presented at trial demonstrated that any acts of violence occurred weeks or months after Evers’

\footnote{190} Id.
\footnote{191} Id. at 929.
\footnote{192} Id. at 922 n.62.
\footnote{193} Id. at 928.
\footnote{194} Id. at 926-27.
\footnote{195} Id. at 922-23.
speeches. Moreover, it found that “virtually every victim of the acts of violence...continued to patronize the white merchants.” On this basis, the Court determined the record “completely failed to demonstrate that business losses suffered in 1972—three years after this lawsuit was filed—were proximately caused by the isolated acts of violence found in 1966,” and thus that “[i]t is impossible to conclude that state power has not been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.”

Despite the temporal circumstances implying a more serious nature surrounding Evers’s speech than inferred from Watts’s statements, the Court decided, without much discussion, that Evers’s speech was not a true threat. Its reference to Watts perhaps indicates it viewed Evers’s speech as more analogous to “political hyperbole” than a direct, serious threat. However, the Court’s jump from discussion of Mississippi’s interest in regulating economic activity to the outright ban it placed on prohibiting “peaceful boycott activity” does not adhere to the Court’s traditional reliance on an ad-hoc form of policy balancing within the context of political boycotts, in which the “commercial expectancies [are weighed] against the defendants interest in advancing

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196 Id. at 928 (emphasis added).

197 Id. at 923 n.63. This was in direct contradiction to the finding of the Mississippi Supreme Court, as noted by the U.S. Supreme Court, to uphold the fines on a theory of concerted liability, writing that “[u]nquestionably the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse from the complainants.” Id. at 894-95.

198 Id. at 923.

199 Id. at 923.

200 Id. at 926-27.

their social objectives.”202 At least one scholar has suggested *Claiborne* may have turned, instead, on the Court’s intervening decision in *United States v. O’Brien*,203 upholding a prosecution of a draft card burning despite the contention the act was protected as symbolic expression.204

*O’Brien* held, in pertinent part, that “a governmental regulation is justified...if it furthers an important or substantial governmental interest...that is unrelated to the suppression of free expression.”205 Professor John Hart Ely has interpreted *O’Brien* as establishing a “switching” function in First Amendment jurisprudence, focusing on the relationship between the asserted government interest and implementation of that interest.206 Under Ely’s interpretation, if the government attempt at regulation is based

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204 Id. at 376.

205 Id. at 377. The part quoted from in the text is taken from the four-prong *O’Brien* test which states that:

- a government regulation is sufficiently justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (2) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. (bracketed numbers added).

206 Ely, supra note 125, at 1484. Professor Ely poses the “critical question” as:

[W]hether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever.

Id. at 1497. If the court is applying a balancing approach, the court may permit a restriction of only the least restrictive means of infringement necessary to vindicate the government's interest. Ely, supra note 125, at 1484-85.
on fear of how individuals will react, the constitutional analysis “switches” from a balancing test to definitional categorization.\textsuperscript{207}

If \textit{O’Brien} established the technique for evaluating instances in which a restriction on speech is merely incidental to the state’s objective in regulating (in which the state’s interest is then justified by a reasonable balancing of interests), \textit{Claiborne} demonstrates the outcome when the government’s desire to regulate is tied to the underlying message of the expression conveyed. In such an instance, the Court has found that a reasonable weighing of the competing interests cannot satisfy the demands of the First Amendment. Instead, the speech is categorically protected unless the state can prove it falls within one of the several narrowly defined categories of unprotected expression.\textsuperscript{208} Thus, even though the Court appeared to reject application of the “true threats” doctrine as applied to Evers’ threatening comments, there were other rationales for protecting his allegedly harmful expression.

\textsuperscript{207} Ely, \textit{supra} note 125, at 1484. See \textit{e.g.}, Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969). Although Ely initially proposed this interpretation in the context of flag desecration, it was eventually applied to political boycotts, similarly containing elements of both speech and conduct. The standard was applied to political boycotts in Note, \textit{Political Boycott Activity and the First Amendment}, 91 HARV. L. REV. 659 (1975) [hereinafter \textit{Harvard Note}]. While the speech-conduct dichotomy has sometimes been used to distinguish constitutionally protected activity from that which is unprotected, it has been criticized as specious and question-begging. See, \textit{e.g.}, Ely, \textit{supra} note 125, at 1494-96. The specific means by which courts ascertain the “actual” state interest in effectuating a regulation, however, begs a different question. Note, \textit{Political Boycott Activity}, \textit{supra} note 207, at 673-74. According to the Note:

On the one hand, courts could accept any plausible interest urged by the state. This is the approach by which the \textit{O’Brien} Court concluded that the governmental interest in that case was administrative efficiency and convenience rather than a desire to suppress a particular politically unpopular message. On the other hand, a much more searching judicial scrutiny of legislative motive might be permissible, if not obligatory, in constitutional cases where legislative interest is a relevant issue.

Note, \textit{Political Boycott Activity}, \textit{supra} note 207, at 674.

\textsuperscript{208} Ely, \textit{Flag Desecration}, \textit{supra} note 125, at 1492-93.
Summary

The cases discussed above demonstrate the Court’s inconsistent approach to determining the constitutionality of threatening speech. Despite the Court’s affirmance of “true threats,” it has never upheld a restriction on speech under the exception and, furthermore, has refused to apply it to threats of physical violence. On the other hand, the Court once rejected punishment of out-of-court contempt statements under an old, common-law presumption that judges could punish statements interfering with the fair and orderly administration of justice. In each instance, the Court ruled in favor of the First Amendment despite the government’s asserted interest in: 1) the fair and orderly administration of justice; 2) protecting the safety of the Chief Executive and in allowing him to perform his duties without interference from threats of physical violence; and 3) the economic interests of the state.

*Bridges* held that a clear-and-present danger did not exist in the form of an individual’s statements threatening labor disruption. The Court rejected the common-law rule that judges could punish out-of-court contempt statements. It held that, in the absence of a legislative declaration that contempt statements are dangerous to the fair and orderly administration of justice or where circumstances lacked demonstrating a clear-and-present danger, the expression was protected under the First Amendment’s guarantees.

*Watts* identified the categorical exemption of “true threats.” Although the Court recognized threats of physical violence aimed at the President may be banned,209 it rejected application of the category to Watts’ political hyperbole. The opinion identified

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209 This is a description later applied to the Court’s *Watts* decision in *R.A.V. v. City of St. Paul* 505 U.S. 377, 388 (1992).
several factors courts should consider in evaluating threatening speech. Under those factors, it simply determined Robert Watts’ expression was protected. Yet, it has never applied those same factors to a subsequent case involving threatening speech.

*Claiborne* held that threatening speech does not lose its protected character simply because it may coerce others into action. It determined, based on its substantive review of the facts, the record amply supported dismissal of liability. According to the Court, much of Evers’ language actually advanced peaceful methods of pursuing equal treatment and opportunity under the law. Moreover, none of the individuals who heard Evers’s threatening statements were threatened by his speech. In the absence of a “proximate” connection between Evers’s expression and any acts of violence, the record failed to demonstrate Evers’ could be held liable for the merchants’ losses. Despite Mississippi’s interest in protecting economic activity within the state, the Court determined Evers’s had engaged and promoted only protected “peaceful” boycott activity.

Perhaps the most consistent approach that emerges amid review of these cases is the emphasis placed on the circumstances surrounding the statements. These factors include: the nature of the speech (whether religious or political); the context of the speech (whether religious or political); and the reaction of the listeners. Absent these factors is an examination of the speaker’s mens rea. It was not until *Virginia v. Black*, \(^{210}\) decided more than thirty years later, that the Court set forth a more definitive statement of “true threats” and rejected a requirement the speaker intend to carry out the threat.

\(^{210}\) 538 U.S. 343 (2003) (finding that a state could ban cross burning carried out with evidence of intent to intimidate but that evidence of actual intent to carry out the threat was unnecessary).
Section 2 discussed the Court’s true threats doctrine. Section 3 turns to expression invoking a hostile-audience reaction.

**Hostile-Audience Reaction**

The hostile-audience doctrine suggests that when a speaker causes a crowd to react, regulation should not occur until that crowd is in fact stirred to violence. While speech at the crux of the hostile-audience reaction category may be closely related to incitement, the two differ in one important respect: incitement comprises expression that may persuade audience members to act undesirably, while speech invoking a hostile audience reaction is suspect because it may result in a violent reaction against the speaker. This category likewise began with application of the clear-and-present-danger test, but evolved into greater examination of the facts underlying the decision and all but rejection of the categorical “fighting words” exception on which the majority of the hostile audience opinions is based.

**Cantwell v. Connecticut**

The Court first applied the clear-and-present-danger test in the context of insulting speech evoking a breach of the peace in *Cantwell v. Connecticut*. In *Cantwell*, the conviction of a Jehovah’s Witness for offending listeners to the point of a violent reaction was voided in the absence of a statute narrowly drawn to define and

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212 *Id.* See also Jennifer Elrod, Expressive Activity, True Threats, and First Amendment, 36 Conn. L. Rev. 541 (2004) (discussing the differences between the Court’s incitement to unlawful action, threatening speech and fighting words doctrines).

213 310 U.S. 296 (1940).
punish specific conduct presenting a clear-and-present danger to a “substantial” state interest.\footnote{Id.}

Jessie Cantwell and his son, members of the Jehovah’s Witnesses, were arrested and charged under a Connecticut solicitation statute\footnote{Specifically, the statute read:}

\begin{quote}
No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council.
\end{quote}

\footnote{Id. at 300.} for proselytizing a predominantly Roman-Catholic neighborhood.\footnote{Id. at 301.} The Cantwells distributed material by traveling door-to-door and by approaching people on the street.\footnote{Id. at 303.} After voluntarily listening to a message on Jessie’s portable phonograph attacking the Roman-Catholic religion and church, two men became “incensed by the content of the record.”\footnote{Id. at 309. According to the Court, “[o]ne may, however, be guilty of the offense if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended.” Id.} One of them said he felt like hitting Cantwell, although he did not actually do so.\footnote{Id. at 309.}

The U.S. Supreme Court found statements actually likely to produce a violent reaction may be proscribed, regardless whether the speaker intended the reaction, if the language consisted of “profane, indecent, or abusive remarks directed to the person of the hearer.”\footnote{Id. at 309.} In an opinion by Justice Owen Roberts, the Court wrote, “[r]esort to
epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." 221 While the Court recognized Connecticut's valid interest in preventing "riot, disorder, interference upon the public streets, or other immediate threat to public safety, peace or order," 222 it held not only that the statute under which Cantwell was convicted swept up "a great variety of conduct destroying or menacing public order," but also that Connecticut had convicted Cantwell without any "showing that his deportment was noisy, truculent, overbearing or offensive." 223 It overturned Cantwell's conviction, concluding the statute was not "narrowly drawn" to prevent only speech deemed a clear-and-present danger to a substantial government interest. 225 It could not, thus, be used to justify suppression of the "free communication of views, religious or otherwise, under the guise of conserving desirable conditions." 226

Despite its holding, Justice Roberts concluded there are limits to the exercise of speech and religion and that individuals who attempted to exploit such freedoms may well be subjected to different constraints:

The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of

221 Id. at 309-10.
222 Id. at 308. Indeed the Court wrote, "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears, the power of the state to prevent or punish is obvious." Id.
223 Id. at 309.
224 Id. at 307.
225 Id. at 311.
226 Id. at 308.
their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.\textsuperscript{227}

Because the statute granted a state official the authority to determine whether such solicitation pertains to a religious cause, the Court found the Connecticut statute violated the First Amendment.\textsuperscript{228} The language of the opinion, however, suggests that under different circumstances, or a more narrowly tailored statute, Cantwell’s speech may not have been protected.\textsuperscript{229}

\textit{Chaplinsky v. New Hampshire}

Two years later, the high court addressed another case involving speech by a Jehovah’s Witness in \textit{Chaplinsky v. New Hampshire}.\textsuperscript{230} This time, it departed from application of the clear-and-present-danger test to insulting words likely to provoke a hostile-audience reaction. Instead, the Court created an exception to the First Amendment when it chose to carve out, in wholesale fashion, an entire category of speech—“fighting words”—from protection.\textsuperscript{231}

Walter Chaplinsky, a preacher for the Jehovah’s Witnesses, was convicted by New Hampshire’s highest court under a statute proscribing “any offensive, derisive, or annoying word” addressed to a person in a public place.\textsuperscript{232} Chaplinsky was convicted

\begin{flushleft}
\textsuperscript{227} \textit{Id.} at 310.
\textsuperscript{228} \textit{Id.} at 310-11.
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} 315 U.S. 568 (1942).
\textsuperscript{231} \textit{Id.} at 571-72. See Burton Caine, \textit{The Trouble with “Fighting Words”: Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should be Overruled}, 88 MARQ. L. REV. 441, 443 (2004) (discussing the \textit{Chaplinsky} Court’s decision as establishing the categorical prohibition of certain categories of speech).
\textsuperscript{232} \textit{Id.} at 569. Specifically, N.H. Gen. Laws section 378(2) states:
\end{flushleft}
for calling a city marshal a “God-damned racketeer” and a “damned fascist” in public.\textsuperscript{233} The New Hampshire Supreme Court found the statute under which Chaplinsky was convicted for breaching the peace forbade only those words that “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”\textsuperscript{234}

Building on dictum from \textit{Cantwell}, the U.S. Supreme Court refused to protect Walter Chaplinsky’s expression.\textsuperscript{235} In his majority opinion for a unanimous bench, Justice Frank Murphy coined the now famous passage:

\begin{quote}
There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting words”—those which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace.\textsuperscript{236}
\end{quote}

Although the Court had never before addressed the issue, it seemed to assume the regulation of such language was “never thought to raise any constitutional problem.”\textsuperscript{237} To the contrary, it wrote, “[i]t has been well-observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to

\begin{quote}
No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.
\end{quote}

\textsuperscript{233} \textit{Chaplinsky}, 315 U.S. at 569.

\textsuperscript{234} State v. Chaplinsky, 18 A.2d at 757, 758 (N.H. 1941).

\textsuperscript{235} \textit{Chaplinsky}, 315 U.S. at 570-71. The Court acknowledged, “Chaplinsky’s version of the affair was slightly different,” but held “[t]here is no substantial dispute over the facts.” \textit{Id.}

\textsuperscript{236} \textit{Id.} at 572.

\textsuperscript{237} \textit{Id.}
truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Chaplinsky refused to apply the clear-and-present danger test, which it had adopted in Cantwell and which it had typically used to address speech that causes or is likely to cause immediate harm. The Court did not address the specific conduct it found “plainly tending to excite the addressee to a breach of the peace,” but summarily held the statute at issue, unlike the one in Cantwell, was “narrowly drawn and limited to define and punish specific conduct lying within the domain of state power....” The standard the Court applied was “what men of common intelligence would understand would be words likely to cause an average addressee to fight.” Apparently, the Court had no problem finding Chaplinsky’s words fell into this category and that New Hampshire’s interest in preventing a breach of the peace outweighed his right to free speech.

The Chaplinsky opinion represented the first time the Court addressed the category of unprotected expression known “fighting words.” It also demonstrates the lengths to which the Court went—failing to stop short of rewriting the legislation—to find the statute was constitutional. Justice Murphy explicitly rejected the contention that the statute was vague and overbroad. He refused mentioning of the language of the

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238 Id. (emphasis added).

239 Id.

240 Id.

241 Id. (emphasis added).

242 Id.
statute,243 except only in passing to hold that when limited to provoking a fight in the minds of “men of common intelligence,” the vagueness and overbreadth arguments disappeared.

Chaplinsky, thus, sought salvation of this impliedly vague and overbroad phrase by injecting a standard of “restricting only words that would be likely to cause the average addressee to fight” into the statutory language. It did not define the words that could be taken as provoking violence, but only provided several examples of words the Court thought plainly fell within this category.244 Yet, a decade after it announced Chaplinsky, it refused to apply the categorical exception to uphold a conviction in Feiner v. New York.245

Feiner v. New York

In Feiner, Irving Feiner was convicted under a New York disorderly conduct statute246 for calling the American Legion “a Nazi Gestapo,” referring to President Harry

243 Specifically, the statute articulated that “any offensive, derisive, or annoying word” should be banned. See supra note 232 for a full reading of the statute.

244 According to a passage from the Court’s opinion:

Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace….The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including ‘classical fighting words’, [sic] words in current use less ‘classical’ but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.

Id. at 573. However, use of the word, including” suggests there may be other categories of fighting words the Court has not thought to list in the opinion. Caine, supra note 231, at 450-51 (discussing possible interpretations of the fighting words dictum).


246 According to the statute:

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have
Truman as “a bum” and denouncing world leaders as “corrupt politicians.” The police received a complaint and found a large crowd had filled a sidewalk and was spreading into the street. Although the police made no effort to interfere with Feiner’s speech, they attempted to get the people listening back on the sidewalk. But as Feiner continued, the crowd grew “restless” and there was “some pushing, shoving and milling around.” Because of the “feeling that existed in the crowd,” the police asked Feiner to disperse it. When he refused, the police “stepped in to prevent it from resulting in a fight.” Feiner was arrested and convicted.

Writing for the majority, Chief Justice Fred Vinson cited Cantwell for the proposition that “when a clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious.” Although the Court acknowledged “ordinary murmurings and objections of a hostile audience cannot be committed the offense of disorderly conduct: 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior; 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; 3. Congregates with others on a public street and refuses to move on when ordered by the police; ** **.

N.Y. PENAL LAW § 722 (McKinney).

247 Feiner, 340 U.S. at 316-17. Irving Feiner referred to President Truman as a “bum,” to the American Legion as “a Nazi Gestapo,” and to the Mayor of Syracuse as a "champagne-sipping bum" who “does not speak for the Negro people." Id. at 330 (Douglas, J., dissenting). He further proclaimed “[T]he Negroes don't have equal rights; they should rise up in arms and fight for their rights.” Id. (Douglas, J., dissenting).

248 Id. at 316 (majority opinion).

249 Id. at 317.

250 Id.

251 Id.

252 Id.

253 Id. at 317-18.

254 Id. at 320.
allowed to silence a speaker,” it determined the officers had not acted inappropriately in preventing Feiner’s speech:

We are not faced here with a blind condonation by a state court of arbitrary police action...It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here, the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.  

In granting New York broad latitude in exercise of its police power to regulate crowd behavior, Justice Vinson wrote:

the findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police requests, supported as they were by the record of this case, are persuasive that the conviction of the petitioner for violation of public police, order authority does not exceed the bounds of proper police action.  

He cited only “testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened” to uphold the conviction.

Despite the Court’s suggestion of independent evidentiary review to determine “whether the right [of free expression] has been violated,” the opinion acknowledged the determination of the New York appellate courts that the police officers were justified in taking action to prevent a breach of the peace” was based on a trial judge’s summation of the contradictory evidence “generally that he believed the state’s witnesses.” On this basis, the Court held, no “one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty

255 Id. at 320.
256 Id. at 319.
257 Id. at 320.
258 Id. at 319.
259 Id. at 316.
connotes the privilege to exhort others to physical attack upon those belonging to another sect.\textsuperscript{260} Its appraisal of the facts thus appears to solely rely on the trial judge’s determination, which was rendered without a jury.\textsuperscript{261}

Notwithstanding the lack of circumstances indicating any great threat of danger arising from Feiner’s speech—but for one individual’s threat of violence if the police did not act\textsuperscript{262}—the majority upheld Irving Feiner’s conviction under a clear-and-present-danger standard. The lack of evidence demonstrating a connection between Feiner speech and any actual harm, however, has not gone uncontestd. Indeed, Justices Hugo Black and William Douglas’s dissents appear to recognize the lack of a sufficient evidentiary record upon which to indict the defendant.\textsuperscript{263} According to Black:

\begin{quote}
The record before us convinces me the petitioner, a young college student, has been sentenced to the penitentiary for the unpopular views he expressed on matters of public interest...Many times in the past this Court has said despite findings below, we will examine the evidence for ourselves to ascertain whether federally protected rights have been denied...But still more has been lost today. Even accepting the 'finding of fact' below, I think this conviction makes a mockery of the free speech guarantees of the [First Amendment].\textsuperscript{264}
\end{quote}

Douglas seconded this opinion when he wrote:

\begin{quote}
A speaker may not, of course, incite a riot any more than he may incite a breach of the peace by the use of ‘fighting words’. But this record shows no such extremes...But there were not fights and no ‘disorder’ even by the standards of the police...It shows an unsympathetic audience and the
\end{quote}

\textsuperscript{260} \textit{Id.} at 320.

\textsuperscript{261} \textit{Id.}

\textsuperscript{262} According to the Court, "One man who heard this told the officers that if they did not take that ‘S...O...B...’ off the box, he would." \textit{Id.} at 308-09.

\textsuperscript{263} \textit{See Feiner,} 340 U.S. at 321-29 (Black, J., dissenting); \textit{id.} at 329-331 (Douglas, J., dissenting).

\textsuperscript{264} \textit{Id.} at 321-24 (Black. J., dissenting).
threat of one man to haul the speaker from the age. It is against that kind of threat that speakers need police protection.\textsuperscript{265}

\textit{Feiner}, thus, narrowed the Court’s “fighting words” doctrine by refusing to apply it in the classic scenario of the “heckler’s veto.”\textsuperscript{266}

Decisions such as \textit{Gooding v. Wilson},\textsuperscript{267} the next case discussed in this section, however, reveal the Court’s willingness to set aside convictions as inconsistent with the “fighting words” doctrine when a statute sweeps up greater classes of speech than are proscribable. \textit{Gooding} also demonstrates the extremely narrow circumstances to which \textit{Chaplinsky} has been confined.

\textbf{Gooding v. Wilson}

Johnny Wilson was convicted under a Georgia “disorderly conduct” statute for using “opprobrious words or abusive language, tending to cause a breach of the peace.”\textsuperscript{268} He had communicated various phrases to police officers while they were trying to restore access to a public building. In particular, he said: “White son of a bitch, I’ll kill you;” “You son of a bitch, I’ll choke you to death;” and “You son of a bitch, if you ever put my your hands on me again, I’ll cut you all to pieces.”\textsuperscript{269} Although Wilson did not argue the statute was unconstitutional as applied to him, he claimed it was facially unconstitutional.\textsuperscript{270}

\begin{flushright}
\textsuperscript{265} \textit{Id.} at 330-31 (Douglas, J., dissenting) (discussing the obligation of the police to protect the speaker).

\textsuperscript{266} The phrase “heckler’s veto” was coined by Professor Harry Kalven. \textit{See} HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT 140-45 (1965).

\textsuperscript{267} 405 U.S. 518 (1972).

\textsuperscript{268} \textit{Id.} at 518-19.

\textsuperscript{269} \textit{Id.} at 534 (Blackmun, J., dissenting).

\textsuperscript{270} \textit{Id.} at 520 (majority opinion).
\end{flushright}
Justice William Brennan, writing for the majority, arguably spent more time in *Gooding* examining the statute itself to determine its “common meaning” than did the original “fighting words” decision.\(^{271}\) Notably, the *Gooding* dissents acknowledged the statute appeared more synchronous with the “fighting words” doctrine than the New Hampshire legislate on in *Chaplinsky*.\(^{272}\) The Court recognized the power of the state to punish fighting words under “carefully drawn statutes not also susceptible of application to protected expression.”\(^{273}\) Yet, it struck down a statute two justices thought satisfied *Chaplinsky’s* requirements.\(^{274}\) The Court observed that the dictionary definitions of the language used in the Georgia statute had not been narrowly construed by the lower courts as applying only to “fighting words” but that it had actually be given great farther reach.\(^{275}\)

*Gooding* reaffirmed the proposition that the government may not punish profane, vulgar or “opprobrious” words simply because they offend, but only if they are aimed at words that have a direct tendency to cause acts of violence by the person to whom they are directed.\(^{276}\) In doing so, the Court appeared to adopt the “actual addressee” standard established in *Cohen v. California*.\(^{277}\) In that case, the Court held that states may not ban, without demonstration of additional justifying circumstances, the simple

\(^{271}\) See supra note 230-45 and accompanying text (discussing the *Chaplinsky* decision).

\(^{272}\) *Gooding*, 404 U.S. at 534 (Burger, J., dissenting); id. at 535-36 (Blackmun, J., dissenting).

\(^{273}\) Id. at 523 (majority opinion).

\(^{274}\) See id. at 529-30, 534 (Burger, J., dissenting); see also id. at 536-37 (Blackmun, J., dissenting).

\(^{275}\) Id. at 528 (majority opinion) (emphasis added).

\(^{276}\) Id. (criticizing the Georgia court’s application of the statute “to utterances where there was no likelihood that the person addressed would make an immediate violent response”).

\(^{277}\) 403 U.S. 15 (1971).
use of so called “fighting words,” where no individual actually or likely present could reasonably have regarded the words as a “direct personal insult.” Gooding narrowed the standard by requiring specific proof that the particular individual addressed must be likely to react in an immediate, violent manner.

Following Gooding, the “fighting words” doctrine was interpreted to apply only to speech: 1) addressed to someone; 2) face-to-face; 3) where the likelihood of violence by the average addressee is great. The decision also demonstrates the changing tide from the Court’s grant of legislative deference in Cantwell and Chaplinsky to its standard of independent review of the record as well as imposition of an increased burden of proof. Gooding’s confinement of “fighting words” to a statute punishing no more than the unprotected category appears to be, as noted by Justice Harry Blackmun’s dissent, “all that is left of the decision in Chaplinsky.”

The cases so far discussed within the hostile audience variety of expression involve speech aimed by an individual at another individual or group of individuals. Conversely, Snyder v. Phelps involves a claim brought by an individual against members of a group for their shocking and offensive speech.

**Snyder v. Phelps**

In Snyder, decided only two terms ago, the father of deceased Marine Lance Corporal Matthew Snyder filed suit against members of the Westboro Baptist Church.

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278 Id. at 20.


280 Id. at 537 (Blackmun, J., dissenting).

(WBC) for picketing his son’s funeral. Church members, who had picketed hundreds of military funerals, traveled from Topeka, Kansas, to Maryland to picket Snyder’s funeral with signs stating, “Thank God for dead soldiers,” “God Hates the USA” and “Fag troops.” The picketing, which remained peaceful, occurred approximately 1,000 feet from the church where the funeral was held, as to way for the WBC members to express their religious and political views that “God hates and punishes the United States for its tolerance of homosexuality, particularly in American’s military.” Snyder claimed the picketers’ speech had caused him severe emotional injury, including that he was unable to separate the thoughts of his dead son from the picketer’s speech. Expert witnesses testified at trial that Snyder’s emotional anguish had resulted in exacerbation of pre-existing health conditions, including his diabetes.

Even though Albert Snyder testified he was not aware of what was written on the signs until he viewed a news report of the funeral on television later that evening, there is no doubt the Westboro members’ expression could have provoked a hostile-audience reaction. Rather than devoting time to reasons why the case did not present expression falling within the “fighting words” category, Professor Paul Salamanca

282 Id. at 1213.

283 Id. at 1216-17.

284 Id. at 1213 (stating “the church frequently communicates its views by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals”).

285 Id. at 1214.


287 Id. at 1213-14.
suggests, "[i]t took the incremental tack of reiterating the importance of speech on matters of public concern and putting the protest into that category." 288

The Court concisely determined that the Phelpses’ speech was protected by the First Amendment, not only because it complied with all police restraints on the time, place and manner of the picket,289 but because it concerned matters of substantial public interest.290 Despite a few of the signs being viewed as relating to Matthew Snyder specifically or the Snyders generally, the lack of “pre-existing relationship or conflict” between Westboro and the Snyders did not change “the fact the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.”291 The Court held:

[W]hile these messages may fall short of refined social and political commentary...the arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern...The issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military and scandals involving the Catholic clergy—are matters of public import.292

In this instance, Albert Snyder’s status as a private figure did not appear to affect protection of the WBC’s expression.

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289 Id. at 1213 (“The picketing took place within a 10-by-25-foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1,000 feet form the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered the church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing.”).

290 Snyder, 131 S. Ct. at 1218 (“Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged.”).

291 Id. at 1217.

292 Id. at 1216, 1217.
Although Snyder applied strict scrutiny to a group’s offensive words, the Court did not set a standard of harm or requirement of evidence necessary to justify the Court’s protection of the expression, as it had done in some of its other, more recent First Amendment jurisprudence, such as Brown or Alvarez. The Court determined the signs “plainly relate[d] to broad issues of interest to society at large, rather than matters of ‘purely private concern’” and that “[s]peech on public issues occupies the highest rung of the hierarchy of First Amendment values.” Snyder, thus, represents a subset of an area of expression in which the Court has refused to extend its requirements of a greater evidentiary burden. The decision can also be differentiated from those opinions on the basis that Snyder involves a tort-based challenge, as opposed to one involving a government restriction resting on the content of expression.

Justice Samuel Alito, on the other hand, took profound contention with the majority’s characterization of the facts in his dissent in Snyder. He recognized, “the First Amendment ensures that [WBC members] have almost limitless opportunities to express their views.” Yet, he wrote, “[i]t does not follow…that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate.” Justice Alito found, among other things: that the WBC’s strategy for garnering attention necessarily involved “outrageous” protest (“[t]he more outrageous

293 See supra notes 432-49 & 573-97 and accompanying text for discussion of these cases.
294 Id. at 1216.
295 Id. at 1211 (internal punctuation omitted).
296 Id. at 1222 (Alito, J., dissenting).
297 Id. (Alito, J., dissenting).
the funeral protest, the more publicity the Westboro Baptist Church is able to obtain\textsuperscript{298}); that the “signs would most naturally have been understood as suggesting—falsely—that Matthew was gay”\textsuperscript{299}; and that from these and other signs, it was “abundantly clear” that WBC members went “far beyond commentary on matters of public concern,” specifically attacking Matthew Snyder.\textsuperscript{300} As such, the WBC members turned Matthew’s funeral into a “tumultuous media event,” depriving Albert Snyder and his family of the “right” to “bury their son in peace.”\textsuperscript{301}

Justice Alito did not contest the picketers compliance with all police instructions or that they had conducted their protest on a public street. He argued, “there is no reason why a public street in close proximity to the scene of the funeral should be regarded as a free-fire zone in which otherwise actionable verbal attacks of shielded from liability.”\textsuperscript{302} Alito, however, objected to the majority’s distinction regarding protection of the WBC’s expression because of a lack of a “private grudge.” The WBC members’ “motivation—‘to increase publicity for its views.’—did not transform their statements attacking the character of a private figure into statements that made a contribution to debate on matters of public concern.”\textsuperscript{303} He argued the decision had, in

\begin{footnotesize}
\begin{enumerate}
\item[298] \textit{id.} at 1224 (Alito, J., dissenting).
\item[299] \textit{id.} (Alito, J., dissenting).
\item[300] \textit{id.} at 1226 (Alito, J., dissenting).
\item[301] \textit{id.} at 1222 (Alito, J., dissenting).
\item[302] \textit{id.} at 1227 (Alito, J., dissenting).
\item[303] \textit{id.} (Alito, J., dissenting).
\end{enumerate}
\end{footnotesize}
essence, allowed for the “brutalization of innocent victims,”\textsuperscript{304} such as Albert Snyder and his family.\textsuperscript{305}

\textbf{Summary}

The evolution of the hostile-audience doctrine mirrors threatening speech in several ways. First, the Court originally applied the clear-and-present-danger test to speech provoking a hostile reaction in \textit{Cantwell}, but then shifted to a definitional categorization in \textit{Chaplinsky}. In fact, \textit{Chaplinsky} is the chief case setting forth the Court’s subscription to categoricalism. Later cases within the “hostile audience” category reveal a transition, similar to the one experienced by threatening speech, from categoricalism to a narrowing of the doctrine in specific factual scenarios (e.g., \textit{Feiner v. New York}, \textit{Gooding v. Wilson}). In fact, \textit{Gooding} exposes a confinement of \textit{Chaplinsky} to statutes punishing no more than “fighting words.”\textsuperscript{306} Despite the Court’s continued affirmance of the doctrine, \textit{Snyder’s} outright refusal to address the Court’s historical, categorical approach demonstrates even sufficiently offensive utterances may be protected where the expression pertains to matters of public concern.

In \textit{Cantwell}, the Court considered the constitutionality of a statute targeting speech posing a breach to the peace. The Court held that while Connecticut may regulate profane, indecent and abusive remarks, the statute was not narrowly drawn to punish specific conduct constituting a clear-and-present danger. The record established no evidence that Cantwell was personally offensive or entered into an argument with anyone he interviewed. While the Court overturned Cantwell’s conviction, it suggested

\textsuperscript{304} \textit{Id.} at 1229 (Alito, J., dissenting).

\textsuperscript{305} \textit{Id.} at 1227 (Alito, J., dissenting).

his conviction might have been upheld under different circumstances, given the interest in maintaining order and peace on the streets.

*Chaplinsky* held New Hampshire could punish words provoking a hostile audience reaction under a statute preventing a breach of the peace. As opposed to *Cantwell*, Walter Chaplinsky’s conviction was upheld on the basis a mere category of speech was employed. It applied a very low standard—namely, “what men of common intelligence would under understand would be words likely to cause an average addressee to fight”—to confirm the conviction.

To the extent *Feiner* embodies any of *Chaplinsky*’s principles, it is perhaps only its punishment of speech for the reaction it produced. *Feiner* upheld a conviction under a disorderly conduct statute, despite a lack of evidence demonstrating a breach of the peace. In fact, the Court found the police had not inappropriately censored Irving Feiner when they arrested him, even though only one individual threatened violence if the police did not act. *Feiner* narrowed the “fighting words” doctrine by refusing to apply it to the classic “heckler’s veto” scenario presented by the facts. The decision raises substantial questions regarding the bounds of police authority to interfere with an individual’s expression. Yet, it has also been highly criticized and limited to the grounds found by the majority that the speaker was inciting the crowd to riot and inadequate means were available to keep the peace. Others have questioned whether *Feiner* remains good law.

To the extent the “fighting words” doctrine remains formally viable, as amended in *Cohen v. California* and its progeny, it is confined to the principle that “States are free to ban the simple use, without a demonstration of additional justifying circumstances, of
so-called ‘fighting words,’ those personally abusive epithets which, when addressed to the ordinary citizen, are a matter of common knowledge, inherently likely to provoke violent reaction.”

Gooding narrowed Chaplinsky’s dictum to apply only to “fighting words” and nothing more. The decision provides an example of a trend away from legislative deference to greater independent review of the facts and the requirement of a more stringent burden of proof.

Finally, Snyder refused to apply the historical, categorical exception for “fighting words” to the religious and political expression of military funeral picketers. The Court rejected Albert Snyder’s claim for IIED in the face of evidence presented at trial that Snyder’s physical condition had worsened as a result of the picketers’ offensive speech. Yet, the decision represents a departure from more recent jurisprudence to impose a heightened evidentiary burden.

Section 3 has discussed the Court’s evolution of its hostile audience reaction doctrine. Section 4 turns to discussion of disclosure of “dangerous” information.

**Disclosure of Dangerous Information**

In each case involving “disclosure of dangerous information,” or government efforts to restrict publication of factual information it would perhaps prefer to keep secret, the Court examined the harm allegedly caused by the release of confidential information. The government’s asserted interests involved span the full realm, including: 1) national security; 2) fair and orderly administration of justice; and 3) the right to a fair trial. A distinction arising within the Court’s “disclosure of dangerous information”

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doctrine, however, is the use of a preferred position balancing, in which the Court’s balancing scale is weighted in favor of the First Amendment.308

**New York Times Co. v. United States**

In what has become known as the *Pentagon Papers* case—*New York Times Co. v. United States*309—the United States government sought to enjoin newspapers from publishing the contents of a classified historical study of U.S. policy during the Vietnam War.310 The splintered Court ruled in an extremely concise, three-paragraph per curiam opinion that the government had not met its “heavy burden” of justifying a prior restraint on the press.311 It thus overturned an injunction granted by lower courts on the newspapers’ publication of the study.312 While the per curiam opinion does not provide much insight into the standard the Court applies to the publication of sensitive government information, members of the fractured Court wrote nine opinions offering additional guidance. Interestingly, although *Pentagon Papers* was decided subsequent to *Brandenburg*, it did not cite to *Brandenburg*, nor mention “clear and present danger.” Yet, three Justices used language evocative of *Brandenburg*’s imminence test.

Justice William Brennan ratified the “absolute bar” imposed by the First Amendment against prior restraints.313 He wrote:

> Even if the present world situation were assumed to be *tantamount to a time of war, or if the power of presently available armaments would justify*

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308 See *supra* notes 294-96 (discussing the preferred-position approach).

309 403 U.S. 713 (1971) (plurality opinion).

310 Id. at 714.

311 Id.

312 Id.

313 Id. at 725 (Brennan, J., concurring).
even if peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of the nature.\(^{314}\)

According to Justice Brennan, “[o]nly governmental allegation of proof that publication must *inevitably, directly, or immediately* cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.”\(^{315}\) Justice Potter Stewart appeared to adopt a similar standard when he wrote, “I cannot say that disclosure of any of [the government’s documents] will surely result in *direct, immediate, and irreparable damage* to our Nation or its people.”\(^{316}\)

At least for Justice Brennan, the government’s argument, in the form of a conclusion that “publication of the material sought to be joined “could,” “might” or “may” prejudice the national interest in various ways,” was simply not sufficient.\(^{317}\)

Rejecting the government’s stated interest in protecting “national security,” Justice William Douglas wrote: “These disclosures may have serious impact. But that is no basis for sanctioning a previous restraint on the press….\(^{318}\) He recognized:

> the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the importance of the fundamental security of life and property by criminal alliances and official neglect.\(^{319}\)

\(^{314}\) *Id.* at 726 (Brennan, J., concurring) (emphasis added).

\(^{315}\) *Id.* at 726-27 (Brennan, J., concurring) (emphasis added).

\(^{316}\) *Id.* at 730 (Stewart, J., concurring) (emphasis added).

\(^{317}\) *Id.* at 725, 727 (Brennan, J., concurring).

\(^{318}\) *Id.* at 722-724 (Douglas, J., concurring).

\(^{319}\) *Id.* at 723 (Douglas, J., concurring).
This, according to Justice Douglas, was reason for “a vigilant and courageous press, especially in great cities.” Recognizing “the dominant purpose of the First Amendment [is] to prohibit the widespread practice of governmental suppression of embarrassing information,” he estimated that, “[t]he present cases will…go down in history as the most dramatic illustration of that principle. Thus, while Douglas argued in favor of press immunity from prior restraint to protect First Amendment values, it seems clear he also believed the attempted use of a prior restraint by the government in this opinion was to prevent publication of so-called embarrassing information.

In his concurrence, Justice Hugo Black scornfully rejected the government’s attempt to rely, not on “any act of Congress,” but on the “bold and dangerously farreaching contention that the courts should take it upon themselves to ‘make’ a law abridging freedom of the press in the name of equity, presidential power and national security.” He observed:

the Government argues in its brief that in spite of the First Amendment ‘(t)he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from…the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.' But “[t]o find that the President has ‘inherent power to halt the publication of news by resort to the courts,” Justice Black admonished, “would wipe out the First Amendment

\[320\] \textit{Id.} (Douglas, J., concurring).

\[321\] \textit{Id.} at 722-724 (Douglas, J., concurring).

\[322\] \textit{Id.} (Black, J., concurring).

\[323\] \textit{Id.} (Black, J., concurring).
and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure.’”

*New York Times* appeared to be more concerned with determining the appropriateness of judicial prior restraints on the press as opposed to specifying the types of events and the appropriate levels of evidence to justify a prior restraint. The per curium opinion did not define the precise circumstances or the type or amount of evidence under which a court could constitutionally enjoin the publication of information relating to national security. Indeed, Justice Harry Blackmun, dissenting, acknowledged, “properly developed standards” upon which the “broad right of the press to print and of the very narrow right of the Government to prevent...[had] not yet developed.”

The standard enunciated by Justice Stewart or Justice Brennan in their concurrences—“direct, immediate, and irreparable” or “inevitable” damage to the nation or national security, perhaps comes closest to a standard of harm in this context. As to evidence, one justice provided a few cursory examples of the types of instances he believed would justify a prior restraint. On the other hand, government reliance on inherent executive authority in national and foreign affairs, absent Congressional legislation and combined with a mere conclusion that “publication of the material sought to be joined “could,” “might” or “may” prejudice the national interest in various ways,” will simply not suffice.

324 *Id.* at 719 (Douglas, J., concurring).

325 *Id.* at 760 (Blackmun, J., dissenting).

326 *Id.* (Blackmun, J., dissenting).

327 See supra note 314 (discussing those examples).

328 *New York Times*, 403 U.S. at 725, 727 (Brennan, J., concurring).
While *New York Times* involved the government’s alleged national security interests, the Court again addressed the constitutionality of prior restraints five years later in *Nebraska Press Association v. Stuart*, establishing the modern-day test for balancing the strong presumption against prior restraints with fair trial considerations.

**Nebraska Press Association v. Stuart**

There is no doubt pretrial publicity may damage a defendant’s right to a fair trial. In *Nebraska Press*, police found the bodies of six family members murdered in their home in a small rural community. The crime immediately garnered widespread local, regional and national news coverage. Upon request, the trial judge entered an order, following oral argument but without the taking of evidence, restraining the press from publishing or broadcasting confessions or admissions made by the accused. Several press and broadcast associations immediately filed a motion to intervene to have the order vacated. The judge granted the media’s motion to vacate, but entered a new order that was subsequently modified by the Nebraska Supreme Court to prohibit the press from reporting on three subjects: “(a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts “strongly implicative” of the accused.”

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330 Id. at 542.
331 Id.
332 Id. at 542.
333 Id. at 543.
334 Id. at 545.
*Nebraska Press* reaffirmed the Court’s presumption against prior restraints by unanimously striking down the order barring the press from reporting on confessions and other information about the accused in such a “sensational” murder case.  

It held that prior restraints are the “most serious and least tolerable infringement on First Amendment rights.” But the five separate opinions expressed some disagreement over the principles that should govern future cases.

The majority, led by Chief Justice Warren Burger and joined by four others, agreed with the trial judge that the murder case would generate “intense and pervasive pretrial publicity,” but it declined to adopt an unqualified rule barring all prior restraints on publication in criminal cases. It adopted a preferred position balancing test, given the heavy presumptive against prior restraints, but found the burden had not been met by the facts of the case. Adopting a version of the clear-and-present-danger test developed by Judge Learned Hand in *United States v. Dennis*, Chief Justice Burger designated three factors for determining whether the danger to a fair trial in a particular case was of sufficient magnitude to justify restraining publication of allegedly prejudicial information: “(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; [and]

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335 Id. at 570.

336 Id. at 559.

337 Chief Justice Burger was joined by Justices White, Powell, Rehnquist and Blackmun.

338 *Nebraska Press Ass’n*, 479 U.S. at 562-64.

339 Id. at 570.

340 See supra notes 85-103 and accompanying text (discussing that opinion).
(c) how effectively a restraining order would operate to prevent the threatened
danger."\(^{341}\)

Applying those factors, the Court initially suggested the trial judge had not
unreasonably inferred a potential risk that pre-trial news accounts could have an
adverse impact on prospective jurors’ attitudes.\(^{342}\) Given the judge had done no more
than imply alternative measures might not be adequate, however, Chief Justice Burger
found the record established no evidence that alternative measures short of a prior
restraint would not have duly served the defendant’s fair trial interests.\(^{343}\) Additionally,
these measures had been found to blunt the impact of such publicity.\(^{344}\) Recognizing
the “practical problems” associated with “managing and enforcing pretrial restraining
orders,” Chief Justice Burger concluded that, while “reasonable minds can have few
doubts about the gravity of evil pretrial publicity can work...the probability that it would
do so here was not demonstrated by the degree of certainty our cases on prior
restraints require.”\(^{345}\)

*Nebraska Press* determined the record lacked sufficient evidence to overcome
the high burden against prior restraints. Yet, Chief Justice Burger stopped far short of

\(^{341}\) *Nebraska Press Ass’n*, 479 U.S. at 562.

\(^{342}\) *Id.* at 568-69.

\(^{343}\) *Id.* at 565.

\(^{344}\) *Id.* at 564. The alternative measures included:

“(a) change of trial venue to a place less exposed to the intense publicity that seemed
imminent in Lincoln County; (b) postponement of the trial to allow public attention to
subside; (c) searching questioning of prospective jurors...to screen out those with fixed
opinions as to guilt or innocence; (d) the use of empathic and clear instructions on the
sworn duty of each juror to decide the issues only on evidence presented in open court.

*Id.* It also suggested juror sequestration. *Id.*

\(^{345}\) *Id.* at 569.
providing a standard of proof-of-harm that would have satisfied the trial judge’s finding. His reference to the “sensational” facts of the case remains penetrable to questions whether the Court would apply the same or a similar standard under a less severe set of facts or, conversely, the “extraordinary” circumstances that could justify imposition of such a prior restraint.346 Although the Court acknowledged it would not “rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint,”347 at least one scholar has suggested Nebraska Press inexorably “announced a virtual bar to prior restraints on reporting of news about crime.”348

Nebraska Press reverted back to the Dennis-Learned Hand formulation of the clear-and-present-danger test. In doing so, it is conceivable Chief Justice Burger wished to establish a propensity of the Court to apply a less stringent standard where the harm alleged is as indirect as fear that jurors will unfairly determine the outcome of a case based on access to prejudicial pretrial information. The Dennis test certainly did not possess Brandenburg imminence, also decided prior to Nebraska Press. Alternatively, it is dubious whether Dennis provides the appropriate standard for evaluating the heavy presumption against prior restraints. New York Times, concerning a harm of similar contiguity, employed a much stricter standard.

One potential rationale for the distinction concerns the government’s asserted interests in restricting speech. Pentagon Papers confronted the constitutionality of a prior restraint on information allegedly injurious to national security. Contrastingly,

346 See, e.g., TRIBE, supra note 43, at 858-59.
347 Nebraska Press Ass’n, 427 U.S. at 569-70.
348 TRIBE, supra note 43, at 858-59.
Nebraska Press implicates a defendant’s fair trial rights. The combination of these opinions—and the standards they employed—perhaps illustrates national security’s elevated location in the hierarchy of government interests. On the other hand, the lack of a majority opinion in New York Times controverts the stringency of the standard to be applied in prospective battles involving threats to national security. Furthermore, these cases represent only a single instance of evaluating the constitutionality of prior restraints against each of these interests.

Landmark Communications, Inc. v. Virginia

In Landmark Communications, Inc. v. Virginia,\textsuperscript{349} the third and final case within this series, the Virginia Pilot, a Landmark Communications newspaper, published an article regarding the Virginia Judicial Inquiry and Review Commission’s investigation into a state judge.\textsuperscript{350} The Pilot published information regarding confidential proceedings in a judicial conduct investigation.\textsuperscript{351} The newspaper did not challenge the state’s confidentiality requirements but the attachment of criminal sanctions to publication of such information.\textsuperscript{352} While a vast majority of states imposed an obligation of confidentiality,\textsuperscript{353} only Virginia and one other state imposed sanctions under a threat of criminal penalty.\textsuperscript{354}

\textsuperscript{349} 435 U.S. 829 (1978).
\textsuperscript{350} Id. at 831.
\textsuperscript{351} Id.
\textsuperscript{352} Id. at 836.
\textsuperscript{353} Id.
\textsuperscript{354} Id. at 836-37.
The Supreme Court, in a 7-0 opinion, ruled for the newspaper. Chief Justice Warren Burger recognized the undoubted necessity, absent “hard in-court evidence,” of maintaining confidentiality to the functionality of proceedings and also the integrity of the judicial system. Yet, he wrote, confidentiality and institutional reputation do not outweigh freedom of expression in the “constitutional scales.” Chief Justice Burger rejected “mechanical application” of the clear-and-present-danger test, finding that the test:

[p]roperly applied...requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need to free and unfettered expression.

He found, “[t]he possibility that other measures will serve the State’s interest should also be weighed.” On these assertions, Burger concluded it was:

incumbent upon the Supreme Court of Virginia to go behind the legislative determination and examine for itself ‘the particular utteranc[e] here in question and the circumstances of [its] publication to determine to what extent the substantial evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment.

As opposed to Nebraska Press, Landmark recommenced a requirement of “imminence.” It required satisfaction of three elements:

\[\text{355 Id. at 833.}\]
\[\text{356 Id. at 841-42.}\]
\[\text{357 Id. at 842.}\]
\[\text{358 Id. at 842-43.}\]
\[\text{359 Id. at 843.}\]
\[\text{360 Id. at 843-44.}\]
1. the “substantial evil must be extremely serious and the degree of imminence extremely high before utterances must be punished;”

2. “‘a solidity of evidence’ is necessary to make the requisite showing of imminence;”

3. “the danger must not be remote or even probable; it must immediately imperil.”

Considering those factors, the Court declared the facts of the case fell “far short those requirements.” According to the Court, numerous opinions in which the clear-and-present danger test was not satisfied involved more extreme circumstances and posed greater risk of substantial danger. It held that while “[i]t is true that some risk of injury...may be posed by premature disclosure,” any potential risk could be “eliminated through careful internal procedures to protect the confidentiality of Commission proceedings.”

*Landmark* analyzed the age-old conflict between freedom of expression and the fair administration of justice but held tight to the preferred position of the First Amendment. Its requirement that the “substantial evil must be extremely serious and the degree of imminence extremely high before utterances must be punished” is reminiscent of the test applied in *Bridges*, involving a very similar factual scenario. Although both opinions overturned government speech restrictions, *Landmark* ratchets up *Bridges’s* standard through its requirements of: 1) a “solidity of evidence”

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361 *Id.* at 843-44.
362 *Id.*
363 *Id.*
364 *Id.* (“If the clear-and-present-danger test could not be satisfied in the more extreme circumstances of those cases, it would seem to follow that the test cannot be met here.”).
365 *Id.* at 845.
366 *Id.*
demonstrating imminence; and 2) that a danger that must “immediately imperil[].” It also refused to bow to legislative ceder, which *Bridges* said would be “given great weight.” Nonetheless, *Landmark* established no specific requirements of the type or amount of evidence that would qualify as a “solidity” of evidence, although it would presumably require more than circumstantial evidence. It also provided no examples of the type of danger that would immediately imperil a judge’s interest in the fair and orderly administration of justice.

**Summary**

Under what circumstances may the government restrict high value speech that potentially causes harm to the government, private individuals or society? Disclosure of “dangerous” information has not been subject to the same categorical restraints as other brands of expression. Instead, the Court’s efforts to define the parameters of government power to regulate dangerous information have largely been governed by a “clear and present danger,” or comparable standard. In each case, it found the facts did not justify the speech restriction, regardless of the interest in: 1) preventing harm to national security; 2) protecting the fair and orderly administration of justice; or 3) ensuring a fair trial.

In *New York Times*, the Court applied a heavy presumption that prior restraints are unconstitutional. Despite the compelling interest in national security, it concluded that it could not prohibit the press from publishing the contents of a classified historical study. The standard enunciated by the plurality required the publication to “inevitably, directly or immediately” imperil. While national security undoubtedly qualifies as a compelling government interests, the Court seemed to question the legitimacy of the government’s interests in prohibiting release of the information. It also contested the
opinions’ sole reliance on inherent executive power and government authority to prevent such disclosure.

*Nebraska Press* adopted a preferred position balancing approach against prior restraints on press freedom despite due process arguments. It found the evidence did not satisfy even the weakened *Dennis* version of the clear-and-present-danger test. While Chief Justice Burger found the record established no evidence demonstrating alternative measures would not have duly served the defendant’s interest, the decision raises questions regarding application of such the test to a factual record in which the alleged harm—publication of truthful information—is so ambiguous and indirect.

*Landmark* likewise involved a challenge to the publication of truthful information, this time regarding judicial commission investigations. The Court applied a clear-and-present-danger test requiring imminence and weighted in favor of the First Amendment. Under its factual review, it acknowledged the government undoubtedly possessed a significant interest in maintaining confidentiality but that the record lacked sufficient evidence of danger arising from the newspaper’s publication to satisfy the requirements of that test.

Part A has detailed the Court’s approaches in each of the areas of: 1) subversive advocacy/incitement to unlawful action; 2) speech evoking a hostile audience reaction; 3) speech that threatens; 4) and disclosure of dangerous information. In some areas, the Court initially applied the clear-and-present-danger test—or a similar test—but eventually moved away from it. In others, the clear-and-present-danger test remains the standard under which speech-based injury will be assessed. Within the Court’s threatening speech and hostile audience doctrine, the Court evolved toward a standard
of definitional categoricalism, in which constitutionality is based on a finding a specific
category of expression was employed. More recent jurisprudence demonstrates a
narrowing of those categories to apply under only very limited circumstances and
conditions. Part B turns to discussion of restrictions on “low-value” speech.

“Low-Value” Speech

Part B examines several brands of “low” value expression—namely, false
statements of facts; sexually explicit and violent expression; lewd, profane and indecent
speech; and hate speech. Section 1 discusses the Supreme Court’s jurisprudence
involving false statements of fact. Section 2, summarizing the Court’s sexually explicit
and violent expression doctrine, encompasses a broad array of speech, including: 1)
obscenity doctrine; 2) child pornography; 3) depictions of animal cruelty; and 4) violent
video games. Section 3 analyzes the court’s jurisprudence regarding lewd, profane and
indecent expression. Section 4 closes with discussion of the hate speech doctrine.

False Statements of Fact

While the Court has long maintained there is “no such thing as a false idea,” it
has also held “there is no constitutional value in false statements of fact.” It is written
the government may not restrict expression simply because it is false, however,
prosecution for just those types of statements underlies the law of defamation. Opposed
to Chaplinsky’s classification of libel of a “narrow categories” of unprotected
expression, the Court’s false factual speech jurisprudence appears to have adopted a
balancing approach, weighing freedom of expression against the state’s interest in

368 Id.
compensating individuals for the reputational and emotional injury of harmful statements. Indeed, more modern jurisprudence has never imposed a categorical exception for all falsities, implicitly recognizing constitutional protection for at least a subset of false speech—false opinions.  

New York Times Co. v. Sullivan

The Court’s first significant face-off with false speech occurred in New York Times v. Sullivan. In Sullivan, L.B. Sullivan, a Montgomery, Alabama city commissioner, filed a libel suit based on a full-page editorial advertisement published in the New York Times. Although the ad did not mention Sullivan by name, he claimed the reference to the Montgomery police personally defamed him. At trial, Sullivan relied on the advertisement itself as well as the testimony of six individuals to establish the connection between himself and the injurious statements. The jury awarded him a $500,000 libel verdict.


371 Id. at 254.

372 Id. at 256.

373 Id. at 258.

374 Id. at 288. In his brief to the Supreme Court, Sullivan argued:

The reference to respondent as police commissioner is clear from the ad. In addition, the jury heart the testimony of a newspaper editor; a real estate and insurance man; the sales manager of a clothing stores; a food equipment man; a service station operator; and the operator of a truck line for whom respondent had formerly worked. Each of these witnesses stated that he associated the statements with respondent.

Id. (internal citations omitted).

375 Id. at 256.
It was “uncontroverted,” upon the U.S. Supreme Court’s review of the factual record, that some of the statements published in the *New York Times* advertisement “were not accurate descriptions of events which occurred in Montgomery.”\(^{376}\) Writing for the Court, Justice William Brennan acknowledged the evidence produced at trial demonstrated that the publisher had failed to check the accuracy of the publication against its own files;\(^{377}\) that the *Times’s* Secretary suspected at least some of information in the advertisement was false;\(^{378}\) and that the newspaper had failed to retract the charges at Sullivan's demand.\(^{379}\) However, *Sullivan* began “constitutionalizing” state tort claims by announcing a high First Amendment barrier on defamation liability based on the “intrinsic value” of false expression in the competition in the market.

In his opinion for the Court, Justice William Brennan quoted philosopher John Stuart Mill, although only in a footnote, for the proposition that, “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”\(^{380}\) He recognized the ability of the First Amendment to serve as a partial or

\(^{376}\) *Id.* at 258.

\(^{377}\) *Id.* at 287.

\(^{378}\) *Id.* at 286.

\(^{379}\) *Id.*

\(^{380}\) *Id.* at 279 n.19.
complete ban on tort liability arising from speech and also the need to protect some false statements to prevent truthful expression from being chilled.

The opinion rejected the standard akin to strict liability that previously existed under common law. Under Alabama law, a publication was libelous per se “if the words ‘tend[ed] to injure a person * * * in his reputation or to ‘bring (him) into public contempt…’” Legal injury from libelous statements could be implied “from the bare fact of publication.” The standard created a presumption that a plaintiff’s position as a public official was “sufficient evidence” that his reputation had been affected by the false statements. It also provided that actual damages did not need to be alleged or proved but were presumed, even though actual malice was “apparently a prerequisite to recovery of punitive damages.”

In its place, Sullivan adopted a standard that false speech about the official conduct of public officials only gives rise to liability when made with actual malice—a state of mind requiring clear and convincing proof—that the defamatory falsehood

\[\text{Sacks, Normative Considerations, supra note 286, at 195.}\] \[\text{Sacks, Normative Considerations, supra note 286, at 195.}\] \[\text{Sullivan, 376 U.S. at 267 (continuing, “once ‘libel per se’ has been established, the defendant has no defense as to the stated facts unless he can persuade the jury that they were true in all their particulars”).}\] \[\text{Id. at 262 (“The jury was instructed that, because the statements were libelous per se, ‘the law * * * implies legal injury from the bare fact of publication itself,’ ‘falsity and malice are presumed,’ [and] ‘general damages need not be alleged or proved but are presumed.…’”).}\] \[\text{Id.}\] \[\text{Id.}\] \[\text{Id. at 267. However “punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.” Id. at 262.}\] \[\text{Id. at 279-80.}\] \[\text{According to Black’s Law Dictionary, clear and convincing proof is “evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the}\]
was made with knowledge of its falsity or with reckless disregard for the truth.\textsuperscript{390} The decision shifted the burden of proving falsity onto the plaintiff.\textsuperscript{391} Under this new standard, the Court found that the “maintenance of the opportunity for free political discussion,” which is “essential to the security of the Republic” and the “American privilege to speak one’s mind,”\textsuperscript{392} tilted the scale in favor of protection of the defendant’s expression under the First Amendment.

The Court wrote that “injury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error.”\textsuperscript{393} It held, “[i]f neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less adequate.”\textsuperscript{394} It, thus, found that the circumstantial and testimonial evidence offered at trial was insufficient to satisfy the new standard of actual malice the Court adopted.

“Malice” as a term to describe what must be proved by the plaintiff to recover damages, however, was not invented for the \textit{Sullivan} opinion. Many jurisdictions, including Alabama (as noted above) required proof of “actual malice” for assessment of punitive damages. Yet, as noted by Justice Hugo Black in his concurrence, what constitutes “actual malice” may not be as clear as it seems. According to Black:

\begin{quote}
\textit{Evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.} EVIDENCE, BLACK LAW’S DICTIONARY (Gardner ed. 2009).
\end{quote}


\textsuperscript{391} Anderson, \textit{supra} note 390, at 498.

\textsuperscript{392} \textit{Sullivan}, 376 U.S. at 269.

\textsuperscript{393} \textit{Id.} at 272.

\textsuperscript{394} \textit{Id.} at 273.
‘Malice,’ even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment.\(^{395}\)

Nonetheless, it has been heralded as “the clearest and most forceful defense of press freedom in American history.”\(^{396}\)

Although *Sullivan* was decided without a dissent, it was not long before the Court retreated from its protection of the value of false speech. Ten years later, *Gertz v. Robert Welch, Inc.*\(^{397}\) held that statements regarding private persons received less protection than statements about public figures or officials.

**Gertz v. Robert Welch, Inc.**

In *Gertz*, attorney Elmer Gertz was hired by a family to sue a police officer who killed their son.\(^{398}\) *American Opinion* magazine published an article in an issue available for nationwide sale\(^{399}\) accusing Gertz of being a “Lennist” and a “Communist-fronter.”\(^{400}\) Gertz filed a libel action for the “serious inaccuracies” made by statements contained in the article.\(^{401}\)

At trial, the publication filed a motion for summary judgment, claiming Gertz could not meet the standard established by the intervening opinion of *Curtis Publishing Co. v.*

\(^{395}\) *Id.* at 293 (Black, J., concurring).


\(^{398}\) *Id.* at 325.

\(^{399}\) *Id.* at 327.

\(^{400}\) *Id.* at 356.

\(^{401}\) *Id.* at 326.
Butts,\textsuperscript{402} applying Sullivan to anyone that was sufficiently public, not just government officials.\textsuperscript{403} The editor also filed an affidavit stating that, although he denied knowledge of the statements’ falsity, he made no effort independently to review the facts of the article, relying instead on the author’s experience.\textsuperscript{404} The judge denied the motion, and a jury granted Gertz an award of $50,000.\textsuperscript{405}

In a 5-4 opinion, Justice Lewis Powell refused to extend Sullivan to the facts in Gertz, allowing for a much lesser fault standard for defamatory statements made about private individuals.\textsuperscript{406} It held states are free to establish their own standards of liability for defamatory statements about private individuals concerning matters of public concern, as long as they did not apply strict liability.\textsuperscript{407} Under Gertz, a private plaintiff could recover damages if he or she could show the defendant acted at least negligently. While Gertz established that evidence concerning the injury would be weighed under a preponderance of the evidence standard, the burden applied in most civil trials,\textsuperscript{408} Gertz held that states could only award punitive or pecuniary damages where a plaintiff

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\textsuperscript{402} 388 U.S. 130 (1967).

\textsuperscript{403} Gertz, 418 U.S. at 327-28.

\textsuperscript{404} Id.

\textsuperscript{405} Id. at 328-29.

\textsuperscript{406} Id. at 348.

\textsuperscript{407} Id. at 347, 353 (“[A] State is free to define for itself the appropriate standard of media liability so long as it does not impose liability without fault.”).

\textsuperscript{408} Preponderance of the evidence means “the greater weight of the evidence.” It is the burden of proof applied in most civil trial. The jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. PREPONDERANCE OF THE EVIDENCE, BLACK’S LAW DICTIONARY (Gardner ed. 2009).
proved actual malice. Stated differently, Gertz eliminated the common law theory of presumed damages, which allowed individuals to recover compensatory damages without evidence of actual loss. The decision also refined the “reckless disregard” standard, holding that “mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth.” It now required a “high degree of awareness of...probable falsity.”

Sullivan and Gertz sought an optimal balance between compensating individuals for damage to their reputations and avoiding unnecessary press censorship. Sullivan imposed a stringent First Amendment burden, requiring “clear and convincing evidence” of actual malice before a public official could recover damages for defamatory falsehoods concerning official conduct. Gertz reduced the burden of proof-of-harm from actual malice when statements were made about private figures regarding matters of public concern. It allowed recovery of pecuniary damages upon a showing of anything more than strict liability. However, it added a requirement of “actual malice” for recovery of actual damages to maintain a reasonable standard in light of the reduced burden.

The Court’s decision to impose a lesser burden in Gertz likely turned on the state’s increased interest in compensating private individuals for injury caused to their

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409 Gertz, 418 U.S. at 349 (“[T]his countervailing state interest extends no further than compensation for actual injury. States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”).

410 Actual loss or injury includes “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” Id. at 350.

411 Id. at 332.

412 Id. (quoting St. Amant v. Thompson, 390 U.S. 727 (1968)).

413 Anderson, supra note 390, at 549.
reputations because they are more “vulnerable to injury.”\textsuperscript{414} Yet, each opinion protected libelous statements, despite \textit{Chaplinsky}’s holding that such utterances can be banned without any prior assessment of the value stemming from its falsity. They also repealed the common-law presumption of strict liability, in favor of a more stringent standard, potentially recognizing the rationale behind the marketplace theory for protecting even false speech to prevent the chilling of truthful expression.\textsuperscript{415}

\textit{Gertz}, on the other hand, signaled a sharp shift in the Court’s view of the value of false statements in contributing to public discourse. While the Court acknowledged, “there is no such thing as a false idea,” it also held not all false factual statements receive First Amendment protection.\textsuperscript{416} The Court did not address the footnote argument in \textit{Sullivan} asserting the opposite point.\textsuperscript{417} It only announced several reasons for its determination, including that “neither the intentional lie nor the careless error materially advances society’s interest.”\textsuperscript{418} Moreover, despite the policy of “independent review” adopted by \textit{Sullivan}, \textit{Gertz} rejected review of private-plaintiff libel jury verdicts on a case-by-case basis. It found that such a policy in the context of defamation claims brought by private individuals would most likely “lead to unpredictable results” and “uncertain expectations,” while also “render[ing the Court’s] duty to supervise the lower courts unmanageable.”\textsuperscript{419}

\textsuperscript{414} \textit{Gertz}, 418 U.S. at 344 (“Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”).

\textsuperscript{415} See supra Part I.A.1. (discussing the marketplace rationale’s protection of false speech on this theory).

\textsuperscript{416} Id.

\textsuperscript{417} See supra note 380 and accompanying text (referencing \textit{Sullivan}’s footnote argument).

\textsuperscript{418} Id. at 340.

\textsuperscript{419} Id. at 343-44.
While Sullivan and Gertz involved libel actions, Hustler Magazine v. Falwell\textsuperscript{420} involved a claim for injury to reputation caused by false statements under a slightly different tort. Falwell extended the actual malice standard to public figures that sue for intentional infliction of emotional distress (IIED) arising from speech.

\textbf{Hustler Magazine v. Falwell}

The inside front cover of the November 1983 issue of Hustler featured a parody of an advertisement for a liquor company, claiming Jerry Falwell, a nationally known minister active as a commentator on politics and public affairs, had a “drunken incestuous rendezvous” with his mother in an outhouse.\textsuperscript{421} In a unanimous opinion by Chief Justice William Rehnquist, the Court held that, “while...a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, the First Amendment prohibits such a result in the area of public debate about public figures.”\textsuperscript{422} It found the “outrageousness” standard that previously existed in cases involving claims of IIED was too subjective to justify damages for emotional harm caused by an ad parody to a public figure because it allowed “a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”\textsuperscript{423}

The Court observed, “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public

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\item \textsuperscript{420} 485 U.S. 46 (1988).
\item \textsuperscript{421} \textit{Id.} at 48 (“The Hustler parody portrays [Falwell] and his mother as drunk and immoral, and suggests that [Falwell] is a hypocrite who preaches only when he is drunk.”).
\item \textsuperscript{422} \textit{Id.}
\item \textsuperscript{423} \textit{Id.} at 55.
\end{itemize}
interest and concern." It continued, “the sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are ‘intimately involved in the resolution of important public questions, or by reason of their fame, shape events in areas of concern to society at large.’" But, this did not mean, according to the Court, that “any speech about a public figure is immune from sanction in the form of damages.”

The Court added the requirement of “actual malice” to its standard for IIED to prevent individuals like Falwell from circumventing the First Amendment limits of tort liability for public-figure defamation plaintiffs by recasting a grievance as a claim for IIED. Stated differently, although actual malice is not an element required under a common-law claim for IIED, the Court found that a public figure could recover damages for IIED only if, in additional to establishing the elements of IIED, a plaintiff could show: 1) the publication was a false statement of fact; and 2) the statement was made with the requisite level of culpability (knowledge or reckless disregard). To hold otherwise, Chief Justice Rehnquist observed, would be to subject political cartoonists and satirists—often thought of as playing “a prominent role in public and political debate”—liable for damages “without any showing that their work falsely defamed its subject.”

424 Id. at 50.
425 Id. at 51 (quoting Curtis Publ’g Co. v. Butts, 388 U.S. 130, 164 (1967)).
426 Id. at 52.
428 Sacks, Normative Considerations, supra note 286, at 207.
429 Falwell, 485 U.S. at 53, 54.
The standard has been interpreted to guarantee the same level of protection to media defendants, whether the plaintiff pleads defamation or IIED.430 Because the jury found the parody was not “reasonably believable” and therefore did not contain “actual facts” about Falwell, the case fell apart.431

Despite dicta in several opinions that false factual statements are not protected under the First Amendment, the Court had never, until United States v. Alvarez,432 directly addressed the constitutionality of solely “false speech.” By the time Alvarez was decided, the Court had almost entirely repudiated its mechanical, categorical approach to libelous statements. In fact, Sullivan, Gertz and Falwell demonstrate not even libelous statements are entirely without First Amendment protection. Alvarez referenced the “historic categories” of unprotected expression, but found in each opinion coming before it, the falsity of the statement had not been dispositive, but instead involved some other legally cognizable harm associated with it, such as invasion of privacy or the costs of vexatious litigation.433

United States v. Alvarez

In Alvarez, Xavier Alvarez was prosecuted for statements made at a water district board meeting under a statute that penalized lying about receipt of a military medal of honor.434 Alvarez proclaimed, “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded

430 Sacks, Normative Considerations, supra note 286, at 207-08.
431 Falwell, 485 U.S. at 57.
433 Id. at 2545.
434 Id. at 2542.
many times by the same guy.” None of this was true, and as the Court acknowledged, “[f]or all the record shows, respondent’s statements were but a pathetic attempt,” not to secure employment or financial gain, but “to gain respect that eluded him.” The Court found while Xavier Alvarez’s statements were indeed “knowing falsehoods,” lies about one’s own credentials—“without regard to whether [they were] made for the purpose of material gain”—did not constitute a category of unprotected speech. As the plurality saw it, the principles established by speech-protective decisions such as *Sullivan* could not now be fashioned into a rule to restrict it.

According to the Court:

> The Government thus seeks to use this principle for a new purpose. It seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression. That inverts the rationale for the exception. The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow more speech, not less. A rule designed to tolerate certain speech ought not to blossom to become a rationale for a rule restricting it.

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435 *Id.*

436 *Id.*

437 *Id.* at 2547.

438 *Id.* at 2544-45.

439 *Id.* at 2545 (“The Government thus seeks to use this principle for a new purpose. It seeks to convert a rule that limits liability...into a rule that expands liability in a different, far greater realm of discourse and expression. That inverts the rationale for the exception...A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it.”).

440 *Id.*
The Court had never endorsed a categorical rule that all false statements receive no First Amendment protection, and no prior decision had confronted a law that targeted “falsity and nothing more.”\textsuperscript{441}

The Court continued its analysis of the government’s asserted compelling interest in protecting the reputation of the military medals,\textsuperscript{442} but found, “to recite the Government’s compelling interests is not to end the matter.”\textsuperscript{443} The Court applied the standard it adopted in \textit{Brown v. Entertainment Merchants Association},\textsuperscript{444} involving the sale and rental of violent video games to minors:

The First Amendment requires that the Government’s chosen restriction on the speech at issue be “actually necessary” to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented.\textsuperscript{445}

But unlike \textit{Brown}, in which the government cited numerous studies purporting to demonstrate a causal link between video games and their impact on minors, the government cited “no evidence to support its claim that the public’s general perception of military awards is diluted by false claims such as those made by \textit{Alvarez}.”\textsuperscript{446} According to the Court: “[t]he link between the Government’s interest in protecting the

\begin{footnotesize}
\textsuperscript{441} \textit{Id.}

\textsuperscript{442} \textit{Id.} at 2548 (“The Government is correct when it states military medals ‘serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service,’ and also ‘fost[e] morale, mission and accomplishment and spirit de corps’ among service members.”).

\textsuperscript{443} \textit{Id.} at 2549.

\textsuperscript{444} 131 S. Ct. 2739 (2011).

\textsuperscript{445} \textit{Alvarez}, 132 S. Ct. 2537 (2012).

\textsuperscript{446} \textit{Id.}
\end{footnotesize}
integrity of the military honor system and the Act’s restriction on the false claims of liars...has not been shown.”

In sharp contrast, Alvarez’s dissent demanded no such direct, evidentiary proof of harm. Justice Samuel Alito, joined by Justices Antonin Scalia and Clarence Thomas, simply found that “Congress reasonably concluded” that lies about medals “were undermining our country’s system of military honors and inflicting real harm on actual medal recipients and their families.” Their opinion seemed more focused on its belief that the speech in question was valueless rather than whether there was evidence that it caused harm.

**Summary**

The variety of expression known as “false factual speech” comprises a variety of claims, including: 1) libel claims brought by a public figure and a private figure respectively; 2) a tort claim for emotional damages from false statements published in an ad parody; and 3) the potential constitutionality of (or liability that could be attached to) solely false statements.

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447 *Id.*

448 *Id.* at 2556 (Alito, J., dissenting) (emphasis added). Justice Alito elaborated that:

> [M]uch damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or other tangible reward. Unless even a small financial loss—say, a dollar given to a homeless man falsely claiming to be a decorated veteran—as more important in the eyes of the First Amendment than the damage caused to the very integrity of the military awards system, there is no basis for distinguishing between the Stolen Valor Act and the alternative statutes that the plurality and concurrence appear willing to sustain.

*Id.* at 2560 (Alito, J., dissenting).

449 Justice Alito described the speech in question as “entirely lacking in intrinsic value.” *Id.* at 2564 (Alito, J., dissenting). He added that “[t]hese lies have no value in and of themselves, and proscribing them does not chill any valuable speech.” *Id.* at 2557 (Alito, J., dissenting).
Sullivan rejected the common law presumption of imposing liability for libelous utterances. It adopted an actual malice standard, providing a more optimal balance, between the First Amendment interest and the state’s interest in compensating individuals for reputational damage, than previously existed under the presumption. Under the new “actual malice” standard, a public figure must demonstrate the false utterances were published with knowledge of their falsity or with reckless disregard for the truth or falsity of the statements. Gertz reduced the burden, given the state’s increased interest in protecting private citizens.

Falwell likewise represented a new approach to establishing potential liability for emotional harm when libelous utterances were aimed at public figures. In Falwell, Jerry Falwell, a Baptist pastor, filed a claim for intentional infliction of emotional distress (IIED) when false statements about sexual experiences he encountered as a kid were trumpeted in a liquor advertisement. The Court rejected his attempt to circumvent libel law to recover emotional damages caused by the indubitable parody. The Court revised the First Amendment standard for public figures’ recovery of damages to require actual malice in addition to the normal showing of IIED.

In analyzing the conflict between tort liability arising from injurious speech and the First Amendment’s freedom of expression, however, the Court’s opinions indicate it will tailor the plaintiff’s evidentiary burdens based on a number of factors, including: (a) the plaintiff’s level of vulnerability; (b) the nature of the speech as public or private and (c) the nature of the plaintiff’s injury. Although the Court has not spoken on the relative state interests in protecting health, feelings or reputation, its opinions within the false speech category also exemplify tort laws’ greater protection of physical injury over pure
emotional injury, at least where physical injury is factually verifiable. However, the Court’s opinions have left open the First Amendment standard to be applied to tortious claims where the speech lacks inherent value.

Alvarez represents a broad leap in the Court’s evidentiary requirements for proving injury stemming from factual falsities. It not only rejected the Court’s ad-hoc balancing approach previously applied to “false factual speech,” but established that government regulations restricting expression needed to be supported by evidence of a “direct causal link” to be upheld. However, it is unclear the extent to which this standard would be applied in other instances involving false factual statements, such as where a different set of government interests is involved. Furthermore, the practical difficulty of meeting the empirical standards required by Alvarez, as invoked in other areas of expression, perhaps raises a different set of questions.

Section 2 reviewed the Court’s jurisprudence on false statements of fact. Section 3 turns to the Court’s decisions on sexually explicit and violent expression.

Sexually Explicit and Violent Expression

Sexually explicit and violent expression encompasses not only opinions involving regulation of obscenity, but also child pornography, animal cruelty and the sale of violent video games to minors. More than fifty-five years after declaring obscene expression beyond First Amendment protection as “utterly without redeeming social value,” the Court appears not to have abandoned its categorical approach to regulating obscenity, as it has done in other categories. While the Court has acknowledged its “history” and “tradition” of finding certain categories “long familiar to the bar” outside First Amendment protection, it has not extended this categorical presumption beyond
obscenity. In fact, *Ashcroft v. Free Speech Coalition*\(^{450}\) declined to extend its ban on obscenity to images of child pornography that looked “like children.” In *Brown v. Entertainment Merchants Association*,\(^{451}\) the Court found the social science studies submitted by California purporting to show a “connection” between the speech at issue—violent video games—and the alleged harm were not enough to demonstrate the requisite evidence of a direct causal link. The burden of direct, causal evidence, as required in *Brown*, appears a long way from *Roth’s* presumption of obscenity as beyond constitutional protection.

**Roth v. United States**

The Court had its first occasion in *Roth v. United States*\(^{452}\) to squarely consider the constitutionality of obscenity. In *Roth*, Samuel Roth, who owned a book-selling business in New York, was found guilty under a federal obscenity statute for mailing obscene materials.\(^{453}\) The Court began by noting, “[a]ll ideas having even the slightest redeeming social importance—unorthodox, controversial ideas, even ideas hateful to prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”\(^{454}\) Apparently, the majority, led by Justice William Brennan, thought obscenity fit this

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\(^{452}\) 354 U.S. 476 (1957).

\(^{453}\) Id. at 480. The statute prohibited the mailing of material that is obscene, lewd, lascivious, or filthy, or other publication of indecent character.

\(^{454}\) Id. at 484.
category. It found obscenity constituted a category of expression that was “utterly without redeeming social value.”

Roth established obscenity as an unprotected category of expression because of its presumed lack of redeeming social value. The Court noted, while obscenity “was not as fully developed as libel law” at the time the First Amendment was adopted, there was sufficient evidence to determine that obscenity was also outside of its protection. For instance, the language in Chaplinsky recognized that the restriction of obscenity, similar to libel, was “never thought to raise any constitutional problem.” Roth also cited the laws in forty-eight states as well as the twenty statutes enacted by Congress from 1842 to 1956 as mirroring “the universal judgment that obscenity should be restrained.”

The defendants in Roth argued the obscenity statutes under which they were convicted violated the Constitution because they punished speech without proof that obscene material would “perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct.” Roth, however, determined regulation and penalties for distribution of obscenity could be justified without satisfaction of the clear-and-present-danger test. It established its own test for determining when speech is prohibited as obscene. According to the Court, the test was: “whether to the average person, applying contemporary community standards, the

455 Id. at 484.
456 Id. at 483.
457 Id. at 485.
458 Id. at 484.
459 Id. at 486.
460 Id.
dominant theme taken as a whole appeals to the prurient interest.”

It upheld the conviction, finding Samuel Roth’s speech could be prohibited simply because it fit the category.

Following Roth, the “utterly without redeeming social value” element was added to the obscenity test in Memoirs v. Massachusetts. Memoirs required that before material could be deemed obscene, “it must be affirmatively established that the material is ‘utterly without redeeming social value.’” The break from Roth in Memoirs was represented most sharply by the third prong of the test, which emphasized that speech could not be proscribed unless it was found to be utterly without redeeming social value, whereas Roth merely presumed obscenity’s lack of redeeming social importance. The formulation essentially required the “prosecution to prove a negative, i.e., that the material was utterly without redeeming social value—a burden virtually impossible to discharge under our criminal standards of proof.”

Miller v. California

Sixteen years later, however, the Court again addressed the First Amendment obscenity standard in Miller v. California. Miller was not the first time within those sixteen years that the addressed the “obscenity-pornography” problem, however, it one

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461 Roth, 354 U.S. at 489.

462 Id. at 485-86.


464 Miller v. California, 413 U.S. 15, 21-22 (1973). Memoirs established the test as: whether “(a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because if (sic) affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.” See Memoirs, 383 U.S. at 418.

465 Miller, 412 U.S. at 22.
of several cases re-examining earlier standards involving “the intractable obscenity problem.”

Defendant Marvin Miller was convicted under a California statute prohibiting “knowing” distribution of obscene material. He was arrested for conducting a mass mailing campaign to advertise the sale of adult material after “unwilling recipients” of his brochures complained to the police. Writing the opinion for the Court, Chief Justice Warren Burger acknowledged California’s “legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.” He affirmed the part of Roth banning obscenity, finding it was “categorically settled...that obscene material is unprotected by the First Amendment.” Yet, Burger acknowledged that, given “the inherent dangers of undertaking to regulate any form of expression...State statutes designed to regulate obscene materials must be carefully limited.”

466 Miller, 418 U.S. at 16.

467 Miller, 418 U.S. at 16. The California statute under which the Miller was convicted prevented, in relevant part, the “[s]ending or bringing into state for sale or distribution...any obscene matter....” CAL. PENAL CODE § 311.2(a) (2006), with “obscene” defined as “to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.” § 311(a). Knowing was defined as “having knowledge that the matter is obscene.” § 311(b).

468 Miller, 413 U.S. at 18. The brochures advertised four books entitled “Intercourse,” “Man-Woman,” “Sex Orgies Illustrated” and “An Illustrated History of Pornography,” as well as a film entitled “Marital Intercourse.” Id. According to the Court, “while the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.” Id.

469 Id. at 18-19. For further discussion of the moral harm caused by obscenity, see Andrew Koppelman, Does Obscenity Cause Moral Harm?, 105 COLUM. L. REV. 1635 (2005).

470 Miller, 413 U.S. at 23.

471 Id. at 23-24.
Miller reformulated the Roth test as requiring that a state offense regulating obscenity must be “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”

The Court found this required a trier-of-fact to establish three elements, whether:

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

The decision repudiated Roth’s presumption that obscenity was “utterly without redeeming social value,” replacing it with a requirement that a depiction or description of sexual conduct must lack “serious literary, artistic, political or scientific value” for it to be deemed obscene.

As to the “contemporary community standards,” Chief Justice Burger did not define the specific standard to be applied, but merely asserted he doubted application of a “national community standard.” According to Burger, “it is neither realistic nor
constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.” He did not clarify the requisite type or amount of evidence needed to demonstrate that sexually explicit material was obscene as to a specific community, but simply found it was not “constitutional error for the prosecution to fail to offer evidence of ‘national standards’ or the trial court judge to charge the jury to consider ‘state community standards.’” The Court vacated the jury verdict and remanded the case back to the California Superior Court “for further proceedings not inconsistent with the First Amendment standards established by this opinion.”

The *Miller* opinion—setting forth the modern-day, three-pronged standard to be used for evaluating obscenity—was the first time a majority since *Roth* had agreed on a definition of obscenity. It provided states with broad leeway for prosecuting purveyors of obscene material. However, it also granted triers of fact “broad discretion in defining the relevant community, and in applying that community’s measure of obscenity.” *Paris Adult Theatre v. Slaton*, decided the same day, simultaneously...


478 Id. at 32.

479 Id.

480 Id. at 37.

481 Id. at 29.


483 Id.

484 413 U.S. 49 (1973).
granted triers of fact freedom from “relying on evidence introduced in court as the basis for identifying obscenity standards.”

*Paris Adult Theatre v. Slaton*

*Paris Adult Theatre* involved the conviction of movie theater owners under a Georgia statute for showing obscene films. Evidence produced at trial included photographs of the entrance of the movie theater at the time the complaint was filed and also testimonial evidence by investigators that there was nothing on the outside of the theater indicating the full nature of the films. However, fifteen days after the proceedings began, the movie theater operators also produced the films themselves into evidence.

In a 5-4 opinion by Chief Justice Warren Burger, the Court held obscene films did not acquire constitutional protection simply because they were shown only to consenting adults. The Court acknowledged that while it has often upheld the “high

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485 Notes, *Community Standards*, supra note 482, at 1842.

486 GA. CODE ANN. § 26-2101. The statute reads in relevant part:

(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do....

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters....

Id.

487 *Paris Adult Theatre*, 413 U.S. at 50-51.

488 Id. at 52.

489 Id.

490 Id. at 57, 68-69 (rejecting the trial court and affirming the Georgia Supreme Court’s determination).
importance of regulating the exposure of obscene materials to juveniles and unconsenting adults,” these were not the only interests in regulating obscene material. The Court affirmed the state’s interest in protecting “the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly the public safety itself.” 491

Although the defendants argued “there was no scientific data which conclusively demonstrate[d] that exposure to obscene material adversely affects men and women or their society,” 492 Chief Justice Burger cited the Hill-Link Minority Report of the Commission on Obscenity and Pornography to support the contention that “there is at least an arguable correlation between obscene material and crime.” 493 But he went further, stating that even if conclusive evidence had not been established, it was not for the Court to “resolve empirical uncertainties underlying state legislation.” 494

491 *Id.* at 58.

492 *Id.* at 50.


While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other antisocial conduct. For example, Dr. George Henry of Cornell University has expressed the opinion that obscenity, with its exaggerate and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce antisocial conduct by the average person.

*Id.* But see *id.* at 451 (discussing a division of thought between behavioral scientists in earlier studies on the correlation between obscenity and socially deleterious conduct).

Chief Justice Burger ruled conclusive proof of a connection between antisocial behavior and obscene material was not necessary to justify the Georgia law.\textsuperscript{495} According to the majority, there is “[n]othing in the Constitution [that] prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.”\textsuperscript{496} To the contrary, Burger rejected a requirement of proof-of-harm before allowing a state to legislate. He held, it was the sum of experience, including that of the last two decades[, that] affords ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.\textsuperscript{497}

\textit{Paris Adult Theatre} thus rejected outright a requirement of proof-of-harm in favor of substantial legislative deference. It approved legislative reliance on qualitative, anecdotal evidence, amounting to less than scientific proof to regulate the display of obscene expression. The opinion also rejected the argument it was failure to require “‘expert’ affirmative evidence that the material were obscene when the materials themselves were placed into evidence.”\textsuperscript{498} Chief Justice Burger noted that the use of expert testimony is usually only admitted “for the purpose of explaining to lay jurors what they otherwise could not understand,”\textsuperscript{499} However, when the films themselves are submitted into evidence, he ruled, they are the “best evidence of what they represent.”\textsuperscript{500}

\textsuperscript{495} \textit{Id.} at 60-61.

\textsuperscript{496} \textit{Id.}

\textsuperscript{497} \textit{Id.} at 63 (emphasis added).

\textsuperscript{498} \textit{Id.} at 56.

\textsuperscript{499} \textit{Id.} n.6.

\textsuperscript{500} \textit{Id.} at 56.
and that, in such an instance, no assistance is needed.\footnote{Id. n.6.} Under such a interpretation, it the Court concluded “nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited [by the Paris Adult Theatres], provided that the applicable Georgia law, as written and authoritatively construed by the Georgia courts, meets the First Amendment standards set forth in \textit{Miller v. California}.\footnote{Id. at 69.}

The decisions so far discussed in Section 2 represent the Court’s tendency not only to defer to government decisionmaking but to wholly discard arguments in favor of some kind of showing to regulate obscenity even as to consenting adults. \textit{Miller} adopted a requirement that the speech be obscene as to a “local” community standard and also that the work as a whole lack “serious literary, artistic, political or scientific value.” However, the \textit{Miller} standard, viewed in its entirety, represented in practice only a minor improvement to the presumption of unconstitutionality \textit{Roth} applied.

In \textit{Paris Adult Theatre}, the Court continued the trend of rejecting a requirement of evidence of proof-of-harm, ruling state legislatures could legitimately regulate obscenity on the basis of a mere \textit{conclusion} of harm stemming from the display of sexually explicit material in the name of protecting the social interest in order and morality. It also ruled expert testimony is not required, especially when the material is presented to the court, to establish that it is obscene.

While these opinions upheld the constitutionality of a ban on obscenity, the next opinion extended the ban to a new category of material—child pornography.
**Ferber v. New York**

In *New York v. Ferber*, the Court had a prime opportunity to address the “serious national problem” stemming from the creation, sale and distribution of child pornography. Defendant Paul Ira Ferber owned a bookstore specializing in sexually oriented products. He was arrested and indicted under a New York statute prohibiting the distribution of a sexual performance of a child under the age of sixteen. New York was one of twenty states prohibiting the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene. In enacting the criminal statute, New York had relied upon an array of sociological and psychological studies purporting to demonstrate the connection between abuse and harm caused to the child as well as the need for restrictions of the kind it had enacted to adequately address the social issue.

*Ferber* extended the categorical exception of unprotected expression to the sale and distribution of child pornography under a standard distinct from the *Miller* test for obscenity. Justice Byron White, writing the opinion for the Court, noted it was the New

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504 *Id.* at 749.

505 New York Penal Law section 263.05 (1980) makes the use of a child in a sexual performance a class C felony. § 236.00(1) defines sexual performance as “any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.” Sexual conduct is defined in § 263.00(3) as “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.” The law also makes it a class D felony to promote, defined to include the sale, publication or distribution of such material if he knows of the character or content of the sexual performance. § 265.145.

506 458 U.S. at 749. The Court noted that forty-seven states and the Federal Government also prohibited the production of child pornography, half of them not requiring the material be legally obscene. *Id.*

507 *Id.* n.9 (listing studies).

508 *Id.* at 749.
York legislature’s determination that there had been a “proliferation of exploitation of children subjects of sexual performance.” He held that “the legislative judgment, as well as the judgment of the relevant literature, is that the use of children of subjects of pornographic material is harmful to the psychological, emotional, and mental health of the child.” Relying upon this literature, Justice White found the “distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of child.” In his opinion, however, he also seemed to accept lawmakers’ conclusions that both depictions of child pornography are: 1) “an economic motive for and are thus an integral part of the production of such materials;” and that, 2) “restraints on the distribution of pornographic materials are required in order to effectively combat the problem.” He held that “the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,” that he would not “second-guess” this judgment, and, ultimately, that a body of relevant literature and testimony supported the legislative conclusions.

The Court next found New York’s attempt to ban knowing distribution of works depicting minors engaged in explicit sexual conduct—without a requirement that the material lack “serious literary, scientific, or educational value” or that it actually

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509 *ld.* at 757 (quoting N.Y. LAWS 910 § 1).
510 *ld.* at 758.
511 *ld.* at 759 (citing one of the studies) (emphasis added).
512 *ld.* at 761.
513 *ld.* at 760 (citing testimony by lawmakers, professors and law enforcement officials before the Subcommittee on Crime of the House Judiciary Committee generally supporting the point that targeting the production of child pornography is not sufficient).
514 *ld.* at 757-60.
threatened the harms identified by the government—facially valid. It wrote that "while some States may find that [such an] approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further."\textsuperscript{515} The Court held the "tiny faction" of instances to which the statute could impermissibly apply did not undermine its constitutionality.\textsuperscript{516}

The Court rejected the application of the \textit{Miller} standard to child pornography, finding that: "a trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive matter; and the material at issue need not be considered as whole."\textsuperscript{517} Justice White continued, "distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection,"\textsuperscript{518} but knowing distribution of depictions of minors engaged in explicit sexual conduct, regardless of the social value, does not.\textsuperscript{519}

On the other hand, Justice John Paul Stevens concurred in opinion, but questioned the Court’s "empirical judgment that the arguably impermissible application of the New York statute amounts to only a ‘tiny fraction’ of the materials within in the statutes’ reach."\textsuperscript{520} He noted, "[t]he Court’s analysis is directed entirely at the

\begin{itemize}
\item \textsuperscript{515} \textit{Id.} at 761.
\item \textsuperscript{516} \textit{Id.} at 773.
\item \textsuperscript{517} \textit{Id.} at 764.
\item \textsuperscript{518} \textit{Id.} at 765.
\item \textsuperscript{519} \textit{Id.} at 765-66.
\item \textsuperscript{520} \textit{Id.} at 765 (Stevens, J., concurring).
\end{itemize}
permissibility of the statute’s coverage of nonobscene material. Its empirical evidence, however, is drawn substantially from congressional Committee Reports that ultimately reached the conclusion that a prohibition against obscene child pornography—coupled with sufficiently stiff sanctions—is an adequate response to this social problem.\textsuperscript{521} The Senate Committee on the Judiciary noted that, “virtually all of the materials that are normally considered child pornography are obscene under the current standards,” and that “[i]n comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential.”\textsuperscript{522}

Stevens wrote, “[e]ven assuming the Court’s empirical analysis is sound, I believe a more conservative approach to the issue would adequately vindicate the State’s interest in protecting its children and cause less harm to the federal interest in free expression.”\textsuperscript{523} He provided an example in which the State’s interest would be “far less compelling” and in which the interest in free expression would correspondingly “be just as strong as if an adult actor had been used,”\textsuperscript{524} yet refused to hypothetically address how such an instance might affect overbreadth analysis.\textsuperscript{525}

\textit{Ferber} held that child pornography was a category of low-value expression that could be categorically prohibited. The Court buttressed its conclusion that distribution of materials depicting children engaged in sexually explicit conduct resulted in psychological harm to children by citing sociological and psychological studies

\textsuperscript{521} \textit{Id.} n.4. (Stevens, J., concurring).

\textsuperscript{522} S. REP. NO. 95-438, at 13 (1977). \textit{See also} \textit{Ferber}, 458 U.S. at 765 n.4 (Stevens, J., concurring).

\textsuperscript{523} \textit{Ferber}, 458 U.S. at 765 (Stevens, J., concurring).

\textsuperscript{524} \textit{Id.} at 779 (Stevens, J., concurring).

\textsuperscript{525} \textit{Id.} (Stevens, J., concurring).
demonstrating a connection between harm to children and child abuse. It also relied upon the testimony of lawmakers, professors and law enforcement officials before a congressional committee hearing to support its contention that stringent restrictions on the distribution of such sexually explicit materials depicting children engaged in sexual explicit conduct were necessary to proper adjudication. It doing so, it appeared to rely on the scientific and testimonial evidence—which may or may not have specifically addressed the specific problem before the Court—to support its conclusion.

Although the decision recognized potential limits to the category of child pornography, it was not until twenty years later in Ashcroft v. Free Speech Coalition that the Court specifically addressed those limits.

**Ashcroft v. Free Speech Coalition**

In Free Speech Coalition, the Court considered the constitutionality of the Child Pornography Prevention Act (CPPA), which extended the federal prohibition on child pornography to images of virtual child pornography. Free Speech Coalition, an adult-entertainment trade association, challenged the statute’s bar on the possession or distribution of materials created using adults who looked like minors or through the use of computer technology that made it possible to create realistic images of children that did not actually exist. It alleged the “appears to be” and “conveys the

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528 Free Speech Coal., 535 U.S. at 239-40.

529 Section 2256(8)(B) of the CPPA bans “any visual depiction, including any photography, film, video, picture or computer or computer-generated image or picture” that “is, or appears to be, or a minor engaging in sexually explicit conduct….” Thus, Section 2256(8)(B) “bans a range of sexually explicit images, sometimes called ‘virtual child pornography’, that appear to depict minors but were produced by
impression" phrases of the CPPA were overbroad and vague and thus violated the First Amendment.\footnote{CPPA Section 2556(8)(D) bans any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it “depicts a minor engaging in sexually explicit conduct...” Thus, the section “is aimed at preventing the production or distribution of pornographic material pandered as child pornography.” § 2556(8). \textit{Free Speech Coal.}, 535 U.S. at 234.}

In a 6-3 opinion by Justice Anthony Kennedy, the Court held the CPPA was overbroad and unconstitutional.\footnote{\textit{Id.}} It found the CPPA did not attempt to conform to the \textit{Miller} standard, but it acknowledged \textit{Ferber} recognized that depictions of child pornography could be banned whether or not they were obscene as defined by \textit{Miller}.\footnote{\textit{Id.} at 240-41.}

However, the Court in this opinion that the images prohibited under the CPPA “did not involve, let alone harm, any children in the production process” and thus were distinguishable from the depictions banned in \textit{Ferber}.\footnote{\textit{Id.} at 241.}

Despite the Court’s rejection of this first rationale, the government alleged there were other reasons for upholding the CPPA, including that the materials could threaten children in less direct ways.\footnote{\textit{Id.} at 241.} For instance, “[p]edophiles might use the materials to encourage children to participate in sexual activity” or to “whet their own sexual appetites.”\footnote{\textit{Id.}} Additionally, the government argued, “the images can lead to actual other means than using real children, such as through the use of youthful-looking adults or computer-imaging technology.” \textit{Free Speech Coal.}, 535 U.S. at 234.
instances of child abuse."\textsuperscript{537} To this, the Court responded, “the mere tendency of speech to encourage unlawful acts is not sufficient reason for banning it.”\textsuperscript{538} It found the government’s suggestion of a “causal link” between the alleged harm and the expression in this instance was only “contingent and indirect” and “depend[ed] upon some unquantified (sic) potential for subsequent criminal acts.”\textsuperscript{539}

Based on such evidence, the Court ruled the government had shown “no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.”\textsuperscript{540} It held, “[w]ithout a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.”\textsuperscript{541} Thus, despite the relevance of the government’s interest in protecting minors—usually underlying a broad deference to legislative discretion—the Court rejected extension of the interest in Free Speech Coalition to strike down a ban on virtual child pornography in the void of evidence demonstrating a greater connection between the alleged harm and the speech to be prevented.

Following the Court’s decision in Free Speech Coalition, Congress took greater efforts to demonstrate the proximate link between virtual child pornography and harm to real children, based on language in Justice Clarence Thomas’s concurrence indicating the majority’s decision had left open “the possibility that a more complete affirmative

\textsuperscript{537} \textit{id.} at 250.
\textsuperscript{538} \textit{id.} at 253.
\textsuperscript{539} \textit{id.}
\textsuperscript{540} \textit{id.}
\textsuperscript{541} \textit{id.}
defense could save the statute’s constitutionality.”

Justice Thomas continued, “if technological advances thwart prosecution of ‘unlawful speech,’ the government will have a compelling interest in barring or otherwise regulating some narrow category of ‘lawful speech’ in order to enforce effectively laws against pornography made through the use of real children.”

In answer to Thomas’s concurrence, Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (or the “PROTECT Act”), to address the Free Speech Coalition majority’s criticisms of and Thomas’s guidance regarding improved drafting of the CPPA’s provisions. Despite Congress’s increased fact-finding and “improved” drafting, at least one commentator has suggested the provisionary language of the PROTECT Act still contains some of the CPPA’s imprecisions. According to Professor Sara Macy, it is unclear whether a study involving virtual child pornography would ever be able to demonstrate the proximate link required under Ferber given the ethical constraints at hand. Furthermore, “even if Congress could establish such a relationship, Ferber could still be distinguished as creating only a production-based prohibition.” It is perhaps for these reasons Macy suggests the government’s efforts may be better effectuated toward pursuing vigorous enforcement of previously-existing federal obscenity laws, in addition

542 Id. at 259 (Thomas, J., concurring).
543 Id. (Thomas J., concurring).
546 Id. at 2149.
547 Id.
to legislation that complies with the Supreme Court’s virtual child pornography precedent.\textsuperscript{548}

The Court’s decisions so far within the “sexually explicit and violent expression” category have: a) upheld a presumption of the constitutionality of regulations targeting obscenity; b) revised that standard in favor of the modern-day three-pronged \textit{Miller} test; c) upheld restrictions on the distribution and sale of child pornography; and d) carved out from that category protection for material involving individuals that only look like children. While \textit{Ferber} appeared to impose a rather burdensome benchmark based on evidence of a “proximate link,” it is questionable whether the standard of legislative deference actually adopted by the Court would require such proof. This is different than the significantly more stringent standard enforced in \textit{Free Speech Coalition}, in which the Court required evidence of a direct speech-injury connection but found the evidence was not sufficient to support that showing. \textit{Free Speech Coalition} also addressed application of the standard in a slightly different method than \textit{Ferber}, in which the Court evaluated the evidence and then concluded it demonstrated the requisite “proximate link.” It began with pronouncement of a standard and then took turn to evaluate whether the evidence offered was sufficient to meet it.

While the cases so far have addressed obscenity and pornography, the next case in this section, \textit{United States v. Stevens},\textsuperscript{549} involved a federal statute prohibiting a different type of material: depictions of animal cruelty.

\textsuperscript{548} \textit{Id.} at 2155-56.

\textsuperscript{549} 559 U.S. 460 (2010).
United States v. Stevens

Stevens involved a challenged to a federal statute prohibiting the creation, sale or possession of depictions of animal cruelty. The statute did not address the “underlying acts harmful to animals,” only the “portrayals of such conduct.” The statute was enacted to target so-called “crush videos,” often featuring “women slowly crushing animals to death ‘with their bare feet or while wearing high heeled shoes,’ sometimes while ‘talking to the animals in a kind of dominatrix patter’ over ‘[t]he cries and squeals of the animals, obviously in great pain.’” The videos were said to appeal to persons with a very specific sexual fetish. Robert J. Stevens challenged the law after he was indicted for selling hunting and other videos through his business and its associated website. The videos included depictions of “pit bulls engaging in dogfights and attacking other animals” and also “the use of pit bulls to hunt wild boar, as well as a ‘gruesome’ scene of a pit bull attacking a domestic farm pig.”

In Stevens, Chief Justice John Roberts, who wrote the opinion for the Court, noted the “historic and traditional categories [of speech] long familiar to the bar” but

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550 Id. at 464-65. The statute made it federal penalty for anyone to “knowingly” create, sell or possess “a depiction of animal cruelty, “if done ‘for commercial gain,”” defining a depiction of animal cruelty as one “in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed.” 18 U.S.C. § 48 (1999). Section 48 (a) created a criminal penalty of up to five years in prison for anyone who knowingly “creates, sells, or possesses a depiction of animal cruelty.” In an attempt to comply with Miller, the law also contained an exceptions clause, exempting any depictions that have “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” § 48(b).

551 Stevens, 559 U.S. at 464. The Court noted the conduct of harming animals often falls within established regulations on animal cruelty—for instance, laws prohibiting dog fighting. Yet, it continued, these laws are often ineffective at targeting the underlying conduct in crush videos because the videos rarely disclosed the participants’ identities. Id. at 466.

552 Id. at 465-66.

553 Id. at 466.

554 Id.

555 Id.
found depictions of animal cruelty were not among them.\footnote{Id. at 468.} Despite the government’s evidence of a “long history in American law” of prohibiting animal cruelty,\footnote{Id. at 469.} Chief Justice Roberts reasoned that that precedent could not “be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”\footnote{Id. at 470.} While the Court acknowledged there were perhaps “some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed,” it declined to extend the historical excision to depictions of animal cruelty in \textit{Stevens}.\footnote{Id. at 471.}

The Court addressed the government’s alternative argument that depictions of animal cruelty could be exempted from First Amendment protection on the basis of the “legislative judgment that…depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection.”\footnote{Id. at 472.} The government contended “depictions of animal cruelty” could be added to the list based on a simple balancing test of the “value of the speech against its societal costs.”\footnote{Id. at 471.} This view, it said, had been derived from a number of opinions, including \textit{Chaplinsky} and \textit{Ferber}.

Yet, Chief Justice Roberts rejected that argument. According to Robert, earlier decisions “describe[d] historically unprotected categories of speech as being ’of such
slight value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”562 Yet, he held that “such descriptions…do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad-hoc calculus of costs and benefits tilts in a statute’s favor.563 Stevens determined “[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs,”564 When speech had been determined to be “fully outside the protection of the First Amendment” Justice Roberts found it had never been on the basis of a “simple cost-benefit analysis.”565 It held that such a “free floating test for First Amendment coverage” would be “startling and dangerous.”566

The Court also took issue with the statute’s exception clause, protecting only those materials that have “serious religious, political, scientific, educational, journalistic, historical or artistic value.”567 It found “the government’s attempt to narrow the statutory ban,” to encompass only crush videos and depictions of “extreme acts of animal cruelty,” however, to require “an unrealistically broad reading of the exceptions clause.”568 The language of the exception was largely drawn from the opinion in Miller, requiring depictions of sex to have serious value for them to be excepted from

562 Id. at 470.
563 Id. at 471.
564 Id.
565 Id.
566 Id.
568 Stevens, 559 U.S. at 478.
obscenity. Nor did the government contest the issue that the presumptively
impermissible applications far outweigh the permissible ones.\textsuperscript{569} Yet, the Court held,
“[w]e did not, however, determine that serious value could be used as a precondition to
protecting other types of speech in the first place.” The Court found that the First
Amendment protected many forms of speech that would not qualify for section 48’s
“serious-value exception,” but that would nonetheless fall within the enumerated
categories of speech prohibited by the statute.\textsuperscript{570}

The government, finally, argued even if the reach of the statute went beyond that
which was permissible, it was nonetheless cured by its construction to reach only
depictions of “extreme” cruelty.\textsuperscript{571} The Court, however, found that a statement by
President William J. Clinton, when the law was enacted characterized the statute as
targeting only depictions of “wanton cruelty to animals designed to appeal to a prurient
interest in sex” and that, as such, to read the statute as the government desired would
“require[] rewriting, not just reinterpretation.” Such revisions, the Court determined,
would constitute “a serious invasion of the legislative domain.”\textsuperscript{572}

In \textit{Stevens}, the Court did not overturn the Court’s historical use of a categorical
exception for obscene material, yet it refused to extent the category to depictions of
animal cruelty. The decision also adhered to a preferred position balancing approach,
placing greater emphasis on First Amendment interest in protecting expression. Chief
Justice Roberts refused to subscribe a standard of deference to Congress on its

\textsuperscript{569} Id. at 481.

\textsuperscript{570} Id.

\textsuperscript{571} Id. at 480.

\textsuperscript{572} Id.
interpretation of the statute or a limiting construction, but simply found that the statute was not narrowly tailored to prohibit only unprotected expression.

If Stevens represents one small step toward an increased burden of proof in the context of “sexually explicit and violent expression,” the next case in the series, Brown v. Entertainment Merchants Association,\(^{573}\) coming down the very next term, represents a giant leap.

**Brown v. Entertainment Merchants Association**

In Brown, representatives of the video game and software industries challenged a California statute that prohibited the sale or rental of “violent video games” to minors and required their packaging to be labeled “18.”\(^{574}\) The law defined violent video games as ones “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that a “reasonable person considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors.”\(^{575}\) Finding that video games were not one of the “few limited areas” in which the Court had “permitted restrictions upon the content of speech” and that new categories of speech could “not be added to the list by a legislature that concludes certain speech is too

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\(^{573}\) 131 S. Ct. 2729 (2011).

\(^{574}\) *Id.* at 2732.

\(^{575}\) *Id.*
harmful to be tolerated,” the Court rejected California’s attempt in Brown to “shoehorn speech about violence into obscenity.”

The Court found “it was of no consequence that California’s statute mimics.”

The New York statute regulating obscenity-for-minors upheld in Ginsburg v. New York. In that case, the Court approved a ban on the sale of sexual material that could be deemed obscene “from the perspective of a child.” It reasoned in Ginsburg that a “legislature could adjust the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of sexual interests…of…minors.” In Brown, however, the Court found that Ginsburg did not allow regulation of violent material on the same basis because violence is not, per se, obscene. According to the Court, “[s]peech that is neither obscene as to youths nor

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576 Id. at 2734. The Court rejected California’s attempt to “create a wholly new category of content-based regulation that is permissible only for speech directed at children,” finding that “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” The Court continued, “[n]o doubt a state possesses legitimate power to protect children from harm, but that does not include a free floating power to restrict the ideas to which children may be exposed.” Id. at 2736 (internal citations omitted).

577 Id. at 2735.

578 390 U.S. 629 (1968).

579 Brown, 131 S. Ct. at 2735 (describing the Ginsberg opinion). See also id. n.2 (stating that “[t]he statute in Ginsberg restricted the sale of certain depictions of ‘nudity, sexual conduct, sexual excitement or sadomasochistic abuse’ that were ‘harmful to minors’”). See also N.Y. PENAL LAW § 484-h(1)(f)(1965) (currently enacted as N.Y. PENAL LAW § 235.2 (McKinney 2014)).

580 Ginsberg, 390 U.S. at 638 (internal punctuation omitted). In that case, the Court noted the legislature’s judgment could be sustained as long as it was not “irrational.” Id. at 641.

581 Brown, 131 S. Ct. at 2729. On that note, the Court found:

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works to adults—and it is wise not to, since that is but a hair’s breadth from the argument rejected in Stevens. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.
subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”\textsuperscript{582} The fact the video games were “disgusting” was “not a valid basis for restricting expression.”\textsuperscript{583}

The Court next addressed the standard to be applied to evaluate the government’s regulation of violent video games. It held that the statute must pass the “demanding standard” of strict scrutiny—that is, in order to impose a restriction on the content of expression, a regulation must be “justified by a compelling government interest” and be “narrowly drawn to serve that interest.”\textsuperscript{584} It added that California “specifically identify an ‘actual problem’ in need to solving” and that the “curtailment of free speech must be actually necessary to the solution.”\textsuperscript{585}

Given such a “demanding standard,” it is not surprising the Court ruled the evidence on which California relied could not satisfy it.\textsuperscript{586} It found the state’s evidence was not compelling. According to the Court, California had relied on research that purported to show no more than a “connection between exposure to violent video games and harmful effects on children.”\textsuperscript{587} Apparently, for Justice Antonin Scalia, who wrote the opinion, this was not sufficient because it did “not prove that the violent video

\textit{Id.} at 2735.

\textsuperscript{582} \textit{Id.} at 2736.

\textsuperscript{583} \textit{Id.} at 2738.

\textsuperscript{584} \textit{Id.}

\textsuperscript{585} \textit{Id.}

\textsuperscript{586} \textit{Id.}

\textsuperscript{587} \textit{Id.} at 2739.
games cause[d] minors to act aggressively.”588 Furthermore, the Court concluded the research, which had been rejected by “every court to consider [it],” could not demonstrate that the small effects video games produced in some studies were distinguishable from effects produced by other media.589 The Court determined California had not produced evidence of a direct, causal link between the games and the harms caused to minors.590

California alternatively asserted it did not need such proof. Based on the Court’s decision in Turner Broadcasting v. Federal Communications Commission,591 California contended it did not need to meet such a high standard of proof because it could “make a predictive legislative judgment that such a link exists, based on competing psychological studies.”592 However, the Court rejected this assertion, finding California’s reliance on Turner Broadcasting was “misplaced” because it involved intermediate scrutiny applied to a content-neutral regulation.593 The Court ruled that “California’s

588 Id.
589 Id.
590 Id. at 2738-42. In Brown, the harm caused by the video games is dependent on how the children react to the video games. Based on a “mode of harm” analysis, discussed above, the harm caused by the video games can be analogized to the harm caused in Nebraska Press, by the media’s reporting of sensational details regarding the murder trial. The harm caused by the media’s speech to the defendant’s fair trial rights was dependent on the jury member’s potential use of the allegedly damaging statements.

Similarly, in Claiborne, the Court found the government’s alleged interest in regulating Evers’s statements was based on fear of how individuals who heard Evers’s speech would react. In each instance, the potential harm caused by the speech was distinct. In Claiborne, the charge revolved around the economic damage caused to the white merchants. In Nebraska Press, the government alleged the newspaper’s expression would injure the defendant’s fair trial rights. In Brown, the government aimed to prevent violent reactions caused as a result of interaction with violent video games. While the type of harm may well impact the level of proof of harm the Court applied, the time period during which each of the opinions were decided may well have also affected the standard required by the Court.

592 Brown, 131 S. Ct. at 2738.
593 Id.
burden is much higher, and because it bears the risk of uncertainty, ambiguous proof will not suffice.\textsuperscript{594}

Scalia and Breyer reached two diametrically opposed decisions in \textit{Brown}. Whereas Scalia, who authored the majority opinion in \textit{Brown}, found the California statute opposing the sale of video games to minors unconstitutional under a strict scrutiny “plus” standard, Breyer acknowledged his lack of “social science expertise,”\textsuperscript{595} stating that at least within matters beyond the Court’s competence, he would defer to the legislature to make such a decision.\textsuperscript{596} He found that in technical matters such as interpreting social science research, the Court owed the legislature a grant of deference.\textsuperscript{597} However, the decision does not provide a rationale why the legislature would be in a better position to make a determination regarding an evaluation of the literature.

\textit{Brown} represents the most stringent First Amendment standard applied by the Court within its obscenity doctrine. The decision represents the first time the Court considered the harm caused to minors from violent video games. In this instance, the nature of harm implicated is trifold: 1) psychological harm; 2) physical harm; and 3) injury to minors. However, the decision is also consistent with the “longstanding history to regulate obscene expression” but not violence.\textsuperscript{598} According to Geoffrey Stone, the Court has had 150 years to develop “reasonably workable standards” regarding

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\textsuperscript{594} \textit{Id.} at 2739.
\textsuperscript{595} \textit{Id.} at 2769 (Breyer, J., dissenting).
\textsuperscript{596} \textit{Id.} at 2770 (Breyer, J., dissenting).
\textsuperscript{597} \textit{Id.} (Breyer J., dissenting).
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obscenity, but to “start from scratch in the realm of violence, after eschewing that approach for more than two centuries, is simply a bad idea.”599

**Summary**

The cases discussed above can arguably be divided into four different subcategories based on the vehicles of expression involved: 1) obscenity, 2) child pornography; 3) depictions of animal cruelty; and 4) violent video games. They also involve an array of alleged government interests, largely involving protection of minors—either in protection of the sensibilities, from violence or sexually explicit material, or from physical abuse. Across the broad variety of expression, the Court appears to have slowly evolved from a presumption of obscenity’s unconstitutionality to a standard requiring a very high level of proof of harm. Yet, the opinions discussed here on also demonstrate the Court’s tendency to treat different brands of speech differently based on the content of the expression, whether obscenity, child pornography, depictions of animal cruelty or depictions of violence contained within the sale or rental of violent video games to minors.

Within obscenity, the Court has largely relied on the government to determine the bounds of access to obscene material. *Roth* adopted a very low standard of First Amendment protection. In *Roth*, the Court determined obscenity was outside of the First Amendment’s ambit without any evidence of proof-of-harm stemming from the expression. In fact, *Roth* rejected the argument that specific proof of harm was needed to regulate obscenity. The Court pointed only to anecdotal evidence of legislative attempts to regulate obscenity to support its contention that obscenity was “utterly

599 *Id.* at 1866-67.
without redeeming social value.” The test the Court applied was “whether to the average person, applying contemporary community standards, the dominant theme taken as a whole appeals to the prurient interest.”

*Miller*, establishing the Court’s modern-day obscenity test, affirmed *Roth*’s designation of obscenity as beyond First Amendment protection. While *Miller* refined the First Amendment standard applicable to obscenity, it overall did little to advance the categorical exemption. *Miller* narrowed the “contemporary community standard” to a local community, while also requiring that obscene material may only be banned when “limited to works…which taken as a whole, do not haveserious literary, artistic, political, or scientific value.”

In *Paris Adult Theatre*, decided the same day as *Miller*, the Court continued the trend of rejecting a requirement of evidence of a connection between obscene material and its “adverse” societal effects, ruling state legislatures could legitimately regulate obscenity, even as to consenting adults, on the basis of a mere conclusion of harm stemming from the display of sexually explicit material.

In *New York v. Ferber*, the Court established the low-value category of child pornography. It granted the government broad deference to regulate child pornography in light of the compelling interest of preventing harm to children. *Ashcroft v. Free Speech Coalition* rejected extension of the categorical exception to virtual child pornography.

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600 The Court wrote that at trial, the jury was instructed to consider whether the “‘dominant theme of the material as a whole…appeals to the prurient interest’ and in determining whether the material ‘goes substantially beyond customary limits of candor and affronts contemporary community standards of decency,’ it was to apply ‘contemporary community standards of the State of California’…” The prosecution and the defense assumed that the relevant ‘community standards’ in making the factual determination of obscenity were those of the State of California,” and that defense counsel “never objected to the testimony of the State’s expert on community standard or to the instructions…on ‘statewide standards.’” *Id.* at 31. On the basis, the Court ruled it was not constitutional error for the prosecution to fail to offer evidence of a national standard.
pornography. As opposed to the broad deference applied in *Ferber*, the Court required a heightened burden of proof. It found that the government’s evidence of a proximate link was only “contingent” and “indirect” and did not satisfy the standard.

In *Stevens*, the Court noted depictions of animal cruelty were not among the historical and traditional categories of unprotected expression. Instead, the Court applied a preferred balancing position weighted in favor of First Amendment interests, rather than an ad-hoc weighing of the societal costs against the value of the expression. In *Brown*, the Court adopted a heightened burden, representing perhaps the most stringent standard the Court has applied in opinions evaluating free speech. It is perhaps interesting the Court has adopted such a stringent standard in a case involving an interest in protecting children. In *Ferber*, for instance, the Court refused to require more stringent evidence in a regulation aimed at child protection.

Similar to *Nebraska Press* (involving the defendant’s fair trial rights) and *Claiborne* (concerning the government’s interest in regulating economic harm caused by political boycotts), the harm posed in *Brown* is dependent upon the actions of an intervening force (a minor’s reactions to participation in violent video games) at some non-immediate future. This same reliance on the conduct of a third party was present in *Free Speech Coalition*, in which the Court required, at least in form, a “proximate link” between the stated government in preventing child abuse through the categorical prohibition of virtual child pornography (that would by definition not use real children in its production.) Rather than adopt a standard focused on the imminence of the third party’s reaction, as applied in the earlier incitement to unlawful action cases, which in all likelihood would fail to account for the relationship that some harms share with
expression, the Court has focused on the connection between the speech and the alleged harm. The Court’s decisions within the category of sexually explicit and violent expression—namely, *Free Speech Coalition*, *Stevens* and *Brown*—demonstrate that while the Court has not repudiated its categorical obscenity doctrine, it has rejected a legislative presumption in favor of requiring evidence of a “proximate” or “direct, causal link.”

Section 2 discussed the Supreme Court’s precedent involving sexually explicit and violent expression. Section 3 addresses cases within the Supreme Court's jurisprudence on “lewd, profane and indecent expression.”

**Lewd, Profane and Indecent Expression**

*Chaplinsky* held that the use of mere “lewd” and “profane” language could be categorically banned under the First Amendment. Yet, these cases demonstrate anything but the direct contravention of speech based on the category of expression used. What this variety does illustrate, however, is the Court’s tendency to uphold restrictions on the expression based on some other governmental rationale for regulating.

The Court’s lewd, profane and indecent expression doctrine comprises the Court’s “secondary effects” doctrine, in which it has upheld what could otherwise be perceived as a content-based restriction, under the guise the regulation did not actually target the content of the expression, but the repercussions of the expression on the surrounding community. Other opinions falling within this variety include endorsement of an agency’s decision to impose “context-based” restrictions on the public dissemination of indecent expression, akin to time, place and manner restrictions.
Cohen v. California

In Cohen v. California, Paul Robert Cohen was convicted under a California disturbing-the-peace statute for wearing a jacket emblazoned with the words “Fuck the Draft” inside a courthouse to express his opposition to the Vietnam War. The California statute prohibited “maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person by offensive conduct.”

The decision did not bode well for the state’s interest in suppressing Cohen’s “offensive” speech from the very beginning. The Court began with declaring that the state had attempted to penalize Paul Robert Cohen based on the words he used to convey his message. Finding the conviction “rested solely upon speech” and not “upon any separately identifiable conduct,” the Court determined the state “certainly lack[ed] the power to punish Cohen for the underlying content of the message the inscription conveyed.” Any attempt by the state to recast the statute as preserving “an appropriately decorous atmosphere in the courthouse where Cohen was arrested,” according to the Court, “must fail in the absence of any language in the statute that

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602 Id. at 16. The defendant testified that he “wore the jacket knowing the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.” Unlike the earlier cases in which the defendants opposed the war draft, Cohen’s actions consisted solely of wearing the jacket. He did not speak to others at the courthouse about evading the war draft. There was no encouragement of others to curtail the war effort. This case can be distinguished from Schenck, Abrams, and other earlier cases in which there was no incitement to unlawful action of curtailing the war effort.
603 Id. at 15 (quoting the statute).
604 Id. at 18.
605 Id.
would have put appellant on notice that certain kinds of otherwise permissible speech or conduct."\textsuperscript{606} 

But this, to the Court, did not end the matter. According to the Court, the First Amendment "ha[s] never been thought to give absolute protection to every individual to speak whenever or wherever he places or to use any form of address in any circumstances that he chooses."\textsuperscript{607} The Court evaluated whether Cohen's speech fit within any one of the "relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed."\textsuperscript{608} The Court first queried whether the speech could be viewed as obscene, but determined "[w]hatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."\textsuperscript{609} It found Cohen's speech did not qualify as obscenity.

The Court next reasoned that "[w]hile the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance, it was clearly not 'directed to the person of the hearer.'"\textsuperscript{610} There was no individual actually or likely to be present that could reasonably have regarded the words on Cohen's jacket as a "direct personal insult," and there "was no showing that anyone

\textsuperscript{606}\textit{Id.} at 19.

\textsuperscript{607}\textit{Id.}

\textsuperscript{608}\textit{Id.} at 19-20.

\textsuperscript{609}\textit{Id.} at 20 (citing Roth v. United States, 354 U.S. 476 (1957)) ("It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.").

\textsuperscript{610}\textit{Id.} (citing Cantwell v. Connecticut, 310 U.S. 296, 309 (1940)).
who saw Cohen was in fact violently aroused” or that Cohen “intended such a result.”\textsuperscript{611} The Court thus rejected that the contention Cohen’s speech fell within the category of “so-called ‘fighting words,’” those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”\textsuperscript{612}

The Court next addressed arguments presented before the Court that California should be able to legitimately act to protect “unwilling or unsuspecting viewers” from “Cohen’s distasteful mode of expression” that was thrust upon them.\textsuperscript{613} It recognized, while the Court has ruled

[the] government may properly act in many situations to prohibit intrusion into the privacy of the home...we have at the same time consistently stressed that ‘we are often ‘captives’ outside the sanctuary of the home’...the ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a manner of personal predilections.\textsuperscript{614}

From here, the Court famously suggested as a remedy that the “presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offensive...[i]n the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”\textsuperscript{615}

\textsuperscript{611} \textit{Id.}
\textsuperscript{612} \textit{Id.}
\textsuperscript{613} \textit{Id.} at 21.
\textsuperscript{614} \textit{Id.}
\textsuperscript{615} \textit{Id.}
While the Court’s dictum supports categorical exceptionalism based on a showing a specific type of expression was used, the Court found Cohen’s speech did not fit any of the previously identified categories and thus could not restrict his speech. Indeed, it recognized the government had recited no evidence that “substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen.”\textsuperscript{616} Yet, even in upholding Cohen’s speech from the grips of governmental attack, the Court indicated it might have deferred to the state’s judgment to restrict Cohen’s speech given “a more particularized,” “compelling” and “sustainable” rationale for the conviction.\textsuperscript{617}

In overturning Cohen’s conviction for his profane, otherwise “crude form of protest,” the Court recognized that “one man’s vulgarity is another’s lyric.”\textsuperscript{618} In doing so, the Court protected not only the emotive but the cognitive element of speech,\textsuperscript{619} even in the face of prior precedent permitting prohibition of “profane” expression.

\textsuperscript{616} \textit{Id.} at 23. The Court continued:

There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a government power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts of little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may appropriately effectuate that censorship themselves.

\textit{Id.}

\textsuperscript{617} \textit{Id.} (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

\textsuperscript{618} \textit{Id.} at 25.

\textsuperscript{619} For further discussion on the emotive and cognitive elements of speech, see, e.g., W. Wat Hopkins, \textit{When Does F*** Not Mean F***?}, FCC v. Fox Television Stations and a Call for Protecting Emotive Speech, 64 \textit{FED. COMM. L.J.} 1 (2011). For further discussion of the facts and impact of the Cohen opinion, see generally, e.g., Clay Calvert, Revisiting the Right to Offend Forty Years After Cohen v. California: One Case’s Legacy on First Amendment Jurisprudence, 10 \textit{FIRST AMEND. REV.} 1 (2011).
The next case in the series, decided three years later, involves a state challenge to a different type of expression falling under this same brand: the display of lewd, but nonobscene, films in a public place.

*Erznoznik v. City of Jacksonville*

In *Erznoznik v. City of Jacksonville*, the City of Jacksonville enacted an ordinance declaring it a public nuisance for any drive-in movie theater to “exhibit any motion picture in which bare buttocks or female bare breasts were exposed if the movie theater screen on which the film was shown was visible from any public street or public place.” The city conceded its ordinance swept far beyond the permissible constitutional restraints on obscenity and thus applied to films that were protected by the First Amendment. But it argued it nonetheless had significant interests in preventing the public display of nude films, not only for the protection of “unwilling viewers from “exposure to materials that may be offensive” but also to protect children from “this kind of visual influence.” The only evidence produced at trial was that “the screen of appellant’s theater is visible from two adjacent public streets and a nearby church parking lot” as well as “testimony indicating that people had been

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620 422 U.S. 205 (1975).

621 *Id.* at 206. The Jacksonville Ordinance section 330.313 declared it a public nuisance to exhibit any motion picture in which bare buttocks or female bare breasts were exposed if movie theater screen on which the film was shown was visible from any public street or public place. JACKSONVILLE, FL., CODE § 330.313 (1972). *See also Erznoznik, 422 at 206-07.*

622 *Id.* at 208.

623 *Id.*

624 *Id.*

625 *Id.* at 212.
observed watching films while sitting outside the theater in parked cars and in the grass."\(^{626}\)

The Supreme Court rejected these arguments. According to Justice Lewis Powell, who wrote the opinion for the Court, while "[a] state or municipality may protect individual privacy by enacting reasonable time, place, and manner" restrictions, the First Amendment’s disdain for content-based restrictions forbade Jacksonville from being able to single out a restriction on the display of movies on the basis of the underlying content.\(^{627}\) According to Justice Powell, "when the government acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."\(^{628}\) Moreover, the Court determined, "speech that is neither obscene as to youths or subject to some other legitimate proscription in the name of protecting the young from ideas or images that a legislative body thinks unsuitable for them."\(^{629}\) On that basis, the Court determined the statutes’ sweeping regulation of all nudity—“irrespective as to the context or pervasiveness”—was too broad to uphold the ordinance.\(^{630}\)

The Court summarily addressed the next argument that the ordinance constituted a traffic regulation.\(^{631}\) It claimed, for the first time upon oral argument before the Court,

\(^{626}\) Id. at 207.

\(^{627}\) Id.

\(^{628}\) Id. at 209.

\(^{629}\) Id. at 213-14.

\(^{630}\) Id. at 209.

\(^{631}\) Id. at 214.
that “nudity on a drive-in movie screen distracts passing motorists, thus slowing the flow of traffic and increasing the likelihood of accidents.” 632 It did not contest the validity of traffic safety, but found that the ordinance as it was currently written did not “satisfy the rigorous constitutional standards that apply when government attempts to regulate expression.” 633 According to the Court, “[t]here is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap operas to violence, would be any less distracting to the passing motorist.” 634 It determined that Jacksonville had “offer[ed] no justification...for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic,” 635 and thus that the statute was “strikingly underinclusive.” 636

In Erznoznik, the Court struck down a government regulation based on content, finding the government offered no valid justification for regulating only the display of movies containing nudity and not any other type of film that might also violate its interests. Although it juxtaposed Erznoznik’s First Amendment interests against any increase in privacy served by restricting the public display of nude films, the Court declined to apply a balancing approach. 637 Instead, Justice Powell characterized the city’s “selective restrictions” on content as censorship that was viable only in situations where “the privacy of the home” was invaded or the “degree of captivity ma[d]e it

632 Id.
633 Id.
634 Id. at 214-215.
635 Id. at 215.
636 Id. at 214.
637 Note, State Power to Impose Restrictions on Content of Drive-In Motion Pictures, 89 HARV. L. REV. 123, 123 (1975).
impractical for the unwilling viewer or auditor to avoid exposures."\textsuperscript{638} While the decision has been interpreted as guaranteeing drive-in movie theaters significant First Amendment protection against state regulation predicated on film content,\textsuperscript{639} the Court also did not impose a stringent evidentiary burden to uphold such a government regulation. It merely found that a "legislature may deal with one part of a problem without addressing all of it," presumably on a mere showing or "justification" to distinguish movies containing nudity from all other movies.\textsuperscript{640}

_Erznoznik_ struck down a regulation prohibiting the public display of nude films on the rationale that content-based restrictions are offensive to free expression. Jacksonville's ordinance was hinged on the films' display of nudity. The remaining opinions illustrate the Court's tendency to uphold restrictions that impinge on the content of expression if the regulation is not aimed at the underlying message conveyed.

**Young v. American Mini Theatres, Inc.**

_Young v. American Mini Theatres_\textsuperscript{641} involved a challenge by the operators of two adult movie establishments in Detroit\textsuperscript{642} to a zoning ordinance requiring certain businesses to be dispersed.\textsuperscript{643} Specifically, the ordinance required that any "regulated

\textsuperscript{638} _Id._ at 123-24 (quoting _Erznoznik_, 422 U.S. 205, 224 (White, J. dissenting)).

\textsuperscript{639} _Id._ at 123.

\textsuperscript{640} _Erznoznik_, 422 U.S. at 215 ("Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic. Absent such a justification, the ordinance cannot be salvaged."). The implication to be taken from the Court's statements is that in light of a justification, the city would be upheld to uphold the ordinance. There is no other language in the Court's opinion indicating any greater requirement of evidence.

\textsuperscript{641} 420 U.S. 50 (1976).

\textsuperscript{642} _Id._ at 52-54.

\textsuperscript{643} _Id._ at 52.
use” establishment could not operate within 1,000 feet of any other regulated use establishment,“ defined to include ten businesses in addition to adult theaters. At the time the original ordinance was adopted, the Detroit Common Council determined that some uses of property were “especially injurious to a neighborhood when they are concentrated in limited areas.”

In support of this finding, urban planners and real estate experts testified that the “location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.” The council's conclusions, however, largely rested on the expect opinion of one individual, Dr. Mel Ravitz, a sociologist at Wayne State University located in Detroit, and a former member of the Detroit Common Council. He filed an affidavit at the time the amendments were enacted reciting some sociological reasons for regulating the location of adult businesses. According to Ravitz:

[The] effect on neighborhoods of concentrations of [adult] business...is deleterious...They attract the kinds of people who frequent these places and drive away those who do not. This contributes to the decline of a neighborhood. A concentration of such businesses also causes the

644 Id.
646 Am. Mini Theatres, 420 U.S. at 54.
647 Id.
neighborhood to appear to be declining and this causes a lack of neighborhood pride, resulting in further decline.\textsuperscript{649}

The plaintiffs challenged the ordinance as imposing a content-based restriction “predicated on the character of the motion pictures it exhibits.”\textsuperscript{650}

In a 5-4 opinion, Justice John Paul Stevens upheld the city’s ordinance regulating the location of adult businesses. He wrote that while the zoning ordinance classified the movie theaters based on the type of films exhibited at the theater, it was not unconstitutional because it was unrelated to the underlying content of the films.\textsuperscript{651} The city’s determination that the concentration of adult businesses “causes the area to deteriorate and become a focus of crime” was not discriminative but represented a regulation aimed only at the “secondary effects” that the concentration of such businesses was likely to produce.\textsuperscript{652}

The majority reasoned that the adoption of zoning regulations was adequately supported by the city’s interest in maintaining the “present and future character” of its neighborhoods and “preserving urban life.”\textsuperscript{653}: According to Justice Stevens, “[a city]

\footnotesize{\textsuperscript{649} Id.}\n
\footnotesize{\textsuperscript{650} Am. Mini Theatres, 420 U.S. at 53.}\n
\footnotesize{\textsuperscript{651} According to the Court:}\n
\footnotesize{\begin{quote}
For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point or another, the effect of the ordinances is exactly the same.
\end{quote}}

\footnotesize{\textsuperscript{ld. at 70.}}\n
\footnotesize{\textsuperscript{652} Id. at 71 n.34 (“It is the secondary effect which these zoning ordinances attempt to avoid, not the discrimination of ‘offensive’ speech.”). For a discussion of the Court’s secondary effects doctrine, see Philip J. Prygoski, The Supreme Court’s “Secondary Effects” Analysis In Free Speech Cases, 6 COOLEY L. REV. 1 (1989).}\n
\footnotesize{\textsuperscript{653} Am. Mini Theatres, 420 U.S. at 62. (“No doubt that the municipality may control the location of the theaters, as well as the location of other commercial establishments, either by confining them to certain specified zones or by requiring that they be dispersed throughout the city.”).}
must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” It was not the Court’s “function” to “appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas.” It found the record contained a “factual basis” for concluding the imposition of such requirements would achieve their “desired effect.”

American Mini Theatres represents a landmark case addressing the relationship between free expression and zoning regulations. It did not, first, set a standard and then determine whether the evidence met that standard or establish the type or amount of evidence that would be necessary to justify the government’s conclusion. It merely reviewed the city’s reliance on the expert testimony, largely of one individual, to find the evidence was sufficient to support that interest. Moreover, it deferred to Detroit’s “experimentation” as to how to achieve its goals. The Court’s initial opinion involving the constitutionality of zoning regulations has had far-reaching implications concerning the establishment of its “secondary effects” doctrine. In American Mini Theatres, the Court reviewed at least some evidence purporting to establish a connection between the government’s interest and its method of achieving it. In the next opinion, the Court required no evidence of a connection between the agency’s method of regulating the broadcast of indecent expression and its interest in protecting minors.

\[^{654}\text{Id.}\]
\[^{655}\text{Id.}\]
\[^{656}\text{Id.}\]
Federal Communications Commission v. Pacifica Foundation

Federal Communications Commission (FCC) v. Pacifica Foundation657 involved the use of indecent expression during a mid-afternoon radio station broadcast. In Pacifica, a New York broadcast station aired a twelve-minute monologue by “satirical humorist” George Carlin at 2 p.m.658 In the monologue entitled “Filthy Words,” Carlin not only spoke the words that he claimed could not be said on the public airwaves,659 but “proceeded to list those words and repeat them over and over again in a variety of colloquialisms.”660 Although the station explained that it aired the monologue during a program concerning “contemporary society’s attitude toward language” and peremptorily warned listeners the monologue included “sensitive language which might be regarded as offensive to some,” the FCC received a complaint from a man who said he heard the broadcast while driving with his young son.661

Following the complaint, the FCC chose not to impose formal sanctions against the radio station, but issued a declaratory order that it said would be “associated with the station’s license file” for the purpose of license renewal.662 Under its “context-based”

658 Id.
659 The seven filthy words were: shit, piss, fuck, cunt, cocksucker, motherfucker and tits. Id. at 751.
660 Id. at 729.
661 Id. at 730.
662 Id. The Radio Act of 1927 first enunciated the prohibition on the Federal Radio Commission (the predecessor to the FCC) to edit proposed broadcasts in advance “censorship prohibition.” 47 U.S.C. § 326, Pub. L. No. 69-632, 44 Stat. 1162 (1927). The same provision also granted the Commission the authority to take note of past program material when considering a licensee’s renewal application. In 1948, the United States Code was rearranged and the prohibition against the obscene, indecent and profane broadcasts was removed from the Communications Act (the Radio Act’s predecessor) and re-enacted in the Criminal Code under 18 U.S.C. § 1464 (2012). “The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties.” Pacifica, 438 U.S. at 735.
— in which the time of day, the content of the program in which the indecent expression was aired and the mode of transmission are all relevant factors for assessing liability—the FCC determined the broadcast of such language was not permitted to be aired on the radio “during a time when children were undoubtedly in the audience.” It characterized the language used in the monologue as “patently offensive,” although not necessarily obscene, for its depictions of sexual and execratory activities.

The Court upheld the FCC’s authority to invoke penalties against a radio station for the airing of such offensive language. Writing the opinion for the Court, Justice John Paul Stevens wrote that, although the words used in the broadcast “ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment.” Yet, he acknowledged that, “[i]f there any reason to believe that the Commission’s characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not

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663 Id. at 750. The Commission proceeded with the claim under a nuisance rationale, under which “context is all-important. The concept requires consideration of a host of variables,” including the time of day, content of the program in which the language was used and difference between radio, television, and closed-circuit transmissions. Id.

664 Id. at 732.

665 Id. at 732. The FCC found the radio’s broadcast of the expression indecent under 18 U.S.C. § 1464 (1976).

666 Id. at 750.

667 Id at 746.
the case."\(^{668}\) He found that the words in the broadcast “offend for the same reasons that obscenity offends.”\(^{669}\)

Finding the expression to be without sufficient value, Justice Stevens next turned to the government’s interest in regulating such expression. He found those interests to be two-fold: First, given the “uniquely pervasive presence” of the broadcast media in the “lives of all Americans,” the broadcast of patently, indecent material over the airwaves “confronts citizens…in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of the intruder.”\(^{670}\) Second, its unique accessibility to children also justified the regulation of otherwise protected content.\(^{671}\)

Based on these interests, Justice Stevens reasoned that, while the broadcast of such language might well have been protected under other circumstances, the broadcast medium had regularly been subjected to significantly more stringent regulations.\(^{672}\) According to Stevens, “because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.” He continued, “[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”\(^{673}\) Additionally, he recognized

\(^{668}\) *Id.* at 746.
\(^{669}\) *Id.*
\(^{670}\) *Id.* at 748.
\(^{671}\) *Id.* at 749.
\(^{672}\) *Id.* at 748.
\(^{673}\) *Id.* at 748-49.
“although Cohen’s written message may have been incomprehensible to a first grader, Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant.”674 He upheld the FCC’s actions, concluding that “[w]hen the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.”675

_Pacifica Foundation_ held the FCC could invoke penalties for the broadcast of Carlin’s monologue without evidence of the harm caused by it. It determined that the regulation broadcast, as a medium, had been given the most limited First Amendment protection, and that the FCC’s restrictions on the airing of certain material during specific times of the day were not inconsistent with its “context-based” method of administrative action.

_Pacifica Foundation_ is not the last time within this selection of cases that the Court would address the FCC’s prohibitions on the airing of indecent material. The next case in this section, however, _City of Renton v. Playtime Theatres, Inc._,676 once again involves the constitutionality of a city’s method for pursuing regulation of the location of adult businesses.

**City of Renton v. Playtime Theatres, Inc.**

In May of 1980, the mayor of Renton, Washington, suggested to city council members that the city should enact zoning legislation to deal with the “significant social problem” involving the proliferation of adult entertainment venues.677 The city’s Planning

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674 _Id._ at 749.

675 _Id._ at 750-51.

676 475 U.S. 41 (1986).

677 _Id._ at 44.
and Development Committee held public hearings and reviewed “the experiences of Seattle and other cities” before submitting a report to the city attorney’s office advising Renton on developments in other cities.\textsuperscript{678}

On the basis of the report, Renton adopted a zoning ordinance prohibiting adult businesses from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school, attempted to gather, or clump, the businesses.\textsuperscript{679} Rather than adopt an ordinance dispersing adult businesses as Detroit had done, Renton’s concentrated the adult businesses in specific areas.\textsuperscript{680} Playtime Theatres, Inc., an adult movie establishment, challenged the ordinance, seeking a permanent injunction against its enforcement.\textsuperscript{681} The Court of Appeals for the Ninth Circuit in the opinion below determined that Renton’s justifications for enacting the ordinance were necessarily “conclusory and speculative” because the city had not conducted its own studies specifically geared to its particular needs and problems.\textsuperscript{682}

Chief Justice William Rehnquist wrote a 7-2 opinion for the Court. He rejected the view that the First Amendment requires cities “to conduct their own studies or produce independent evidence already generated by other cites before enacting an

\begin{enumerate}
\item \textit{ld.}
\item \textit{ld.} (quoting the ordinance).
\item \textit{ld.} at 52 (describing the method through which the ordinance attempted to regulate the location of the adult businesses).
\item The Court ruled the statute did not fit neatly into the category of being specifically either content-based or content-neutral because it “treat[ed] theaters that specialize in adult films differently from other kinds of theaters,” but concluded, “the Renton ordinance is completely consistent with our definition of ‘content-neutral’ speech regulations as those that ‘are justified without reference to the content of the regulated speech.’” \textit{ld.} at 47-48.
\item \textit{ld.} at 50.
\end{enumerate}
ordinance.” It held that Renton’s interest in “prevent[ing] crime, protect[ing] the city’s retail trade, maintain[ing] property values and generally [to] protect[t] and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life” was an interest “that must be accorded high respect.” In rejecting the “unnecessarily rigid burden of proof” required by the appellate court, Chief Justice Rehnquist reasoned that “so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.”

According to the Court, Renton was entitled “rely on the experiences of Seattle and other cities, and in particular on the ‘detailed findings’ summarized in the Washington Supreme Court’s Northend Cinema [v. Seattle] opinion in enacting its adult theater zoning ordinance.” In that opinion, the state high court found the city’s zoning codes were the:

culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas....The trial court...heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts[, including] a finding that the location of the adult theaters has a harmful effect on the area and contribute to neighborhood blight.

The fact Renton attempted to regulate adult businesses using a different method than Seattle gave the Court no pause for upholding the regulations as constitutional.

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683 Id. at 51-52.
684 Id. at 48.
685 Id. at 50.
686 Id.
687 Id. at 51-52.
688 Id.
The Court determined that such an interest was “more than adequate” to justify Renton’s method of enacting restrictions on the locations of adult businesses.\textsuperscript{690}

\textit{Renton} upheld a regulation akin to a time, place and manner restriction on the location of adult businesses.\textsuperscript{691} The Court found Renton’s reliance on another city’s studies purporting to show a connection between the adult businesses and neighborhood blight. It balanced the city’s interests in protecting the quality of urban life against the regulation of the secondary effects produced by such businesses, but found the evidence offered by the city sufficiently justified its means of regulation. \textit{Renton}, however, would not be the last time the Court addressed the relationship between a city’s interests in regulating the “secondary effects” of adult businesses and its implementation of them. In the very next case, \textit{City of Los Angeles v. Alameda Books}, the Court examined Los Angeles’s efforts to prohibit the concentration of more than business in a single building.

\textit{City of Los Angeles v. Alameda Books, Inc.}

In 1977, Los Angeles conducted a study that concluded that concentrations of adult-entertainment establishments are associated with high crime rates.\textsuperscript{692} A central component of the study was a Los Angeles police report indicating, “crime rates for, \textit{e.g.}, robbery and prostitution grew much faster Hollywood, which had the city’s largest concentration of adult establishments, than in the city as a whole.”\textsuperscript{693} Accordingly, Los Angeles enacted an ordinance prohibiting two establishments from operating “within

\begin{itemize}
\item \textsuperscript{690} \textit{Id.}
\item \textsuperscript{691} \textit{Id.} at 46-47.
\item \textsuperscript{693} \textit{Id.} at 435.
\end{itemize}
1,000 feet of each other or within 500 feet of a religious institution, school, or public park. In 1983, it closed a “loophole” in the ordinance to prohibit “more than one adult entertainment business in the same building.” Alameda Books, which operated a combined adult book store and video arcade in a single location, challenged the amendment on the ground there was no evidence that combining two activities in a single location produced high crime rates.

Justice Clarence Thomas authored a plurality opinion that was joined by Justices Sandra Day O’Conner and Antonin Scalia, and also by Chief Justice William Rehnquist. The Court first considered its decision in Renton. It found the decision was comprised of three parts: first, that it determined “the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain locations;” second, that it “considered whether the ordinance was content neutral or content based,” but determined it was “aimed not at the content of the films shown at the adult theaters, but rather at the secondary effects of such theaters on the surrounding community…. Third, the Court determined that the ordinance would be upheld “so long as the city of Renton showed that its ordinance was designed to serve a

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694 Id. at 430 (quoting Los Angeles, CA., Code § 12.70 (C) (1978)) (“There is evidence that the intent of the city council when enacting this prohibition was not only to disperse distinct adult establishments housed in separate buildings, but also to disperse distinct adult businesses operated under common ownership and housed in a single structure.”).

695 Id. at 431 (quoting Los Angeles, CA., Code § 12.70 (C) (1983)).

696 Id.

697 Id. at 429.

698 Id. at 433.

699 Id. at 434.

700 Id.
substantial government interest and that reasonable alternative avenues of communication remained available."

The Supreme Court overturned the Court of Appeals for the Second Circuit’s decision to overturn the ordinance. That court had determined the study on which Los Angeles had relied failed Renton’s third requirement of demonstrating that the prohibition on the multiple-use adult establishments was designed to serve its substantial interest in reducing crime. It found Los Angeles could not primarily rely on the 1977 study as demonstrating a link between the combination of adult businesses and harmful secondary effects because “it did not ‘support[t] a reasonable belief that [the] combination [of] businesses…produced harmful secondary effects of the type asserted.’"

Justice Thomas concluded, however, that the appellate court “misunderstood the implications of the 1977 study.” According to Thomas, “while the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, areas with high concentrations of adult establishments are also areas with high concentrations of adult operations…. The plurality determined Los Angeles, alternatively, had reasonably relied on the 1977 study to demonstrate that its “present ban on multiple-use adults establishments serves its interest in reducing crime.”

701 Id.
702 Id. at 434.
703 Id. at 435 (internal citation omitted).
704 Id. at 436.
705 Id.
706 Id. at 430.
As opposed to the Second Circuit’s interpretation, Thomas found *Renton* “refused to set a high bar for municipalities that want to address merely the secondary effects of adult businesses.”707 Quoting that opinion, *Alameda Books* held “a municipality may rely on any evidence that is ‘reasonably believed to be relevant’ for demonstrating a connection between speech and a substantial, independent government interest.”708 Yet, the Court noted “this is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support [its] rationale for its ordinance.”709 It found the evidence on which Los Angeles relied satisfied *Renton*'s evidentiary requirement.”710

In *Alameda Books*, the Court addressed whether Los Angeles’ primary reliance on a study that did not specifically address the problem considered by its ordinance was constitutional. In doing so, it characterized the opinion as a “careful balance” of the competing interests between its “obligation to exercise independent judgment when First Amendment rights are implicated” and Los Angeles’ efforts to reduce crime.711 Yet, under the relatively low evidentiary bar it applied from *Renton*, it found Los Angeles could “infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates.”712 In that case, the Court determined that the city must present only evidence

707 *Id.* at 438.

708 *Id.* (quoting *Renton*, 475 U.S. at 51-52).

709 *Id.*

710 *Id.*

711 *Id.* at 440.

712 *Id.* at 426.
that “fairly supports” the municipality’s rationale for its ordinance. The Court’s
deference to the evidence presented by the city of Los Angeles,” was based on its
determination “that the Los Angeles City Council is in a better position that the Judiciary
to gather and evaluate data on local problems.”713

The dictum also appeared to adopt a rationale that it was the obligation of the
plaintiff—in this case, the owners or operators of adult businesses—to “cast direct doubt
on this rationale, either by demonstrating that the municipality’s evidence does not
support its rationale or by furnishing evidence that disputes the municipality’s factual
findings.”714 Comparative to the Court’s sometimes incorrect interpretation of scientific,
empirical research involving complex legal questions, however, would appear to place
undue reliance on the owner or operator—or rather his attorney—to understand,
interpret and apply such complicated evidence.715

While Alameda Books represents the last case in this line in which the Court
evaluated the relationship between research demonstrating a connection between the
adult establishments and their secondary effects, the Court next evaluated the FCC’s
authority to regulate the broadcast of indecent expression, this time, occurring during a
television broadcast.

713 Id. at 440.

714 Id.

715 See Part 2.D. (discussing the setbacks or drawbacks to the use of social science evidence in Supreme
Court jurisprudence).
In *Federal Communications Commission (FCC) v. Fox Television Stations, Inc.*, the Court revisited the FCC’s authority to regulate the broadcasting of indecent expression. In *Pacifica Foundation*, the Court upheld the FCC’s power to prohibit the broadcast of “any indecent...language, which includes expletives referring to sexual or excretory activity or organs” during certain hours of the day. The Commission’s policy placed the burden of the indecency ban on the shoulders of the licensees. *Pacifica*, however, has been largely interpreted as turning on George Carlin’s repetitive use of indecent language.

After *Pacifica*, “the Commission took a cautious, but gradually expanding, approach to enforcing the statutory prohibition against indecent broadcasts.”

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717 *Id.* at 506 (“The Court first invoked the statutory ban on indecent broadcasts in 1975, declaring a daytime broadcast of George Carlin’s ‘Filthy Words’ monologue actionably indecent.”).

718 *Id.* at 505 (internal citations omitted).

719 *Id.* at 506 (“One of the burdens that licensees shoulder is the indecency ban—the statutory proscription against ‘utter[ing] any obscene, indecency, or profane language...’—which Congress has instructed the Commission to enforce between the hours of 6 a.m. and 10 p.m. ...Congress has given the Commission various means of enforcing the indecency ban, including civil fines and license revocations or the denial of license renewals.”).

720 This belief came from an opinion expressed by two justices of the majority in *Pacifica* that they might reach a different conclusion if the decision had been based on the “isolated use of a potentially offensive word...as distinguished from the verbal shock treatment” the case presented. *Pacifica Foundation*, 438 U.S. 726, 760-61 (1978) (Powell, J., concurring in part and concurring in judgment). While the FCC subsequently made clear it thought Justice Powell’s concurrence “set forth a constitutional line that its indecency policy should embody,” *Fox Television Stations*, 556 U.S. at 553 (Stevens, J., dissenting), it also said it intended to narrowly construe the *Pacifica* decision. The FCC later abandoned this interpretation of *Pacifica*’s holding, arguing that “such a ‘highly restricted enforcement standard...was unduly narrow as a matter of law and inconsistent with [the Commission’s] enforcement responsibilities...” *Fox Television Stations*, 556 U.S. at 507 (quoting *In re Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930, ¶ 5, 1987 WL 345514 (1987)). See also *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4982, ¶ 9 2004 WL 540339 (2004) [hereinafter Golden Globes Order].

721 *Fox Television Stations*, 556 U.S. at 507.
Commission and staff action had "indicated that isolated or fleeting broadcasts of the ‘F-Word’...are not actionably indecent or would not be acted upon." Following the NBC broadcast of the 2002 Golden Globes Awards, in which U2 singer Bono commented, "This is really, really f*** brilliant," however, the FCC implemented a policy change to hold even the "fleeting" use of expletives actionably indecent. In the order establishing its change in policy, the FCC repudiated its previous strict literal-nonliteral dichotomy policy that distinguished the use of expletives (nonliteral) from descriptions or depictions of sexual or excretory functions (literal). It determined the categorical exemption of such language from enforcement actions was "likely to lead to more widespread use." It determined the action was necessary to protect children from the most objectionable and offensive language, and that technological advances made it easier to "bleep out" any "single and gratuitous use of a vulgar expletive."

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722 Id. at 509-10. However, the FCC determined that such precedent was no longer good law. Id. at 510.

723 In In re Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and the Enforcement Policies Regarding Broadcast Indecency, the Court emphasized that the “full context” in which the material is broadcast “critically important” to the inquiry whether the material could be categorized as indecent but that a few “principle” factors would lead—namely, the “explicit or graphic nature” of the material; the “extent to which the material ‘delves on or repeats’ the offensive material; and the extent to which the material was presented to “pander,” “titillate” or to “shock.” 16 FCC Rcd. 7999, 8002 ¶ 9, 8003 ¶ 10, 2001 WL 332787 (2001) [hereinafter In re Industry Guidance]. In In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, the Commission went one step further by declaring that a nonliteral (expletive) use of the F- and S-words could be actionably indecent, even if used only once. 19 FCC Rcd. at 4976 n. 4.

724 Fox Television Stations, 556 U.S. at 509-10. Because the Order represented a change in policy, however, the FCC did not impose formal sanctions because it determined NBC and its affiliates would not have had requisite notice of apparent liability. Id. at 510 (quoting Golden Globes Order, 19 FCC Rcd. at 4981-82, ¶ 15).

725 Id. at 512.

726 Id. at 509 (quoting Golden Globes Order, 19 FCC Rcd., at 4979, ¶ 9).

727 Id. (quoting Golden Globes Order, 19 FCC Rcd., at 4980, ¶ 11).
Fox Television Stations concerned utterances made during two live broadcasts. The first occurred during the 2002 Billboard Music Awards when singer Cher exclaimed, “I’ve also had critics for the last 40 years saying that I was on my way out every year. Right so f*** ‘em.” The second involved a presentation during the 2003 Billboard Music Awards by Nichole Richie and Paris Hilton, principles of a show called “The Simple Life.” Richie queried, “Why do they even call it ‘The Simple Life’? Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.” In the wake of each broadcast, the Commission received numerous complaints from parents whose children were exposed to the language. Both broadcasts were found by the Commission to violate its policy against indecent expression.

In Fox Television Stations, Justice Scalia reviewed the FCC’s policy change under the guidelines of the Administrative Procedures Act (APA), which require courts to set aside agency action that is “arbitrary and capricious.” He found that, “of course the agency must show that there are good reasons for the new policy[,] but it

728 Id. (quoting Golden Globes Order, 19 FCC Rcd., at 4979, ¶ 9).
729 Id. at 510 (quoting Golden Globes Order, 19 FCC Rcd., at 4980, ¶ 12).
730 Id.
731 Id.
732 In March of 2006, the Commission released Notices of Apparent Liability for a number of broadcasts that the Commission deemed actionably indecent, including the airing of the two incidents described above. Multiple parties petitioned and were granted a voluntary remand by the Court of Appeals for the Second Circuit so that the parties could air their objections. Upon remand, the FCC found the regulation of the use of indecent language during both broadcasts “fell comfortably within the subject-matter scope of the Commission’s indecency test.” Id. at 511 (quoting In re Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005, 21 FCC Rcd. 13299, 2006 WL 3207085 (2006)(Remand Order)[hereinafter Remand Order]. The order determined that the broadcasts were patently offensive under the community standards for the medium. Id. (quoting Remand Order, at 13304 ¶ 16, 13323 ¶ 58).
need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one…”735 In stark contrast to his decision in Brown v. Entertainment Merchants Association, decided just two years earlier, however, Scalia held, “[h]ere it suffices to know that children mimic behavior they observe—or at least the behavior that is presented to them as normal and appropriate.”736 He continued, “[i]t is surely rationale (if not inescapable) to believe that a safe harbor for single words would ‘likely lead to more widespread use of offensive language.’”737

In Fox Television Stations, the Court first addressed the argument that the Commission had failed to explain why it had not previously banned fleeting expletives as “harmful ‘first blows’” to children.738 The Second Circuit Court of Appeals below had found that the FCC had presented no evidence suggesting that “a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation.”739 Yet, the Court rejected this argument, finding that “the fact the agency had a prior stance does not prevent it from changing its policy or create a higher hurdle for doing so.”740 According to Justice Scalia:

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them…It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can be

735 Fox Television Stations, 556 U.S. at 515.

736 Id. at 519.

737 Id. at 518.

738 Id. at 518-19.

739 Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 461 (2d Cir. 2007).

740 Fox Televisions Stations, 556 U.S. at 519.
readily obtained. It is something else to insist upon obtaining the unobtainable.\textsuperscript{741}

The Court cited \textit{Pacifica} as supporting the proposition that quantitative, empirical evidence was not required to support the government’s interest in the “well-being of its young.”\textsuperscript{742} According to Scalia, “[i]f the Constitution itself demands of agencies no more scientifically certain criteria to comply with the First Amendment, neither does the [APA] to comply with the requirement of reasoned decisionmaking.”\textsuperscript{743}

The Court next addressed the argument that the FCC possessed no scientific proof for its belief the per se exemption of liability for fleeting expletives would result in an increase use of expletives “one at a time.”\textsuperscript{744} The Court however, found the Commission’s predictive judgment, which it said merited deference, was not only rational but “ma[d]e entire sense.”\textsuperscript{745} Despite a lack of evidence that the Commission’s prior policy had resulted in a “barrag[e] of airwaves with expletives,”\textsuperscript{746} the Court summarily determined that “to predict that complete immunity for fleeting expletives…will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance.”\textsuperscript{747}

Justice Scalia determined:

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 520.
\item \textit{Id.} at 521.
\item \textit{Id.}
\item \textit{Id.} According to the Court, “[t]hat may have been because the prior permissive policy had been confirmed (save in dicta) only at the staff level.” \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
By using the narrowness of *Pacifica*’s holding to require empirical evidence of harm before the Commission regulates more broadly, the broadcasters attempt to turn the sword of *Pacifica*, which allowed *some* regulation of broadcast indecency, into an administrative-shield preventing any regulation beyond what *Pacifica* sanctioned. Nothing prohibits federal agencies from moving in an incremental manner.\(^{748}\)

The Court concluded the FCC’s change in policy, combined with acknowledgment of its belief that the policy change improved the former policy, satisfied the APA’s requirements.\(^{749}\)

The standard imposed by Scalia in *Fox Television*, which has been characterized as requiring nothing more than “common sense,”\(^{750}\) appears a long way from the requirement of empirical evidence of harm he imposed in *Brown*. According to Scalia, “[p]rogramming replete with one-word indecent expletives will tend to produce children who use (at least) one word-indecet expletives.”\(^{751}\) This standard appears quite similar to the one Justice Anthony Kennedy, concurring in *Fox Televisions Stations*, said he would require. According to Justice Kennedy, the amount of evidence required to support an agency change in policy “is not susceptible, in my view, to an answer that applies in all cases.”\(^{752}\) He continued, “[t]here may be instances when it becomes apparent to an agency that the reasons for the longstanding policy have been altered by discoveries in science, advances in technology, or by any of the other forces at work in

\(^{748}\) *Id*. at 522.

\(^{749}\) *Id*. at 517.

\(^{750}\) Clay Calvert et al., *Social Science, Media Effects & The Supreme Court: Is Communication Research Relevant After Brown v. Entertainment Merchants Association?*, 19 UCLA ENT. L. REV. 293, 311 (2012). Continuing, the authors write, “Justice Scalia’s belief here about the lack of need for empirical proof of harm comports well with the Supreme Court’s observations year ago in the obscenity case of *Paris Adult Theatre v. Slaton* that ‘from the beginning of civilized societies legislators and judges have acted on various unprovable assumptions.’” *Id*.

\(^{751}\) *Fox Television Stations*, 556 U.S. at 518.

\(^{752}\) *Id*. at 535 (Kennedy, J., concurring).
a dynamic society…In other cases the altered circumstances may be so new that the 
agency must make predictive judgments that are as difficult now as when the agency’s 
earlier policy was first announced.” Justice Scalia likewise acknowledged the 
potential difficulty of developing new evidence of harm in certain situations, such as 
where the precise question before the Court is not particularly susceptible to scientific 
inquiry.

Kennedy correspondingly found the record adequately supported a finding the 
FCC had not acted “arbitrary and capriciously” in making its police change. While he 
acknowledged, “an agency’s decision to change course may be arbitrary and capricious 
[where it] ignores or countermands its earlier factual findings without reasoned 
explanation for doing so,” he concluded the that the Court’s careful analysis of the 
reasons given by the FCC to support its change in policy “is quite sufficiency to sustain 
the FCC’s change of course against respondents’ claim that the agency acted in an 
arbitrary and capacious fashion.” Such a conclusion, however, ignores the lack of 
evidence provided by the FCC to support its contention concerning the harm caused to 
children by the fleeting use of one-word expletives.

Justice Stevens, in his cogent dissent, takes issue with the very assertion. Stevens acknowledges, similar to the majority, that he does not “believe that an agency 
must always conduct full empirical studies on such matters” but disputes that the FCC 
provided any “empirical (or other) evidence to demonstrate that it previously

753 Id. (Kennedy, J., concurring).
754 Id. at 538 (Kennedy, J., concurring).
755 Id. at 555-56 (Stevens J., dissenting).
understated the importance of avoiding the ‘first blow.’” He concluded that the FCC’s failure to discuss the findings of at least study of which the Court was aware, purporting to demonstrate that vulgarities have no negative effect on children, or “any other such evidence,” for that matter—while all the while “providing no empirical evidence at all that favors its position”—must necessarily “weaken the logical force of its conclusion.”

Summary

Despite the oft-quoted mantra that free expression should not be prohibited simply because it offends, the Court’s doctrine involving “lewd, profane and indecent” expression reveals a propensity to uphold some restrictions on expression deemed only offensive and not obscene. These regulations have taken several forms, focusing on the circumstances and medium in which lewd, profane or indecent speech may be expressed. Early doctrine within this brand, however, demonstrates a tendency to question the legitimacy of the government’s regulatory concern.

For instance, Cohen overturned a conviction for “offensive conduct” for wearing a jacket bearing a profanity to protest U.S. involvement in Vietnam. It rejected a categorical approach to banning Paul Robert Cohen’s expression, as well as any attempt by California to frame the statute as a time, place and manner regulation. Cohen is also famous for sheltering offensive speech despite the “captive audience” that existed in the form of the “unwilling” viewers from the otherwise “unavoidable

756 Id. at 564 (Stevens, J., dissenting).

757 The study referenced by the dissenting opinion reports that “[i]t is doubtful that the children under the age of 12 understand sexual language and innuendo therefore, it is unlikely that vulgarities have any negative effect.” Id. (Stevens, J., dissenting). See also Barbara K. Kaye & Barry S. Sapolsky, Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television, 4 MASS COMMUNICATION & SOC’Y 7 429, 433 (2004).

758 Fox Television Stations, 556 U.S. at 564 (Stevens, J., dissenting).
exposure” to Cohen’s “crude form of protest.” In *Erznoznik*, the Court rebuffed Jacksonville’s effort to classify a nude-film ban as a traffic regulation. It found the city offered no evidence to distinguish nude films from other content that might also distract drivers, and it rejected the government’s interest in protecting children and the “captive audience” from unwilling exposure to offensive yet otherwise protected material. The Court refused to apply a balancing approach, finding, instead, the regulation did not satisfy the rigorous constitutional standards.

The Court has had the opportunity to address a city’s interest in “urban planning” and “the quality of urban life” in a line of cases involving zoning. The opinions established the state’s evidentiary burden when attempting to regulate the secondary effects of adult businesses on the surrounding community. In *American Mini Theatres*, the Court held that an attempt to disperse the location of “adult” movie theaters was not a content-based regulation predicated on the underlying message of the films displayed at the establishment. Detroit largely relied on the testimony of one expert’s opinion that the concentration of several adult businesses in the same neighborhood negatively affected property values. *American Mini Theatres* found this evidence was “clearly adequate” to support the zoning requirements. Justice Stevens wrote it was not the Court’s “function...to appraise the wisdom of its decision to require adult movie theaters to be separated rather than concentrated in the same areas.” It held a “city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”

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Holding true to dictum in *American Mini Theatres*, *Renton* upheld a challenge to an ordinance requiring that, rather than being dispersed, adult movie theaters be concentrated in red-light areas. *Renton* likewise found the ordinance was not “content-based” because it attempted to regulate only theaters’ secondary effects. Finding that the predominant concern of the city was not the underlying content of the sexually explicit films, the Court found Renton was entitled to rely on other cities’ experiences and findings regarding effective methods of regulating the location of the adult establishments. It held the First Amendment did not require a city to “conduct new studies or produce evidence independent of that already produced by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.” The Court found Renton could reasonably rely on studies it admitted were not specifically tailored to addressing Renton’s needs and problems, and furthermore the specific method Renton chose for regulating the location of the businesses advanced its substantial interests.

Finally, in *Alameda Books*, the Court similarly found that the City of Los Angeles could rely on a study it produced some time before it enacted an ordinance prohibiting more than one adult establishment from locating in the same building, even though the study did not address the negative effects of the combination of such businesses. The Court rejected a requirement of empirical evidence demonstrating the city’s particular method for regulating would actually further its substantial government interest in reducing crime. It held that Los Angeles could rely on a single study, as well as “common experiences,” which would be overturned only upon a finding the city had

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760 Id. at 51-52.
acted unreasonably. Furthermore, the decision shifted the burden onto the adult businesses to demonstrate that the evidence does not fairly support the city’s rationale.

In the last line of cases falling under category of “lewd, profane and indecent” expression, the Court analyzed the Federal Communications Commission’s authority to impose sanctions on the broadcast of indecent expression. In *Pacifica Foundation*, the Court upheld the FCC’s order finding that the repetitive use of profane language on the radio violated its ban on airing indecent language at a time when children would most likely be in the audience. *Pacifica* determined the FCC’s context-based approach for determining when indecent expression may be banned from public broadcast fell under the authority granted to it by Congress.

In *Fox Television Stations*, the Court upheld civil penalties for the airing of several live television programs in which celebrities used unscripted profanities. The Court determined the FCC’s decision to amend its policy to penalize even the single use of nonliteral expletives justified its interests in preventing the broadcast of indecent expression. Although the FCC presented no evidence of any harm caused by the “fleeting” use of profane language, or the connection between a policy refusing to punish only fleeting expletives and an increase in the broadcast of profane language, it held the FCC’s action would be overturned only if it had acted arbitrarily or capriciously.

The Court’s doctrine involving the regulation of secondary effects of adult businesses and the broadcast of indecent expression over the airwaves represents an area of First Amendment law in which the Court has not imposed heavy evidentiary burdens on demonstrating the state’s justifications are tied to its particular methods of
enacting speech restrictions. Indeed, in each area, the Court has rejected arguments that the state should produce empirical evidence of the connection between its justifications for regulation and the specific means of pursuing those ends. Section 3 evaluated the Court’s free speech jurisprudence regarding indecent, lewd and profane expression. Section 4 turns to the final category of expression, hate speech.

**Hate Speech**

The speech at issue under the category of “hate speech” encompasses a broad array of expression aimed at inflicting injury—in the form of fear and emotional umbrage—on a particular individual or group of individuals. Although the category began with expansion of one category of unprotected expression in the group libel case of *Beauharnais v. Illinois*, the section demonstrates that decision was later discredited. The remaining segment of the section demonstrates a narrowing of the doctrine in the context of bias-motivated statutes, the enactment of which began in the 1950s with the civil rights movement. Those cases, however, demonstrate a hesitancy to uphold application of the statute where it attempts to go beyond those categories of banned expression or when it attempts to regulate on certain disfavored topics, constituting content- or view-point based discrimination, in violation of the First Amendment.

*Beauharnais v. Illinois*

*Beauharnais v. Illinois*, 761 decided in 1952, involved the prosecution of Joseph Beauharnais, president of the White Circle League, under an Illinois statute forbidding any person from exhibiting any publication portraying lack of virtue of a class of

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761 343 U.S. 250 (1952).
citizens. Specifically, it declared it unlawful for any person to distribute any publication that “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.”

The Court found the “testimony at the trial was substantially undisputed.” Beauharnais distributed a leaflet setting forth a petition calling on the mayor and city council of Chicago to “halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro * * *.” The leaflet called for “[o]ne million self respecting white people in Chicago to unite” and added that “[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, than the aggressions, [rapes], robberies, knives, guns and marijuana of the negro surely will.” An application for membership in the White Circle League was attached to the leaflet.

The trial judge refused to instruct the jury that in order to convict the defendant, they must find that “the article complained of was likely to produce a clear and present danger of a serious substantial evil that rises for (sic) above public inconvenience, annoyance and unrest.” Instead, the judge instructed the jury that “if you find * * * that the defendant, Joseph Beauharnais, did * * * manufacture, sell or offer for sale,

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762 Id. at 251.

763 Id. See also ILL. REV. STAT. ch. 38, § 471 (1949).

764 Beauharnais, 343 U.S. at 252.

765 Id.

766 Id.

767 Id.

768 Id. at 253 (quoting the trial judge’s jury instructions).
advertise or publish, present or exhibit in any public place the lithograph, then you are to find the defendant guilty.”

The Supreme Court, in a 5-4 opinion delivered by Justice Felix Frankfurter, affirmed the conviction under the criminal libel statute. While courts were previously reluctant to uphold libel convictions for attacks upon entire races, religions or professions, opinions where convictions were upheld indicate the courts believed the group was either so well-defined that the libel amounted to a direct attack upon each individual or the nature of the statement so inflammatory as to create a serious danger of violence. In upholding Beauharnais’ conviction, the Court ruled a state may proscribe a certain class of libelous statements directed at a “defined group” when the state determined the statement caused a particular social problem. It extended libel doctrine to include defamatory statements aimed at a defined group.

The Court determined “the statute before us is not a catchall enactment left at large by the State court which applied it,” but a “law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions.” Yet, it rejected the requirement that before libelous utterances could be punished, the Court must find that they constituted a clear-and-present danger. The Court upheld the statute under a standard of extreme deference to

769 Id. (quoting the trial judge’s jury instructions).
770 Id. at 253, 266-67.
771 Id. at 252.
772 Id. at 253. The Court noted that criminal libel was a common-law crime, which had not been abolished. It also noted that “every American jurisdiction—the forty-eight states, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals.” Id.
773 Id. at 266.
legislative decisionmaking. It found, the legislature had offered no evidence that its method of regulation would actually solve the deeply-embedded racial and religious tensions that existed in Chicago and Illinois during the last several decades.\textsuperscript{774}

According to Justice Frankfurter, given the “tragic experience of the last three decades,” Illinois was not “without reason in seeking ways to curb false or malicious defamation of racial and religious groups.”\textsuperscript{775} Although “the legislative remedy might not mitigate the evil, or might itself raise new problems…it is the price to be paid for the trial-by-error inherent in legislative efforts to deal with obstinate social issues.”\textsuperscript{776} He held, it would be “arrant dogmatism…for us to deny that the Illinois Legislature may warrantly believe that a man’s job and his educational opportunities and the dignity accorded him may depend as much as on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.”\textsuperscript{777} He found that “certainly the Due Process Clause does not require legislatures to be in the vanguard of science” and also that it was not in the Court’s “competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community.”\textsuperscript{778}

\textsuperscript{774} \textit{Id.} at 258-59. Specifically, the Court referenced a number of events occurring in Chicago and in Illinois over three decades—including the murder of abolitionist Love-joy, the Cicero riots, northern race riots, and a series of bombings—as demonstrating “the clash between white and Negroes” that existed within the state. \textit{Id.} at 259-61.

\textsuperscript{775} \textit{Id.} at 261 (emphasis added).

\textsuperscript{776} \textit{Id.}

\textsuperscript{777} \textit{Id.} at 263.

\textsuperscript{778} \textit{Id.}
The Court next addressed whether Beauharnais’ speech fell within the category of expression protected by the First Amendment.\textsuperscript{779} Citing \textit{Chaplinsky}, Justice Frankfurter declared, “[n]o one would gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana.”\textsuperscript{780} He continued, “if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny a State power to punish the same utterance directed a defined group, unless we can say that this is a willful (sic) and purposeless restriction unrelated to the peace and well-being of the State.”\textsuperscript{781}

The minority in \textit{Beauharnais}, on the other hand, attacked the majority’s failure to apply the clear-and-present-danger test before justifying limitations on the protected expression.\textsuperscript{782} It severely criticized the majority’s unwillingness to consider any specific requirement of evidence before it summarily concluded libel aimed at a group was beyond constitutional protection.\textsuperscript{783}

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\textsuperscript{779} \textit{Id.} at 258-59.
\textsuperscript{780} \textit{Id.} at 258.
\textsuperscript{781} \textit{Id.}
\textsuperscript{782} \textit{Id.} at 267-76 (Black, J., dissenting); \textit{Id.} at 277-84 (Reed, J., dissenting); \textit{Id.} at 284-87 (Douglas, J., dissenting); \textit{Id.} at 287-305 (Jackson, J., dissenting).
\textsuperscript{783} Notwithstanding the appropriateness of such an offer of proof, the Court noted the defendant offered to show “(1) that crimes were more frequent in districts heavily populated by Negroes than in those where white predominated; (2) three specific crimes allegedly committed by Negroes; and (3) that properly values declined when Negroes moved into a neighborhood.” \textit{Id.} at 266 n.21. Besides finding the defendant’s argument did not satisfy both parts of the requirements of the defense—not only the truth of the facts of the publication, but that the publication was made “with good motive and for justifiable ends”—the Court responded “[i]t is doubtful whether such a showing is as extensive as the defamatory allegations in the lithograph circulated by the defendant.” \textit{Id.} at 266, 266 n.21. On the opposite side of the argument, the Court mysteriously noted “it is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community,” but merely applied a standard of deference, holding that it would be “outside the scope of our authority [for] us to deny that the Illinois legislature may warrantably believe that a man’s job or his educational opportunities and the dignity afforded him may depend as much on the reputation of his racial and religious group to which is willy-nilly belongs, as on his own merits.” \textit{Id.} at 263.
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Since Beauharnais, a number of subsequent decisions have also questioned its continued legitimacy. Specifically, the cases underlying the “Skokie Controversy,” as it has been called, demonstrates the negative treatment Beauharnais has received since it was originally decided.

The Skokie controversy arose, appropriately enough, within the same jurisdiction as Beauharnais. It involved the threat of a group of National Socialist Party members to host a parade in Skokie, Illinois. Although “hardly represent[ing] a reincarnation of Hitler,” the small Chicago-based group of 30-50 members planned to wear their uniforms similar to those worn by Nazis, including the swastika armbands, in a single file parade line in front of the village hall. At trial, testimony was presented, including by a concentration camp survivor, that “the swastika is a symbol that his closest family was killed by the Nazis” and that he did not “intend to use violence against” the marchers, but that at the time of the event, he did not know if he would be able to control himself. The Illinois Supreme Court eventually held the entire injunction against the parade invalid.

The group’s intent to host a parade, however, quickly gained public notoriety because it planned to host the parade in a city in which more than 40,000 of its 70,000

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786 Skokie, 69 Ill.2d at 610.

787 Skokie, 51 Ill.3d at 351.

788 Skokie, 609 Ill.2d at 619.
residents were Jewish, thousands of whom had survived Nazi concentration camps.\textsuperscript{789} Following the spread of news concerning the planned protest, the village enacted a string of ordinances designed to block the march, including one that specifically prohibited the “dissemination of materials which would promote hatred towards persons on the basis of their heritage,”\textsuperscript{790} with “dissemination of materials” defined to include “publication or display or distribution of posters, signs, handbills, or writings and public display of markings and clothing of symbolic significance.”\textsuperscript{791}

\textsuperscript{792} All three ordinances were found to violate the First Amendment.\textsuperscript{793}

Although not explicitly overruling Beauharnais, Skokie indicated Beauharnais had been limited to “turn[ ] quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder,”\textsuperscript{794} and that opinions decided in the quarter century since Beauharnais questioned whether such “tendency to incite violence…would pass constitutional muster today.”\textsuperscript{795} Secondly, opinions such as \textit{New York Times v. Sullivan} and \textit{Gertz v. Robert Welch} made it apparent that libelous utterances about public

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\textsuperscript{789} \textit{Id.} at 610.
\textsuperscript{790} \textsc{Village of Skokie, Ill., Ordinance 77-5-N-995} § 28-43.1.
\textsuperscript{791} \textit{Id.} § 28-43.2.
\textsuperscript{793} \textit{Collin v. Smith}, 578 F.2d 1197 (7th Cir.).
\textsuperscript{794} \textit{Collin}, 579 at 1204.
\textsuperscript{795} \textit{Id.} (citing \textit{Cohen v. California}, Gooding v. Wilson; and \textit{Brandenburg v. Ohio}).
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figures were subject to First Amendment ramifications.\textsuperscript{796} It expressed doubt whether “Beauharnais remains good law at all after the constitutional libel cases.”\textsuperscript{797}

In the wake of increased public focus on hate speech and other bias-motivated concerns, state legislatures began in the 1950s to enact anti-hate laws proscribing bias-motivated violence and intimidation, many of them based on the fighting words exception.\textsuperscript{798} However, many of these laws created their own First Amendment concerns due to judicial confusion and inconsistent treatment of the scope of the fighting words doctrine in the lower courts.\textsuperscript{799}

\textit{R.A.V. v. City of St. Paul}

One of these cases, \textit{R.A.V. v. City of St. Paul}\textsuperscript{800} involved several teenagers who burned a “crudely made cross” in a black family’s yard.\textsuperscript{801} The police charged the teens under a local bias-motivated, disorderly conduct ordinance. The regulation prohibited the display of a symbol one “knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”\textsuperscript{802} The Minnesota Supreme Court upheld the statute, construing it only to reach expression that would constitute “fighting words” under \textit{Chaplinsky}.\textsuperscript{803}

\textsuperscript{796} \textit{Id.} at 1205. \textit{See} New York Times v. Sullivan, 376 U.S. 254, 269 (stating that “libel can claim no talismanic immunity from constitutional limitations”).

\textsuperscript{797} \textit{Collin}, 578 F.2d at 1205.


\textsuperscript{799} \textit{Id.} at 1146.

\textsuperscript{800} 505 U.S. 377 (1952).

\textsuperscript{801} \textit{Id.} at 379.

\textsuperscript{802} \textit{Id.} (quoting from MINN. STAT. § 292.02 (1990)).

\textsuperscript{803} \textit{Id.} at 380-81.
The Supreme Court reversed. Justice Antonin Scalia’s construed *Chaplinsky* differently than the Court had done in prior decisions. Although it accepted the Minnesota Supreme Court’s narrow construction of the statute, it unanimously found the ordinance facially unconstitutional based on its viewpoint discrimination.

The Court rejected the concurrences’ argument that *R.A.V.* “set[] forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be underinclusive.” According to Justice Scalia, “the proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace and has found application in many contexts.” In other words, the state could prohibit a particular *mode of communication*—such as through time, place and manner restriction—or “where the subclass of speech happens to be associated with particular ‘secondary effects,’” but not where based on the content of the expression conveyed.

*R.A.V.* determined that while the phrase in the ordinance, “arouses anger, alarm or resentment in others” had been limited by the Minnesota high court to apply only to

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804 *Id.* at 381 (“In construing the St. Paul ordinance we are bound by the construction given to it by the Minnesota court.”).

805 *Id.* at 381.

806 *Id.* at 388. Scalia wrote, “[T]he First Amendment imposes not an ‘underinclusiveness’ limitation but a ‘content discrimination’ limitation upon a State’s prohibition of proscribable speech…. [B]ut when the basis for the content discrimination consists entirely of the reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exist.”

807 *Id.*

808 Hurdle, *supra* note 798, at 1159 (discussing state’s regulation of speech based on particular “modes” of communication).

809 *Id.* at 389 (“[T]he regulation is *justified* without reference to the content of the…speech”)(emphasis added).
fighting words, the “remaining unmodified terms make clear that the ordinances applies only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender.’ The ordinance thus permitted “displays containing abusive invective, no matter how vicious or severe...unless they [were] addressed to one of the specified disfavored topics,” but “those who wish[ed] to expression hostility, for example, on the basis of political affiliation, union membership, or homosexuality” were not covered.\textsuperscript{810} The Court suggested the ordinance did not impose a prohibition of fighting words...directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain...messages of ‘bias-motivated’ hatred...."\textsuperscript{811} In doing so, the Court rejected St. Paul’s argument that a “general ‘fighting words’ law would not meet the city’s needs because only a content-specific measure can communicate to minority groups that the ‘group hatred’ aspect of such speech ‘is not condoned by the majority.’”\textsuperscript{812}

Although a limited categorical approach remained an important aspect of the Supreme Court’s First Amendment jurisprudence, it began a trend in the 1960s of narrowing of the scope of the traditional categorical exceptions. The Court tightened its categorical exception for defamation in each of \textit{New York Times Co. v. Sullivan} and \textit{Gertz v. Robert Welch, Inc}. It also constricted its categorical exception for obscenity in \textit{Miller v. California}.\textsuperscript{813} In the same way, the Court’s decision in \textit{R.A.V.} prohibited

\begin{footnotes}
\item[810] \textit{Id.} at 391.
\item[811] \textit{Id.} at 392.
\item[812] \textit{Id.}
\item[813] \textit{Id.}
\end{footnotes}
extension of its historical fighting words doctrine to be used by the legislature without justification—i.e., evidence of any sort—any subset of proscribable speech, such as fighting words. The contention that the Court was “setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be ‘underinclusive’” was raised by the R.A.V. concurrences.814 The Court responded it was simply prohibiting the use of fighting words by proponents of only side of the point of view or who wished to express their ideas on the basis of another reason such as “political affiliation, union membership or homosexuality”815: “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.”816 The state offered no evidence of the racial tensions giving rise to the St. Paul politicians’ desires to display their hostility toward the particular bias being singled out—albeit, through a statute imposing limitations on speaker who possessed certain (to them, disagreeable) viewpoints. On this basis, the Court found the statute not narrowly tailored to serving a compelling state interest.817

**Virginia v. Black**

In a second case involving cross burning, *Virginia v. Black*,818 three individuals, including Barry Black, were found guilty independently of violating a Virginia statute that made it a felony for any person to burn a cross within intent to intimidate.819 It also had a

814 *Id.* at 401 (White, J., concurring); *see also id.* at 418 (Stevens, J., concurring).

815 *Id.*

816 *Id.* at 391-92.

817 The content-based discrimination was unconstitutional because it allowed the city to “impose special prohibitions on those speakers who expression views on disfavored subjects.”


819 *Id.* at 348. *See also VA. CODE ANN. § 18.2-423 (1996)*. The statute read in full:
provision that stated "any such burning of a cross shall be prima facie evidence\textsuperscript{820} of an intent to intimidate."\textsuperscript{821} In an opinion by Justice Sandra Day O’Connor, the Court ruled, “while a State, consistent with the First Amendment, may ban cross burning carried out with intent to intimidate, the provision of the Virginia statute treating any cross burning as a prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form\textsuperscript{822} because it “strips away the very reason why a State may ban cross burning with the intent to intimidate.”\textsuperscript{823}

The Court first addressed the dual message conveyed by cross burning.\textsuperscript{824} The \textit{Black} plurality recognized that “cross burnings have been used to communicate both threats of violence and messages of shared ideology”\textsuperscript{825} and that the “Klan often used cross burnings as a tool of intimidation and a threat of impending violence.”\textsuperscript{826} But, the Court continued, the fact cross burning as used in conjunction with a nonviolent message did not undermine the fact that “at other times the intimidating messages is \textit{only} message conveyed.”\textsuperscript{827} According to O’Connor, “when a cross burning is used to

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\textit{It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.}

\textsuperscript{820} § 18.2-423; see also \textit{Black}, 528 U.S. at 348.

\textsuperscript{821} \textit{Black}, 528 U.S. at 348.

\textsuperscript{822} \textit{ld.} at 348-49.

\textsuperscript{823} \textit{ld.} at 365.

\textsuperscript{824} \textit{ld.} at 352-61.

\textsuperscript{825} \textit{ld.} at 354.

\textsuperscript{826} \textit{ld.}

\textsuperscript{827} \textit{ld.} at 357.
intimidate, few if any messages are more powerful,” and indeed those “who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.”

While the Court recognized the First Amendment “‘ordinarily’ denies a State ‘the power to prohibit the dissemination of social, economic, and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequences,’” it does not protect “threats of violence.” Given the opportunity to definition of true threats, the Court wrote “true threats encompass those statements were the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particularly individual or group of individuals.” Addressing the issue of intent, the Court held it would not require that the speaker to have intended to carry out the threat, since the state’s interest in prohibiting “true threats” is necessarily founded on protecting individuals from the fear and disruption that threats engender, as well as the “possibility that the threatened violence will occur.” The Court continued, “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death.” The Court relied on “the history

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828 Id.
829 Id. at 358.
830 Id. at 359.
831 Id. at 344.
832 Id. at 360.
of cross burning in this country” as “often intimidating” to demonstrate that it fell within the category that could be prohibited as true threats.\textsuperscript{833}

The Court found the statute was unconstitutional because it attempted to discriminate on the basis of content and viewpoint.\textsuperscript{834} In doing so, it attempted to distinguish its holding from its earlier opinion in \textit{R.A.V. v. St. Paul}.\textsuperscript{835} In \textit{R.A.V.}, the Court held a state could not ban the act of cross burning by targeting those who provoked violence on the basis of a “specified disfavored topic,” such as race, gender or religion.\textsuperscript{836} But the Court wrote, \textit{R.A.V.} did not hold \textit{all} forms of content-based discrimination are bad.\textsuperscript{837} Such content-based form of discrimination could be upheld where such a decision was “based on the very reasons why the particular class of speech at issue...is proscribable.”\textsuperscript{838}

Similar to the constitutionality of the ban on threats directed at the President upheld in \textit{Watts}, the Court found, “the First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.”\textsuperscript{839} Although an individual who threatens violence, even against a violent backdrop, may \textit{not} be held liable for the violent acts of others, the Court found the history of cross burning as a particularly virulent form of intimidation

\textsuperscript{833} \textit{Id.}

\textsuperscript{834} \textit{Id.}

\textsuperscript{835} 505 U.S. 377 (1992).

\textsuperscript{836} \textit{Id.} at 378 (holding that the state may not attempt to regulate fighting words based on the underlying message).

\textsuperscript{837} \textit{Black}, 253 U.S. at 344.

\textsuperscript{838} \textit{Id.} at 345.

\textsuperscript{839} \textit{Id.} at 363.
satisfied the government’s interest in regulating cross burning with “intent to intimidate.” While the Court presumably would require evidence of intent-to-intimidate before allowing a conviction under the Virginia statute, it concluded there would be no requirement of a finding that the speaker have intended to carry it out.

Anecdotal evidence demonstrating that form of symbolic speech possesses dual meaning requires specific evidence that defendant intended to intimidate. The decision in Virginia v. Black employed a heightened First Amendment because it did not apply the clear and present danger test (which was often used by the Court to prohibit speech without any evidence of harm being caused by the defendant’s speech at all); it did not defer to legislative judgment. Here, the Court said it would require evidence—though it did not establish what kind or how much—of intent to intimidate before a conviction under a statute banning cross-burning would be upheld. Again, Black’s conviction was overturned because the state interpreted the statute banning cross burning not only targeted threatening speech but speech that could be interpreted to have, for example, a political motive. Application of the statute to this type of speech would extend the statute beyond speech prohibited under the categorical exception against true threats.

Summary

Section 4 demonstrates the category of hate speech has done more to further the Court’s other doctrine than necessarily contribute to a distinct variety of expression. For instance, Beauharnais rejected application of the clear-and-present-danger test in the context of a statute prohibiting the use of libelous utterances against racial groups. While Beauharnais no longer represents good law, the case extended the category of libel to include group libel aimed at specific racial and religious groups. The Court rejected a requirement of evidence to demonstrate that an individual’s affiliation with a
particular group was connected to that group’s reputation and also the need for
evidence demonstrating the libelous utterances were harmful to particular group.

*R.A.V.* reviewed the constitutionality of a statute punishing bias-motivated
disorderly conduct. R.A.V. was prosecuted under the statute for allegedly burning a
cross on a black family’s lawn. The Court found that while “fighting words” consistently
with the First Amendment, can be regulated by their constitutionally proscribable
content, the government may not regulate those areas based on hostility or favoritism
toward the nonproscribable message they contain. While the decision affirmed the
fighting words doctrine, it rejected the government’s argument that the statute was
narrowly tailored to achieving only a compelling government interest.

*Black* similarly involved a challenge to a statute against cross burning. *Black* was
the first time since it original enunciation of the doctrine that it clarified “true threats.” In
an opinion by Justice O’Connor, the Court upheld the statute finding that because the
statute attempted to regulate only a pernicious form of cross burning and was not aimed
at the particular message conveyed by burning a cross, it constituted a constitutional
form of regulation. The Court rejected evidence of cross burning as prima facie
evidence of intent to intimidate, due to the dual message cross burning was said to
possess.

**Chapter Summary**

This Chapter reviewed thirty-eight Supreme Court opinions spanning numerous
varieties of speech. Part A analyzed speech that may be banned because of its
“dangerousness:” 1) incitement to unlawful action; 2) threatening speech; 3) speech
provoking a hostile audience reaction; and 4) disclosure of dangerous information. Part
B reviewed cases involving speech that may be regulated due to its “low value”: 1) false
statements of fact; 2) sexually explicit or violent expression; 3) lewd, profane and indecent expression; and 4) hate speech. Each section summarized the evolution of the Court’s proof-of-harm doctrine occurring within the variety of expression, paying close attention to the evidence evaluated, the specific burdens of proof and the standards applied in each case.

Free speech jurisprudence has never adhered to a position of absolute protection for expression, a position that would render all laws restricting speech unconstitutional. Rather, the Court has more often engaged in a balancing approach that weighs the government’s asserted interest in regulating potentially harmful speech against the value of the expression. Examination of more recent First Amendment jurisprudence reveals a trend at least within certain brands of expression away from its historical balancing approach to one that requires sufficient empirical or social scientific evidence of harm. Brands of expression in which the Court has imposed evidentiary burdens requiring empirical evidence have included “sexually explicit and violent expression” (e.g., Brown v. Entertainment Merchants Association) and “false statements of fact” (e.g., Alvarez v. United States).

The category known as sexually-explicit-and-violent expression initially rejected any requirement of a proof-of-harm, instead adopting a presumption that obscenity was “utterly lack[ing] of redeeming social value.” Such speech now boasts a requirement of scientifically empirical evidence establishing a “direct causal link.” Brown, involving a challenge to a California law prohibiting the sale of violent video games to minors, rejected the scientific, empirical evidence the government offered to support its contention. Under imposition of a standard requiring a “direct causal link,” the Court
found the research, demonstrating what the Court believed to be a “correlation” rather than “causation” between violent video games and minors’ acts of violence, simply did not meet that burden.

Doctrine involving “false statements of fact” historically allowed individuals to recover damages without any evidence of harm stemming from libelous statements. Individuals were granted recovery under a presumption that harm occurs to one’s reputation. The most recent free speech opinion within this brand, however, adopted Brown’s potentially insurmountable evidentiary hurdle. In Alvarez, the Court required evidence of a “direct causal link” between false statements and the harm wrought by them. It found the government had offered no evidence demonstrating that Xavier Alvarez’s lies about receiving a Congressional Medal of Honor had actually diluted the public’s perception of them, much less proof of a direct causal connection between harm and the lies.

A caveat is that it is questionable whether the evidentiary burden applies to the entire variety of expression or, more likely, only narrowly pertains to the specific factual record. Alvarez and Brown both involved challenges to unique types of speech—violent video games and lies about military medals, respectively—not previously addressed by the any of the Court’s opinions. It has yet not imposed such stringent evidentiary burdens on other types of expression falling even within the same variety of expression.

In other instances, the Court has evaluated the appropriateness of requiring stringent evidentiary proof of harm but rejected it in favor of a much lesser burden. For instance, within the category of “lewd, profane and indecent” expression, the Court rejected the contention that the First Amendment requires cities to conduct new studies
or produce their own evidence, independent of that already generated by other cities, to enact zoning ordinances targeting the secondary effects of adult businesses. Moreover, it found that the evidence relied upon by the cities did not even have to specifically address the particularly social problem the cities was attempted to address. It held a city is “entitled to rely on the experiences of and studies produced by...other cities;” it may reasonably rely on any evidence that is reasonably believes to be relevant in demonstrating a connection between speech constituting a substantial government interest, even if it only fairly supports its justification for enacting such an ordinance.

In other areas, the Court has never required empirically proven, scientific data to support a government regulation. For example, within its incitement-to-unlawful-action doctrine, the Court weighed only testimonial and circumstantial evidence to suppress expression under a showing of clear-and-present-danger. The Court also has indicated that restrictions on the broadcast or public display of “lewd, profane and indecent expression” may be upheld upon without empirical proof of harm. In Erznoznik, the Court ruled the City of Jacksonville’s attempt to protect unwilling viewers from material that may otherwise be offensive was “dependent upon a showing that substantial privacy interests are being invaded...”840 Furthermore, Jacksonville offered no evidence for distinguishing movies containing nudity from other movies that might also be distracting to passing drivers to justify upholding the ordinance as a traffic regulation. The Court’s language requiring a “showing” or a reasonable “justification” for enacting the ordinance surely does not indicate a standard requiring empirical proof.

Alternatively, the Court’s jurisprudence demonstrates it has not adopted an empirical approach across all categories of expression. Decisions such as Alvarez and Brown perhaps more accurately represent outliers to the Court’s traditional approach of imposing lower standards of proof. These two decisions can also be distinguished from the Court’s other opinions in their establishment of an evidentiary burden prior to its assessment of the evidence. The remainder of the opinions establish an evidentiary burden, if they do so at all, only upon review of the sufficiency of the evidence.

Several questions arise from such a determination, including: 1) whether the establishment of the evidentiary burden was based on the availability of evidence; 2) whether a different Court weighing the evidence would conclude it established the same or similar connection or relationship, between the speech and alleged government injury; and 3) whether the Court would impose the same or similar evidentiary burden in cases involving similar types of expression.

Until the Court has additional time to consider application of its newfound empirical approach to a broader spectrum of expression, it is difficult to determine whether the “mini-trend” of requiring scientific evidence of empirical proof—specifically, one requiring a direct causal link—will develop into a broader and more encompassing jurisprudential trend within the Court’s free speech opinions. Moreover, there appears to be a deficit between the Court’s interpretation of the empirical research underlying some of its more recent free speech opinions and conclusions by the Court on the value of such evidence. As discussed earlier, this deficit—likely founded on differences between the social science and legal fields in terminology; misplaced reliance on attorneys’ statements of the evidence, and confusion regarding the ability of social science
evidence (and the willingness of the social scientists to suggest that the evidence) actually demonstrates causation. In fact, there is actually a segment of the social science community that believes that social science research will never be strong enough to demonstrate causation.

Yet, the Court’s continued evaluation of and interaction with scientific, empirical research will likely lead to greater understanding and reliance on this type of research and thus, impact the establishment of evidentiary burdens.

Chapter 4 analyzed the Court’s evolution of proof-of-harm in the various categories of speech. It discussed the assorted governmental interests that often are asserted against the First Amendment’s interest in prohibiting speech-based restrictions. The table below provides a tabular depiction of the evolution of the Court’s proof-of-harm doctrine across the multiples varieties of expression and decades. The information included in each of the boxes focuses standard applied, the type of evidence required or evaluated by the Court, the specific evidence evaluated by the Court, the ultimate outcome of the case, any requirement of intent as discussed in the opinion, and the asserted government interest in a particular case. As stated, these opinions appear not only be variety of expression but by the specific decade in which they were decided in order to provide for a chronological assessment of evolution of the Court’s proof-of-harm doctrine. A caveat of this specific table, however, is that it is limited to those cases actually discussed in analyzed in this study.

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841 See supra Part 2.C.3. (discussing “proving” causation in social science research).

842 See supra Part 2.C.3. (discussing “proving” causation in social science research).
Chapter 5 now turns to the development and application of an evidentiary typology and rubric to a hypothetical fact pattern.
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<tr>
<th>By Decade (column)</th>
<th>Incitement to Violence/Unlawful Action</th>
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<th>Hate Speech</th>
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<td>1910-1919</td>
<td>Schenck (1919): C&amp;PD; Espionage Act conviction upheld upon CE &amp; TE; fliers asserting a right to oppose the draft and that Schenck had participated in printing; intent inferred; interest: national security/protection of gov. programs</td>
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<td>Abrams (1919): BT; conviction under Espionage Act amendment upheld based upon CE of fliers advocating curtailment of production of wartime materials; sole bad tendency; presumed intent; interest: national security / protection of government programs</td>
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Figure G-4. Evolution of proof-of-harm in U.S. Supreme Court opinions (by decade)
### Variety of Speech

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<td>1920-1929</td>
<td><em>Gitlow</em> (1925): BT; conviction under NY criminal anarchy statute upheld under std. of deference to legislative judgment that speech—radical fascist manifesto—advocated violent revolution; required no evidence of intent; interest: state’s own “peace and safety”</td>
<td><em>Whitney</em> (1927): BT; conviction under CA criminal syndicalism statute upheld upon DLJ; CE &amp; TE of Whitney’s association with group organized for unlawful means; interest: “public peace” and “security of the State”</td>
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<td>1930-1939</td>
<td><strong>Bridges</strong> (1941): PPB; C&amp;PD: evil must be “extremely serious;” degree of imminence “extremely high”; liability established CL presumption to punish contempt statements overturned; CE: Bridges’ telegram calling for strike if judge’s decision enforced; interest: fair and orderly administration of justice</td>
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<td>1940-1949</td>
<td><strong>Cantwell</strong> (1941): AHB; C&amp;PD; conviction under CT solicitation statute overturned; while personal epithets not protected and intent not required, conviction under statute not narrowly drawn to prohibit only C&amp;PD overturned; TE: no “truculent” deportment; one man felt like hitting Cantwell, though the did not do so; interest: order upon the public streets</td>
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<td>1940-1949 (cont.)</td>
<td>Chaplinsky (1942): CB; “fighting words” not protected by the Constitution; test: “what men of common intelligence would understand would be words likely to cause an average addressee to fight”; interest: public order and safety</td>
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<td>1950-1959</td>
<td>Dennis (1951): Hand C&amp;PD; conviction under Smith Act upheld upon CE evidence of plot to overthrow government and AE, “inflammable nature of world conditions”; interest: apparent requirement of intent but unclear whether any evidence of intent actually adduced; interest: protect existing government... from change... by violence, revolution or terrorism</td>
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<td>Feiner (1951): AHB; conviction for disorderly conduct upheld; std: C&amp;PD; TE: words used by Feiner; one man threatened violence if police didn’t react; police only “stepped in to prevent it from resulting in a fight”; Feiner’s refusal to comply with police instructions; interest: public order and safety</td>
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<td>Roth (1956): CB; conviction under statute prohibiting mailing of obscene materials upheld; 1st Am. Does not protect material “utterly without redeeming social importance”; test: test: whether the average person, applying contemporary community standards, the dominant theme of material taken as a whole appeals to prurient interests; AE: laws in 48 states, and federal restriction, restricting obscenity</td>
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<td>Beauharnais (1952): AHB; CB; conviction under group libel statute upheld, added to categories of unprotected expression; the legislature is entitled to seeks ways to curb false or malicious defamation of racial and religious groups without evidence that its method of regulation would actually solve the deeply-embedded racial and religious tensions in Chicago and Illinois; interest: emotional harm</td>
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<td>1960-1969</td>
<td><strong>Brandenburg</strong> (1969): C&amp;PD; conviction under CA criminal syndicalism statute overturned under new C&amp;PD test; harm must be imminent; degree of imminence extremely high; only serious lawless action or violence; specific intent req’d; CE: films of speech; TE that Brandenburg was the speaker; AE of laws in other states; interest: prevention of use of force or lawless action to effectuate political reform</td>
<td><strong>Watts</strong> (1969): AHB; established category of true threats but overturned conviction under federal statute prohibiting threats against President; CE &amp; TE: Watts’ speech (viewed as protected political hyperbole); 2) context (political rally); 3) conditional nature of Watts’s speech; 4) listeners reaction (laughs); interest: President’s physical safety</td>
<td><strong>Sullivan</strong> (1964): AHB; std.: public figure cannot recover damages where fails to prove defamatory falsehood concerning official conduct was made with “actual malice” (CCP that falsehood was made with K of its falsity or with RD for the truth to recover actual or punitive damages; TE: publisher had failed to check accuracy of ad with Times’ own files; Times’ secretary suspected that at least some of the information in the ad was false; newspaper failed to retract publication upon Sullivan’s demand; P must prove falsity; interest: reputational injury</td>
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<td>1970-1979</td>
<td>Gooding (1972): SS; conviction under disorderly conduct statute overturned in void of statute not &quot;narrowly drawn and limited to define and punish specific conduct lying within the domain of state power;&quot; limited &quot;fighting words&quot; doctrine by adopting &quot;actual&quot; addressee requirement; interest: public order and safety</td>
<td>Pentagon Papers (1971): PPB; heavy presumption against prior restraints not satisfied by &quot;executive authority&quot; to prevent publication of embarrassing information; &quot;only governmental allegation of proof that publication must inevitably, directly, or immediately cause the occurrence of an event kindred to imperiling the safety of transport already at sea;&quot; interest: national security</td>
<td>Gertz (1974): AHB; Ct. overturned liability for statements made about a private figure concerning matters of public concern; STD: private figures can recover actual damages for defamatory statements concerning matters of public concern under a standard akin to anything above strict liability; evidence reviewed under POE; however, punitive damages can only be awarded upon proof of actual malice; mere proof of failure to investigate, without more, does not establish RD; publisher must act with high degree of awareness of falsity; interest: reputational injury</td>
<td>Miller (1973): CB; obscene material is not protected by the 1st Am.; test: state statute prohibiting obscenity must be &quot;limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as whole, do not have serious literary, artistic, political, or scientific value;&quot; conviction under state statute remanded for ruling in light of new standard adopted; interest: &quot;offending sensibilities of unwilling recipients or exposure to juveniles“</td>
<td>Cohen (1971): SS; conviction under California statute prohibiting breach of the peace for wearing jacket with profanity in courthouse overturned; profane speech is not obscenity (Miller) or fighting words (Chaplinsky); nothing in the California’s statute to indicate it is a valid TMP restriction; DE: words on Cohen’s jacket; lack of violent reaction by those who saw Cohen’s jacket; interest: public order and safety</td>
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**Nebraska Press Ass'n (1976):** PPB; high burden against prior restraints not met by “mere conclusion” that other measures short of a prior restraint would not have duly protected the defendant’s fair trial interests; Factors: 1) “nature of extent of pretrial coverage”; and 2) “how effectively a restraining order would operate to prevent the threatened danger,” interest: defendant’s fair trial interests.

**Paris Adult Theatre (1973):** CB; states may rely on their own experience in regulating obscenity; evidence establishing a correlation between obscene material and antisocial conduct not required; expert testimony is not necessary to establish what constitutes obscenity; DE: films; interest: social interest in order and morality

**American Mini Theatres (1975):** IS; AHB; city zoning ordinance dispersing adult businesses upheld; city must be allowed “reasonable opportunity” to experiment with solutions to social problems; (TE/FE: qualitative studies) (largely of one individual location of several such businesses in same neighborhood decreases property values and causes increase in crime; interest: urban planning; preservation of urban life

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<td>Landmark Comm’n’s (1978): Government interests in protecting the confidentiality of confidential judicial proceedings did not outweigh high burden against prior restraints; C&amp;PD test weighed in favor of the 1st Am. (PBB) required: 1) &quot;substantial evil&quot; to be &quot;extremely serious&quot;; 2) &quot;solidity of evidence&quot; necessary to requisite showing of imminence; and 3) danger must not be remove or probable, but must &quot;immediately imperil&quot;; AE: other states imposing sanctions for publishing confidential proceeding information; interest: fair and orderly administration of justice</td>
<td>Pacifica Foundation (1978): AA; FCC’s authority to impose sanctions on radio station’s airing of indecent expression is not based on proof that expression is obscene or caused harm to those who heard it; interest: privacy; protection of minors; CE: man heard broadcast while traveling in car with son; factors: repetitive use; aired during a time when children in the audience (mid-afternoon); use of warning does not overcome burden</td>
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<td>1980-1889</td>
<td>Claiborne Hardware:  (1982): AHB; liability for malicious interference overturned due to lack of “proximate cause”; TE: no hearers were threatened by Evers' speeches; virtually even victim of violence continued to patronize white merchants; “DE: Evers' speech recorded by police, including several threatening comments, but was mostly peaceful; factors: timing of events in relation to other factors; interest: economic losses</td>
<td>Falwell (1988): AHB; Claim for IIED rejected where jury found ad parody was not “reasonably believed” and thus could not be viewed as stating “actual facts” about P; Test: To recover for IIED, a public figure must prove, in addition to elements of IIED, that the: 1) the statement was false; and 2) was made with actual malice (same standard as in defamation claims); did not matter than D had malicious intent to defame P (would go toward intent); interest: emotional injury</td>
<td>Ferber (1982): CB; child pornography is a unprotected category of expression; AE: 20 states prohibited distribution of material depicting children engaged in sexual conduct without requiring the material be obscene; TE &amp; FE: psychological and sociological (qualitative) studies purporting to demonstrate a connection between child abuse and psychological, emotional, psychological, mental harm.</td>
<td>Renton (1986): IS; AHB; city zoning ordinance concentrating adult businesses in specific locations upheld; city was entitled to rely on the experiences of other cities; FE/TE: another city’s (qualitative) studies purported to show a connection between adult businesses and neighborhood blight “sufficiently justified” means of regulation; interest: preventing crime, protecting city’s retail trade, maintaining property values, preserving quality of urban life</td>
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<td><strong>R.A.V.</strong> (1992): AHB; SS; conviction for crudely made cross burned in family's backyard under bias motivated statute overturned; went beyond fighting words doctrine (<em>Chaplinisky</em>) to punish fighting words that contain messages of bias-motivated hatred (based on viewpoint); state can prohibit “mode of communication” but cannot punish not based on content of expression; TE: city’s needs to communicate to minority that group hatred not condoned by majority; interest: emotional harm; perceived legitimacy of interest</td>
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## Variety of Speech

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<td>Free Speech Coalition (2002): SS; AHB; speech that is neither obscene (Miller) nor child pornography (Ferber) cannot be banned; virtual child pornography is not “intrinsically related” to sexual abuse of children; argument that it whets pedophiles appetites is “contingent” on some subsequent criminal action and “indirect” and does not demonstrate a “proximate link”; interest: harm to minors</td>
<td>Alameda Books (2002): AHB; IM; zoning ordinance prohibiting two businesses from operating in same building upheld; municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent govt interest. TE/FE: police report (quantitative) purporting to demonstrate a concentrations of adult businesses are associated with high crime rates; interest: reduction in crime</td>
<td>Black (2003): AHB; SS; conviction under statute prohibiting cross burning with intent to intimidate, where cross burning was viewed as prima facie evidence of intent to intimidate overturned because it “strips away the very reason why a State may ban cross burning with intent to intimidate”; threats: those statements where speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group; while threats of violence not protected, history of dual message communicated by expression requires evidence of intent to intimidate; no intent to carry out threat required; interest: emotional harm; physical harm</td>
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<td>Fox Television Stations (2002): AA; FCC policy change to punish “fleeting” expletives because they are harmful to children does not need to be supported by scientific, empirical evidence; CE complaints from parents following airing of live broadcasts; interest: injury to minors</td>
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<td>2010-present</td>
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<td>Snyder (2011): SS; TE/FE: Albert Snyder’s emotional and physical anguish (exacerbated pre-existing health conditions, depression); lack of pre-existing relationship b/w Snyders and WBC members; signs not viewed as mounting personal attack; dominant theme of signs’ relation to broader public (political and religious) issues</td>
<td><em>Snyder</em> (2011): SS; TE/FE: Albert Snyder’s emotional and physical anguish (exacerbated pre-existing health conditions, depression); lack of pre-existing relationship b/w Snyders and WBC members; signs not viewed as mounting personal attack; dominant theme of signs’ relation to broader public (political and religious) issues</td>
<td><em>Alvarez</em> (2012): SS+; STD: requirement of “direct causal link” between restriction imposed and injury to be prevented (dilution of perception of military medals); interest: law prohibiting lies about one’s own credentials without regard to whether they were made for purposes of material gain (solely false speech) overturned; integrity of the military honor system</td>
<td><em>Stevens</em> (2010): SS; PPB: conviction under federal statute prohibiting depictions of animal cruelty overturned as reaching material protected by the 1st Am.; depictions of animal cruelty are not a category of unprotected expression; DE: gruesome hunting videos sold through Stevens’ website; interest: social morality</td>
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<td>Brown (2011): SS+: statute prohibiting sale or rental of violent video games struck down; “direct causal link” between the harm and the expression; TE &amp; FE: qualitative, empirical studies purporting to demonstrate a “connection” between violent material and violent reaction; interest: protection of minors</td>
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Key:

Types of evidence
CE = Circumstantial
TE = Testimonial
EE = Expert
AE = Anecdotal
SE = Scientific

Standards:
C+PD = clear and present danger
BT = bad tendency
SS = strict scrutiny
SS + = strict scrutiny plus (more than SS)
IS = intermediate scrutiny

Approaches:
AHB = ad hoc balancing
PPB = preferred position balancing
AA = deference to administrative authority
CB = categorical ban

Figure G-4. Continued
CHAPTER 5
CONCLUSIONS

Chapter 5 features four parts. Part A proposes a proof-of-harm typology of factors or variables potentially affecting burdens of proof in allegedly harmful-speech cases. Part B establishes a proof-of-harm rubric for evaluating the evidentiary burden a court would apply in specific factual scenarios. Part C makes normative suggestions regarding the weight that should be allotted the typological factors when engaging in an evidentiary calculation of the burden-of-proof. Part D sets forth a hypothetical fact pattern, which embellishes on a real-life events and the Supreme Court's own First Amendment jurisprudence and applies the analytic tools—the typology and rubric—to the fact pattern to demonstrate how the typology and rubric would be applied to a specific factual scenario. Part E reexamines the mass communication theory of the third-person effect to explain its potential impact on judicial decisions evaluating potential harms to governmental interests. Part F then reviews the research questions initially proposed in Chapter 1, summarizing the research to specifically answer each of those questions. It identifies potential areas for future research.

Proof-of-Harm Typology

Typologies are useful analytic tools for simplifying complex legal issues. It is a system for dividing “things” into “types” according to how they are similar. This section lists those factors this study has identified as potentially affecting the Court’s assessment of an evidentiary burden of proof in the thirty-eight Supreme Court cases examined in Chapter 4. Of course, it is potentially impossible to know exactly what factors influence a judge’s decision in a particular case.¹ Surveys of judges attempt to

¹ Ryan, supra note 1, at 1655.
better understand the factors that influence their decisions. But even these studies assume the respondents are candid and aware of all variables affecting those decisions.\(^2\) Even where the social scientific data is cited, it is potentially unclear whether the social scientific evidence influenced the outcome or whether it was cited to support an outcome reached on other grounds. \(^3\) Furthermore, social scientific data may influence a judge’s perspective without being expressly cited in the opinion.

Yet, it seems clear that judicial evaluation of an evidentiary burden of proof-of-harm is dependent on at least some other variables beyond the nature of harm alleged and variety of expression involved. The typology proposed by this study is to assist in the development of a better understanding concerning those factors. Thus, the factors or variables this study has identified that may affect the Court’s evaluation of the evidentiary burden of proof-of-harm, thus, include but may not be limited to, the:

1. nature of legal question;
2. jurist’s ideological values;
3. number of government interests at issue;
4. weightiness of the interest(s);
5. perceived legitimacy of the asserted interest(s);
6. level of legislative deference adopted by the Court;
7. strength of evidence presented by the government to support its interest(s);
8. availability of evidence;
9. difficulty of gathering new evidence of harm.

These next sections review these factors.

\(^2\) Ryan, \textit{supra} note 1, at 1655.

\(^3\) Ryan, \textit{supra} note 1, at 1655.
Nature of Legal Question

The nature of a legal question is a key factor affecting the relevance of social science evidence to legal decisionmaking. According James Ryan, now dean of the Harvard Graduate School of Education, if a judge perceives a legal issue involves moral or philosophical judgments or that the question is abstract or value-laden, he may be less likely to rely on social science evidence or view the evidence as important.4 Alternatively, if the question is an empirical one or viewed as involving “pragmatic” judgments, a judge may view social science findings as significant.5

It is no doubt violence and abuse, and their effects particularly on children, are the focus of much psychological and sociological research. Questions involving the potential effect of violence on children, thus, may be viewed as involving empirically based questions. *Brown v. Entertainment Merchants Association* reviewed psychological and sociological studies purporting to demonstrate causation between violent video games and harm to minors.6 *Ferber* relied on literature offered by Congress and New York, demonstrating a connection between child abuse and psychological harm to hold that the distribution and sale of child pornography should be prohibited.7 It seems clear, in each case, the Court at least viewed the evidence as relevant to answering the pertinent legal question.

Comparatively, legal questions involving personal privacy and emotional injury resulting from defamatory statements may be viewed as comprising normative

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5 *Id.*

6 See supra Part 4.B.2. (reviewing that opinion).

7 See supra Part 4.B.2. (reviewing that opinion).
judgments about human behavior. Erznoznik v. City of Jacksonville\(^8\) held the state’s power to prohibit the public display of nudity was “dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”\(^9\) Such a determination, however, would appear to involve subjective measurements regarding the point at which privacy interests are deemed “substantial” or can be viewed as “intolerably” violated. These relatively broad abstract questions are then reduced to specific legal inquiries at the individual level. Did the New York Times harm L.B. Sullivan’s reputation when it failed to check the accuracy of the statements made in the ad? Did Westboro Baptist members cause Albert Snyder emotional injury when they picketed his son’s funeral? Did Xavier Alvarez’s lies about receiving a military medal of honor wound the perceived integrity of the Congressional Medal of Honor. Yet, scientific research on human behavior loses precision when it is applied in a generalized manner at the micro level. This is potentially one of the problems Justice Scalia encountered when he determined that the video game literature had failed to rule out the impact of other factors or media as contributing to minors’ violent reactions.

It is important to recognize there are potentially innumerable factors that weigh on a judge’s sizing of an issue, and thus the particular outcome the jurist may reach in a particular case. For parsimony, this study will not discuss each of those here, but it will make mention of one element—political ideology—that has received some support in the literature.

\(^8\) 422 U.S. 204 (1975).

\(^9\) Id. at 210.
Jurists’ Ideological Values

In the same article, Dean Ryan proposes, "[c]ommon sense suggests that the more familiar and politically salient an issue, the greater the potential for ideology and preference to play influential roles."  

Consider, moreover, a *New York Times* article published in the November 2012 following a vote by a federal appellate court in Michigan that the state could not ban racial preferences in admissions decisions to its public universities. The article was not a comment on the state’s equal protection practices but the curiousness of the judges’ political affiliations in relation to their votes. Recapping a report posted on Scotusblog subsequent to the decision, the author acknowledges while the direct impact of a judge’s political ideology is indeed a “very difficult thing to prove,” all of the eight judges who voted in favor of the ban were Democratic nominees, while each of the seven judges in the dissent were Republican nominees. According to the author:

Many judges hate it when news reports note this sort of thing, saying it undermines public trust in the courts by painting them as political actors rather than how they like to see themselves—as disinterested guardians of neutral legal principles. But the there is a lot of evidence that the party of the president who appointed a judge is a significant guide to how that judge will vote on politically charged issues like affirmative action.

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10 *Id.* at 1663. In the inverse, Ryan suggests, “When those two conditions are both present—an issue is politically salient and perceived in moral and philosophical terms—the likelihood that social science research will influence the outcome seems quite slim.” *Id.*


12 *Id.*

13 *Id.*

14 *Id.*
But backed by more than common sense, studies have documented the impact of judges’ political bent on their voting practices. Jeffrey Segal et al., acknowledge support among political scientists investigating the relationship between votes and values.\textsuperscript{15} They recognize the sum of this research has concluded that “[a] predominant, if not the predominant, view of the U.S. Supreme Court decision making is the attitudinal model[,] which] supposes that the ideological values of jurists provide the best predictor of their votes.”\textsuperscript{16}

Yet, in an article published in 2000, Professor Schauer criticizes what he characterizes as “virtually no systematic empirical inquiry into judicial ambition or self-interested judicial motivation.”\textsuperscript{17} He lays out the argument for the personal ambition and self-interest of judges as a motivating factor in judicial decision-making, vying that “if judges are human beings who have an array of self-interested motivations to accompany their public-interested motivations, then it is important that not only political

\textsuperscript{15} Jeffrey Segal et al., \textit{Ideological Values and the Votes of U.S. Supreme Court Justices Revisited}, 57 J. POLITICS 812, 812 (1995).

\textsuperscript{16} \textit{Id.} (citing JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDBINAL MODEL (Cambridge University Press 1993). The study however, did not find as concrete support for the attitudinal model as earlier Studies. See Jeffrey A. Segal and Albert D. Cover, \textit{Ideological Values and the Votes of U.S. Supreme Court Justices}, 83 AM. POL. SCI. REV. 557 (1989). The study updated the prior research to include the two Bush appointees (Justices David Souter and Clarence Thomas) and backdate them by including the seven Roosevelt nominees (Black, Reed, Frankfurter, Douglas, Murphy, Jackson and Rutledge) and the four Truman nominees (Burton, Vinson, Clark, and Minton). It used the same measures of the independent as the earlier Segal/Cover research: newspapers editors’ assessments of the justices’ political values, ranging from -1 (unanimously conservative) to 0 (moderate) to +1 (unanimously liberal). The newspapers included the \textit{New York Times, Washington Post, Los Angeles Tribune} and \textit{Chicago Tribune}, two with conservative stances and two with liberal ones. The later study added two additional newspapers, the \textit{St. Louis Post-Dispatch} and the \textit{Wall Street Journal}. For an argument that judges must act strategically rather than vote their sincere policy preferences, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

scientists, but also lawyers, law students, and all the rest of us who study the courts ought to understand these motivations.”

Lee Epstein, William Landes and Judge Richard Posner take what has been referred to as “the most comprehensive and detailed empirical analysis yet of the role played by ideology and political affiliation in judicial decision making” in their book, The Behavior of Federal Judges, published in January 2013. The three authors conclude, less anyone still doubt such a finding, that “Justices appointed by Republican presidents vote more conservatively on average than justices appointed by Democratic ones, with the difference being most pronounced in civil rights cases.”

The justices’ votes in the recent case, United States v. Alvarez only continue to support such conclusions. Except for Chief Justice Roberts, the panel of liberal justices voted in favor to overturn the federal statute, while those viewed as conservative Justices Alito, Scalia and Thomas (all appointed by Republican presidents, George W. Bush or Ronald Reagan) dissented, voting to uphold the law. According to the dissent, the law “breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.”

18 Id. at 617-18.
Number of Government Interests

Review of First Amendment jurisprudence demonstrates that, where relevant, the government’s interest in regulating expression in a particular case may not only occur in isolation. *Erznoznik v. City of Jacksonville*\(^{21}\) involved not only a government interest in “protect[ing] its citizens against unwilling exposure to materials that may be offensive”\(^{22}\) but shielding minors “from this type of visual display” and also prohibiting the “distract[ion of] passing motorists, and thus, slowing the flow of traffic and increasing the likelihood of accidents.”\(^{23}\) Similarly, *City of Renton v. Playtime Theaters, Inc.*\(^{24}\) involved the city’s interest in “prevent[ing] crime, protect[ing] the city’s retail trade, maintain[ing] property values, and generally ‘protec[t]ing and preserv[ing] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life.”\(^{25}\) The “multiplicity of government interests,” however, does not ensure the government regulation will be upheld or that the interests will be more heavily weighted in the constitutional balance, but it certainly does not hurt.

Weightiness of the Government Interest(s)

Undoubtedly, some interests may be viewed as “weightier” in the hierarchy of interests than others. Within tort law, for instance, an unstated hierarchy exists with regard to the assessment of damages, which places physical harm above others, such

\(^{21}\) 422 U.S. 204, 210 (1975).
\(^{22}\) Id. at 212.
\(^{23}\) Id. at 211.
\(^{24}\) 475 U.S. 41 (1986).
\(^{25}\) Id. at 48.
as emotional, reputational and psychological harm.\textsuperscript{26} Similarly, national security unquestionably places a greater encumbrance on the scheme of interests. In each case involving subversive advocacy, the Court required little to no evidence to uphold the defendant’s criminal convictions, based only upon his expression.\textsuperscript{27} Indeed, only when the Court doubted the legitimacy of government’s asserted interest did it refuse to uphold the restriction.

**Perceived Legitimacy of the Asserted Interest(s)**

Thus, ultimately, the perceived legitimacy, or authenticity, of the asserted interests will also likely play some part in a court’s assessment of an evidentiary standard. *Erznoznik* first rejected the city’s stated interest in protecting adults and minors from unwanted exposure to potentially offensive material. It then turned to the city’s alternative argument, finding the city’s attempt, for the first time upon oral argument before it, “to justify its ordinance as a traffic regulation” was unsupported by the record.\textsuperscript{28} According to the Court, “[n]othing in the record or in the text of the ordinance suggests that it is aimed at traffic regulation.”\textsuperscript{29} “But even if this were the purpose of the ordinance,” continued the Court, “it nonetheless would be invalid...There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.”\textsuperscript{30}

\textsuperscript{26} See Part 4.B.1. (discussing this hierarchy).

\textsuperscript{27} See Part 4.A.1. (discussing those cases).

\textsuperscript{28} 422 U.S. 205, 214 (1975).

\textsuperscript{29} Id. at 214. Indeed, the Court noted, “the ordinance applies to move screens visible from public places as well as public streets, thus indicating it is not a traffic regulation.” Id.

\textsuperscript{30} Id. at 214-15.
Comparably, *New York Times Co. v. United States* skeptically rejected the government’s appeal to enjoin publication of the U.S. study on its policy in Vietnam “in the name of ‘national security.’” In his concurrence, Justice Hugo Black, joined by Justice William Douglas, wrote a scathing review of the government’s attempt to rely, not on “any act of Congress,” but on the “bold and dangerously farreaching contention that the courts should take it upon themselves to ‘make’ a law abridging freedom of the press in the name of equity, presidential power and national security.”

He observed:

> the Government argues in its brief that in spite of the First Amendment ‘(t)he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from...the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.’

But “[t]o find that the President has ‘inherent power to halt the publication of news by resort to the courts,” Justice Douglas admitted, “would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure.’”

Justice Douglas took a similar position in his own concurrence when he wrote that, while disclosure of the report “may have serious impact,” the dangers of “the opportunity and malfeasance and corruption” by public officials had so grown that there was particular need for a “vigilant and courageous press, especially in great cities.”

According to Justice Douglas, “Secrecy in government is fundamentally anti-democratic,

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32 *Id.* (Black, J., concurring).
33 *Id.* (Black, J., concurring).
34 *Id.* at 719 (Douglas, J., concurring).
35 *Id.* at 722, 723 (Douglas, J., concurring).
perpetuating bureaucratic errors...”, continuing, “[t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.”

He predicted, *New York Times* would likely “go down in history as the most dramatic illustration of that principle.”

**Level of Legislative Deference**

Free speech jurisprudence demonstrates it is transitioning beyond a historical trend of deferring solely to legislative judgment. Yet, not all Supreme Court opinions aptly support this conclusion. While Justice Scalia provided an extremely deferential standard to the legislative conclusions in *Fox Television Stations* that the public television broadcast of even fleeting expletives would cause harm to children, two years later he outright rejected any deferential standard to legislative decisionmaking in *Brown v. Entertainment Merchants Association*. Specifically, he refused in *Brown* to accept the conclusions reached by a vast majority of social scientific research that violent material causes harm to children.

Yet, *Fox Television Stations* and other decisions like it demonstrate there are at least three ways in which the Court can defer to legislative judgment. While more recent jurisprudence demonstrates the Court is likely to engage in its own fact-finding, the standard of legislative deference applied in each of these instances is likely to impact the Court’s reasoning. First, a court may defer to the stated *governmental interests* at stake in a particular instance involving speech-associated harm. For instance, in *Fox Television Stations*, the Court took for granted that the broadcast of even a single,

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36 *Id.* at 723-24 (Douglas, J., concurring).

37 *Id.* at 724 (Douglas, J., concurring).
“fleeting” expletive was likely to cause irreparable harm to a child from hearing it. According to Justice Scalia in *Fox Television Stations*, the FCC did not need empirical evidence proving the fleeting expletives constitutes harmful “first blows” to children. It “suffice[d] to know that children mimic behavior they observe.”

Second, a court may defer to the evidence provided by the legislature to support its conclusions. In *Ferber v. New York*, the Court not only deferred to the New York legislature’s judgment, perhaps unarguably, that the distribution of child pornography harms children, but also deferred to the evidence provided by the legislature—in this instance, several qualitative sociological and psychological studies purporting to demonstrate a conclusion between child abuse and psychological harm—to support the contention that the distribution of child pornography harms children.

Perhaps more persuasively, the Court in *City of Los Angeles v. Alameda Books* permitted Los Angeles to rely on studies not specifically addressing the particular social problem the city aimed to prevent to support its conclusion that the concentration of more than two types of certain adult businesses in one building resulted in increased crime. Justice O’Connor affirmed the age-old mantra the upheld several times in opinions involving red light districts to hold that cities or municipalities “must be given a ‘reasonable opportunity to experiment with solutions’” to social problems, including the secondary effects of even protected expression. Thus, it granted the city deference to pursue means of regulating the secondary effects of adult businesses in the way the city saw fit, the final way in which a court may defer to legislative judgment.

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In summation, the level of deference granted to lawmakers concerning the: 1) suspected harm; 2) evidence offered to support the legislative conclusions; and the 3) method of regulation the alleged harm-producing expression will likely influence the stringency with which the Court may require an asserted “connection” between the injury and the speech itself.

**Availability of Evidence**

The availability of evidence might also impact assessment of an evidentiary. In *Brown*, the Court surveyed available evidence, which included more than 1,000 studies purporting to show a correlation between violent video games and harm to minors, but established the evidence did not meet its evidentiary burden. The prior availability of evidence likely impacted the assessment of its burden of proof. But whether evidence is available does not always, apparently, preface the adoption of a standard requiring empirical evidence.

Undoubtedly, there are going to be questions of law for which studies have not been conducted or for which the evidence might not be available or might not be “all in.” In *Alvarez*, the Court imposed a standard requiring empirical evidence of proof when no evidence had been offered by the government purporting to demonstrate a speech-harm connection. In *United States v. Alvarez*, the establishment of such a stringent evidentiary burden appeared based on its prior development of such a standard. But it also raises questions whether the requirement of such stringent evidence was the appropriate standard in such a case, or alternatively, the method by which evidence of a direct causal link between lies and dilution of the perception of military medals would be produced.
Strength of Evidence

Strength of evidence has several attributes. First and most simply, “strength of evidence” refers to the volume of studies (mounting evidence) to support the conclusion the legislature is drawing from the scientific evidence and the ability of the evidence to continue to support those conclusions (longitudinal studies) over time. In Brown, there was evidence of more than 1,000 studies purporting to demonstrate at least a correlation between violent video games and children’s violent reactions. The government provided many types of studies, including longitudinal and meta-analyses (studies of all the studies) to support its conclusions, but the Court still found against the government. In City of Renton v. Playtime Theatres, the city relied largely on the testimonial and expert evidence of one sociologist, Dr. Mel Ravitz, to support its argument that adult businesses result in neighborhood blight. The Court’s decision in Alameda Books similarly purported to rely upon a single quantitative 1977 police report in crime rates in Los Angeles to justify the city’s ordinance to disperse adult businesses. Fox Television Stations relied on no evidence (empirical or otherwise) to support its conclusion, boasting only administrative authority to regulate the public broadcast of profanity during hours when children would be in the audience in the way that it saw fit to pursue its protection of minors.

Second, strength of evidence, as succinctly summed up by Professor James Ryan, refers to the ability of the evidence to measure what it purports to measure. 40 According to Ryan, “the more deterministic the evidence, the more influential it might be; the more mixed and inconclusive it is, the less likely it is that courts will rely heavily

40 See Ryan, supra note 1.
upon it in reaching (as opposed to merely bolstering) a decision.”  

Professor Faigman adopts a similar perspective when he argues that scientific strength of evidence is the standard by which evidence’s significance to legal decisionmaking should be judged.  

While social science research is sometimes thought of as possessing lesser “merit”, or scientific validity, than the natural sciences—and thus viewed as holding slighter relevance to legal decisionmaking—the reality is that no area of human inquiry escapes this critique. Social science research falling short of the “scientific ideal” or that is “not scientific at all” should be rejected as providing unreliable evidence on which to base legal decisions. Yet, the argument that any reliance on social science evidence places law on unstable footing because it is “imprecise” ignores the burden that would otherwise be placed on law to make complex objective assessments regarding human behavior. Social scientists maintain an understanding of human behavior superior to the layperson; they findings “can provide valuable assistance to legal decisionmakers” where they “describe ‘objective’ reality” or can answer legal “questions of fact.”  

A setback of the strength of evidence factor, however, is a belief held even by proponents of social science research, despite any mounting, longitudinal evidence, social scientific research may never definitely prove causation. As recognized by the

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41 Ryan, supra note 1, at 1662.

42 David Faigman, To Have and Have Not: The Value of Social Science to the Law as Science and Policy, 28 EMOY L.J. 1005, 1009-10 (1989) (“The principle standard by which the legal relevance of social science research can be judged...[is] their scientific strength, that is, on the ability of the social scientists to answer validly the question posed to them.”).

43 Faigman, supra note 40, at 1012. Social science is potentially less scientific and is thus legal reliance on it would subject law to unstable footing because social scientist are unable are unable to separate their values and judgments from their experiments and analysis and thus the “values and biases of the researchers invariably affects their findings.” Faigman, supra note 40, at 1012.

44 Faigman, supra note 40, at 1012.

45 Faigman, supra note 40, 1012.
Brown majority, there are always going to be other variables that will influence the effect.

**Difficulty of Gathering New Evidence of Harm**

In stark contrast to Justice Antonin Scalia’s demand for proof of causation of harm in Brown, he “took a decidedly less rigorous approach”\(^\text{46}\) just two years earlier in *Federal Communications Commission v. Fox Television Stations, Inc.*\(^\text{47}\) Instead of requiring causal evidence of harm to children stemming from the broadcast of profanity, he wrote, the FCC did not need empirical evidence proving that fleeting expletives constitute harmful “first blows.”\(^\text{48}\) According to Scalia: “it is one thing to set aside agency action...because of failure to adduce empirical data that can be readily obtained...it is something else to insist upon obtaining the unobtainable.”\(^\text{49}\) Scalia held it was sufficient that Congress had determined that indecent material is harmful to children.\(^\text{50}\)

As to the specific difficulty associated with gathering evidence of this kind, Scalia observed:

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effects of broadcast profanity on children in one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.\(^\text{51}\)

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\(^{48}\) *Id.* at 518-21.

\(^{49}\) *Id.* at 519.

\(^{50}\) *Id.*

\(^{51}\) *Id.*
Chief Justice Rehnquist observed a similar notion in his majority opinion in *City of Renton v. Playtime Theaters*,\(^{52}\) when considering the city’s interest in urban planning and crime prevention in the context of zoning ordinances. According to Rehnquist:

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.\(^{53}\)

Part A discussed potential factors affecting a court’s establishment of an evidentiary burden. Part B makes some observations regarding the weight of certain factors in the overall application of the typological factors to judicial assessment of proof-of-harm.

**Normative Ranking / Ordering of Typological Factors**

It is difficult, if not impossible, to determine the factors that may affect or impact judicial assessment of an evidentiary burden in a particular case. In the same way, it is also potentially arduous to determine the weight placed in the calculus of selecting an appropriate evidentiary burden on any particular factor. Indeed, it may be true that not every factor is relevant to assessment of an evidentiary burden in a specific case.

Part B makes some suggestions regarding which of the typological factors should possess greater weight in the overall assessment and selection of an evidentiary burden. It divides the factors into three “tiers,” or levels, to illustrate the priority that should govern potential application of each of the factors identified in the proof-of-harm typology. Some factors, however, are intrinsically related to another factor or variable. These variables appear in green directly below their blue counterparts.

\(^{52}\) 475 U.S. 41 (1986).

\(^{53}\) *Id.* at 51.
**Tier 1**

Given that the *nature* of the legal question is relevant to the whether judge’s view regarding the sufficiency of evidence to answer it, “nature of the legal question” appears on the top rung in the normative hierarchy of typological factors. Related to the issue of the nature of the legal question is the judge’s ideological views, and so that variable appears in green directly below the blue square labeled “nature of the legal question” in Tier 1.

**Tier 2**

The Court’s transition toward empiricism suggests availability of evidence should follow the nature of the legal question in the hierarchy of typological factors. Indeed, the availability of evidence is essential to whether the legal question can be answered empirically, and as Justice Scalia mentioned in his majority opinion in *Fox Television Stations*, “there are some propositions for which scant empirical evidence can be marshaled.” On the other hand, where there is an availability of evidence, the strength of that evidence may also come into play, but whether there is “strength of evidence” depends on the availability of evidence. Thus, “strength of evidence” and “difficulty of gathering new evidence” appear under the “availability of evidence” in the second tier.

Where there is evidence purporting to support or deny the presence of a relationship between the alleged governmental harm and expression, it should be examined to determine its actual sufficiency for measuring the connection. Despite arguments against the use of social science evidence in judicial decisionmaking, the evaluation of scientific, empirical evidence appears to weaken the likelihood that ideological values can influence the outcome in a particular case. Yet, it has been acknowledged that not every legal question can be answered empirically.
Where there is not empirical evidence to confirm or cast doubt on a speech-harm relationship, the Court has most often engaged in a balancing of the governmental interest(s) against the First Amendment’s interest in protecting the expression. Of course, a preferred-position balancing approach, as opposed to ad-hoc balancing position, better recognizes the First Amendment’s protection of our freedom of expression. This was the approach taken in the recent U.S. Supreme Court opinion of *United States v. Stevens*. In *Stevens*, the Court not only rejected the categorical approach to banning expression, but disallowed protection afforded the expression to be calculated on an ad-hoc basis.

The Supreme Court opinions examined in this study demonstrate that the weightiness of the interests involved, such as national security or prevention of physical harm, may sometimes accrue more weight in the overall balancing test afforded to the interests at stake. Yet, there may be other instances where the number of governmental interests alleged or the perceived legitimacy of the interests in issue may come to bear just as equally on the equation. For instance, although the government’s request to enjoin the study’s publication stemmed from its alleged concern for protection of national security, the Court incredulously overturned the injunction. In this sense, the perceived legitimacy of the alleged governmental interest overwhelmed the weightiness of the expression. These factors—the weightiness of the expression, the number of government interest(s) and the perceived legitimacy of the interest(s) all appear on equal platform in Tier 2.

**Tier 3**

The Supreme Court’s jurisprudence demonstrates that, for the most, it has evolved beyond its historical approach of deferring to legislative judgment regarding the
decision to ban expression only deemed harmful. Indeed, its most recent subscription to empiricism illustrates legislative may be required to confirm suspected harms empirically. Prerequisite proof-of-harm is likely to lessen the level of legislative deference concerning the alleged harm and the evidence provided by the legislature to support its conclusions, but also the means of pursuing regulation of the suspected harm-producing expression.

Part B provided normative suggestions regarding the weight that should be assigned to the typological factors in establishing the evidentiary burden of proof. Part C discusses the development of a proof-of-harm rubric for assessing an appropriate burden-of-proof in First Amendment cases. It provides courts with a framework determining the burden it should require when evaluating First Amendment claims.

**Proof-of-Harm Rubric**

The proof-of-harm rubric centers on the Supreme Court’s burden of proof-of-harm doctrine in its First Amendment jurisprudence. As such, the proof-of-harm rubric provides recommendations for selecting the appropriate burden of proof in specific factual scenarios. On one axis, set forth in rows, are the categories of speech that have guided this study’s discussion of the evolution of the proof-of-harm doctrine. On the other axis, listed in columns, are the various interests have been asserted by the government for squelching speech. These interests are characterized as the natures of harm.

In applying the rubric, a court would presumably identify the specific *variety of speech* as well as the *nature of the harm alleged* to identify the appropriate burden of proof, or the standard applied, the type of evidence required and other factors that would potentially assessment of the expression’s constitutionality in the particular
factual scenario. The rubric also sets forth the Supreme Court precedent presumably providing a good place to start for investigating further case law and reasoning that might prove useful to the analysis. A limitation of the rubric is that it is based only on analysis of the thirty-eight cases analyzed in Chapter 4. The rubric is set forth below in Figure 5-2. Part D next describes a hypothetical and applies the rubric and the typology to the hypothetical to demonstrate how they would work in the context of a specific factual pattern.

Application of Proof-of-Harm Tools to a Specific Factual Scenario

This part comprises two sections. Section 1 describes a hypothetical fact pattern, replete with potential speech-based causes of action for illustrating application of the proof-of-harm rubric and typology. Portions of the hypothetical are inspired by the real-life events and facts underlying the Court’s own free speech jurisprudence, but vary in several important respects, teased out the hypothetical.54 Section 2 applies the rubric and typology to the fact pattern to demonstrate how they might work.

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54 For instance, as indicated, the Austin City Council did indeed enact an ordinance endorsing same-sex marriage, although it possess no legal significance. Similarly, the bias-motivated statute is inspired by a similar one, indicated above, that was enacted in Colorado. Other portions of the hypothetical are based on facts established by Supreme Court opinions discussed within this study. For instance, the group’s hosting of protests in support of their religious and political beliefs stems from Snyder v. Phelps. The group leader’s speech mirrors the speech by Clarence Brandenburg that was broadcast in Brandenburg v. Ohio. The hypothetical additional states that the group members laughed following the conclusion of the group leader’s speech. This mirrors the facts in Watts v. United States, although the addition of the “cheering” response provides an additional element for analysis. That bystanders jumped a protester can be analogized to the facts of the hostile audience reaction/fighting words cases, although the hypothetical fact pattern differs from any of the facts in those cases in several important regards. The exposure of children to the anti-LGBT expression both on the school bus and in accompanying their parents to the picket ignites important discussion regarding the harm to minors regarded as government interest in several free speech cases discussed in this study. Thus, the facts underlying the hypothetical are based true events, covered by U.S. Supreme Court opinions or in the media, but vary in several important aspects, providing the impetus for the analysis conducted in the next section.
Hypothetical Fact Pattern

The National Child Liberation Front of America (NCLFA) is a religious and political group that believes homosexuality is a sin. In support of its religious and political beliefs, NCLFA protests in front of capitol buildings of states that have not yet approved same-sex couples’ joint child adoption. On one particular instance, the group staged a protest in front of the Austin City Council building in response to the council’s recent endorsement of same-sex marriage. NCLFA members wanted to demonstrate their opposition to council’s endorsement because approval of same-sex marriage often removes legal obstacles to adoption by same-sex couples. Council members approved the resolution to symbolically express their opinion on “the right side of history” amid Texas’s ban on same-sex marriage. A chief advocate of the council’s endorsement was Council member Gerry Schlender, who drove to California on the day it approved same-sex marriage to wed his long-time partner. Schlender hopes to someday formally adopt his partner’s biological child from a previous marriage.

Prior to the event, the group received permission to protest in front of the city council building before business hours, and it complied with all police instructions on the day of the protest. NCLFA members marched in front of the office and held signs that

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56 The sentiment that council members wanted to be on the “right side of history” was also true. See id. (quoting a spokesman for the city council). Interestingly, after this hypothetical was written, U.S. District Circuit Judge Orlando Garcia in San Antonio issued a preliminary injunction on Texas’ ban on gay marriage, pending review by an appellate court, in light of the recent Supreme Court opinions on the matter. Chris Tomlinson, Federal Judges Strikes Down Texas Gay Marriage Ban, AP.COM, http://abcnews.go.com/US/wireStory/federal-judge-strikes-texas-gay-marriage-ban-22685164 (last visited Feb. 26, 2014).
read, “Two Dongs Don’t Make a Right,” “Protect the Children!”; “Every Child Deserves a Mom & Dad;” “Keep Texas Straight” and “Remove Gays From Office!”

News about the protest spread fast. Portions were broadcast on local television news stations, including on the 6:00 a.m. news. During the protest, a group leader made a speech, urging protesters to refrain from shopping at businesses owned by members of the lesbian, gay, bisexual or transgendered (LGBT) community. He believed that a boycott of LGBT businesses would eventually force them to move elsewhere. He proclaimed:

This is a protest for the citizens of Texas who believe in the protection of our future and our children’s future. Any citizen who believes in our cause should refrain from shopping or receiving services at stores and businesses owned by gays. We must hold each other accountable to this cause or fear the wrath of God! And if our elected officials continue to take this course of action—we are not a vengeful organization—but there might have to be some repercussions taken to ensure that our message is clearly communicated. And as for the council members who spearheaded this endorsement, well, may God have mercy on their souls!

As he spoke, the speaker raised his right arm and shook his fist ferociously at the crowd. In response to the speaker’s closing remarks, the crowd laughed and cheered.

Meanwhile, Council member Schlender, who was watching his regular 6:00 a.m. news show, saw coverage of the protest, including what was written on the signs. He became disturbed and distraught, and decided it would be best if he delayed his arrival to the office that morning to avoid any potential confrontation with the protesters. The news station and the FCC hotline received complaints from parents, some of which included same-sex couples, that their children were harmed by the contents of the protest that was covered by the news station.

Members of the Austin Police Department supervised the area during the entire protest. At no time during the protest did police interfere with the protesters’ speech. As
soon as the protest ended, however, police arrested the speaker and charged him under a recently enacted city ordinance banning bias-motivated intimidation. Specifically, it prohibits speech made with the intent to intimidate based on race, ethnicity, gender, sexual orientation, political affiliation or union membership. The ordinance includes a legislative declaration that, in light of the recent social unrest over the legalization of same-sex marriage, there is a need to protect members of the LGBT community from groups engaging in concerted harmful activity. The ordinance requires evidence of intent to intimidate.

Following the protest but before the group had completely dispersed, bystanders who came to protest the speech jumped one of the protest members who was entering his vehicle parked nearby. The police, who had been patrolling the entire area, saw the fight break out and quickly arrested the individuals who had jumped on the protester.

An NCLFA member who owns a magazine shop refinished a section of his store by turning it into a video arcade. The arcade features violent video games, including some depicting physical acts of violence against, but not limited to, LGBT members.

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57 This law is modeled after those enacted in Colorado in 2005. Specifically, COLO. REV. STAT. § 18-9-121(2) (2005) says, in pertinent part, that:

A person commits a bias-motivated crime if, with intent to intimidate or harass another person because of that person’s actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation, he or she (a) knowingly causes bodily injury to another person; or (b) by words or conduct, knowingly places another person in fear of imminent lawless action directed at that person or that person’s property and such words or conduct are likely to produce bodily injury to that person or damage to that person’s property.

Application of the Analytic Tools to the Fact Scenario

There are potentially sixteen causes of action the government could allege concerning the facts alleging in the hypothetical. Each cause of action involves the identification of the: 1) type of speech and 2) the nature of harm/government involved. The factors addressed under each cause-of-action relate to the elements listed in the rubric for assessing the appropriate burden of proof-of-harm under that combination. It identifies the specific facts in the hypothetical giving rise the cause of action and applies the Supreme Court precedent applicable to the facts.

Speech provoking a hostile-audience reaction—emotional harm (1)

The first challenge involves the group’s hostile expression resulting in Schlender’s emotional harm. The fact pattern states Schlender viewed coverage of the protest on the news program and “became disturbed and distraught, and decided it would be best if he delayed his arrival to work” that day. *Snyder v. Phelps* sets forth the Supreme Court’s precedent for evaluating emotional harm arising from hostile expression.

Under *Snyder*, a court assessing the group member’s potential liability for emotional injury arising from their hostile expression would evaluate evidence including: 1) testimonial and expert evidence of emotional injury, including the worsening of any physical conditions; as well as 2) circumstantial and testimonial evidence of a) any prior existing relationship between the parties; b) a mounting personal attack; c) the relations of the subject matter to a significant interest of public concern. Other factors that could affect a court’s assessment include: 1) the status of individual, whether public or private;

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58 131 S. Ct. at 1207, 1216 (2011).
2) the protesters’ compliance with all police instructions or time, place and manner (TPM) restrictions; and also 3) the particular mode through which the plaintiff viewed the expression.

In Snyder, the Court protected the WBC’s expression in the face of circumstantial and testimonial evidence of emotional and physical harm and speech that could be viewed as personally attacking Albert Snyder, a private individual. Despite the evidence of injury, the connection of the group member’s expression to matters of public (religious and political) concern proved the dispositive factor. Snyder’s public-concern test establishes that speech can be protected if it relates to “any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interests, that is, a subject of general interest and value and concern to the public.”59 Based on this standard, a court could determine that the speech involved a significant matter of public concern so as to warrant First Amendment protection despite any emotional or physical harm arising from the group’s expression.

Emotional injury: A court reviewing circumstantial and testimonial evidence of Schlender’s emotional harm could determine that there was not sufficient evidence of emotional injury arising from the group’s expression to attach liability. The facts state Schlender became distraught and disturbed when he saw the words on the sign and decided not to go to work. However, there is no indication of any further emotional harm suffered by Schlender because of the speech. This is different from the evidence presented in Snyder that Albert Snyder had suffered severe emotional injuries, including emotional anguish resulting in severe depression and the inability to separate the

59 Id. at 1214.
WBC’s expression from thoughts of his son’s death as a result of the WBC members’
expression.\textsuperscript{60} Given that the \textit{Snyder} presented stronger evidence of emotional injury
arising from the group members’ expression and was still found lacking, it is likely a
court would not rule in Schlender’s favor concerning this factor.

\textit{Physical injury}: A court could determine, additionally, there was no circumstantial
or expert evidence of physical injury arising from NCFLA’s expression to hold the group
liable for emotional injury. Generally, physical manifestations of a plaintiff’s emotional
harm would strengthen a claim against a defendant’s intentional actions. Depending on
the state in which the claim arose, a court, alternatively, may \textit{require} physical
manifestation of emotional injury to establish such a claim.

In \textit{Snyder}, the plaintiff presented not only circumstantial, testimonial and expert
evidence of emotional injury, but that his physical ailments had been exacerbated by the
group member’s “offensive” expression. Yet, the fact pattern provides no similar
indication that Schlender suffered physical harm on account of the group’s hostile
eexpression. Given that a court would not likely find sufficient evidence of emotional
injury, it is likely a claim for physical injury demonstrating emotional harm would likewise
fail.

\textit{Pre-existing relationship}: Moreover, a court would likely find others reasons
sufficient to reject Schlender’s claim of emotional harm as a result of the NCLFA’s
expression, including the lack of a pre-existing relationship. A court would likely find no
evidence of a pre-existing relationship existing between Schlender and NCLFA
members to hold the group members liable. The hypothetical states the group members

\textsuperscript{60} \textit{Id.}
decided to stage the protest in front of the city council building because of the council’s endorsement of same-sex marriage. Even if the group members had become aware of Schlender’s involvement in the enactment of the endorsement through publicity of it, it is unlikely that mere awareness of an individual establishes a “pre-existing relationship.”

In *Snyder*, Albert Snyder claimed the signs condemning Catholicism and the United States military personally targeted him and his family, and that, as a result of the WBC’s expression, he was unable to separate the thoughts of the picketing from his son’s funeral.\(^61\) However, despite evidence of signs that could be viewed as waging a personal attack against Snyder and his family, the Court found the facts of the case, including the history of the pickets to promote the WBC’s political and religious viewpoints, cut against the finding of a pre-existing relationship.\(^62\)

The hypothetical indicates the group members, similar to the WBC in *Snyder*, staged protests opposing legalization of same-sex marriage long before any potential knowledge of Schlender’s involvement in the council’s endorsement. Given the connection of the protest to their religious and political views, combined with the fact the group had held many protests before this one, advertising their opposition to the legalization of adoption by same-sex couples, it is unlikely a court would find the protester’s expression established a pre-existing relationship.

**Personal attack:** It is furthermore unlikely a court would find for Schlender on the issue of personal attack. The hypothetical states that the group members held signs that called for the removal of gays from office and that children should be raised by

\(^{61}\) *Id.*

\(^{62}\) *Id.* at 1218 ("Westboro has been actively engaged in speaking on the subjects in its picketing long before it became aware of Matthew Snyder….")
opposite-sex couples only. Given Schlender’s sexual orientation and his desire to adopt his same-sex partner’s child, these signs could be viewed as mounting a personal attack against Schlender and his family, his position with the council and his involvement with the passing of the endorsement. Additionally, the fact that in addition to the signs, the group leader’s speech also contained comments that could be viewed as waging a personal attack against Schlender. On these facts, Schlender could argue the signs, combined with the group leader’s speech, went beyond the personal attack launched by the Westboro members against the Snyders.

In Snyder, the Court found even though some signs could be viewed as personally targeting Albert Snyder and his family, including some that “would most naturally have been understood as suggesting—falsely—that Matthew was gay,” it ruled the statements that could be viewed as aimed at the Snyder family did “not change the fact that the overall thrust and dominant themes of Westboro’s demonstration spoke to broader public issues.” Although Snyder provides no indication a speech was made by a group leader on behalf of the group that could also be viewed as personally attacking the Snyders, the dissent mentioned the existence of a poem that was published online containing several offensive comments. However, the only issue concerning the poem were not granted certiorari and thus were not addressed by the Court. Therefore, the impact of the addition of the poem to the analysis is uncertain. Moreover, the dissent vigorously attacked the majority’s argument that the signs did not constitute a personal attack, contending the content of the signs

63 Id. at 1225 (Alito, J., dissenting).
64 Id. at 1217 (majority opinion).
went “far beyond commentary on matters of public concern,”\textsuperscript{65} resulting in a “brutalization of innocent victims.”\textsuperscript{66} He concluded that such speech should not be protected.\textsuperscript{67} Nonetheless, under the “totality of the message approach” adopted by the Court, it is likely the Court would view the dominant theme of the signs, even combined with the speech, would weigh against a finding of a personal attack. The message of the signs largely related to the religious and political beliefs on issues of public concern.

\textit{Speech on Matter of Public Concern:} Additionally, a court would likely find that the protesters’ expression was of significant public concern. This element would likely have significant impact on a court’s weighing of the evidence, given it appeared the dispositive factor in \textit{Snyder}.

The hypothetical states that the group staged the protest to demonstrate their religious and political views that the legalization of same-sex marriage results in the removal of obstacles to the process of child adoption by same-sex couples. Additionally, there is no reason to believe, as the Court recognized in \textit{Snyder}, that the beliefs expressed during the group’s picket did not honestly represent its religious and political views regarding homosexuality and legalization of same-sex marriage.

\textit{Snyder} held a speech on matters of public concern were given “special protection” under the First Amendment.\textsuperscript{68} It established speech is of public concern “when it can be fairly considered as relating to any matter of political, social, or other

\textsuperscript{65} \textit{Id.} at 1226 (Alito, J., dissenting).

\textsuperscript{66} \textit{Id.} at 1229 (Alito, J., dissenting).

\textsuperscript{67} \textit{Id.} (Alito, J., dissenting).

\textsuperscript{68} \textit{Id.} at 1219 (majority opinion).
concern to the community.” 69 While Justice Breyer reviewed the majority’s opinion as not implying the States are “always powerless to private individuals with necessary protection,” the broad definition of “public concern” established by the Court would cut against a finding the protest was unrelated to a significant issue of public concern.

Group members hosted the protest to demonstrate their religious and political views regarding homosexuality and the legalization of child adoption by same-sex couples. The legalization of same-sex marriage and the benefits that are attached to achieving such marital equality, including child adoption, is undoubtedly a current hot-button issue in the United States. There was no reason to doubt the group member’s expression was reflective of their honest beliefs, and the protest garnered attention from the news media. These factors all weigh in favor of a finding the group members’ protest involved an issue of significant public concern.

*Status of the Individual:* Schlender’s status as a public official would only likely weigh in greater favor protection of the group members’ expression from liability. In *Snyder*, the Court ruled that the picketers’ expression was protected despite Albert Snyder’s status as a private individual. The Court’s First Amendment jurisprudence has generally allowed private plaintiffs to recover for emotional injury caused by malevolent actors under a much lower evidentiary burden than applied to public figures and officials. Given Schlender’s status as a public figure it is unlikely his status would affect a court’s determination of the relationship of the group members’ expression to matters of public concern.

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69 *Id.* at 1216.
Compliance with police instructions/TMP restrictions: The fact pattern also states the group complied with all police restrictions. There is no indication of a TMP restriction placing more stringent constraints placed on the group’s protest than with which they complied. Moreover, the hypothetical states the group filed a permit to host the protest, demonstrating an interest to keep their picket within the bounds of government and police confines.

Mode of viewing expression: The hypothetical states Schlender became aware of the protest that was being conducted in front of his office while watching the morning news, presumably at the time the protest occurred. This presents a slightly different factual scenario than Snyder, in which it was indicated even though there was testimonial evidence the Snyders saw the tops of signs at the funeral, Albert Snyder became aware of the protest and what was written on the signs later that evening on the news. Nonetheless, both Schlender and Albert saw the protest through the same mode—televised news coverage—rather than being confronted by the protest in first-hand fashion. Although it is potentially impossible to know the potential impact such a first-hand experience would have on the analysis of the emotional harm caused to the individual as a result of hostile audience expression, the fact at issue do not give any reason to believe a different conclusion would result from a court's examination of the facts underlying this hypothetical.

Speech that threatens—emotional harm (3)

There are several potential claims that could arise for emotional harm resulting from the group leader’s allegedly threatening speech. The hypothetical states the leader advocated the group members “hold each other accountable” to the cause of refraining from shopping or receiving services at stores and businesses owned by members of the
LGBT community or “fear the wrath of God.” Additionally, it indicated that if council members insisted on continuing on the same course of action, “there might have to be some repercussions taken to ensure that our message is clearly communicated.”

Supreme Court precedent giving rise to a cause of action for emotional harm stemming from threatening speech include Watts v. United States\(^\text{70}\) and Virginia v. Black.\(^\text{71}\) Although it was not until Black, decided more than thirty years after Watts, that the Court provided a definition of “true threats,” Watts ruled that “political hyperbole” did not constitute expression falling within the categorical prohibition.\(^\text{72}\) The decision also identified several factors a court should consider in evaluating threatening speech: 1) whether speech constitutes political hyperbole; 2) the content of the expression (what was actually said, whether religious or political in nature); 3) the context of the speech (the circumstances surrounding the expression, whether religious or political in nature); and 4) the listeners’ reaction.\(^\text{73}\) While context and circumstance undoubtedly impact the determination of the meaning behind expression,\(^\text{74}\) Supreme Court precedent has not since explicitly upheld these factors.

Virginia v. Black established the definition of true threats as “encompass[ing] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of


\(^{71}\) 253 U.S. 343 (2003).

\(^{72}\) Watts, 394 U.S. at 708.

\(^{73}\) Id. at 707-08.

\(^{74}\) Indeed, the Court evaluated the context and circumstances in Claiborne Hardware v. NAACP, involving economic harm. 458 U.S. 886 (1982).
individuals.” 75 Although Black determined “[t]he speaker need not actually intend to carry out the threat,” 76 it identified three interests in preventing threatening speech: 1) “fear of violence”; 2) “the disruption fear engenders”; and 3) “the possibility that the threatened violence will occur.” 77 Under the variety of interests recognized by Black, there are three groups that could bring potential causes of action for the group leader’s allegedly threatening statements: 1) NCLFA members; 2) Austin City Council members; and 3) LGBT business owners. Specifically, NFLFA members could claim that the speaker’s remarks indicating group members should “hold each other accountable” or “fear the wrath of God” resulted in emotional harm. Austin City Council members could claim emotional harm from the group leader’s suggestion that God should take mercy on the endorsement-initiating council members. However, the fact that the speech appears to target only those council members spearheading the endorsement could potentially cut against an argument that the speaker directed his comments at the entirety of the council board. Furthermore, the LGBT business owners could potentially have a claim for emotional harm stemming from the group leader’s advocacy of the boycott against them. Although likely the weakest argument, the business owners may allege they were placed in emotional harm that boycott participants may launch violent attacks against them in pursuance of the boycott.

Review of the circumstantial and testimonial evidence would likely produce a finding in favor of protection for the group leader’s expression, despite the allegedly threatening comments that were made. While it is possible the group leader could be

75 253 U.S. at 359.
76 Id. at 360.
77 Id.
found to have communicated a “serious expression of intent to commit an act of unlawful violence,” it is unlikely the groups’ claims for emotional harm would survive. The group leader’s expression is undoubtedly offensive, yet numerous Supreme Court opinions have held speech may not be suppressed on the basis of offensiveness. Moreover, political speech often produces expression that is “vituperative, abusive, and inexact.” Yet, such speech is not forbidden protection.

**NCLFA members:** Although NCLFA members potentially have the strongest claim for emotional harm stemming from the leader’s allegedly coercive speech, a court’s review of the facts under the *Watts* factors would likely rule in favor of the speaker. In *Watts*, the Court found Robert Watts’ statements were made at a political rally. They were conditional in nature and both he and the crowd laughed following the statements. Although the Court ruled they surely constituted a “crude offensive method of stating political opposition to the President,” they were nothing more than political hyperbole.

Similarly, the fact pattern states the protest was held to express the group’s political and religious beliefs and that the spokesman addressed the group on these issues. Additionally, there is no evidence that any of the NCLFA members who heard the speech were threatened by it or placed in fear of the possibility of a violent reaction by other members of the group. Moreover, the hypothetical states NCLFA members

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78 *Watts*, 394 U.S. at 708.

79 *Id.* at 707.

80 *Id.*

81 *Id.* at 708.

82 *Id.*
laughed and cheered at the conclusion of the spokesman’s remarks. Indeed, a court could find, given the context and nature of group leader’s speech, combined with the listeners’ reaction (laughing and cheering), the expression amounted to nothing more than political hyperbole. Yet, the hypothetical states the crowd laughed and cheered upon conclusion of the speaker’s remarks. Although the crowd, similar to Watts, reacted with laughter, it also states the crowd cheered. This would suggest the crowd heard his remarks, took them seriously, and, endorsed his position. Such a finding would likely weigh against a finding that the speaker engaged in nothing more than political hyperbole.

Intent: While a claim for emotional harm stemming from threatening speech is not based on the speaker’s intent to carry it out, it is unlikely a court could find the speaker possessed intent to carry out any specific threat of violence that may have been alleged. First, examination of the speaker’s words reveals a lack of expression communicating a serious threat of violence. The fact pattern states the picket was held to protest the endorsement and the speaker promoted an economic boycott of LGBT businesses. However, First Amendment jurisprudence has generally provided broad protection for political and religious boycott activity. Moreover, it is unlikely the speaker could be held liable for any actions of the boycott participants to “hold each other accountable” due to the lack of proximity between the speaker’s words and any those actions.

It is arguable the speech in *Brandenburg v. Ohio*,\(^{84}\) after which this speech is modeled,\(^{85}\) contained rhetoric that was more highly charged than the NCLFA leader’s expression. Yet, in *Brandenburg*, the Court found Clarence Brandenburg did not possess the requisite intent to be held accountable for the associated speech crime, under a standard requiring intent.\(^{86}\) Under *Black*, which adopted the *Brandenburg* standard, it is likely a court would find that element was not satisfied by the facts of the hypothetical.\(^{87}\)

**Intent to intimidate:** Whether the speaker’s remarks could be taken as communicating a serious expression of intent to commit an act of unlawful violence would, thus, also likely weigh in an assessment of intent to intimidate. The hypothetical states that a recently enacted Austin resolution prohibits speech made with intent to intimidate based on race, ethnicity, gender, sexual orientation, political affiliation or union membership. The city council enacted the ordinance in light of the recent social unrest over the legalization of same-sex marriage. While the ordinance appears to makes amends for at least some of the *Black* statute’s shortcomings, unclear is whether the statute’s enactment in the interests of protecting members of the LGBT community from harmful activity in light of recent social unrest would violate *R.A.V. v. City of St. Paul’s* prohibition on regulation on certain disfavored topics.


\(^{85}\) See *id.* at 446.

\(^{86}\) *Id.* at 447.

\(^{87}\) *Black*, 538 U.S. at 366. Indeed, the Court acknowledged, under that standard, that even “[b]urning a cross at a political rally would almost certainly be protected expression.” *Id.*
Nonetheless, the ordinance’s prohibition on bias-motivated speech made with “intent-to-intimidate” appears modeled after the *Black* statute’s requirement. In *Black*, Justice O’Conner found a state could punish cross burning with intent to intimidate. It found, given the pernicious history of cross burning, a state could punish cross burning as long cross burning was not taken as prima facie evidence of intent to intimidate.\(^88\) It defined “intent to intimidate” as “the motivation to intentionally put a person or a group of persons in fear of bodily harm...that must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim.”\(^89\)

Given the connection of the speaker’s message to the group’s religious and political beliefs, it is unclear whether a court could separate the spokesman’s expression regarding the LGBT community from the group’s religious and political beliefs. The *Black* Court recognized the cross burning at a political rally would almost certainly be protected expression. Moreover, religious and political protest and boycotts are generally granted broad First Amendment protection. Thus, *Black* would seem to require that mere speech about race, ethnicity, gender, sexual orientation, political affiliation or union membership could not serve as prima facie evidence of intent to intimidate.

*Austin City Council members*: Austin City Council members could likely bring a claim for emotional distress as a result of the leader’s threatening remarks. The hypothetical states that the leader threatened that “if our elected officials and council members continue to take this course of action [participating in activist endorsement of

\(^{88}\) *Black*, 253 U.S. at 363-65.

\(^{89}\) Id. at 349
same-sex marriage rights]...there might have to be some repercussions taken.” The speech continues that, “as for the councilmembers who spearheaded this endorsement…may God have mercy on their souls!” However, neither statements articulate a direct “serious expression of intent to commit an act of unlawful violence”\(^90\) and thus would likely fall short of constituting a true threat.

**LGBT business owners:** The same analysis would apply to the threats directed at the LGBT business owners. Additionally, however, there is another line of reasoning that may apply to the LGBT members.

The hypothetical states that the speaker proclaimed that “any citizen who believes in our cause should refrain from shopping or receiving services at stores and businesses owned by gays.” This is similar to *NAACP v. Claiborne County*,\(^91\) in which a group leader of the Claiborne County NAACP made a plea for NAACP members to refrain from shopping at stores owned by white merchants.\(^92\) Additionally, there was evidence that the NAACP leader threatened that any NAACP members who failed to comply with the boycott would be subject to physical punishment.\(^93\) Especially considering the social unrest acknowledged by the city as a rationale for the enacting the ordinance, the call for a political boycott of LGBT businesses may have placed the business owners in emotional fear that the boycott participants would engage in violent acts against them. However, given that such an action would rely on the intervening

\(^90\) *Id.* at 359.

\(^91\) 458 U.S. 886 (1982).

\(^92\) *Id.* at 899.

\(^93\) Specifically, the leader threatened that, If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.” *Id.* at 902.
action of the boycott participants to engage in violence against them, combined with a lack of a specific call by the leader to engage in violence against the LGBT business owners, would likely weigh against such a finding.

**Speech that threatens—physical harm (3)**

The same analysis that would apply under a pleading of emotional harm applies to physical harm given that both *Watts* and *Black* likewise addressed physical harm. For instance, the federal statute at issue in *Watts* was enacted in the interest of “protecting the safety of its Chief Executive” (physical harm) and in allowing him to perform his duties without interference from threats of physical violence”94 (emotional harm). The interest recognized in *Black* included not only the “fear of violence and “the disruption fear engenders,” but also “the possibility that the threatened violence will occur.”95

**Speech that threatens—economic harm (1)**

The next cause of action concerns a claim for economic harm stemming from threatening speech. In the hypothetical states the NCLFA group leader threatened that “any citizen who believes in our cause should refrain from shopping or receiving services at stories and businesses owned by gays.” The case setting forth the standard for evaluating claims of economic harm stemming from threatening speech is *NAACP v. Claiborne Hardware*.96 In *Claiborne*, NAACP leaders pursued a boycott to advance political goals, namely, achievement of racial equality and integration.97 The Court acknowledged the government’s interest in protecting economic activity, but held

94 *Watts*, 394 U.S. at 707.
95 *Black*, 538 U.S. at 360.
97 *Id.* at 899.
that the NAACP had engaged in protected symbolic expression. In doing so, the Court insinuated the NAACP leader’s allegedly threatening remarks, which may have been viewed as instigating violent recourse, were akin to Robert Watts’s political hyperbole. In rebuking the merchants claims, the Claiborne Court also noted there were intervening factors—beyond the speaker’s violent expression—that the resulted in a boycott’s success.

It is questionable under this standard whether the facts underlying the hypothetical would satisfy the Court’s standard. Although the Court did not set the amount of evidence that would be needed to constitute sufficient evidence of economic harm, Claiborne featured multiple reports of economic losses suffered by merchants due to the boycott activity. Sufficient evidence would then seem to require at least more than one report of monetary loss caused by the threatening speech.

Claiborne also emphasized the importance of timing of the threats in relation to the alleged economic losses. The Court noted that there were intervening events that may have impacted the success of the boycott. However, the hypothetical states the speaker was arrested immediately following the protest; it did not provide any indication the boycott continued following the protest and after the speaker’s arrests. Additionally, there was no apparent evidence whether any businesses suffered economic harm as a result of the NCLFA members’ participation in the boycott. A finding of economic harm

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98 Id. at 894-95, 926-29.
99 Id. at 911.
100 Id. at 901, 922.
101 Id. at 899. “The complaint was filed in Chancery Court of Hinds County by 17 white merchants.” Id. “The affected businesses included four grocery stories, two hardware stories, a pharmacy, two general variety stores, a laundry, a liquor store, two car dealers, two auto parts stories, a gas station.”). Id. n.3.
stemming from boycott activity would also seem to require evidence that the economic harm was suffered as a result of the boycott and not because of any intervening variables.

**Hate speech—emotional harm (2)**

In light of the city’s ordinance prohibiting bias-motivated intimidation, a claim could be brought against the group and/or the speaker for their anti-homosexual (hate) speech in the interest of protecting the specific class of individuals from emotional harm caused by the speech. Because the discussion above has already addressed intent and intent to intimidate elements, this section will focus on the ordinance banning bias-motivated intimidation. The precedent that applies most aptly to this analysis is *Black* and *R.A.V. v. City of St. Paul.* Indeed, in each of those instances, the Court evaluated a statute that attempted to prevent expression that could be viewed as targeting a specific group. Yet, in each of those instances, the Court found, while not all content-based restrictions are unconstitutional, a statute’s attempt to regulate on the basis of disfavored topics, while leaving others unabridged, constituted content- and view-point based discrimination, in the violation of the First Amendment.

For instance, *R.A.V.* held that it was unconstitutional for the City of St. Paul to enact an ordinance imposing special prohibitions on speakers who expressed views on disfavored subjects of race, color, creed, religion or gender. It found the ordinance unconstitutional because it failed to prohibit “fighting words” in connection with other ideas such as political affiliation, union membership or homosexuality. *Black* held the

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104 505 U.S. at 380.
government *may* deal with part of a problem without addressing the entire category, but it must not do so on the basis of viewpoint.\textsuperscript{105}

*Disfavored topics:* The hypothetical states that the ordinance prohibits only bias-motivated intimidation if committed with intent to intimidate based on, for example, race, ethnicity, gender, sexual orientation, political affiliation or union membership. As long as a court does not view the advocacy of boycott activity as prima facie evidence of the protesters’ intent to intimidate, the ordinance seemingly passes constitutional muster under *Black.*

Here, the ordinance seemingly addresses the broad spectrum of the Court’s disfavored topics. Yet, a court may view the legislative declaration as focusing on prohibited harmful acts against members of the LGBT community, given the current social unrest, as just the type of content- and viewpoint-based restriction that was prohibited in *R.A.V.* and *Black.*

*Intent to intimidate under the bias-motivated statute:* However, a conviction under such a statute may be difficult, however, based on the necessity of sufficient circumstantial and testimonial evidence of intent to intimidate.

Similar to cross burning, not all forms of boycott constitute unprotected expression. The Court’s jurisprudence demonstrates boycotts may be given categorical protection when connected to a political or religious motive. However, the *Black* Court recognized that given the dual message of cross burning, burning a cross at a political rally would almost certainly be protected expression.\textsuperscript{106} On the other hand, boycotts

\textsuperscript{105} *Id.* at 388-90.

\textsuperscript{106} *Black,* 538 U.S. at 366.
initiated with intent-to-intimidate a specific class of individuals may constitute a pernicious form of hate speech because of the message communicated by the activity. Given the connection of the group’s expression to their political and religious beliefs, it is likely the group’s speech would not be viewed as evidence of intent to intimidate.

Conviction based only on speech: Moreover, the statute may run into problems where a conviction is based entirely on speech. The hypothetical states that the group members have not engaged in any action besides hosting a political protest. Due to the First Amendment protection generally afforded political and religious protests, combined distaste for statutes that punish speech alone, without being direct to inciting or producing imminent lawless action, it is unlikely a court could rule in favor of the LGBT members on this factor.

Incitement to unlawful action—physical harm (1)

There are potential claims for physical harm from the speaker’s expression constituting incitement to unlawful action. Brandenburg sets forth the modern Court’s standard for inciting speech. In Brandenburg, Clarence Brandenburg made a speech that is very similar to the one made by the group leader. The Court, however, found that Clarence Brandenburg’s speech

A claim for physical harm arising from the group leader’s allegedly inciting speech could arise under two theories: the speaker’s statement about the repercussions that may need to occur to have the group’s message clearly communicated and; the incitement to boycott the LGBT members businesses, could fall within the language of

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108 Id. at 449.
the bias-motivated statute. Under an incitement claim, a court would evaluate circumstantial and testimonial evidence of imminence.

It is unclear whether the defendant’s speech in either instance would rise to the necessary level of imminence and intent to commit a serious crime under the Court’s incitement doctrine, given it has not upheld an incitement conviction since the 1950s. In *Brandenburg*, the Court overturned a conviction for criminal syndicalism upon a finding that the speaker’s expression did not possess the requisite intent. In this sense, the expression—and thus the harm arising from the expression—could be viewed as very similar to the expression harm arising under the fact pattern.

**Incitement to unlawful action—public health, safety, order, morals and welfare (1)**

The government could also potentially bring a claim for the violent reaction caused by the group’s protest in the interest of protecting the public order, safety, health, morals and general welfare. A court should weigh circumstantial and testimonial evidence of the clear and present danger of riot and disorderly interference upon the streets and to public safety. The standard requires a finding of imminence. Although it is apparent that a violent reaction occurred, it does not require one. Also, under the Court’s hostile audience doctrine, a threat of even one audience member has been found sufficient to upheld a statute prohibiting breach of the peace, although it is unclear whether such a holding still remains good law.

The hypothetical states the brawl between two individuals occurred immediately following after the protest. It is thus unclear whether the violent reaction was a result of the protest or simply a dispute between two individual members of the crowd. A finding it occurred immediately after the protest would potentially also weigh on a court’s finding of imminence, required under the hostile audience doctrine involving an interest in
protecting the public order. A court would also need to potentially weigh testimonial evidence, including the specific statements communicated between the two, to determine whether it was related to the protest or another issue.

**Sexually explicit and violent expression—physical harm (1)**

The government could potentially have an interest in preventing physical harm to LGBT members by violent video games including those that depict acts of violence against LGBT members, which would fall under the category of sexually explicit and violent expression. Under this doctrine, a court should require empirical scientific evidence of a direct causal link between the video games and violent acts toward minors. In *Brown v. Entertainment Merchants Association*, the Court found that the vast majority of literature supported at least a weak correlation between the violent video games and children’s acts of violence. Yet, the Court held that the evidence was not sufficient to uphold California’s legislation. It is unclear whether Austin would be able to uphold application of a similar statute to the shop owner’s video games. In this instance, *Brown* appears to set an insurmountable hurdle to regulating types of speech that perhaps should be regulated in the interest of preventing harm. However, it is questionable whether the government maintains a similar interest in protecting LGBT members as it does in protecting children, who are often viewed an vulnerable and unable to protect themselves.

The government may further allege an interest in protecting LGBT members from physical acts of violence under the statute. Under the statute, it is unclear whether the government could offer circumstantial and testimonial evidence of intent to intimidate based on the identified disfavored topics. The fact pattern states that the shop owner began featuring video games including depictions of acts of violence against LGBT
members. It indicates, however, that these are not the only depictions of violence
included in the video games, and thus may not have been the reason the shop owner
started offering the games. A court may need to evaluate whether there is any evidence
that the shop owner started offering the video games in relation because of his desire to
promote acts of violence against LGBT members.

**Lewd, profane and indecent expression—urban planning and crime reduction (1)**

Under the Court’s lewd, profane and indecent expression doctrine, the city could
have the strongest argument for restricting the shop owner’s use of video games
depicting acts of violence against LGBT members in the same venue as his magazine
shop. Under such a claim, municipality’s interest constitutes urban planning and
reduction of crime. *City of Renton v. Playtime Theatres, Inc.* provides the jurisprudential
guidance on this issue.\(^{109}\) Under *Renton*, the Court established that a city may only be
required to produce qualitative evidence and/or expert testimony “fairly supporting” the
city’s justification to uphold the regulation. It may reasonably rely on evidence it only
believes to be relevant to demonstrating a connection between the city’s interest and its
means of regulating for its regulation to be upheld. In some cases, a single expert
opinion or study may suffice. The doctrine has greatly deferred to the city’s measures of
experimenting with solutions to neighborhood planning and crime reduction.

**Lewd, profane and indecent expression—injury to minors (2)**

There are potentially two different groups of minors for which causes of action
could be brought in the interest of preventing injury to minors. Both of these potential
causes of action stem from allegedly lewd, profane and indecent expression. First, the

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\(^{109}\) 475 U.S. 41 (1986).
hypothetical states that parents complained following exposure of their children to the indecent and profane comments displayed on the signs and made during the protest. Second, the hypothetical states that parents engaged in a same-sex relationship alleged harm to their children from the hearing of anti-LGBT words. Specifically, the speaker makes comments such as “any citizen who believes in our cause should refrain from shopping or receive services at stores and businesses owned by gays.” It also says that the several signs displayed at the protest contained statements such as “Two Dongs Don’t Make a Right” and “Every Child Deserves a Mom and Dad.” In this sense, the harm caused to the children with same-sex parents could be characterized not only as exposure to indecent and profane expression, but emotional and psychological injury caused by questioning whether they are “normal” for being raised by the parents of the same-sex.

The Supreme Court cases that are most analogous include *FCC v. Pacifica Foundation*, 110 and *FCC v. Fox Television Stations*.111 In *Pacifica*, a man who was traveling with his son in the car complained to the FCC after hearing George Carlin’s protest regarding the “Filthy Words” monologue.112 In the interest of protecting minors and privacy interests, the Court ruled in *Pacifica* that the FCC’s authority to impose sanctions on radio stations for the airing of indecent content is not based on proof that the expression is obscene or caused harm to those who heard it.113 The Court’s decision in that opinion, however, was based on several factors, including the medium

112 *Pacifica*, 438 U.S. at 729-30.
113 *Id.* at 750-51.
used, the repetitive use of the indecent expression during the program and that it was broadcast at a time of day—mid-afternoon—when children were likely to be in the audience.\textsuperscript{114} It held that the use of a warning before the airing of the program would not overcome the burden of airing indecent content since the nature of the radio permitted listeners to tune in and out of the program and could have missed the initial warning.

In \textit{Fox Television Stations}, the FCC received complaints following the airing of indecent expression toward two celebrity awards program.\textsuperscript{115} Prior to the program, the FCC had changed its policy to punish even the broadcast of single, fleeting use of expletives on television.\textsuperscript{116} Although not penalizing the broadcast station in this instance, the Court upheld the FCC's change in policy decision under an "arbitrary and capricious" standard: The policy would be overturned only upon a finding that the FCC had acted arbitrarily and capriciously.\textsuperscript{117} Alternatively, Justice Scalia found the FCC's policy change did not need to be supported by scientific, empirical evidence. Among other reasons, the Court found that it was rational for the FCC to conclude that even the fleeting use of expletives harms children under a "first blow" theory.\textsuperscript{118} According to Justice Scalia, "there are some propositions from which scant empirical evidence can be marshaled" and subjecting children to indecent expression was one of them.\textsuperscript{119}

\textsuperscript{114} \textit{Id.} at 729-30, 750.
\textsuperscript{115} \textit{Fox Television Stations}, 556 U.S. at 510.
\textsuperscript{116} \textit{Id.} at 507-10.
\textsuperscript{117} \textit{Id.} at 515-16.
\textsuperscript{118} \textit{Id.} at 517-18.
\textsuperscript{119} \textit{Id.} at 519.
The hypothetical veers from these precedents in several ways. First, even if the comments and signs were not found to be repetitive in nature, it is arguable the allegedly harmful statements to which the children were exposed do not rise to the level of indecency conveyed by the expression in both *Pacifica* and *Fox Television Stations*. Those cases concerned some of the vilest forms of profanity and, as in *Pacifica*, included the repetitive statements terms over and over again. Although it could be argued the expression was sexual in nature (in that it concerned homosexuality; sexual orientation) or was profane (involved intimidating speech that could be viewed as a direct personal insult to members of the LGBT community), the signs displayed at the protest could be characterized as containing the most graphic sexual content and the comments on the signs were written from than verbal in form. A single sentence in Justice John Paul Steven’s majority opinion in the *Pacifica* distills significance of their form: “Although Cohen’s written message might have been incomprehensible to a first grader, *Pacifica*'s broadcast could have enlarged a child’s vocabulary in an instant.”

Part C has discussed sixteen challenges that could be brought by different parties in response to the facts alleged in the hypothetical. The purpose has been to demonstrate how the rubric might work. Part D recaps the third-person effect in regards to its specific relationship on censorship legislation.

**Effect of Third-Person Effect on Censorship of Expression**

In Chapter 2, this study provided an introduction to the mass communication concept known as the third-person effect. Specifically, it suggested that the third-person perception could be used to explain legislation aimed at restricting potentially harmful

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120 *Id.* at 749.
speech. Communications sociologist W. Phillips Davison articulated what he perceived to be a third-person effect in his studies of historical events, including the decision of black troops to desert in Iwo Jima, as well as in estimating the impact of journalists’ editorials on German foreign policy. In both anecdotes, the parties that evaluated the impact of communication estimated a larger media effect on others than on themselves. Since then, the concept has gained significance in a broader array of research areas and contexts.

The third-person effect predicts that people perceive that mass communicated messages have a different influence on themselves compared to others, but the concept may also produce behavioral consequences—namely, that people will take action to counteract the consequences of a harmful message on other people. The behavioral component of the third-person perception has spurred considerable recent research, especially involving the use of the perception to explain censorial attitudes toward undesirable material.

For instance, empirical research suggests that people judge others to be more negatively influenced by—and thus a greater need for censorship of—pornography\(^{121}\) and violent rap music\(^{122}\). Other research indicates that people may overestimate the extent of reputational injury caused by defamatory statements, resulting in excessive monetary damages and a chilling effect on the press\(^ {123}\). The result is likely to have severe consequences for First Amendment jurisprudence. According to communication


research Albert C. Gunther, “If people are systematically overestimating the negative social-level effects of [harmful messages], then the third-person effect may be inflating opinion in favor of censorship.” The result is likely to have severe consequences for First Amendment jurisprudence.

Legislators and jurists are not exempt from those individuals who may react one way to neutralize what they perceive as a larger effect on other individuals. Moreover, their position as elected officials gives them greater power to “do something” about what they may perceive in their constituents as a lesser ability to cope with or protect against these potentially harmful stimuli. Unpacking this relationship a bit, however, legislators may also have an additional interest in enacting legislation appealing to their constituents. This legislation may be filled with emotional appeals to judicial sensibilities to restrict speech-based harm unnecessarily. Alternatively, judges and justices may not be aware or may simply ignore the influences at work.

Research in the area of communication and law aids the important goal of elucidating complex problems underlying our innate desires to restrict speech we believe is harmful. Continued investigation of the connection between the third-person perception and censorial attitudes may help to explicate and eliminate or at least reduce the introduction of legislation aimed at restricting expression. Beneficial studies may focus on the potential impact of the third-person perceptions on legislators’ likelihood of proposing speech-based restrictions; or the third-person perception as an explanation for the increase in speech-targeted legislation, including the number of speech based

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124 Gunther, X-Rating, supra note 112, at 37.

laws proposed or enacted over several decades. Research on the third-person perception may also assist judges in weighing the constitutionality of laws aimed at prohibiting speech-based injury, the likelihood of the impact of the third-person perception on legislators’ regulatory attempts, and the impact of the third-person perception on their own attitudes for upholding speech-based prohibitions, including the legitimacy of the government interests in restricting the allegedly harmful expression.

Part C has discussed the third-person perception and its likely impact on speech-based regulation. In doing so, it has discussed how potential future research investigations may continue to contribute to explicating the complicated interactions between the mass communication concept and free expression. This next part concludes by answering the research questions proposed in Chapter 1 and suggesting additional research possibilities.
<table>
<thead>
<tr>
<th>Factors / Variables Potentially Affecting Judicial Assessment of Proof-of-Harm</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Nature of Legal Question</td>
</tr>
<tr>
<td>2. Jurist's Ideological Values</td>
</tr>
<tr>
<td>3. Number of Government Interests</td>
</tr>
<tr>
<td>4. Weightiness of the Interest(s)</td>
</tr>
<tr>
<td>5. Perceived Legitimacy of Asserted Interest(s)</td>
</tr>
<tr>
<td>6. Level of Legislative Deference</td>
</tr>
<tr>
<td>7. Strength of Evidence</td>
</tr>
<tr>
<td>8. Availability of Evidence</td>
</tr>
<tr>
<td>9. Difficulty of Gathering New Evidence</td>
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Figure G-5. Proof-of-harm typology
<table>
<thead>
<tr>
<th>Type of Speech (column)</th>
<th>Nature of Harm / Government Interest (row)</th>
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</thead>
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<tr>
<td>Emotional, psychological, mental, reputational harm / fear</td>
<td>Individuals physical harm</td>
</tr>
<tr>
<td>Incitement to Unlawful Action</td>
<td>Criminal syndicalism: AHB; CE + TE; new C&amp;PD test; harm = imminent; degree of imminence = extremely high; only serious lawless action or violence; requirement of specific intent; AE: laws in other states - Brandenburg v. Ohio</td>
</tr>
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Figure G-6. Proof-of-harm rubric
<table>
<thead>
<tr>
<th>Speech that Threatens</th>
<th>Nature of Harm / Government Interest</th>
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<tbody>
<tr>
<td><strong>Emotional, psychological, mental, reputational harm / fear</strong></td>
<td><strong>Individuals physical harm</strong></td>
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<tr>
<td>Intimidating speech: AHB; CE + TE; True Threats = serious expression of intent to commit act of violence against individual/group</td>
<td>Intimidating speech: AHB; CE + TE; True Threats = serious expression of intent to commit act of violence against individual/group</td>
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<tr>
<td>Factors: 1) nature; 2) context; 3) hearers’ reactions; and 4) political hyperbole. Intent: no requirement</td>
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<td>to carry out the threat; dual message of expression requires evidence of intent to intimidate</td>
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<td>TE: whether audience who heard expression was threatened by it</td>
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<td>- Claiborne v. NAACP</td>
<td>- Claiborne v. NAACP</td>
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<tr>
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<th>Emotional, psychological, mental, reputational harm / fear</th>
<th>Individuals physical harm</th>
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<th>Injury to minors</th>
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<tr>
<td>Hostile Audience Reaction</td>
<td>IIED: SS; TE + EE of worsening of emotional / physical harm; TE + CE: 1) pre-existing relationship between the parties; 2) whether speech constitutes personal attack; 3) whether speech on matters significant public concern. Other factors: 1) plaintiffs’ status (private v. public figure) 2) whether protest complied with police instructions/TPM restrictions; 3) mode of viewing expression - Snyder v. Phelps</td>
<td>Solicitation: C→PD; Profane, indecent, abusive, personal epithets not protected; TE: man felt like hitting speaker, although he did not; violent reaction not req’d; intent: no req’t of intent to produce violent reaction; CE/TE: relationship of the expression to religious or political topics; other factors: level of legislative deference; statute tailored to prohibiting only speech constituting C&amp;PD - Cantwell v. Connecticut</td>
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<tr>
<td>Disclosure of Dangerous Information</td>
<td>Publication of government information: PPB: heavy presumption against prior restraints; CE + TE; 1) “solidity” of evidence of imminence; 2) danger = extremely serious; 3) imminence = extremely high. Danger must not be remote or even probable; must immediately imperil; weightiness of interests - <em>Landmark Communication v. Virginia</em></td>
<td>Pretrial publicity: PPB; heavy presumption against prior restraints; CE + TE; Factors: 1) nature and extent of pretrial news; 2) whether other measures could mitigate effects of unrestrained publicity; 2) effectiveness of restraining order to prevent danger; 4) terms of restraining order; weightiness of interests - <em>Nebraska Press v. Stuart</em></td>
<td>Publication of government secrets: PPB: heavy presumption against prior restraints; CE + TE; immediate, irreparable damage; to nation and its people; proof that publication must inevitably, directly, or immediately cause occurrence of an event kindred to imperiling the safety of a transport already at sea; perceived legitimacy of gov. interest in prohibiting publication of report - <em>NYT v. US</em></td>
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<tr>
<td>False Statements of Fact</td>
<td>Libel/IIED: AHB; CE + TE; Statements were published with evidence of actual malice (knowledge that statements were false or with reckless disregard as to truth or falsity of statements); requires more than proof of mere failure to investigate; high degree of awareness; factors: 1) status of individual (public = actual malice for recovery of any damages; private: actual malice for recovery of punitive damages); - New York Times Co. v. Sullivan - Gertz v. Robert Welch</td>
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<td>Lies about military medals: SS+; SE: “direct causal link” (government’s restriction on speech must be actually necessary to achieve its interest); - United States v. Alvarez</td>
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Figure G-6. Continued
### Nature of Harm / Government Interest

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<tr>
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<td>Emotional, psychological, mental, reputational harm / fear / privacy</td>
<td>Child pornography: CB; TE &amp; FE: psychological and sociological studies (qualitative) purporting to demonstrate a connection b/w child abuse and psychological harm used to support “proximate connection” b/w psychological harm and distribution of child pornography; confirmed under much lesser standard; weightiness of gov interest; level of leg. deference - Ferber v. NY production of materials that only appear to use children not categorically banned - Ashcroft v. Free Speech Coalition</td>
<td>Obscenity: CB; CE, TE, EE; 1) average person, applying contemporary community standards would find work, taken as whole: 1) appeals to prurient interest in sex; portrays sexual conduct in patently offensive way; and 3) lacks serious literary, artistic, political, or scientific value; statute must also be limited to preventing only such works; no req’t of expert testimony; states may rely on their own experiences in regulating obscenity; no req’t of correlation b/w antisocial conduct and obscene material - Miller v. California - Paris Adult Theatre v. Slaton</td>
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<td>Child pornography: CB; TE &amp; FE: psychological and sociological studies (qualitative) purporting to demonstrate a connection b/w child abuse and psychological harm used to support “proximate connection” b/w psychological harm and distribution of child pornography; confirmed under much lesser standard; weightiness of gov interest; level of leg. deference - Ferber v. NY production of materials that only appear to use children not categorically banned - Ashcroft v. Free Speech Coalition</td>
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**Sexually Explicit and Violent Expression (continued)**

Violent video games: SS+ (curtailment of free speech must be actually necessary to the solution’ gov must identify an actual problem in need of solving; std: SE: direct causal link’ between harm alleged and injury to be prevented; scientific evidence supporting only a correlation not sufficient; - Brown v. Entertainment Merchants Association

Videos depicting physical harm to animals: SS; PPB; statute must be limited to prohibiting no more than Miller; hesitancy to expect unprotected categories of expression - US v. Stevens

Violent video games: SS+ (curtailment of free speech must be actually necessary to the solution’ gov must identify an actual problem in need of solving; std: SE: direct causal link’ between harm alleged and injury to be prevented; scientific evidence supporting only a correlation not sufficient; - Brown v. Entertainment Merchants Association

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<tr>
<td>Lewd, Profane and Indecent Expression</td>
<td>Broadcast of indecent expression: AA; FCC’s authority to impose fines not based on proof that expression is obscene or caused harm to listeners; factors: repetitive use; (single fleeting use may be punishable); time of day; medium; use of warning does not overcome burden; level of legislative deference; weightiness of interests - Pacifica Foundation - Fox Television Stations</td>
<td>Broadcast of indecent expression: AA; FCC’s authority to impose fines not based on proof that expression is obscene or caused harm to listeners; factors: repetitive use; (single fleeting use may be punishable); time of day; medium; use of warning does not overcome burden; weightiness of interest - Fox Television Stations Pacifica Foundation</td>
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<td>Zoning of adult establishments: AHB; SE (one or more) +/- EE that the city “reasonably believes” evidence “fairly supports” rationale for regulating; level of legislative deference - Young v. American Mini Theatres - City of Renton v. Playtime Theaters - City of Los Angeles v. Alameda Books</td>
<td></td>
<td>Public display of nudity: IS: CE + TE that the movie screen was visible from public streets and people could be seen watching films outside the movie theater; perceived legitimacy of government interest - Erznoznik v. City of Jacksonville</td>
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<tr>
<td>Lewd, profane, indecent Expression (cont.)</td>
<td>Public display of nudity: IS: CE + TE that the movie screen was visible from public streets and people were observed sitting watching films outside the movie theater; - Erznoznik v. City of Jacksonville</td>
<td>Public display of nudity: IS: CE + TE that the movie screen was visible from public streets and people were observed sitting watching films outside the movie theater; - Erznoznik v. City of Jacksonville</td>
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<td>Broadcast of indecent expression: AA; FCC's authority to impose sanctions not based on proof that expression is obscene or caused harm to listeners; factors: repetitive use; time of day; medium; use of warning does not overcome burden - FCC v. Pacifica Foundation</td>
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<tr>
<td><strong>Hate Speech</strong></td>
<td>Cross burning: SS; CE + TE; State may ban expression for the very reason the expression is proscribable (represents particularly pernicious form of intimidating speech), but may not attempt to regulate such expression on the basis of content- or viewpoint; statute that attempts to regulate on the basis of certain disfavored topics will be found unconstitutional;</td>
<td>Cross burning: SS; CE + TE; State may ban expression for the very reason the expression is proscribable (represents particularly pernicious form of intimidating speech), but may not attempt to regulate such expression on the basis of content- or viewpoint; statute that attempts to regulate on the basis of certain disfavored topics will be found unconstitutional;</td>
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Figure G-6. Continued
## Nature of Harm / Government Interest

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<tr>
<td><strong>Hate Speech</strong></td>
<td>intent: no requirement of intent to carry the threat; intent to intimidate; requirement of intent to intimidate where dual message of expression makes it unclear whether the decision was based on the very reason the speech is proscribable; AE: evidence of racial tension giving rise to bias</td>
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<td>- R.A.V. v. City of St. Paul</td>
<td>- Virginia v. Black</td>
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### Key:
- **Types of evidence**
  - CE = Circumstantial
  - TE = Testimonial
  - SE = Scientific
  - AE = Anecdotal
  - EE = Expert

### Standards:
- SS = strict scrutiny
- SS + = strict scrutiny plus (more than SS)
- IS = intermediate scrutiny
- CB = categorical ban
- AA = deference to administrative authority

### Approaches:
- C+PD = clear and present danger
- BT = bad tendency
- AHB = ad hoc balancing
- PPB = preferred position balancing

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**Figure G-6.** Continued
Figure G-7. Normative ranking/ordering of typological factors
Review of Research Questions

In Chapter 1, this study proposed two research questions:

1. Do recent opinions such as Alvarez and Brown signal a shift toward a heightened standard of proof of harm stemming from speech as compared with earlier cases?

2. How does the nature of the alleged harm (physical, psychological or financial) and/or the type of speech involved (incitement, libel) affect the level of proof of harm—the type of evidence and the quantity of evidence—required by the Court?

It has attempted to answer these research questions through systematic examination of the Court’s First Amendment jurisprudence, spanning a broad swath of decades and numerous varieties of speech. Chapter 5 recaps the research questions and addresses each of them specifically and then makes some suggestions for areas of potential future research.

1. Do recent opinions such as Alvarez and Brown signal a shift toward a heightened standard of proof of harm stemming from speech as compared with earlier cases?

While the research has shown the Court has moved away from its categorical approach of placing certain categories of speech beyond First Amendment protection, it has not much evolved beyond simple ad-hoc balancing. Indeed, only within specific brands of expression has it adhered to a preferred balancing approach, or alternatively, one that requires empirical evidence of harm. Alternatively, the Court has never subscribed to absolute protection for First Amendment freedoms, but has repeatedly placed certain types of harmful speech beyond First Amendment protection. For instance, early jurisprudence focused on the “danger” that could result from expression in upholding government restrictions that targeted speech alone. Rather than adopting the principle that only real injury justifies speech suppression, as suggested by
philosopher John Stuart Mill, the Court was prone to censor speech without any evidence of harm deriving from the expression.

Fortunately, more recent jurisprudence endorses greater evidentiary burdens of proof-of-harm to justify speech restrictions. Whether the Court’s adoption of an evidentiary burden requiring empirical, quantitative evidence of a “direct causal link” between the harm and the expression apply across the broad spectrum of speech, or even more narrowly to the entire category under which they arise, is perhaps unclear. More accurately, the stringent evidentiary burdens of proof adopted by the Court in Brown and Alvarez, two prominent cases involving unique speech restrictions and very narrow varieties of expression, may seem more like outliers—applying only within the specific factual scenario—than the Court’s new vogue. Until the Court has additional time to consider application of its empirical approach to a broader spectrum of expression, it is perhaps unclear whether the trend will continue.

Alternatively, the Court adopted a similarly stringent standard in Alvarez and Brown. In Brown, the struck down the California statute prohibiting the sale or rental of violent video games to minors under a standard requiring evidence of a “direct causal link” between the video games and harm caused to minors, such that the video games caused minors to act aggressively. Alvarez appeared to adopt Brown’s seemingly insurmountable evidentiary hurdle when it required evidence of a “direct causal link” between lies about military medals and dilution of the public’s perception of them.

While these cases involve very distinct and diverse factual patterns, the Court adopted a same or similar standard of the evidence required to satisfy the government’s claim. In this sense, the Brown and Alvarez opinions represent a small step forward in
the Court’s jurisprudence to requiring systematic scientific, empirical evidence of harm to uphold government content-based restrictions on expression. At the very least, these decisions represent a mini-trend of an evidentiary burden requiring evidence of a “direct causal link” between the speech and the alleged harm. However, it is only likely, given the Court’s familiarity with use of scientific evidence within other areas of its jurisprudence; its increasing understanding of empirical, scientific concepts and methods; and mounting reliance on scientific evidence in constitutional law, generally, and First Amendment doctrine, specifically, that the Alvarez and Brown decisions represent the beginning of the Court’s trajectory toward imposing scientific, empirical standards of proof-of-harm.

2. How does the nature of the alleged harm (physical, psychological or financial) and/or the type of speech involved (incitement, libel) affect the level of proof of harm—the type of evidence and the quantity of evidence—required by the Court?

The Court has never adopted a one-size-fits-all standard of proof-of-harm. Neither has the standards appeared consistent within categories. In some instances, the Court has evaluated the particular factual circumstances, including any evidence offered in support of the government interest in regulating, and developed an evidentiary burden based on the circumstances. In other instances, it established the evidentiary burden and then evaluated the availability of evidence to meet that standard. A broad array of factors has also been found to play into the Court’s establishment of an evidentiary burden.

Within the Court’s free speech jurisprudence, certain patterns exist which create lines within the Court’s jurisprudence. These sometimes exist solely within a specific category of speech, but may also occur across categories. For instance, within the Court’s subversive advocacy doctrine, the Court applied a number of tests—including the
clear and present danger test as originally enunciated by Justice Holmes, as well as the bad tendency test derived from Patterson v. Colorado. Yet, in each of the cases, regardless of the test, the Court was prone to upheld a conviction upon only circumstantial or testimonial evidence of the defendant’s involvement in the production or distribution of the fliers. A similar factor spanning this line of cases is the government’s interest, as characterized in this study, in protecting national security or preventing interference with military operations such as the draft. Only when the stated interest veered from category—as occurred in Brandenburg v. Ohio, involving fear of racial violence—did the Court refuse to upheld the conviction upon circumstantial and testimonial evidence of Clarence Brandenburg’s participation in the protest (a film of the speech) and that Brandenburg was indeed the speaker.

At least in the initial case within each of the categories coming under content-based restrictions based on the expression’s alleged “dangerousness,” the Court applied the clear-present-danger test, or a test reminiscent of the clear-and-present danger test. This proved true regardless whether the initial opinion came down in 1919 (Schenck v. United States), the earliest recorded First Amendment opinion, or decided more than five decades later (New York Times v. United States, 1971). The opinions in which the Court applied the clear-and-present danger test involve a variety of government interest—from national security to the fair and orderly administration of justice to safety and order upon the public streets—and thus does not offer a conjoining factor. Indeed, in each of the opinions, the Court proffered various enunciations of the clear-and-present-danger test. In Bridges v. California, it required that the evil be “extremely serious;” and the degree of imminence be “extremely high.” The Dennis v.
the United States opinion adopted a different version when it characterized the clear-and-present-danger test as one that balanced the “gravity” of the harm against its “improbability” of occurring. Although the Pentagon Papers case (New York Times v. US) was decided subsequent to Brandenburg, in which the Court very clearly set forth the clear-and-present danger test it said would govern future cases, the Court in that opinion adopted a test that was only reminiscent of Brandenburg, suggesting that “only governmental allegation of proof that publication must inevitable, directly or immediately” cause damage to the government’s security interest would the prior restraint imposed by the government be able to prevail.

The earlier opinions’ adherence to the clear-and-present danger may be founded on the standard of extreme deference to legislation decisionmaking that existed in at least the first half of the twentieth century within First Amendment jurisprudence. In Schenck, the Court posed the question as: “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent…” This theme reiterates across and throughout many of the Court’s early opinions involving dangerous expression. Only when the Court found the conviction was based on an old English common law presumption of judges’ right to punish out-of-court contempt statements when they tended to interfere with a pending trial (Bridges v. California) or that it doubted the legitimacy of the alleged interest (New York Times Co. v. United States) did it reject the deference-to-legislative, or executive, decisionmaking standard it previously upheld outright. In each of those cases, the Court upheld the legislature’s
speech restriction without evidence of a confirmed harm arising from the expression underlying the speech restriction.

On the other hand, the opinions in *Bridges*, the *Pentagon Papers* case and *Cantwell v. Connecticut*—all falling within those opinions initially decided within each of the categories applying the clear-and-present-danger test and involving extremely divergent governmental stakes—indicate a willingness to defer to legislative authority upon different circumstances—each of those rejected such a standard in favor of protecting the defendant’s speech despite the legislature’s determination of an evil of a specific character arising from the expression.

Broader review of the case law falling under the “dangerous information” designation reveals this trend may apply more broadly. Indeed, although the Court applied the clear-and-present-danger test across the broad categories—at least initially—all four categories of speech (incitement to unlawful action, speech that threatens, speech provoking a hostile audience reaction and disclosure of dangerous information), it has not upheld a conviction for a speaker’s utterances since *Feiner v. New York*, and even that opinion has been criticized and severely limited to the facts underlying the majority opinion. In many instances, the Court designated circumstances, which did not exist in the case at hand, as potentially providing the facts that would justify a conviction, but did chose not rule against the speaker given the facts before it.

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126 *Bridges* indicated a statute with a legislative declaration indicating that such statements were dangerous would be upheld, but that the law’s reliance on the common law presumption required the Court to overturn the conviction. Cantwell similar suggested that the Jesse Cantwell’s speech would be protected under a statute that was not narrowly tailored to preventing only speech constituting a clear and present danger to peace and safety on the public streets. Yet, the opinion indicated that upon different facts, his speech might not have been protected. Moreover, *New York Times v. United States* indicated that “only governmental allegation of proof that publication must inevitably, directly, or immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea would be worthy of upholding a prior restraint on the press.
In at least three cases (*Watts v. United States*, *NAACP v. Claiborne Hardware*, *Snyder v. Phelps*), the Court set forth several factors it would evaluate in evaluating the constitutionality of the government speech restriction, but neither are these opinions broadly conjoined by the type of speech involved or the governmental interest at stake. *Watts* and *Claiborne Hardware* both fall under the category of “speech that threatens.” While acknowledging the existence of the unprotected category of “true threats,” both opinions found the threatening or coercive expression communicated by the speaker could not be banned solely upon a finding a specific type of expression was used. It did not reject the category of “true threats” but simply found the category did not apply to the facts at hand.

Contrastingly, *Snyder* involved speech provoking a hostile audience reaction. While numerous causes of action were advanced by the plaintiff, similar to *Claiborne*, the claim actually reviewed by the Court was founded in tort law (*Snyder*: intentional infliction of emotional distress; *Claiborne*: malicious interference with businesses practices). While involving separate categories of expression, all could be said to involve speech that could be deemed offensive. Alternatively, while the Court has broadly proliferated the speech cannot be restricted because of its alleged offensiveness, the Court has often times prohibited speech based on just that rationale.

Review of these opinions finds no similarity in the governmental interest alleged. *Snyder* involved government interest in compensating private individuals for emotional injury. *Claiborne* involved governmental allegations of economic harm caused to certain merchants as a result of a boycott. Lastly, *Watts* concerned the physical safety of the
chief executive and allowing him to perform his duties free of interference from threats of physical violence.

Future research should examine how subsequent Supreme Court cases involving First Amendment speech factor into the typology proposed by this study—whether they extend or reject the evidentiary burden proposed by the typology to be applied in instances involving certain types of speech and governmental harms—and how these cases impact the Court’s potential trajectory toward the imposition of empirical evidentiary burdens. In these instances, the inductive establishment of an evidentiary burden may only be based on the Court’s prior evaluation and assessment of the evidentiary burden of a “similar” case, whether because of the: 1) government interests involved (Bridges, Cantwell), or 2) variety of the speech involved (Young v. American Mini Theatres, Inc., City of Renton v. Playtime Theatres Inc., and City of Los Angeles v. Alameda Books, Inc.). Alternatively, it may be, as was suggested earlier in this study, the First Amendment law has never settled any on systematic analytic approach to the assessment of an evidentiary burden.
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Constitutions
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