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The Architecture of First Amendment Free Speech

Edward J. Eberle
Roger Williams University School of Law

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Free speech has evolved into a highly complicated body of law. At the advent of the Supreme Court's entry into Free Speech jurisprudence, starting in the early 20th century,[1] speech was measured according to a two-level theory: speech was either protected or not. Under the two-level theory articulated prominently in Chaplinsky v. New Hampshire, speech was protected unless it fell within one of those "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." [2] These exceptions included "the lewd and the obscene, the profane, the libelous, and the insulting or 'fighting words. . . .'"[3] With the Court's reconception of Free Speech jurisprudence in the second half of the 20th century, however, most of the exceptions noted in *Chaplinsky* have been reconfigured, with most now meriting some constitutional protection.[4] Of

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*Distinguished Research Professor of Law, Roger Williams University School of Law.

[1]Compare Schenck v. United States, 249 U.S. 47 (1919) with Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[2]315 U.S. 568, 571-72 (1942). See also Harry Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 10 (articulating 2-level theory).

[3]Chaplinsky, 315 U.S at 572.

[4]For reevaluation of "the lewd and obscene," see Roth v. United States, 354 U.S. 476, 484 (1957)(holding obscenity unprotected and specifying the test to be "whether to the average

person, applying contemporary community standards, the dominant theme of the material taken

as a whole appeals to the prurient interest"); Miller v. California, 413 U.S. 15, 24 (1974)(rejecting the *Roth* standard and imposing a narrower, three-part test). For reconsideration

of “the profane,” see Erznoznik v. City of Jackonville, 422 U.S. 205, 213-14 (1975)(holding ordinance prohibiting outdoor exhibition of films containing nudity overinclusive) and Cohen v. California, 403 U.S. 15, 26 (1971)(reversing disturbing the peace conviction based on defendants’s wearing a jacket emblazoned with the words “Fuck the Draft” because doing so was

the exceptions mentioned in *Chaplinsky,* only obscenity[5] and fighting words[6] yet remain wholly

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"speech" rather than "offensive conduct"). For an illustration of change with respect to "the libelous," see New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). For reevaluation of "insulting or 'fighting' words," see Hess v. Indiana, 414 U.S. 105, 108 (1973)(per curiam); Cohen, 403 U.S. at 20.

[5]Under *Miller*, 413 U.S. at 24, obscenity must meet these guidelines "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently

unprotected categories of speech, subject to the Court's narrowing of their definitions.

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offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (citations omitted).

[6]Under *Cohen,* 403 U.S. at 20, fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction."

The explanation for this change in the state of law is the Court's recognition of Free Speech as a fundamental right (Free Speech being the vanguard of the 20th century fundamental rights project),[7] and its prioritization of Free Speech as the most prized of these rights.[8] With its prioritization of Free Speech, the Court has reevaluated how it views acts of communication, concentrating fundamentally on whether the act possesses communicative qualities, and less on what baggage in the form of conduct, harm or disruption the act carries. Stated a different way, if the act contains communicative qualities, it constitutes Free Speech, and then the Court can move to the next question as to how to balance Free Speech concerns with those of the baggage implicated by nonspeech components.

The ever expanding range of communicative matter grouped within the circumference of the First Amendment carries with it its own innate tensions, contradictions and ambiguities, matters arising from the relationship of the communicative matter to social reality that must be assessed and then sorted out. These tensions pose great challenges to the substance and stability of the First Amendment and to our reasoning capabilities.[9] How is fringe speech (like pornography or corporate and securities speech) to be treated in relation to core speech (such as political, religious, artistic or scientific speech)? Can these different categories of speech be adequately defined and their range delineated? Assuming the difficult, if not quixotic, task of

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[7]Free Speech was the first civil right to be incorporated into the 14th amendment and made applicable to the states. Gitlow v. New York, 268 U.S. 652 (1925).

[8]See, e.g., R.A.V. v. St. Paul, 505 U.S. 377 (1992)(Free Speech trumps Equal Protection).

[9]Edward J. Eberle, Hate Speech, Offensive Speech and Public Discourse in America, 29 Wake Forest L. Rev. 1135, 1151 (1994)(hereinafter "WF").

precise definition of categories can be accomplished, can the varying levels of protection accorded different categories of speech be distinguished from one another so that the First Amendment has coherence and stability. One danger is that of doctrinal "dilution . . . by a leveling process, of the force of the Amendment's guarantee."[10] Under doctrinal dilution core areas of speech might be judged by levels of protection afforded intermediate or low-ranked categories of speech. An example would be where the rule of intermediate scrutiny applicable to commercial speech would then be applied to political speech, which merits strict scrutiny. The process can also work the other way: lower valued categories of speech could be leveled up to rules of protection appropriate to higher valued categories. An example would be in R.A.V. v. St. Paul,[11] where the Court applied the rule of strict scrutiny appropriate to core categories of speech to an unprotected category of speech, in this case fighting words.

These are problems of the architecture of First Amendment Free Speech law. There is a need for a coherent structure to Free Speech law that can provide a sound foundation to judge and settle the issues of Free Speech. An important part of the foundation is the articulation of clear definitions and applicable rules that can demarcate the differently valued categories of speech and, then, assign them the appropriate level of protection. The two-level protection theory of speech articulated in *Chaplinsky* has been replaced by what is now a four-level theory of speech: high, intermediate, low and minimally valued speech. This is an inevitable consequence of the Court's expansion of the range of communicative matter included within the First Amendment. But with expansion of the Amendment comes the need for coherence in the structure and

[10]Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[11]505 U.S. 377 (1992).

methodology of Free Speech. And that states the purpose of this article: assessing, fashioning and stabilizing the architecture of the First Amendment in order to lend coherence to Free Speech law.

The article proceeds as follows: Part I describes briefly the methodology of Free Speech analysis. Free Speech is presumptively protected absent clear demonstration of concrete harm independent from the speech. This is so as a matter of constitutional text and prioritization of liberty, which structurally operates as the default rule, empowering people so that they may influence the tenor of the democracy and the culture. Part II describes why we must bring coherence to Free Speech law. Part III sets forth the rules that comprise the architecture of the First Amendment. We must determine how to value and order speech once it is determined to merit protection under the First Amendment. The value of speech must be justified by its intrinsic or instrumental worth, and its relation to conduct or harm as measured by a speech/conduct dichotomy. Free Speech should then be ordered as follows. High valued or core speech should be accorded the highest level of protection under the most exacting scrutiny, conventionally phrased as strict scrutiny analysis. Intermediate valued speech should be accorded heightened scrutiny as well, but less probing than strict scrutiny; normally intermediate scrutiny is appropriate. Low valued speech should be judged on an ad hoc balancing review. And minimally valued speech, which lies outside the First Amendment, merits minimal level rational basis review. Establishing and maintaining the architecture of the First Amendment is crucial to the Free Speech project. But, of course, we must also recognize that architecture is only as good as the foundation; the foundation must be solid and able to deal with the fluidity of changing socio-economic dynamics. This architecture, as any architecture, must be situated to withstand the pressures of social forces and adjust to the times.

I. Free Speech as a Preferred Value

Free Speech is properly one of the seminal values of the American constitutional order. This is so as a matter of constitutional text, the autonomy of the individual and the promotion of democracy, among other reasons. The textual mandate of the Free Speech Clause, providing that "Congress shall make no law . . . abridging the freedom of speech,"[12] reasonably yields an absolutist orientation.[13] No textual limitation of speech is present in the Constitution. The absolutist orientation of the Free Speech Clause contrasts with the circumscription of communication freedoms typical of European constitutions.[14] Text matters, especially given the

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[12]U.S. Const. amend. I. In this article, I only consider the Free Speech Clause.

[13]Edward J. Eberle, Cross Burning, Hate Speech and Free Speech in American, 36 Ariz. St. L. J.953, 958 (2004)(hereinafter "ASU'). Justice Black captured the sense of the amendment about right: "The phrase 'Congress shall make no law' is composed of plain words, easily understood . . . [T]he language [is] absolute." Hugo L. Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865, 874 (1960).

[14]*See, e.g.,* European Convention for the Protection of Human Rights and Fundamental Freedoms, article 10

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and

sparsely worded U.S. Constitution,"[15] which contrasts with the greater length of most European

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responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

See also Basic Law for the Federal Republic of Germany, article 5

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.

(3)Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

[15]Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)("It cannot be presumed that any clause in the constitution is intended to be without effect. . . .").

constitutions.[16] The placement of speech as an enumerated right without limitation in the Constitution structurally suggests that protection of speech is presumptively favored.

It is also true, of course, that Free Speech has never been interpreted to protect absolutely all expression, with justification. Speech must be regulated, in instances, to prevent serious harm to people or society and when it violates the rights of others. Still, free speech is one of the essential natural rights on which the U.S. constitutional order is founded. In this respect, the Free Speech Clause preserves the autonomy of a person as it protects and preserves the capacity of a person to control her thought process and engage in expression according to her motivations.[17] Free Speech is also fundamental because free thought and dissemination of ideas is crucial to the formation and facilitation of democracy and the culture.[18]

Given its place as a preferred fundamental right, we must turn to the question of determining the scope of Free Speech rights. To do this, we must determine what is speech. The definition of speech turns on whether the act under review possesses communicative qualities. Speech is expression, the communication of information about something. To be protected constitutionally, the act must possess sufficient communicative qualities.[19] Inevitably, what quantum of communicative material must be present to merit constitutional protection is an

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[16]For example, the German Constitution (Grundgesetz) is 83 pages long in its 1991 official version pocket book form.

[17]Edward J. Eberle, Cross Burning, Hate Speech and Free Speech in American, 36 Ariz. St. L. J.953, 959 (2004)(hereinafter "ASU').

[18]For extended discussion of this, see id at 959-61.

[19]Id. at 964.

exercise of judgment.[20]

The Court has framed the relevant inquiry well. "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[21] The Court's simple focus on the communicative act, both from the standpoint of the speaker and the listener, is a sound way to frame the inquiry into speech. "Message" is best left as an open term, not packed with a particular content, such as, for example, intellectual, artistic or entertainment

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[20]Judicial decision-making is, at bottom, a process of "reasoned judgment," as the Court explained in Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992)(plurality).

> At its best, judicial reasoning is a form of pragmatic reasoning, entailing careful deduction from general standards to specific cases; paying attention to history, tradition and context, being skeptical of rigid dichotomies; exhibiting faith in dialogue and deliberation; and appreciating the human component of decision-making.

Edward J. Eberle, The Right to Information Self-Determination, 2001 Utah L. Rev. 965, 1011.

[21]Texas v. Johnson, 491 U.S. 397, 404 (1989)(quoting Spence v. Washington, 418 U.S. 405, 410-11(1974)). Relevant to determination of constitutional protection is whether the communicative qualities present are related to the principles that justify treatment of speech as protected under the First Amendment, justifications like pursuit of knowledge, self-expression or self-government. Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vanderbilt L. Rev. 265, 290 (1981).

qualities. Rather, the inquiry should be possession of "communicative qualities." The speaker and/or the listener will themselves determine what are relevant communicative qualities for their purposes. The role of the courts is simply to judge whether the communicative qualities, of whatever sort, are adequate for First Amendment purposes, as a judgement of law.

The qualities of communication satisfactory for First Amendment purposes should be considered broad, as broad as speakers and/or listeners determine. After all, Free Speech is a protected zone of freedom, and it is up to people to determine the domain of Free Speech, not government. Free speech can partake of rational components of the human condition, such as over politics, science, literature or academics. Free speech can as well partake of more irrational domains of human existence, such as over religion, art, emotion, sense or feelings. Since Free Speech is, at bottom, a reflection of the human condition in all of its dimensions, it is as varied as the human condition and should be protected in accordance with its variety. Justice Harlan well spoke to this element of the First Amendment:

> much linguistic expression serves a dual communicative function; it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be

communicated.[22]

Likewise, the medium of communication can be varied, consisting of standard forms of communication, like speaking, writing or reading. But communication can consist of more unorthodox medium too, like conduct, symbols, pictures or silence. Again, what is relevant, simply, is that the behavior in question possess sufficient communicative qualities. Speaker and/or listener will determine the nature and form of expression.

Here too the Court, appropriately, has demonstrated how to meticulously evaluate behavior so that all possible communicative value may be gleaned. R.A.V. v. St. Paul[23] is a good example of this approach. Here the Court evaluated actions involving the erection and placement of a cross assembled from the parts of a broken chair and then carried into a neighbor's yard and set aflame to determine what was speech and what was conduct. The Court scrutinized the actions element by element, and not as undifferentiated wholes, to determine whether and which elements merited First Amendment protection and which did not. The focus of the Court's inquiry was whether the element under review possessed sufficient communicative qualities. The Court determined that the burning of the constructed cross possessed sufficient communicative

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[22]Cohen v. California, 403 U.S. 15, 25-26 (1971). *See also Bery*, 97 F.3d at 695 ("written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. . . . Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished.").

[23]505 U.S. 377 (1992).

qualities as a message of hate. Constitutionality then hinged on the motives of government: did government act based on speech (which is presumptively unconstitutional) or conduct (which is the proper domain of government). In *R.A.V.*, there were both speech elements (hate speech) and conduct elements (trespass, arson, threat). In R.A.V., the Court determined that the City of St. Paul acted on speech motives in applying a content-discriminatory fighting words ordinance, which the Court found unconstitutional.[24] The Court's approach of microevaluating actions, element by element, for sufficient expressive properties is a sound methodology for approaching Free Speech questions. Speech qualities must be assessed quite carefully to squeeze out whatever value can be obtained so that people can self-determine the course of their lives to the extent possible.

R.A.V. is illustrative of the Court's quest over the last 50 years to broaden the domain of protected speech under the First Amendment. *R.A.V.* is one of the more extreme examples of this broadening enterprise of the Court. After all, the speech under review, fighting words, is an unprotected category of speech since its inception in Chaplinsky v. New Hampshire.[25] Nevertheless, the Court applied an exacting form of strict scrutiny to the fighting words under review because it found the fighting words ordinance to be content-based and, worse, viewpoint-based.[26] *R.A.V.* is also illustrative of a second major enterprise of the Court with respect to the

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[24]*R.A.V*, 505 U.S. at 379, 380, 393-96. For extended discussion of this view of *R.A.V.*, see Eberle, WF, supra note , at 1152-54.

[25]315 U.S. 568 (1942).

[26]*R.A.V.* 505 U.S. at 393-96. For evaluation of these aspects of *R.A.V,* see Eberle, WF,. supra note , at 1142-43, 1154-58.

Free Speech project, initiated by the Warren Court in the 1960s: "narrowing [of] the scope of traditional categorical exceptions,"[27] as measured against the baseline of the 1942 world of *Chaplinsky.*

In broadening the scope of protected Free Speech, the Court has accorded constitutional protection to these previously unprotected categories of speech: commercial speech,[28] the lewd or profane,[29] and offensive speech.[30] The Court has also reconsidered the range of previously unprotected categories of speech and accorded certain constitutional protection to them; these include pornography,[31] libel[32] and incitement to violence.[33] The Court has also recognized new

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[27]*R.A.V.,* 505 U.S. at 383.

[28]*Compare* Virginia State Board of Pharmacy v. Virginia, 425 U.S. 748 (1976)(commercial speech protected) *with* Valentine v. Chrestensen, 316 U.S. 52 (1942)(commercial speech unprotected)..

[29]Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

[30]Cohen v. California, 403 U.S. 15 (1971).

[31]Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957)(adult speech is protected unless meets definition of obscenity).

[32]New York Times Co.v. Sullivan, 376 U.S. 254 (1964)(defamatory speech directed against public people protected unless meets definition of actual malice.).

[33]Brandenburg v. Ohio, 395 U.S.444, 447(1969)(all advocacy protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

forms of protected speech, including flag burning,[34] internet speech,[35] and nude dancing.[36] The enterprise of broadening the reach of the First Amendment reflects a commitment to enlarging the channels of communication as much as possible so that people may have as much information as possible to self-govern their lives.[37] This is in line with the Constitutional commitment to limitation of government as a structural way to empower personal liberty. In the area of Free Speech, this is a matter of fundamental rights.

In keeping with its mission to enlarge the scope of the First Amendment, the Court has also actively narrowed the range of traditional categories of unprotected speech. Notable topics of this narrowing exercise include fighting words,[38] libel,[39] and obscenity.[40] The apex of this

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[34]United States v. Eichman, 496 U.S. 310 (1990);Texas v. Johnson, 491 U.S. 397 (1989); Street v. New York, 394 U.S. 576 (1969).

[35]Reno v. ACLU, 521 U.S. 844 (1997).

[36]Barnes v. Glenn Theater, 501 U.S. 560 (1991).

[37]Thornhill v. Alabama, 310 U.S. 88, 102 (1940)("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

[38]Cohen v. California, 403 U.S. at 20 ("'fighting words' [are] those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.")(redefining test for fighting words set out in *Chaplinsky*).

[39]New York Times Co.v. Sullivan, 376 U.S. 254 (1964)(redrawing notions of libel and

movement, in recent time, is R.A.V. v. St. Paul, where the Court reconceived the idea of unprotected categories of speech.

> [S]tatements [concerning unprotected categories] must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all," . . . . What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)–not that they are categories of speech entirely invisible to the Constitution, so that they be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government. . . . It is not true that "fighting words" have at most a "*de minimis"* expressive content . . . or that their content is *in all respects* "worthless and undeserving of constitutional protection," . . . sometimes they are quite expressive indeed.[41]

Relevant to an action, simply, is whether it possesses communicative qualities. If it does in sufficient quantity, the act should be protected under the First Amendment. A separate inquiry is whether the act also contains proscribable content. Under this methodology, acts must be viewed microscopically, element by element, so that protected speech can be separated from legitimate harms. The broad dichotomy between speech (protected) and conduct (unprotected) is a useful guide to make this distinction, as discussed further later.

A final movement toward enlarging the scope of the First Amendment has been the

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defamatory speech that are unprotected; for public people, libel directed against them is protected unless meets definition of actual malice.).

[40]Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957)(narrowing definition of proscribable obscenity).

[41]*R.A.V.* 505 U.S. at 383-85 (citations omitted).

Court's reluctance to recognize new categories of unprotected speech. The Court has rejected these candidates of unprotected speech: flag burning,[42] outrageous and intentional infliction of emotional distress,[43] a vice and temperance exception [44] and virtual child pornography.[45] The only category of unprotected speech recognized in recent time is that for child pornography.[46] Child pornography constitutes a category of unprotected speech because "use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," and because "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children. . . ."[47] Child pornography is unprotected speech because there is a clear demonstration of serious harm that is independent of the speech.

Together, these three movements–broadening the reach of protected speech, narrowing the categories of unprotected speech, and presumptively rejecting new candidates of unprotected speech–are of a like purpose. They are all part of the modern Free Speech project of enlarging the scope of the First Amendment so that members of society have as much information available as is possible to direct their lives. More needs to be done here, of course. A crucial next project is

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[42]United States v. Eichman, 496 U.S. 310 (1990);Texas v. Johnson, 491 U.S. 397 (1989); Street v. New York, 394 U.S. 576 (1969).

[43]Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[44]44 LiquorMart, Inc. v. Rhode Island, 517 U.S. 484, 513-14 (1996)(plurality).

[45]Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

[46]New York v. Ferber, 458 U.S. 747 (1982).

[47]Id. at

enlarging even further the circumference of the Amendment. The frontier of this enterprise is likely to lie with respect to fringe speech, like pornography/obscenity, workplace speech, money donations to campaigns, video games and expanded professional communications and business, corporate and securities speech that might fit within the definition of commercial speech.[48] Consideration of speech at the fringe will, no doubt, push further the inquiry into resolving the tensions inherent in the interaction of communication with social reality.[49] This project will inevitably present challenges to the coherence of Free Speech law and to our reasoning capabilities.[50] But consideration of fringe speech is a topic for another day.

For our purposes, the result of the Court's handiwork is that the general rule of Free Speech jurisprudence is that Free Speech is presumptively protected unless government can persuasively prove the presence of a clear and present harm independent of the speech, as in the case of *Ferber's* recognition of child pornography as unprotected speech. Governmental targeting of harm that is purely communicative is presumptively unconstitutional. The harm government targets must be noncommunicative harm, such as child pornography. Identification and isolation of harm from speech is another central focus of the Free Speech project.

Of course, many actions contain both communicative and noncommunicative content. A good example is, again, *R.A.V.* Cross burning can be communicative (hate) and behavioral

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[48]Eberle, WF, supra note , at 1150-51; Eberle, ASU, supra note , at 969-971. Frederick Schauer, Commercial Speech and the Architecture of the First Amendment, 56 Cinn. L. Rev. 1181, 1183-85, 1201 n.78 (1988).

[49]Eberle, ASU, supra note , at 970.

[50]Eberle, WF, supra note , at 1151.

(arson, assault and battery, threat, intimidation). Resolution of such mixed speech/conduct acts are not easy and call for quite careful consideration of the values at issue.[51] A useful rubric to measure acts of asserted communication is the speech (protected)/conduct(unprotected) dichotomy. Speech, of course, is presumptively off limits to government. We might consider guarantee of Free Speech to be an end point of government, a limitation of government power. Instead, conduct is the proper domain of government.[52]

With these modern rules of Free Speech in place, we are left with another challenge: making sense of the complexity of the modern First Amendment. The Court's expansion of the scope of the Amendment has brought in more and more communicative content to the domain of Free Speech. This has raised its own set of problems. How do you value speech? Is one category of speech to be valued as another? Alternatively, should varieties of speech be valued differently? If so, how and on what basis? What rules of law should apply to different ordered speech? These are just some of the questions that comprise our next topic: the architecture of the First Amendment.

II. The Need for Coherence in First Amendment Law

Enlarging the scope of Free Speech protected within the First Amendment is a noteworthy enterprise, and a major accomplishment of the 20th century Court. But expansion of the

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[51]For detailed evaluation of this issue, see Eberle, ASU, supra note ; Eberle, WF, supra note .

[52]Of course, the speech/conduct dichotomy is a largely pragmatic distinction, a guide to make hard decisions. For consideration of this, see Eberle, ASU, supra note , at 964-65; Eberle, WF, supra note , at 1193-94.

Amendment brings its own set of problems. It is one thing to apply the simple 1942 two-level rule of *Chaplinsky*: speech is either protected or not. It is quite a bit more complicated to, first, determine if speech is protected and, second, then to determine what level of protection it merits. This is one of the problems we now face in constructing and stabilizing the architecture of the First Amendment.

Speech, of course, is multi various. Different forms of speech address different dimensions of human thought. Political speech speaks to our desire to affect public policy and the character of the society we live in. Religious speech speaks to the transcendental yearning we experience (or do not experience) beyond the here-and-now of ordinary existence. Academic or scientific speech speaks to our search for pure truth, trying to understand, devise or reformulate the facts or rules that constitute the paradigms that comprise the world we live in.[53] Commercial speech speaks to basic product and service information we need to navigate our consumer society. And so on.

All of these forms of speech, and more, justifiably merit protection under the First Amendment based upon Free Speech justifications, such as self-government, self-realization, autonomy or pursuit of truth, to name some of the panoply of Free Speech rationales. This exercise, of course, is implication of the *Chaplinsky* two-level theory of Free Speech; speech is protected or not. The more complicated question posed by the Court's expansion of the First Amendment is how to value different forms of speech, how to differentiate one form of speech from another, what rules of law to apply to them, and how to make sense of what is now a complicated First Amendment jurisprudence. These are the questions at issue in the architecture

[53]Edward J. Eberle, Art as Speech, U. Pa. J. of Law & Social Change (forthcoming)..

of the First Amendment.

We can think of the First Amendment as consisting of clusters of communicative content. Conventionally, the clusters are considered categories of speech, and this seems an appropriate term. A category demarcates a particular species of speech, which helps order thinking. Each of the categories consists of communication of a certain variety. And because speech is of different varieties, it may be valued differently. Under the current state of the law, we might think of four levels of valuation. First-order speech consists of the central core of the First Amendment. Conventionally understood, core or first order speech consists of political, religious, academic, scientific and artistic speech. New York Times Co. v. Sullivan identified the very center of the First Amendment as a subspecies of political speech: the ability to engage in "criticism of official conduct . . . [is] the central meaning of the First Amendment."[54] Second order speech is generally thought to be commercial speech, labor speech, [55] and offensive speech, especially of the kind

[54]376 U. S. at 273.

[55]Hughes v. Superior Court of California, 339 U.S. 460, 464-65 (1950)("But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'")(citations omitted); id. at 468 ("compulsive features inherent in picketing); Thornhill v. Alabama, 310 U.S. 88 (1940). Speech on labor matters is important even if motivated by economic concerns. Nevertheless, one could conclude, as Justice Brennan, that "[S]peech about commercial or economic matters, even if not directly implicating 'the central meaning of the First Amendment,' . . . is an important part of our public

that might violate substantial privacy interests.[56] Third level speech can be thought to include

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discourse." Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 787(1984)(Brennan, J., dissenting).

[56]The leading case here is Cohen v. California, 403 U.S. 15, 21 (1971), where the Court framed the rule: "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." This rule of *Cohen* is context, or a time, place, manner restriction, not content-based regulation. If the regulation is content-based, as the facts in *Cohen*, then strict scrutiny seemingly applies. "It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense." Id. at 26. In *Cohen*, of course, the speaker expressed his disgust with the Vietnam War by wearing a jacket that displayed "Fuck the Draft" on the back. Thus, this communicative act was politically motivated and plausibly, therefore, constituted core political speech. Under this analysis, the content of speech was political. What was at issue was the mode of communication--that is, the use of an epithet to convey the message. Accord, Erznozick v. Jacksonville, 422 U.S. 205, 219 (1975)("We hold only that the present ordinance [regulating films that display nudity] does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression.").

Of course, speech that merely offends, without more, might be hard to value as core speech. Second level speech would seem a more appropriate category.

private speech, including private defamatory speech,[57] pornography or adult oriented speech,[58] libel directed against private people,[59] speech publicizing actions of private citizens implicating privacy interests,[60] offensive speech in restrictive forums[61] and nude dancing.[62] Fourth level and

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[57]Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 759-60 (1985)("In contrast, speech on matters of purely private concern is of less First Amendment concern. . . . While such speech is not totally unprotected by the First Amendment . . . its protections are less stringent.").

[58]Young v. American Mini Theatres, Inc. 427 U.S. 50, 70-71 (1976)(plurality)(social interest in nonobscene erotic films of lesser importance than interest in political debate). "[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . " Id. at 70.

[59]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[60]Zacchini v. Scripss-Howard Broadcasting Co., 433 U.S. 562 (1977)(First Amendment media right to publicity may have to yield to privacy interest in securing ability to earn a living); Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975).

[61]Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978)(radio as restricted medium justifies greater regulation).

[62]Erie v. Paps A.M., 529 U.S. 277, 289 (2000)("As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."); Barnes v. Glenn Theater, 501 U.S.560 (1991)(plurality). In *Erie,* the Court extended the "secondary effects" analysis applicable

unprotected speech includes categories like obscenity,[63] actual malice defamation,[64] fighting words,[65] incitement to violence,[66] false facts[67] and child pornography.[68]

Each of these levels of speech is not fixed. New species of communication can be valued as meeting any one of the four levels or, even, a new level. Existing categories of speech can be revalued, higher or lower. The process of valuation proceeds in conjunction with the flow of social reality. This is a living, organic process, not a fixed end point. Whatever framework for Free Speech is established, it must be secure, and yet flexible, to adapt to the changes brought about through the dynamics of social-reality.

The problem now posed is how to differentiate these four levels of speech from one another. Differentiating levels of speech from one another is crucial to the Free Speech project in

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to zoning of adult entertainment facilities, as in *Young,* to nude dancing. In essence, the Court applied the less stringent content-neutral test of United States v. O'Brien, 391 U.S. 367, 377 (1968), to nude dancing. The Court's analysis demonstrates the difficulty of making judgements about qualities, varieties and treatment of species of speech. In fact, the Court's choice to apply the more lenient standard of *O'Brien* may have been its way of recognizing the lesser value of adult speech and nude dancing.

[63]Miller v. California, 413 U.S. 15 (1973).

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

[65]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[66]Brandenburg v. Ohio, 395 U.S. 444 (1969).

[67]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[68]New York v. Ferber, 458 U.S. 747 (1982).

order to assure that there is integrity and coherence to the First Amendment. A particular problem to be on guard for is a blending of different valued categories of speech that might occur by blurring the lines between differently valued categories of speech. For example, is money spent to promote a certain good or service political or social speech, on the one hand, or commercial speech on the other? Merging of categories of differently value speech might occur in two ways. One, the rules of lower-valued speech might be applied to speech that is higher valued. This is the critical problem of doctrinal dilution, by which higher valued speech is diminished by the misapplication of norms appropriate to lower valued speech.[69] The process could also go the other way: lower-ranked speech might be judged by the rules applicable to higher-ranked speech. *R.A.V.* is an example of this: judging fighting words, an unprotected category of speech, by the rules of strict scrutiny applicable to core speech. These are the critical questions of architecture that need to be worked out in order to preserve the integrity of the First Amendment.

Several rubrics are central to establishing the architecture. First, there is a need for clear definition as to what constitutes a category of speech. Second, the speech must be evaluated according to central justifications of free speech in order to assign the proper level of valuation of the speech. Once this is done, a third rubric is employment of lexicographical reasoning, which calls for a lexical or serial ordering of values.[70] The methodology of lexical reasoning will be quite helpful in lending coherence to Free Speech. Fourth, and finally, rules of judicial scrutiny must be clarified and assigned to the differently valued levels of speech so that differently valued

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[69]Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[70]William D. Ross, The Right and the Good 43 (1930), discussed in Eberle, CW, supra note , at 434-35.

speech can be demarcated from each other under appropriate rules of law. In this way, we can establish and maintain a certain coherence to Free Speech law.

III. The Architecture of the First Amendment

A. Defining Categories of Speech

The first question critical to the architecture of Free Speech is defining with precision a category of speech. When faced with a question of what to do with a species of protected speech, we must determine what kind of speech it is. Much rides on this initial value judgement. Is the speech in question protected or unprotected. If protected, what form of protected speech is it? Likewise, if unprotected, what form of unprotected speech is it? Is the communicative conduct susceptible to multiple interpretations? For example, could the communicative behavior exhibit more than one form of protected/unprotected forms of speech? If so, parts of the cluster of communicative activity may be protected speech. Protected speech could consist of communication involving protected categories of multiple types. Still other parts of the communicative activity might be unprotected. All of these judgements turn on the core question of how to value the communication at issue and judge it according to accepted speech criterion. For this, precise definition of the category of speech is essential, at least as is reasonably possible. We must all acknowledge that our thinking capabilities are not perfect, and this applies to fixing categories too.[71] We can only do the best we can.

Definition of core categories of protected speech is especially crucial because core speech is the very essence of what the First Amendment protects. For example, political speech partakes

[71]Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vanderbilt L. Rev. 265, 280-81 (1981).

of our desire to speak out and affect public policy and the tenor of the society we live in. In Hustler Magazine v. Falwell, the Court framed the definition of political speech well, as concerning discussion of "ideas and opinions on matters of public interest and opinion."[72] In Dun & Bradstreet, Inc. v. Greenmoss Builders, the Court articulated the definition of political speech more simply: "It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'"[73] The definition set forth in *Hustler Magazine* captures the important domain of public discourse, but it also serves as a ready definition of political speech more broadly. Under the definition, any discussion of any idea or opinion on any matter of public interest or opinion should be considered political speech, as engagement in political speech is essential to the lifeblood of democracy.

Religious speech is that which concerns people's discussion of God or other transcendental yearning of what is beyond the experience of normal, ordinary existence. Settling the concept of what is religious in a legal, not theological sense, is a necessary, but not easy determination. A look at Free Exercise law can be a useful starting point.

There are at least two approaches. In Wisconsin v. Yoder, the Court took a more conventional, established approach to defining religion. Amish belief was religious because it entailed a theocratic view "of deep religious conviction, shared by an organized group, and intimately related to daily living."[74] The *Yoder* definition works well for conventional

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[72]Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).

[73]472 U.S. 749, 758-59 (1985), *citing* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) *and* Thornhill v. Alabama, 310 U.S. 88, 101 (1940).

[74]Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

conceptions of religion. But it excludes the wide range of unconventional practitioners of religion present in the United States. A more accommodating definition of religion can be gleaned from United States v. Seeger, where the Court fixed the standard for judging Congressional exemption from military service as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God."[75] Synthesizing both of these definitions may provide a more realistic, and workable, definition of religious speech. For example, perhaps religious speech can be defined as speech concerning: a sincere and meaningful belief which occupies in the life of its possessor a crucial place intimately related to daily living. There might be other ways of defining religious speech. This question, as so many in Free Speech law, calls for careful working out through the hard crucibles of common law decision making.

Scientific or academic speech is that which involves the pursuit of knowledge. More precisely, we can think of scientific speech as that which advances the pursuit of knowledge that comprise the paradigms that organize the world we live in. The Court has not yet settled on a precise definition of scientific speech and so my definition can stand as a working definition for scrutiny and comment as we work to settle on a precise definition.

The same can be said for artistic speech, where the Court has not provided a workable definition yet as well. I offer this definition of artistic speech in the interim: "artistic speech is the autonomous use of the artist's creative process to make and fashion form, color, symbol, image, movement or other communication of meaning that is made manifest in a tangible medium."[76]

More work must be done to frame and tighten these definitions of core categories of

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[75]United States v. Seeger, 380 U.S. 163, 176 (1965).

[76]Edward J. Eberle, Art as Speech, U. Pa. J. of Law & Social Change (forthcoming)..

speech. The hard facts of cases will provide ample opportunity to flesh out workable definitions of categories of speech, and then test them through experience in order to delineate more precisely their boundaries. However this is done, safeguarding the central core of Free Speech is the most urgent matter in Free Speech law because core speech is most central to our daily lives and the functioning of the democracy.

The same process of definition applies to species of speech that are not core or first order categories. There are a range of types of speech that fit within second order, third order and, lastly, fourth order or unprotected categories of speech that also call for precise definition. There is not space in this article to methodically go through and define all possible categories of speech. Instead, we will consider a few examples of defining a species of speech that comprises a category to illustrate the process. The process of definition is even more important for categories of speech that are not first order or core speech because of the need to differentiate with clarity a lower ranked category from that of core speech and, thereby again, safeguard core speech..

Let us start with second order speech because that presents all the crucial questions central to the architecture of the First Amendment: protecting speech that is valued, but valued less highly than core speech. Precision in definition is crucial in order to avoid the danger of doctrinal confusion: of valuing a category of speech either too highly or too lowly and thus assigning it too much or too little constitutional protection. Such doctrinal confusion can seep into other categories of speech, upsetting settled expectations, and undermining the cohesion of the First Amendment.

The Court was first presented with this dilemma when it reconsidered the status of commercial speech in 1976, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer

Council, Inc.[77] Prior to *Virginia Pharmacy Board,* commercial speech was unprotected speech.[78] Determining that commercial speech should now be protected speech because, under conventional Free Speech justifications, commercial speech is an exposition of an idea, facilitates speaker and listener interests and provides information, among other reasons, the Court was now faced with exactly what is commercial speech.[79] The Court came up with this simple definition of commercial speech: "speech which does 'no more than propose a commercial transaction.'"[80] Conventionally understood, commercial speech is commercial advertising. As Justice Blackmun wrote for the Court,

> Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particular newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."[81]

The Court's definition of commercial speech effectively specifies that commercial speech is and can only be commercial advertising–the selling of a product or service at a certain price--and not political speech, speech that editorializes, reports or opines on matters germane to the world,

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[77]425 U.S. 748 (1976).

[78]The seminal case establishing the unprotected status of commercial speech was Valentine v. Chrestensen, 316 U.S. 52 (1942), *o.r.* Village of Schaumberg v. Citizens for Better Environment, 444 U.S. 620 (1980).

[79]*Virginia Pharmacy Board,* 425 U.S. at 762-65.

[80]Id. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

[81]Id. at 761.

including commerce. This process of definition demonstrates the precision in word choice and content that is necessary to delineate different categories of speech.

Likewise, the Court has done a good job of delineating unprotected categories of speech. The process of defining unprotected categories of speech is especially important because it "usefully channels official attention away from regulating speech and toward regulation of those narrow categories of speech so imbued or closely linked with serious harm. . . . The narrow definitions of these unprotected categories are designed to tailor closely governmental regulation to the underlying harm. "[82]

For example, under Brandenburg v. Ohio, incitement can only be proscribed when the speaker intends to cause imminent unlawfulness and such unlawfulness is imminently likely to occur.[83] Fighting words are only "those personally abusive epithets which, when addressed to the ordinary citizen, are . . . inherently likely to provoke violent reaction;"[84] actual malice public

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[82]Edward J. Eberle, Cross Burning, Hate Speech and Free Speech in America, 36 Ariz. St. L. J. 953, 962 (2004).

[83]395 U.S 444, 447 (1969). The Court framed the incitement test as follows:

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

Id. at 447.

[84]Cohen v. California, 403 U.S. 15, 20 (1971), redefining test set out in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

defamation is statements made "with knowledge that it was false or with reckless disregard of whether it was false or not;"[85] and obscenity is

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest. . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[86]

Precise definition of categories of speech is an important first step in establishing the architecture of the First Amendment.

Especially important to the architecture of the First Amendment is clarity in constituting unprotected categories of speech. In these cases, the burden is on government to show clearly that the behavior at issue meets the burden of proof set forth in the tests for unprotected categories of speech. This centrally directs official attention to proving the elements that comprise harm, separate and apart from the speech. If government cannot make its case, the speech in question is protected. Unprotected categories of speech operate, in essence, as default rules: prove your case

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[85]New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

[86]Miller v. California, 413 U.S. 15, 24 (1973). The best arguments for treatment of obscenity as unprotected speech is: (1) it appeals to the sexual instinct and, thus, is more like conduct than speech, and (2) even if obscenity is speech, it is speech that is noncognitive. See Frederick Schauer, Speech and "Speech"–Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L. J. 899, 922, 925-929 (1979); Frederick Schuaer, Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity, 56 N. Car. L. Rev. 1,14-17 (1978). Thus, one might argue that such noncognitive speech has no relation to the First Amendment. Id.

or the speech is protected under the First Amendment.

Directing governmental attention to the harm in question has the added benefit of shifting the battle away from speech. Directing the battle over the meaning of speech to the outside of the circumference of the First Amendment helps protect speech because the gales and flurries can pummel the edge of protection instead of the central cores of communication. Fighting battles at the core must be guarded against at all costs, lest we erode our fundamental freedoms. In this manner, speech may be insulated, to a degree, from the motives and proclivities of authority. In effect, the role of government is cabined: prove harm independent of speech. Speech itself is for citizens to determine. We can see how these are crucial elements to the architecture of the First Amendment.

B. Establishing the Criterion for Justifying Speech

A second matter critical to establishing the architecture of the First Amendment is determining the proper valuation of the numerous varieties of protected speech. This assumes, of course, the first question in Free Speech analysis: is the speech protected or not? In assessing the value of speech for this question, our assumption is that it has already been determined that the speech is protected under the First Amendment. Being protected under the First Amendment, now we must determine what level of protection the speech in question merits.

To determine valuation of speech, we must establish a criterion that provides a sound and reasoned way of establishing the value of speech. I suggest two main rubrics to comprise this criterion. First, we must assess the value of speech. Second, we must measure the speech in question against the speech/conduct dichotomy. Neither of these is, of course, perfect. Any criterion is subject to interpretation, reassessment and refinement. Moreover, perhaps other

criterion might work as well. But the value of a criterion is that it provides a measure by which to assess speech and, thereby, provide a basis on which to make a judgement, lending a certain structure and coherence to the First Amendment. [87] Let me explain each of these rubrics, in turn, and then illustrate how they might be used to order the different valuations of speech.

1. value of speech

In providing content to the rubric of valuing speech, we must explain what is value as concerns speech. I suggest the key criterion in fixing a definition of value is the relevance of communicative activity to the human condition. Admittedly, this itself can be an obtuse and lengthy discourse on matters like meaning, existence or knowledge, topics well covered through the ages of philosophy. But I am looking for a more pragmatic rubric, one that can aid in the organization of different categories of speech.

One key criterion in establishing the value of speech is its relation to a person's capacity to develop his/her mental faculties and personality and to aid a person in the living of his/her life. After all, Free Speech is a preserve of personal freedom, shielded from government absent exigent circumstance, and participation in Free Speech is the central way people can develop their capacities and achieve personal identity so they can live as they like. In the mind, a person thinks, deliberates, forms ideas and plans of actions, and then voices and acts on those thoughts. We might think of the mind as the inner citadel of freedom, and that is why it is so essential to the human condition.

Certainly there might be other ways of framing this rubric. Development of mental capacities and personality has a certain resonance with theories of free speech famously

[87] John Rawls, A Theory of Justice 39 (1971).

articulated as ideas of "self-fulfillment,"[88] "self-realization,"[89] "liberty,"[90] or "autonomous self-determination."[91] All of these speak to the central concern of Free Speech: providing people with as much information as is possible to make sense of themselves, their world and human existence. Simply stated, speech is intricately related to the human condition in all of its dimensions. We ordinarily refer to these justifications of speech as deontological or nonconsequential because these justifications are valuable per se and do not depend on justification based on another value.

Free Speech also has an important role to play in addressing the human condition for the value it offers to purposes related to daily life. Most notable, Free Speech promotes the formation and structuring of the political will, a justification of speech resting on the idea of self-government or democracy.[92] Or speech may be instrumentally valuable for the pursuit of truth, knowledge or a better understanding of reality.[93] This variety of values is consequential or

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[88]Thomas Emerson, The System of Freedom of Expression 7 (1970).

[89]Martin Redish, Freedom of Expression: A Critical Analysis 30 (1984); Martin Redish, Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker, 130 U. Pa. L. Rev. 678, 679-80 (1982).

[90]C. Edwin Baker, Human Liberty and Freedom of Speech 47 (1989); C. Edwin Baker, Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech, 130 U. Pa. L. Rev. 646, 658 (1982).

[91]David Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 62 (1974).

[92]The classic work is Alexander Meiklejohn, Political Freedom (2d ed. 1965).

[93]Abrams v. United States, 250 U.S. 616, 630 (1919)(Holmes, J. dissenting).

instrumental because its value lies in the furthering of other ends. In sum, the value of speech can be measured both for its ability to aid the human condition (nonconsequential) and to further improvement of daily life (consequential).

Demonstration of how the first rubric of value based on, first, development of human capacity and personality (nonconsequential) and, second, aid in living (consequential) can be provided through illustration. Again, we resort to the core categories of speech, which are centrally related to development of human capacity and personality. For example, political speech is crucial to the ability of a person to be heard and valued as he or she thereby can affect the tenor of public policies and the character of the society we live in or hope to live in. These topics have a central impact on the human person and daily life. Religious speech address the transcendent. The spirit is a crucial element of human personality. Scientific speech involves the search for pure truth and is crucial to human existence because it helps develop the thinking capacities central to human existence and autonomy. Art speech partakes of the creative process central and unique to human existence. All of these core categories of speech are central components in the development of human capacities, such as thought, personality, awareness or identity.

Likewise, the core categories are centrally linked to promoting purposes crucial to daily life. For example, political speech furthers the marketplace of ideas critical to the fixing of public policies; religious speech is central to the acquisition of meaning in life; scientific speech helps form the data that comprises the paradigms we structure our world around; and artistic speech can be valuable in pursuing truth or knowledge, as political speech.

We can see that all of these core categories of protected speech are central to human

existence in the 21st century and thereby provide easy justification for their status as first order, core categories. The more important question is how do other, less highly valued categories of speech come out under this rubric. A starting point, of course, is how does a particular category measure up against a core category in relation to its importance to human personality. In a sense, this question calls for an examination of the Free Speech justifications of the category of speech in question, and examining how these justifications compare to the intrinsically and instrumentally valuable justifications present in core speech categories. We will need to take up this question later, as first we must turn to explanation of the second rubric of justification.

2. speech/conduct

A second rubric useful to sorting out the value of speech is application of the speech/conduct dichotomy. To be protected constitutionally, behavior must possess communicative qualities.[94] Behavior devoid of communicative qualities is not protected speech. Instead, pure behavior directs official attention to the personal or social behavioral interests that should be secured in order to protect public health, safety and welfare. These are the easy questions of Free Speech. The difficult questions of Free Speech involve behavior with elements of both communicative and noncommunicative qualities. An example is the burning of a cross in cases like R.A.V. v. St. Paul[95] or Virginia v. Black.[96] Burning a cross is a clear expression of hate, a vile truth the speaker is expressing. But burning a cross on someone's property could also be arson, trespass or assault, all noncommunicative behavior.

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[94]Spence v. Washington, 418 U.S. 405, 409 (1974).

[95]505 U.S. 377 (1992).

[96]538 U.S. 343 (2003).

The value of the speech/conduct dichotomy is as an organizing principle of Free Speech. Behavior can be of at least three types as measured on the speech/conduct dichotomy. First, behavior may be pure speech, devoid of conduct. If so, it is protected speech. An example of this would be talking or writing, at least as related to First Amendment purposes. Second, behavior may contain a mix of speech and conduct, as in *R.A. V.* and *Black.* In this case, some of the behavior may be protected speech and some of it will be unprotected speech. Third, behavior can be pure behavior, devoid of speech and, therefore, unprotected speech. An example of this would be driving a car.

Application of the speech/conduct rubric provides a measure by which to assess a category of speech's position on the speech/conduct rubric. The closer the speech stands in relation to speech, the greater justification for its higher valuation. The closer the speech stands in relation to conduct, the lesser justification for its higher valuation. Use of the speech/conduct dichotomy is critical to preserving the integrity of the First Amendment. Crucial here is protecting the core of Free Speech. Whatever battles are to be fought over Free Speech, they should occur at the fringe of the Amendment, not its core, as noted previously. Speech/conduct helps so direct the placement of these battles.

Before applying the rubric of speech/conduct, we need to be clear what speech and conduct mean. The speech/conduct dichotomy is largely a pragmatic distinction. All speech activity is behavior; for example, reading and writing, speaking and listening, or picketing. What distinguishes it as speech are its communicative qualities. Behavior devoid of noncommunicative qualities constitutes conduct; the legitimate interests addressed by the police powers of government. Thus, the only relevant inquiry for Free Speech is: how much and how valuable are

the communicative qualities present in the behavior at issue? Restating the measure: the greater presence of communicative qualities, the stronger the argument for speech protection; the greater presence of noncommunicative qualities, the stronger the argument for treatment as conduct.

Use of speech/conduct understood this way can be a helpful tool to sort out the varied valuations of speech. A good example involves commercial speech. Commercial speech is, of course, speech because it constitutes the communication of an offer of a service or product for a stated price; in sum, a commercial advertisement. But the quality of the communication also relies upon underlying conduct components. Commercial advertising is really the offer of a contract: buy this product/service at this price. "[T]he commercial speaker not only talks about a product, but also sells it."[97] There is a close nexus between "the speech proposing a commercial transaction and the subsequent transactions in which sellers and buyers engage."[98] The

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[97]Daniel A. Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev.372, 386 (1979).

[98]Edward J. Eberle, Practical Reason: The Commercial Speech Paradigm, 42 Case W. Reserve L. Rev. 411, 462 (1992)[hereinafter "Case Western"]. For careful explication of commercial speech's proximity to contract law, see Farber, supra note, at 387-89. The contractual function of commercial speech helps

> explain[s] the intuitive belief that commercial speech is somehow more akin to conduct than other forms of speech. The unique aspect of commercial speech is that it is a prelude to, and therefore becomes integrated into, a contract, the essence of which is the presence of a promise. Because a promise is an

subsequent transaction is handled by contract law, which regulates the behavior of contracting parties; contract law speaks to conduct, not speech. Thus, in measuring commercial speech, we can see that it has a close relationship to conduct. Its closer relationship to conduct can be useful in assigning a proper valuation to commercial speech under the First Amendment. Because commercial speech stands in a close relationship to conduct through contract law, it should merit less valuation as speech than speech that stands in a more distant relationship to conduct, such as most political or religious speech.

Evaluation of commercial speech along speech/conduct also serves other important values of the architecture of the First Amendment. The contractual purpose of commercial speech provides a basis for identifying commercial speech, a basis captured in its definition as "speech which does 'no more than propose a commercial transaction.'"[99] A key distinguishing trait of

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> undertaking to ensure that a certain state of affairs take place, promises obviously have a closer connection with conduct than with self-expression. Second, this approach focuses on the distinctive and powerful state interests implicated by the process of contract formation.

Id. at 389.

[99]Virginia Pharmacy, 425 U.S. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). The Court also distinguished commercial speech as possessing lesser value than core speech on account of its easier verifiability and greater durability than other types of speech, convincing rationales for assigning a species of speech a lesser protected status. Id. at 771, n. 24. Measuring speech based on its relationship to verifiabilty and durability is an additional sound way to order the value of speech. By this

measure, the more verifiable or durable speech is, the tendency would be to value it lower because its dissemination will ordinarily be robust on account of its nature and therefore less in need of enhanced protection from the human tendency to control, through censorship in the case of speech. For example, commercial speech is verifiable because it is an offer of a product or service that represents an underlying real contractual relation. Measuring the commercial speech as contract offer against the actual commercial transaction, the speech either mirrors the actual commercial transaction and is, therefore, true, or the speech is misleading or false. Id. Likewise, commercial speech is more durable than other forms of speech because money is spent to promote it. At the root of commercial speech lies the profit-motive. Commercial advertising thrived in the world before *Virginia Pharmacy* in 1976. For elaboration of this rationale, see Eberle, Case Western, supra note , at 469-76.

Labor speech and political campaign donations are also likely to be more verifiable and more durable species of speech for the reasons described above with respect to commercial speech. See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 787-89 (1985)(Brennan, J., dissenting.). *Compare* "In evaluating the subject matter of expression, this Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or audience."*with* "Speech about commercial or economic matters, even if not directly implicating 'the central meaning of the First Amendment,' . . . is an important part of our public discourse." Id. at 787.

Most critical to a system of free speech, speech that is more verifiable and more durable is less likely to involve unpopular or dissenting views and, instead, is more likely to entail popular

commercial speech is its close nexus between speech and the ensuing commercial transaction. By so crystallizing the definition of commercial speech, its content and treatment can be demarcated from other elements of speech, forming an important component of precise categorization.[100]

Further, the contractual function of commercial speech brings into focus the important state interests that underlie commercial speech. These state interests include contract doctrines of falsity, fraud, misrepresentation, coercion, overreaching, harassment, duress and unconscionability. Identification of state interests like these uncovers legitimate concerns of government–consumer protection-- apart from speech. Identifying a basis for governmental regulation apart from speech better protects speech from suppression.[101] We can thus see how use of a speech/conduct dichotomy can be helpful to sorting out the issues involved in protecting Free Speech.

Assessment of categories of speech against the two rubrics of value and speech/conduct will call upon our reasoning abilities and sound judgment. We will need to employ the skill of practical reasoning, reasoning through the problem in a sound analytical manner so that "reasonably reliable"[102] solutions can be reached. Part of this will involve use of intuitionism,

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views. Given the configuration of majoritarian views with majoritarian power, there is likely to be a much lesser danger of overregulation or censorhip. These make for sound reasons why species of speech that are more verifiable and more durable are less deserving of a status of core speech.

[100]This part relies upon Eberle, Case Western supra note , at 463.

[101]This part relies upon Eberle, Case Western supra note , at 463.

[102]John Rawls, A Theory of Justice 44 (1971).

identifying a priori first principles and then assessing categories of speech against them. This would be the approach of nonconsequentialist thinking, and has especial importance in determining first order forms of speech, which then can serve, in turn, as a measure for other, lowered ordered forms of speech. And part of this will entail practical reason, assessing the values and interests presented by a category of speech, understanding them in their context, and comparing them to other forms of speech to see where they sit in the world of Free Speech. The results of real life scenarios decided in cases will be particularly instructive.

Still, we must be quite careful here. The older two-level theory of *Chaplinsky* had certain advantages. Most importantly, the methodology of speech was quite simple: speech was either protected or not. This had the great advantage of making Free Speech doctrine coherent, especially for those on the front-line of the Free Speech battles: prosecutors, authorities and judges. The modern reconception of Free Speech, however, has effectively undermined the technical applicability of the *Chaplinsky* approach, as described previously.

Yet, we need to recognize certain guideposts. First, the two-level theory, suggested by *Chaplinsky*, still applies, analogously, in the modern methodology of determining whether speech is protected or not. Consider again the categorical approach: government must prove the elements that comprise an unprotected category of speech. If government cannot make its case, the speech is protected. In this way, the essence of *Chaplinsky* yet applies, and does so where it must matters: directing the Free Speech battles to the fringe of the Amendment which has the important benefit of safeguarding the core.

Second, given the complexity of social reality and how it has been reevaluated through the First Amendment prism, resulting in protection for many more types of speech that are of

different value, the levels of Free Speech protection have been expanded from two to four. This is an inevitable consequence of the broadening of the Amendment. Still, we must be careful here. We should be reluctant to create secondary categories of speech, at levels of two or three, in order to present as simple and coherent a theory of Free Speech as we can. This is especially significant for those on the frontlines of the Free Speech battles (again, prosecutors, authorities, judges) so that mistakes in application of law will be less likely.[103] The process described in this part suggests one reasoned way to accomplish this objective; that is applying a species of speech against the criterion for fixing valuation.

C. Ordering Speech

Given that the modern First Amendment contains a variety of differently valued speech, and is quite likely to present new candidates for inclusion in the Amendment that themselves will involve communicative value of different orders, it is important we sort out the different levels of speech. Quite helpful to the ordering of levels of speech are insights derived from moral philosophy. The tools of philosophy call for use of reason and logic to sort out the principles that comprise knowledge. Tools of logic and reason apply to moral philosophy as well, as it is necessary to sort and resolve conflicts among contending moral principles. When faced with this dilemmas, a way must be found to resolve the conflict. Essentially, this calls for use of judgment; we need to critically analyze the situation, considering all of its components, so that it may be resolved in an ethically satisfying manner.[104]

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[103]Schauer, Vanderbilt supra note , at 294-96, 306-07.

[104]Eberle, Case Western, surpra note , at 433. See generally id, at 433-440.

John Rawls characterized this approach as "intuitionism."[105] By intuitionism, Rawls meant a doctrine containing "an irreducible family of first principles which have to be weighed against one another by asking ourselves which balance, in our considered judgment, is the most just."[106] Intuitionism relies on our powers of reasoning and judgment. We identify principles we consider "most just" or "most nearly right."[107] Intuitionist theories can be deontological or instrumental, but most commonly are deontological.[108]

An example of a deontological intuitionist theory is that of W. D. Ross. Ross viewed the problem of moral philosophy as one of distributive justice, calling for the distribution of goods according to moral worth. But "while the principle to produce the most good ranks as a first principle, it is but one such principle which must be balanced against the claims of the other prima facie principles."[109] Thus, when presented with a justice conflict between competing moral claims one must try to find a "constructive answer . . . to the problem of assigning weights to competing principles of justice "[110] This is referred to as the "priority problem" in moral philosophy.

We can see the ready analogy to Free Speech law. Like moral philosophy, Free Speech contains a number of values that vie for dominance. Seminal Free Speech values include pursuit

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[105]John Rawls, A Theory of Justice 34 (1971).

[106]Id.

[107]Id.

[108]Id. at 40.

[109]Id. at 40, citing W.D. Ross, The Right and the Good 21-27 (1930).

[110]Id.

of truth and knowledge, self-government, self-realization, personal autonomy and the like. Each of these values stands in a close relationship to underlying purposes of speech; proximity to human existence and to human daily life. The importance of communication is generally judged insofar as it furthers seminal values like these. The closer relation the communication has to core Free Speech values, implicating matters central to human existence, the greater its value. The lesser relation the communication has to core Free Speech values, the lesser the value, matters discussed in Part II B. We need a rubric to sort out the possible ways of judging speech, a problem shared with moral philosophy.

Here too we can resort to moral philosophy for some useful guidance. A major tool to employ is lexicographical reasoning, which calls for a serial or lexical ordering of values. It "requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on."[111] In this manner, Ross ranked moral worth as lexically superior to nonmoral values. Kant placed the priority of rights as the first rank.[112] These are clear orderings; moral values should outweigh nonmoral values; rights or prima facie duties should outweigh other considerations. A more difficult problem is a conflict between moral values of equal weight. In such situations, the conflict must be evaluated and resolved in an ethically satisfying manner.[113] Here we must rely on our reasoning capabilities; we must critically evaluate the situation, sifting through and considering carefully all of the possibilities, consequences and the respective weights of the interests, through use of sound practical

[111]Id. at 43.

[112]Id. at 42-43 n. 23.

[113]W.D. Ross, The Right and the Good 149-54 (1930).

judgment.[114] This task is one "of reducing and not of eliminating entirely reliance on intuitive judgement."[115] The goal is to reach a "reasonably reliable agreement."[116]

Serial or lexical reasoning has ready application to Free Speech law. First, serial reasoning can be quite useful in ordering the various categories of speech. Second, serial reasoning can also be quite useful in ordering socio-economic concerns that government is addressing as valid state interests.

Applying serial reasoning to categories of speech, we can come up with the ordering of speech according to the four levels discussed above. First order speech is the most prized because it has the closet relationship to the seminal values of expression, such as understanding and furthering control of the human condition through values of personal autonomy or self-realization, or through understanding or influencing the world around us through values like self-government or pursuit of truth. Because of their close relationship to these seminal nonconsequential and consequential values, we group first order, core speech as political, religious, scientific and artistic speech. Second order speech has important communicative properties, but has a less close nexus to the seminal values of speech and, also, may have a closer relationship to conduct as measured by the speech/conduct dichotomy. Our discussion of commercial speech illustrates why

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[114]Aristotle would have referred to this as "practical judgment" or "practical wisdom." VI Aristotle, Nichomachean Ethics (Martin Oswald trans. 1962). Kant termed it "universal practical reasoning." Immanuel Kant, Foundations of the Metaphysics of Morals 32-33 (Lewis W. Beck trans, 1976)(all moral concepts have their origin in practical, rational reasoning).

[115]John Rawls, supra note , at 44.

[116]Id.

this is so. Thus, we might say second order speech comprises commercial speech, labor speech and offensive speech, to name some species. Third level speech has an even further distance from the seminal values of speech and may have an even closer connection to conduct. For example, in the case of nude dancing, dancing, even in the nude, certainly conveys a message. However, to the extent the nude dancing is for adult entertainment, it is somewhat remote from seminal Free Speech values like self-realization or pursuit of truth, even remoter than that of commercial speech. Because the adult oriented nude dancing is ordinarily done in exchange for money and arousal of the sexual function, it also has a closer nexus to conduct.[117] Conventional third level speech would be nude dancing, pornography, defamation against private parties and private speech. Finally, fourth level or unprotected speech has the most remote connection to core speech values and the closest proximity to conduct. For example, a threat is quite far removed from seminal speech values and, instead, quite closely related to conduct; in fact, it is a communication about ready to gestate into conduct. Standard fourth level speech is obscenity, actual malice defamation, incitements to violence, threats or fighting words, among others. Of course, each of the four categories of speech is open for both new candidates and for reassessment of the status of existing candidates. The dynamics of social reality are such that change is always afoot.

We might likewise use serial reasoning to order social interests that are juxtaposed against speech. For example, first order or "compelling" governmental interests would include clear,

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[117]City or Erie v. Pap's A. M., 529 U.S. 277, 239 (2000)("As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991)(plurality).

present, imminent and serious dangers to individuals, the state order or public health, safety or welfare. Here we might include interests like threats, incitements to violence or serious threats to national security, such as "publication of the sailing dates of transports or the number and location of troops," especially during wartime.[118] Second order or "substantial" state interests would include speech that is deceptive, misleading or violative of certain human interests, such as privacy concerns.[119] Third order or "rational" interests would include the traditional concerns of things like maintaining the streets and public facilities in a sanitary and workable fashion.

Use of serial reasoning can thus offer a certain structure and coherence to Free Speech law. But, of course, serial reasoning, as any reasoning, can only go so far, providing aid, but not complete solution. The essence of Free Speech decisionmaking, like all legal decisionmaking, is solving the concrete problem. For this, we must, once again, rely upon our reasoning capabilities. Here use of sound, practical judgment can be of great use.

Use of practical judgment, luckily, does not occur in a void with respect to First Amendment law. We have a rich tradition of constitutional decisionmaking, relying on concern for the Constitution's language, structure, context and history, and then consideration of the large body of precedent, which usefully illustrates what works and what has not worked. Common law decisionmaking is central here, which entails use of

> reasoned judgment . . . close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value. . . . like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse. . . . Common law method tends to pay respect . . . to detail, seeking to

[118]Near v. Minnesota, 283 U.S. 697, 716 (1931).

[119]Cohen v. California, 403 U.S. at 21.

understand old principles afresh by new examples and new counterexamples.[120] Thus, these judgments are not unguided but bounded by identifiable principles and techniques.

Here too we can start with serial reasoning, applying it to the context of concrete decisionmaking. For example, first order speech like political speech clearly outweighs third level interests like maintaining the street; will presumptively outweigh second level interests like deception or certain privacy concerns; but may or may not prevail over first order interests, especially if they are a clear and present danger to a person or the social order. Likewise, third order speech, like private speech might outweigh a third order interest like the sanitation of the streets; but will not prevail over a second order interest like deception; and will certainly lose in relation to a clear and present danger. Serial reasoning will not answer all questions, but it will lend structure and a certain coherence to Free Speech questions.

In this way, attention can be directed to solving the concrete balance between speech and social interests within the serial order. The judgment to be made is thereby cabined within appropriate limits offered by serial reasoning. After that, the question must be resolved through the standard process of concrete practical reasoning, the optimal form of common law decisionmaking. Taking account of the rich constitutional tradition described above, we must then search for reasonably reliable judgments as to how to make the proper accommodation of speech values in relation to state interests situated in a socio-economic context.[121] Here resort to

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[120]Washington v. Glucksberg, 521 U.S. 702, 769-70 (Souter, J,., concurring)(internal citations omitted)(discussing Poe v. Ullman, 367 U.S. 497, 542-44 (1961)(Harlan, J., dissenting and Harlan's elaboration of substantive Due Process judicial decisionmaking).

[121]Eberle, Case Western, supra note, at 439-40.

and consideration of precedent can be helpful.

D. Levels of Scrutiny

A final rubric crucial to establishing and maintaining the architecture of the First Amendment is assigning appropriate levels of scrutiny to the differently valued categories of speech. Speech must be ordered according to its value. In a system of law, this calls for development and application of a rule of law in accord with the value of speech. Through the process of valuation and its ordering by serial reasoning, we have seen how communication can be sorted pursuant to four levels of value: high, intermediate, low and minimal. We must now establish a rule of law appropriate to each of the four levels of speech.

Establishing a system of law concerning speech is critical to delineating the different categories of speech so that their value can be properly assessed for its own worth. Identification of the species of speech is critical to this task. Two means are readily available to accomplish the task of identification. First is fitting the species of speech into its properly defined category. For example, speech that concerns matters germane to public policy constitutes political speech. This has been the task of Part II A. Second, is the corollary to this process of assigning communication to its proper category: assigning the proper level of scrutiny to the category of speech under review. By so identifying speech both by its category and its level of scrutiny, we can establish a sound structure to order speech according to its value. The structure provides a workable way of ordering speech according to its value so that one level of speech is judged properly according to its estimation as compared to it being judged by rules of law more applicable to speech that might be higher or lower valued. This process of separating speech by value allows legal authorities to focus attention on the speech for its own qualities. Most

importantly, the ordering structure helps guard against a major concern of modern Free Speech law: doctrinal confusion, which as we know, is caused by judging a species of speech according to levels of scrutiny that are appropriate to either higher or lower valued categories. Such misapplication of doctrine carries with it the danger of undermining the structure of First Amendment law.

We are thus now called upon to develop the rules of law applicable to the categories of speech. Luckily for us, we do not have to look far to accomplish this task, as the Court itself has done much of this in a sound way. We can build on the work of the Court. The four levels of speech each have their own level of scrutiny. Core or first order speech is judged pursuant to strict scrutiny; intermediate or second order speech is judged pursuant to intermediate scrutiny; third order or low level speech is judged according an ad hoc balancing test comparing the merits of the speech versus the regulation; and fourth order or no value speech is judged by the rational basis test. Let me speak briefly to each of the four levels of scrutiny.

Core or first order speech is judged, appropriately, pursuant to the most exacting scrutiny. This is appropriate because core speech possess the most communicative value, either on account of its intrinsic worth to the human condition or its value in furthering ends crucial to daily life. The Court has framed its genre of most exacting scrutiny as strict scrutiny, analysis that requires government to justify its regulation as "necessary to serve a compelling state interest . . . that . . . is narrowly drawn to achieve that end."[122] Strict scrutiny normally attaches when fundamental rights are implicated or when government targets people based on traits comprising justifications

[122]Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

for suspect class or similar discriminatory treatment under equal protection review.[123] Core speech, by definition, is considered to be the very essence of the fundamental right of Free Speech, thereby meriting its incursion only upon justification by most exacting, strict scrutiny.

Strict scrutiny analysis is well worked out and highly predictable. Gerald Gunther's famous description of strict scrutiny as "strict in theory, but fatal in fact"[124] still largely applies with respect to core speech determinations, and this is appropriate. The Court has toyed with the definition and application some in recent time. But this effort has been directed to heightening the degree of review associated with strict scrutiny. R.A.V. v. St. Paul is the best example of this phenomenon. In *R.A.V.* the Court developed and applied a two-level approach to strict scrutiny when content regulation was at hand. Content regulation can be either subject matter discrimination or viewpoint discrimination. Subject matter discrimination is justifiable only upon satisfaction of traditional strict scrutiny analysis, as described above. When viewpoint

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[123]Compare Korematus v. United States, 323 U.S. 214 (1944)(discrimination against discrete and insular minorities constitutes suspect class triggering strict scrutiny) with Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)(under color-blind approach applicable to affirmative action, preference of race triggers strict scrutiny).

[124]Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court–A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). The Court has reduced the strength of Gunther's classic formulation of strict scrutiny in equal protection affirmative action cases. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, (1995)("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"). No such reduction of strict scrutiny analysis is discernible in Free Speech law.

discrimination is afoot, however, as in *R.A.V.*, then the Court applied a more exacting standard to judge the means chosen by government to pursue the compelling end. In *R.A.V.* the viewpoint discrimination in singling out only politically incorrect forms of fighting words could be justified only if it were "*necessary* to serve the asserted [compelling] end" even though the Court conceded that the city had met its burden in showing that it had a compelling reason to act.[125] I have referred to this form of analysis as "strict scrutiny plus necessity,"[126] and this shows how there is

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[125]*R.A.V.*, 505 U.S. at 395 (citations omitted). For fuller discussion of this point, see Edward J. Eberle, Hate Speech, Offensive Speech, and Public Discourse in America, 29 Wake Forest L. Rev. 1135, 1170-1178 (1994)[hereinafter "Wake Forest"].

[126]Eberle, Wake Forest, supra note , at 1178. Justice Kennedy has even argued for a per se rule of unconstitutionality in cases of pure censorship, in place of strict scrutiny. Perhaps the Court may, at some point, be headed for even more enhanced protection of speech than employment of conventional strict scrutiny.

> The case before us presents the opportunity to adhere to a surer test for content-based cases and to avoid using an unnecessary formulation [strict scrutiny], one with the capacity to weaken central protections of the First Amendment. I would recognize this opportunity to confirm our past holdings and to rule that the New York statute amounts to raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press. That ought to end the matter.

room yet to work out even more precise formulations of law through the process of concrete decisionmaking.

Second order or intermediate categories of speech merit intermediate scrutiny, originated in *Virginia Pharmacy*, and still applicable today as framed by the Court in Central Hudson Gas v. Public Service Commission:

> For commercial speech to come within . . . [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest.[127]

Applicable to commercial speech, this test states the core elements of intermediate scrutiny: that the governmental interest be substantial or important and that government employ means substantially related to the substantial governmental interest. A simpler statement of intermediate scrutiny can be gleaned from equal protection law: "To withstand constitutional challenge, [government must establish that its legal measure] serve[s] important governmental objectives and must be substantially related to achievement of those objectives."[128]

Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105, 128 (1991)(Kennedy, J., concurring).

[127]Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 566 (1980). A plurality of the Court has recently argued that truthful commercial speech should be accorded the highest level of protection, strict scrutiny. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996)(plurality). This makes sense, as truthful speech is valuable for both speakers and listeners and presents no harm. Eberle, Case Western supra note , at 485-91.

[128]Craig v. Boren, 429 U.S. 190, 197 (1976).

Intermediate scrutiny is appropriate for second order speech for the same reasons it is appropriate to quasi-suspect classes in equal protection law: the value of the constitutional activity is important, but less important than constitutional activities of a higher order. In the case of speech, commercial speech is simply less valuable than core speech, like political or religious speech. Accordingly, it should have high value, but value less high than speech critical to a person or the body politic. A word choice of "important" or "substantial" conveys adequately the notion that the speech is valued significantly, but not crucially, as conveyed by justification of regulation by "compelling."[129]

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[129]With the advent of intermediate scrutiny, in 1976, in both commercial speech and gender discrimination, the scrutiny has had a mixed history. In the immediate aftermath of *Virginia Pharmacy,* intermediate scrutiny was applied to commercial speech with rigor. See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977). But later, members of the Court battled over what intermediate scrutiny meant in application, resulting in a diminished level of review, more akin in respects to rational basis review. See, e.g., Posadas de Puerto Rico Asso. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986). In 1996, the Court restored intermediate scrutiny to the rigor it had under the regime of *Virginia Pharmacy* in 44 Liquormart, Inc. v. Rhode Island, 517 U.S., 509-12 (1996). The path of intermediate scrutiny in gender discrimination paralleled that of commercial speech. Compare Michael M. v. Sonoma Court, 450 U.S. 464 (1981)(reduced scrutiny) with United States v. VMI, 518 U.S. 515 (1996)(heightening scrutiny). For our purposes, we will define intermediate scrutiny applicable to second order speech in the rigorous manner established in cases like *Virginia Pharmacy* or *Craig v. Boren.*

Third order or low-level speech should be judged according to an ad hoc balancing test that calls for judgements to be made by weighing the merits of the speech as compared to the merits of the governmental interests. If the speech has more worth than the governmental interest, then the speech should remain protected and imperious to regulation. If the governmental interest outweighs the value of the speech, government can regulate the speech. This process will, by definition, call for the exercise of judgment to settle the exigencies of the case. Over time, the law will sort itself out according to the normal process of common law decisionmaking.

A form of ad hoc balancing seems appropriate to third order speech because while this level of speech has value and is, accordingly, protected under the First Amendment, it does not have the stature of first or second order speech. Lacking the greater worth of those types of speech, there is no reason to apply a form of heightened scrutiny to assess the degree of constitutional regulation. Instead, a simple assessment of the value of the speech compared to that of the governmental interest seems appropriate.

There are ready analogies to employment of ad hoc balancing. One is Justice Frankfurter's approach to Free Speech questions.[130] A second is the *Pike* balancing test used in

[130]Dennis v. United States, 341 U.S. 494, 517, 524-25, 542 (1951)(Frankfurter, J., concurring)("The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved." Id. at 524-25)("A survey of the relevant decisions indicates that the results which we have reached are on the whole those that would ensue from careful weighing of conflicting interests." Id. at 542). Of course, when faced with free speech questions,

dormant commerce clause cases. When a state does not discriminate in commerce between in-state and out-of-state interests, *Pike* balancing calls for a weighing of the "burden imposed on . . . commerce . . . in relation to the putative local benefits."[131] In short, ad hoc balancing calls for the

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Justice Frankfurter adverted to the legislature to strike the balance of interests under his theory of judicial restraint.

Different variants of ad hoc balancing can be found in earlier cases. In American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950), for example, the Court stated the approach this way: "When particular conduct is regulated in the interest of the public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."

The origin of ad hoc balancing in free speech may lie in Schneider v. State, 308 U.S. 147, 161 (1939), where the Court observed: "the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

For careful consideration of balancing approaches to the First Amendment, see Laurent B. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424 (1962).

[131]Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The full statement of the test is:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found,

assessment of two items on an equal, unweighted scale. Ad hoc balancing differs from weighted balancing in that weighted balancing evaluates the two items on an uneven, weighed scale; one item is presumptively preferred over the other. Weighed balancing is the process used in heightened scrutiny. For strict scrutiny, the rule of law is that core speech is presumptively determined to be constitutional and immune from regulation unless the state interest is of overwhelming importance. For intermediate scrutiny, the rule of law is that second order speech will merit strong constitutional protection and will often survive attempts at regulation, but to a less certain degree then speech judged by strict scrutiny. For ad hoc balancing, the rule of law is simply weighing the value of the speech versus the value of the governmental interest; whichever is weightier wins. There is obviously less predictability to evaluation of third order speech as compared to higher ranked speech. We will need to rely on the practical judgements made through case law to bring order and cohesion to third level forms of speech.

The final form of speech to be evaluated is fourth level or unprotected speech. Appropriate to fourth level speech is rational basis review, which calls on government to justify its policy choice by demonstrating it is pursuing a rational end that it is rationally related to the pursuit of that end. Rational basis review is a low, deferential standard of review as seems appropriate to unprotected speech. After all, unprotected speech has communicative value, but carries with it the baggage of clear and present dangers.

Because there is harm connected with unprotected speech, government must prove the elements of harm that make up the definition of the unprotected category of speech. This is the

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then the question becomes one of degree.

Id.

essence of the categorical approach; proving why wholesale regulation is merited on account of the presence of elements that comprise the definition of speech. For example, to prove sanction of fighting words, government must prove that the communications under review are "those personally abusive epithets which, when addressed to the ordinary citizens, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[132] If government makes out its case, then it has met its burden of proof and the speech may be regulated. There is great benefit to this categorical approach; government attention is focused on the properties of the speech that cause or proximately cause the harm and not the speech itself. It is akin to the criminal justice system; government must prove the elements of the unprotected category of speech like it must prove the elements of a crime. The speech is presumptively protected unless government can make out its case for regulation. The official focus on harm insulates substantially the fundamental right of speech.

IV. Conclusion

To establish and maintain coherence in Free Speech law, it is crucial that we attend to the architecture of the First Amendment. A focus on structure and ordering can provide a solid foundation to the complicated nature of expression law so that it can avoid the dangers of doctrinal confusion and put in place a ready methodology to solve the inevitable tests brought about through new social developments. The First Amendment must be equipped to deal with the changing technologies, mores and developments of the 21st century.

We have seen how critical to the task of maintaining the architecture are the goals of defining with precision categories of speech; justifying the value of speech according to solid

[132]Cohen v California, 403 U.S. 15, 20 (1971).

rubrics such as valuation of speech and measurement according to the speech/conduct dichotomy; ordering speech by categories; and assigning levels of scrutiny appropriate to the valuation of the expression. These principles can establish a certain predictability and coherence to Free Speech law, thereby forming a foundation that solidifies the Amendment and establishes a base on which to judge future free speech questions. An architecture of this nature will not, of course, solve all issues of Free Speech law. None of us possess the prescience or analytical skill to accomplish that quixotic task. But a solid architecture will establish a certain coherence to the law. Coherence is needed to provide predictability to the law.

Most importantly, coherence in the law will solidify the core of protected speech, the area most fundamental to our expressive freedoms, by establishing what is core speech and how it is to be protected. The center is to be protected at all costs. Whatever future battles are to take place in the Free Speech wars, we want them to take place at the fringes of the Amendment, not at its centers.