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The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience

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THE BOUNDARIES OF THE FIRST AMENDMENT: A PRELIMINARY EXPLORATION OF CONSTITUTIONAL SALIENCE

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I. Introduction

The history of the First Amendment is the history of its boundaries. Though the strength of American free speech doctrine is located chiefly in the formidable barriers the doctrine requires countervailing interests to overcome in order to prevail against free speech interests, these barriers have emerged against the background of a largely accepted understanding of the scope of the First Amendment itself. There have been important disagreements about what rules

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should apply when a law or practice infringes upon the First Amendment, but disagreements about whether as a threshold matter the First Amendment is even implicated have been far fewer. We may not always have known how to resolve First Amendment cases, but at least we knew them when we saw them.

As contemporary debates about the initial applicability of the First Amendment to topics such as copyright,[2] computer source code,[3] securities regulation,[4] panhandling,[5] computer

[2]See, most recently, Eldred v. Reno, 239 F.2d 372, 375 (D.C. Cir. 2001), aff'd sub nom. Eldred v. Ashcroft, 2003 U.S. LEXIS 751 (Jan. 15, 2003). See also Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000); C. Edwin Baker, First Amendment Limits on Copyright, 55 Vand. L. Rev. 891 (2002); Mark A. Lemley and Eugene Volokh, Freedom of Speech and Injunctions in Copyright Cases, 48 Duke L.J. 147 (1998); Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 Stan. L. Rev. 1 (2001); Neil Weinstock Netanel, Market Hierarchy and Copyright in Our System of Free Expression, 53 Vand. L. Rev. 1879 (2000); Rebecca Tushnet, Copyright as a Model for Free Speech Law: What Copyright Has in Common withy Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation, 42 B.C. L. Rev. 1 (2000).

[3]See Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Junger v. Daley, 209 F.3d 481 (6th Cir. 2000); Bernstein v. United States Department of State, 974 F. Supp. 1288 (1997); DVD Copy Control Ass'n v. Bunner, 113 Cal. Rptr. 2d 338 (Cal. Ct. App. 2001); Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354 (1999); Brian R. Chase, The First Amendment and DECSS, 8 B.U.J. Sci. & Tech. L. 729 (2002); Ryan Christopher Fox, Old Law and New Technology: The Problem of Computer Code and the First Amendment, 49 UCLA L. Rev. 871 (2002); Geoffrey Gordon, Breaking the Code: What Encryption Means for the First Amendment and Human Rights, 32 Colum. Hum. Rts. L. Rev. 477 (2001); Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. Rev. 1057, 1059-61 (2001); Margaret Jane Radin, Online Standardization and the Integration of Text and Machine, 70 Ford. L. Rev. 1125 (2002); Patrick Ian Ross, Computer Programming Language: Bernstein v. United States Department of State, 13 Berkeley Tech. L.J. 405 (1998); Andreas Rueda, The Implications of Strong Encryption

"spam,"[6] telemarketing,[7] labor organizing and elections,[8] antitrust,[9] and hostile environment

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Technology on Money Laundering, 12 Alb. L.J. Sci. & Tech. 1 (2001); Pamela Samuelson and Suzanne Scotchmer, The Law and Economics of Reverse Engineering, 111 Yale L.J. 1575 (2002); R. Polk Wagner, The Medium is the Mistake: The Law of Software for the First Amendment, 51 Stan. L. Rev. 387, 404-05 (1998).

[4]See Lowe v. S.E.C., 472 U.S. 181 (1985); Aleta Estreicher, Securities Regulation and the First Amendment, 24 Ga. L. Rev. 223 (1990); Burt Neuborne, The First Amenedment and Government Regulation of Capital Markets, 55 Brook. L. Rev. 5 (1989); Nicholas Wolfson, The First Amendment and the SEC, 20 Conn. L. Rev. 265 (1988); Symposium, The First Amendment and Federal Securities Regulation, 20 Conn. L. Rev. 261 (1988).

[5]See Gresham v. Peterson, 225 F.3d 899, 903-07 (7th Cir. 2000); Los Angeles Alliance for Survival v. City of Los Angeles, 224 F.3d 1076 (9th Cir. 2000); Smith v. City of Fort Lauderdale, 177 F.3d 954 (11th Cir. 1999); Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993); Robert C. Ellickson, Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning, 105 Yale L.J. 1165, 1229 (1996).

[6]See ACLU of Georgia v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997); Compuserve, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997); Cyber Promotions, Inc. v. American Online, Inc., 948 F. Supp. 436 (E.D. Pa. 1996); Michael A. Fisher, The Right to Spam?: Regulating Electronic Junk Mail, 23 Colum–VLA J.L. & Arts 363 (2000); Heather Jacobson and Rebecca Green, Computer Crimes, 39 Am. Crim. L. Rev. 273, 317-25 (2002); Laura Quilter, Cyberlaw: The Continuing Expansion of Cyberspace Trespass to Chattels, 17 Berkeley Tech. L.J. 421 (2002); John D. Saba, Jr., Internet Property Rights: E-Trespass, 33 St. Mary's L.J. 367 (2002); Comment, The TCPA: A Justification for the Prohibition of Spam in 2002?: Unsolicited Commercial E-mail: Why is It Such a Problem?, 3 N.C. J.L. & Tech. 375 (2002).

[7]See U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999); Moser v. FCC, 46 F.3d 970, 975 (9th Cir. 1995); FEC v. Int'l Funding Inst., 969 F.3d 1110, 1118 (D.C. Cir. 1992); Michael Shannon, Combating Unsolicited Sales Calls: The "Do Not Call" Approach to Solving the Telemarketing Problem, 27 J. Legis. 381 (2001);

[8]See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568 (1988); Midland Nat'l Life Ins., 263 N.L.R.B. 127 (1982); Laurence Tribe, Constitutional Choices 200 (1985); Julius Getman, Labor Speech and Free Speech: The Curious Policy of Limited Expression, 43 Md. L. Rev. 4 (1984); James Gray Pope, The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century, 51 Rutg. L. Rev. 941 (1999); James Gray Pope, Labor and the Constitution: From Abolition to Deindustrialization, 65 Tex. L. Rev. 1071 (1987).

[9]Compare FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)(First

sexual harassment[10] demonstrate, however, issues about the very involvement of the First

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Amendment does not constrain antitrust prosecution based on organized boycott), with NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)(First Amendment precludes antitrust prosecution of politically motivated consumer boycott).

[10]See Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); DeAngelis v. El Paso Municipal Police Officers Ass'n, 51 F.3d 591 (5th Cir. 1995); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991); Black v. City of Auburn, 857 F. Supp. 1540 (M.D. Ala. 1994); Jew v. University of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990); Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000); J.M. Balkin, Free Speech and Hostile Environments, 99 Colum. L. Rev. 2295 (1999); Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 Ohio St. L.J. 481 (1991); Cynthia Estlund, The Architecture of the First Amendment and the Case of Workplace Harassment, 72 Notre Dame L. Rev. 1361 (1997); Cynthia Estlund, Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment, 75 Tex. L. Rev. 687 (1997); Richard H. Fallon, Jr., Sexual Harassment, Content

Amendment in the first instance are often far more consequential than are the issues surrounding the strength of the protection the First Amendment offers for the speech to which it applies. Once the First Amendment shows up, much of the game is over, but the question of whether and when the First Amendment shows up at all is rarely addressed and too often simply assumed. This inattention to the importance of the boundaries of the First Amendment does not make the question any less important, however, and a serious and comprehensive examination of this long-neglected[11] dimension of the First Amendment is well overdue.

Neutrality, and the First Amendment Dog That Didn't Bark, 1994 Sup. Ct. Rev. 1; Judith Resnik, Changing the Topic, 8 Cardozo Stud. L. & Lit. 339 (1996); Frederick Schauer, The Speech-ing of Sexual Harassment, in New Directions in Sexual Harassment Law (Catherine MacKinnon & Reva Siegel, eds., forthcoming 2003); Nadine Strossen, Regulating Workplace Sexual Harassment and Upholding the First Amendment – Avoiding a Collision, 37 Vill. L. Rev. 757 (1992); Eugene Volokh, What Speech Does "Hostile Work Environment" Harassment Law Restrict, 85 Geo. L.J. 627 (1997), updated at http://www.law.ucla.edu/faculty/volokh/harass/breadth.htm.

[11]The noteworthy exception is Kent Greenawalt, Speech, Crime, and the Uses of Language (1989), and Greenawalt's earlier Speech and Crime, which I will discuss in Section V below.

At times the First Amendment's boundaries have figured in the case law and academic commentary, as with the familiar debates about whether obscenity, libel, fighting words, and commercial advertising are inside or outside the coverage of the First Amendment. But more often, the boundary disputes have been invisible, and there is little case law and not much more commentary about why the content-based restrictions of speech in the Securities Act of 1933, the Sherman Antitrust Act, the National Labor Relations Act, the Uniform Commercial Code, the common law of fraud, the law of criminal conspiracy and solicitation, much of the law of evidence, and countless others do not at the least present serious First Amendment issues. Indeed, although arguments warning of the dangers of so-called "exceptions" to the First Amendment are a staple of civil libertarian rhetoric,[12] even the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication exposes that it is the speech with which the First Amendment deals that is the exception, and the speech that may routinely be regulated that is the rule.

If we examine the speech that the First Amendment ignores, we can begin to perceive the boundaries of the First Amendment. But recognizing where that boundary is located gives us less assistance than we might at first suppose in understanding and applying the boundary as a matter of legal doctrine or legal principle. Rather, the boundaries of the First Amendment, far more than the doctrine lying within those boundaries, turn out to be a function of a complex and

[12]See, e.g. Nina Bernstein, "A Free Speech Hero? It's Not That Simple," New York Times, December 22, 1996, §2, p. 1, col. 1; Henry Louis Gates, Jr., "Let Them Talk," The New Republic, September 20, 1993, p. 37; Nat Hentoff, "Co-Conspirators: Khallid and Safir," The Village Voice, September 22, 1998, p. 24. See also the table of contents to Eugene Volokh, First Amendment Problems, Cases and Policy Arguments (2001).

seemingly serendipitous array of social, political, historical, cultural, psychological, and economic factors that cannot be (or at least have not been) reduced to or explained by legal doctrine or by the background philosophical ideas and ideals of the First Amendment. If it is true that more of the First Amendment is explained by its boundaries than we have previously thought, it may also be the case that less of the First Amendment can be explained by the tools of legal and constitutional analysis than we have thought as well.

II. The Coverage of the First Amendment

To set the stage, it will be useful to restate the distinction between the coverage and the protection of the First Amendment.[13] Like any legal rule, the First Amendment is not infinitely applicable. Though many cases involve the First Amendment, many more do not. Thus, the acts, events, behaviors, and restrictions not encompassed by the First Amendment at all, that remain wholly untouched by the First Amendment, are the ones we will describe as not being covered by the First Amendment. It is not that the speech (or anything else) is not protected by the First Amendment. Rather, it is that the entire event does not present a First Amendment issue at all, and the government's action is consequently measured against no First Amendment standard whatsoever. The First Amendment simply does not show up.

[13]What follows is a brief version of an analysis I have developed at much greater length earlier and elsewhere. Frederick Schauer, Free Speech: A Philosophical Enquiry (1982); Frederick Schauer, Codifying the First Amendment: New York v. Ferber, 1982 Sup. Ct. Rev. 285; Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265 (1981); Frederick Schauer, Can Rights Be Abused?, 29 Phil. Rev. 225 (1981).

When the First Amendment does show up, the full arsenal of First Amendment rules, principles, maxims, standards, canons, distinctions, presumptions, tools, factors, and three-part tests becomes available to determine whether the particular speech will actually wind up being protected. Perhaps the speech is an intentional and explicit incitement to likely imminent lawless action and thus regulable under Brandenburg v. Ohio.[14] Or perhaps it is a knowingly false disparagement of a named individual and subject to libel damages even after New York Times Co. v. Sullivan.[15] Or maybe a regulation of some form of non-misleading commercial advertising directly advances in the least restrictive way possible a substantial government interest, in which case the advertising may be regulated in accordance with the test in Central Hudson Gas and Electric Co. v. Public Service Commission,[16] But the fact that the tests in Brandenburg, New York Times, or Central Hudson are the ones to be applied reflects the influence and thus the coverage of the First Amendment. And the way in which these First

[14]395 U.S. 444 (1969)(per curiam) (the First Amendment "do[es] 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").

[15]376 U.S. 254 (1964) (libel damages recoverable by public official only where a statement about official conduct is made "with knowledge that it was false or with reckless disregard of whether it was false or not"). Where the victim is neither a public official nor a public figure, the burden on a plaintiff is less, see Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), but it is still a burden created in light of the constraints of the First Amendment.

[16]447 U.S. 557 (1980) (regulation of non-misleading commercial advertising of lawful products or services permissible only if in service of substantial governmental interest, only of "regulation directly advances the governmental interest asserted," and only if the regulation is "not more extensive than is necessary to serve that interest").

Amendment tests impose greater burdens than the negligible scrutiny of rationality review shows that the First Amendment makes a difference even when a particular act winds up unprotected.

By contrast, no First Amendment test determines whether the advertising restrictions of the Securities Act of 1933 are constitutional, whether corporate executives may be imprisoned under the Sherman Act for exchanging accurate information about proposed prices, or whether an organized crime leader may be prosecuted for urging that his subordinates murder a mob rival. Each of these examples involves punishment for speech, each involves liability based on both the content[17] and the communicative impact[18] of the speech, and yet in each the First Amendment makes no appearance. In these and countless other instances, the permissibility of regulation, the control of incitement, libel, and commercial advertising, is not measured against First Amendment-inspired standards.

Securities regulation, antitrust, criminal solicitation, and many other categories are our concern here, because these are the categories of "speech" that remain uncovered by the First Amendment. The circumstances under which covered speech winds up being protected are

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[17]See Larry A. Alexander, Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory, 44 Hastings L.J. 921 (1993); Kent Greenawalt, O'er the Land of the Free: Flag Burning as Speech, 37 UCLA L. Rev. 925 (1990); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983); Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615 (1991).

[18]See United States v. O'Brien, 391 U.S. 367 (1968); Laurence Tribe, American Constitutional Law 791-92 (2d ed., 1988); John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975).

important, but we address here the logically prior and long neglected issue of speech not encompassed by the First Amendment in the first instance. The focus is thus on the domain in which the First Amendment is not even considered relevant to the case, and consequently no First Amendment principle guards -- even if non-absolutely -- against infringement. Questions about the boundaries of the First Amendment are questions not about the First Amendment's degree of protection when it applies, but rather are questions about whether the First Amendment applies at all.

The distinction between coverage and protection is pertinent to virtually all constitutional rights, and indeed to virtually all legal rules. Before proceeding to see what a rule's strictures require, we must determine if the rule even applies.. Any rule, including a constitutional rule, is divisible into two components, one delineating the scope of the rule's application and the other prescribing what is to happen for acts or events lying within that scope. "Speed Limit 60," for example, is but shorthand for a more formally articulable rule in which the scope of the rule is limited to those driving vehicles on particular stretches of highway, and in those cases, but only in those cases, the rule limits their speed to 60 miles per hour. Elaborating the rule in full would make clear that the two parts of the rule can be understood as a predicate – the coverage – and a consequent, such that the consequence of the predicate conditions actually occurring is the application of the rule[19] If you are driving a motor vehicle, and if you are not a police officer or driving an emergency vehicle, and if you are driving between these points on this highway, then

[19]See Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991).

you are prohibited from driving in excess of sixty miles per hour.

The same division if a rule into an if – then form applies to constitutional rules as well. If a person is on trial for treason (but not if on trial for anything else), then two witnesses to the same overt act are required for a constitutionally valid conviction.[20] If state legislation distinguishes in-state from out-of-state businesses, then it is invalid unless serving an important safety or equivalent interest in the least discriminatory way possible.[21] If governmental action interferes with a fundamental right[22] or classifies on the basis of a suspect classification,[23] then the government is required to demonstrate a compelling interest in order for the government's action to be permissible.

[20]U.S. Const. Art. III §3.

[21]See Hughes v. Oklahoma, 441U.S. 322 (1979).

[22]Roe v. Wade, 410 U.S. 113 (1973).

[23]Korematsu v. United States, 323 U.S. 214 (1944).

Questions of coverage typically remain out of sight because they are so obvious as to attract scant controversy. There is a question of coverage about when the two-witness rule applies, but the question is easily answered – and thus invisible – because it is ordinarily clear whether a trial is for treason. By contrast, the First Amendment's coverage questions are difficult because the normal tools for delineating the coverage of a constitutional rule are unavailing in the context of the First Amendment. The coverage of some of the Fourth Amendment is determined in part by the comparatively manageable (which is not to say undisputed) contours of what constitutes a seizure,[24] in much the same way that the coverage of the Eighth Amendment is substantially determined by the smallish range of disagreement about whether something is a punishment.[25] We may have disagreements about which seizures are unreasonable, and about which punishments are cruel and unusual, but disagreements about whether we are dealing with a seizure or a punishment are comparatively rare.

Not so, however, in talking about freedom of speech under the First Amendment. Here the counterpart to "seizure" in the Fourth Amendment and "punishment" in the Eighth is "speech," and that word in the constitutional text is of far less value in the task of boundary setting. "Speech" is what we use to enter into contracts, to make wills, to sell securities, to warrant the quality of the goods we sell, to fix prices, to place bets, to bid at auctions, to enter into conspiracies, to commit blackmail, to threaten, to give evidence at a trial, and to do most of

[24]See 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment §2.1(a) at 375 (1996).

[25]See United States v. Bajakajian, 524 U.S. 321 (1998).

the things that occupy our days and occupy the courts. To imagine that the boundaries of the First Amendment are delineated by the ordinary language meanings of the word "speech" is simply implausible.

A common move at this point in the analysis is to recognize that the boundaries of the First Amendment are set not by the word "speech" standing alone, but by the words "the freedom of speech," because it is "the freedom of speech" and not "speech" that Congress (and, now, the states[26]) is forbidden to abridge. But transforming the inquiry in this way does not solve the problem; it only exposes it.. For if the coverage of the First Amendment is determined by the meaning of "the freedom of speech," then we still need of an explanation of why the speech with which we make contracts is, in general, not part of "the freedom of speech" and thus not covered by the First Amendment, and the speech with which we urge civil disobedience is part of "the freedom of speech" and thus, in general, covered. Now at this juncture we could consult history, original intentions, moral theory, tradition, or any of the other conventional albeit contested sources of constitutional guidance, but let us postpone that inquiry. For present purposes, the important task is to distinguish between coverage and protection, and thus to identify boundary disputes as ones not about the protection but about the coverage of the First Amendment.

III. The Visible Boundaries of the First Amendment's History

A few of the First Amendment's boundary disputes have been highly visible, and a quick

[26]Stromberg v. California, 283 U.S. 359 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

survey will set the stage for the more important exploration of those boundary disputes that have been less noticed but more significant precisely because of the way in which they have been taken for granted.

The most notorious of the First Amendment's contested boundary disputes has been about obscenity.[27] For much of the First Amendment's history, both legislation restricting obscenity and individual prosecutions for trafficking in obscene materials were explicitly treated as beyond the First Amendment's borders, the First Amendment remaining unimplicated simply because of the category in which the restriction or prosecution was placed.[28] When in the

[27]Compare David Cole, Playing By Pornography's Rules: The Regulation of Sexual Expression, 143 U. Pa. L. Rev. 111, 126-27 (1994) (all obscenity and pornography should be covered by the First Amendment), and David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974) (same), with Harry Kalven, Jr., The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1 (only hard-core pornography lies outside the First Amendment's scope), and Frederick Schauer, Speech and "Speech" – Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutionasl Language, 67 Geo. L.J. 899 (1979) (same). See also Cass R. Sunstein, Words, Conduct, Caste, 60 U. Chi. L. Rev. 795, 807-08 (1993).

[28]See generally Frederick F. Schauer, The Law of Obscenity (1976).

nineteenth century the Supreme Court first offhandedly dismissed a First Amendment challenge to an obscenity proceeding,[29] it did so not because the Court thought that the magazine presented dangers sufficient to override the First Amendment, but rather because the Court treated the First Amendment as no more applicable to an obscenity prosecution than to a prosecution for assault – in neither case did the government's action even bring the First Amendment into play.

[29]In re Rapier, 143 U.S. 110 (1892). See also Near v. Minnesota, 283 U.S. 697, 716 (1931).

When the Court in 1957 finally acknowledged that obscenity prosecutions could touch on First Amendment concerns by restricting works that it was the function of the First Amendment to guard,[30] the Court still insisted that works actually determined to be obscene according to First Amendment-inspired standards lay outside the coverage of the First Amendment.[31] In proceeding in this manner, the Court – mistakenly to all but a handful of commentators – had no need to subject the rationales for regulation to anything more than minimal rational basis scrutiny.[32] Though those rationales are tenuous even to those who find them plausible, treating legally obscene images and utterances as beyond the First Amendment pale enabled the Court to treat obscenity control as no more subject to First Amendment standards than the regulation of pushcart vendors in New Orleans[33] or opticians in Oklahoma,[34] to take two prominent cases in which state laws had a sufficiently dubious justification that only the stunningly minimal scrutiny of the rational basis standard enabled them to survive constitutional review.

The continuing objections to the Supreme Court's approach to obscenity were premised on the view that even materials found to be legally obscene under the test later crystallized in

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[30]Roth v. United States, 354 U.S. 476 (1957).

[31]354 U.S. at ___. For contemporaneous analysis, see Kalven, supra note 27; William B. Lockhart and Robert C. McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960).

[32]Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[33]New Orleans v. Dukes, 427 U.S. 297 (1976).

[34]Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Miller v. California[35] were inside and not outside the First Amendment, and thus part of the class of acts whose regulation must be tested against First Amendment standards. But by continuing to insist that materials meeting the Miller test were beyond the First Amendment's boundaries and consequently regulable by satisfying only rational basis scrutiny,[36] the Court recognized that some images and utterances remained outside of the First Amendment's reach, even though the line between the inside and the outside was fraught with First Amendment implications.

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

[36]Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

To most commentators, the fact that legally obscene materials remain outside the First Amendment is unfavorably contrasted with those categories of speech that were previously out but are now wholly in. Defamation, for example, was formerly uncovered, with the Supreme Court declaring in 1952 in Beauharnais v. Illinois[37] that libel itself was one of "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem."[38] But starting with New York Times Co. v. Sullivan,[39] no libelous utterance remains outside the First Amendment. The standards for punishing libel may vary with the nature of the victim – whether public official, public figure, or private individual[40] – and possibly with the nature of the speaker – whether the media or not[41] – but, unlike obscenity, there remains no set of libelous utterances whose restriction is not tested against a standard inspired and heightened by the First Amendment. Even more importantly, the

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[37]343 U.S. 250 (1952).

[38]343 U.S. at ___.

[39]376 U.S. 254 (1964).

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

[41]Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985). See Steven H. Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology, 25 UCLA L. Rev. 915 (1978).

tests that have emerged for dealing with the various categories of defamation reflect a process in which the rationales for regulating any libelous utterance are measured against the values informing the First Amendment.

Much the same is true of commercial advertising. Like defamation, the Supreme Court had earlier treated the entire category of commercial advertisements as being beyond the coverage of the First Amendment.[42] Starting with Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.[43] in 1976, however, the category of utterances that "do no more than propose a commercial transaction" became subject to regulation only if the regulation satisfied a test driven by the First Amendment.[44] That test, set out in Central Hudson Gas &

[42]Valentine v. Chrestensen, 316 U.S. 52 (1942).

[43]425 U.S. 748 (1976).

[44]That test is most prominently associated with Central Hudson Gas & Elec. Corp. v. Public Service Comm's of New York, 447 U.S. 557 (1980), but the test has been the subject of subsequent explication and modification. See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). Whether all commercial speech is in fact now covered is actually a complex issue. Under the Central Hudson approach, there is a threshold inquiry into whether the speech is false and misleading, and thus it is more accurate to treat false and misleading commercial advertisements as akin to legally obscene materials – regulable under minimal rational basis scrutiny without regard to First Amendment standards or values. Indeed, the degree of continuing non-coverage is even greater than it might first appear. With respect to obscenity, the determination that something is legally obscene and thus uncovered is subject to "independent" (something close to de novo) appellate review, Jacobellis v. Ohio, 378 U.S. 184, 187-90 (1964), just as with the determination that libelous material is unprotected because published with actual malice. Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989); Bose Corp. V. Consumers Union, 466 U.S. 485 (1984); Susan Gilles, Taking First Amendment Procedure Seriously, 58 Ohio St. L.J. 1752 (1998); Henry L. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985). Yet if that standard were to be applied to the work of the Federal Trade Commission, for example, virtually all of its work, dealing as it does largely with the

Elec. Co. v. Public Service Comm'n[45] and modified since,[46] is less protective than the test in Brandenburg, but the fact that it represents scrutiny stricter than that applied pursuant to simple rationality review reflects the way in which commercial advertising now lies within and not outside the First Amendment.

Finally, we have so-called "fighting words." When the Supreme Court in 1942 upheld Walter Chaplinsky's conviction for delivering a public vituperative speech against religion and then following it up with a harsh denunciation of the police officers who sought to control him,[47] Justice Murphy's opinion for a unanimous Court rejected Chaplinsky's First Amendment argument by saying, famously, that the "classes of speech . . . which have never been thought to raise any constitutional problem" included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[48] To Justice Murphy and his colleagues, the fighting

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regulation of false and misleading advertising, would be subject to independent constitutional appellate review, something that has not happened and is not likely to happen. As long as this state of affairs continues, then the regulation of false and misleading commercial advertising will be most analogous to pre-Roth obscenity law, with the nature of the proceeding rather than the actual falsity (or obscenity) of the material determining non-coverage.

[45]447 U.S. 557 (1980).

[46]See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); Board of Trustees v. Fox, 492 U.S. 469 (1989). See generally Kathleen M. Sullivan, Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart, 1996 Sup. Ct. Rev. 123.

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

[48]315 U.S. at (emphasis added).

words uttered by Chaplinsky were regulable not because the state interest in controlling them was so powerful as to override the First Amendment, but rather because the words lay outside the First Amendment entirely.[49]

[49]It is noteworthy that on the coverage issue the most important of the 1919 cases was neither Schenck v. United States, 249 U.S. 47 (1919), nor Abrams v. United States, 250 U.S. 616 (1919), but the less famous Frohwerk v. United States, 249 U.S. 204 (1919), in which Justice Holmes observed that "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." 249 U.S. at 206.

Subsequent developments have narrowed the class of fighting words considerably.[50] As with obscenity, the size of the category of fighting words is vastly diminished,[51] but at least in theory the Supreme Court still views fighting words as part of the area in which the presence of words in the literal and ordinary language sense is not a sufficient condition for testing their regulation against First Amendment standards.

IV. Beyond the Border: The Domain of the Barely Contested

There are those who act as if the aforementioned exclusions, whether still with us or not, represent the universe of speech lying outside the First Amendment.[52] Yet to take that position is to be afflicted with the common ailment of spending too much time with one's casebooks, and thus of defining the domain of constitutional permissibility by reference only to those cases that have been close and contested enough to wind up in the courts, especially the Supreme Court. But if we are interested in the speech that the First Amendment does not touch, we need to leave our casebooks and the Supreme Court's docket behind, and consider not only the speech that the First Amendment noticeably ignores, but also the speech that is ignored more silently.[53] In undertaking this task, a non-exhaustive survey of what lies well beyond the First

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[50]See especially Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972). See also Cohen v. California, 403 U.S. 15 (1971).

[51]See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[52]See supra note ___.

[53]On the theoretical question of whether the First Amendment encompasses all behavior describable as "speech" in the ordinary language sense of that word, see Kent Greenawalt, Criminal Coercion and Freedom of Speech, 78 Nw. U.L. Rev. 1081 (1983); Robert Post,

Amendment's borders may be instructive.

Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249 (1995); Schauer, supra note ___.

A prime example of the speech that is relatively invisibly outside the First Amendment's boundaries is the speech that comprises the primary target of the federal regulation of securities. It might be hyperbolic to describe the Securities and Exchange Commission as the Content Regulation Commission, but it would not be wholly inaccurate.[54] When exercising its authority under the Securities Act of 1933, the Securities and Exchange Act of 1934, and various other statutes regulating the securities markets, the SEC engages in a pervasive process of controlling speech on the basis of its content. Under the registration provisions of the 1933 Act, securities may neither be offered nor sold, except under narrow circumstances typically reserved for small offerings, without registration. And as the registration provisions operate, neither offers nor advertisements may be made, published, or delivered without approval in advance by the SEC, an approval contingent upon the Commission's determination that the materials are neither false nor misleading. Even after registration, SEC civil and criminal enforcement actions, as well as private suits (usually under implied private rights of action) combine to produce a milieu in which materials pertaining to a company's securities are written and distributed under the threat of government sanction and civil liability for false, misleading, or omitted disclosure.

Much the same is true of the highly controlled world of proxy solicitation. Although a proxy contest is an election, it is an election in which what the candidates can say, when they can say it, and to whom they can say it is tightly constrained by the 1934 Act and the regulations

[54]"Securities regulation is essentially the regulation of speech." Roberta S. Karmel, Introduction, 55 Brooklyn L. Rev. 1,1 (1989).

promulgated pursuant to it. As with registration under the 1933 Act, the SEC in managing the proxy process is concerned with whether the materials used are false or misleading, and equally with the timing and style of the communications. Because a persistent issue in proxy contests is the ability of management to control the channels of communications with shareholders, much of the "action," sometimes litigated but usually not, revolves around the claims of corporate pirates and dissident shareholders to compel management, in or accompanying management's own materials, to distribute literature and statements directly opposed to management's positions.

Although content regulation in the world of securities regulation is not limited to the registration and proxy processes (the prohibitions on insider trading encompass behavior that consists largely of the transmission of accurate information), this brief description of registration and proxy regulation is sufficient to make the point. In just two short paragraphs we have set off what in other contexts would be a large number of First Amendment alarm bells – at the least prior restraint by virtue of mandatory government approval in advance of publication,[55] content

[55]Although most modern prior restraint cases deal with injunctions, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931), the classic prior restraint involves the licensing of speech by a bureaucracy. See Lovell v. Griffin, 303 U.S. 444 (1938).

regulation, compelled speech,[56] and official management of representations made in elections.[57]

[56]See Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705 (1977).

[57]Brown v. Hartlage, 456 U.S. 45 (1982).

Until the assimilation of commercial speech into the First Amendment, it would scarcely have occurred to anyone that the First Amendment could be relevant to securities regulation. After Virginia Pharmacy, however, things were for a few years quite different. Starting in the early 1980s, claims that the entire scheme of securities regulation needed to be tested against First Amendment standards became more common.[58] Some of these claims were made by academics, but others were made in domains inhibited by practicing lawyers. Indeed, in 1983 James Goodale, then a highly influential Wall Street lawyer with a substantial media practice, ominously announced that securities regulation and the First Amendment were on a "collision course."[59]

[58]See Aleta Estreicher, supra note 4; Donald E. Lively, Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment, 60 Wash. L. Rev. 843 (1985); Burt Neuborne, supra note 4; Michael E. Schoeman, The First Amendment and Restrictions on Advertising under the Securities Act of 1933, 41 Bus. L. 377 (1986); Nicholas Wolfson, supra note 4.

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The collision never happened. Although the Supreme Court and the lower courts occasionally warned about the First Amendment when securities regulation appeared to trench upon the editorial content of newspapers and newsletters,[60] or upon the behavior of journalists, [61] the large scale First Amendment assault on the system of securities regulation did not get off the ground. Few court challenges were mounted and none succeeded, even in the lower courts.[62] A quarter of a century after the first warnings were sounded, and almost twenty years after those warnings were loudest, securities regulation goes on as before, remaining a domain almost entirely outside the coverage of the First Amendment and outside the ambit of even the slightest degree of constitutionally-inspired scrutiny.

The story of the First Amendment and antitrust is similar but less overt. There are many ways to violate the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the various other sources of antitrust regulation in the United States, but most of the good ones involve speech. Fixing prices is typically facilitated by the transfer of accurate information, yet were the president of the Ford Motor Company to convey to the president of General Motors

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[60]See especially Lowe v. SEC, 472 U.S. 181 (1985)(interpreting Investment Advisors Act of 1940 to exclude financial newsletters in order to prevent potential First Amendment problems). See also Agora, Inc. v. Axxess, Inc., 90 F. Supp. 2d 697 (D. Md. 2000)(applying Lowe to electronic publication); In re Scott Paper Co. Securities Litigation, 145 F.R.D. 366 (E.D. Pa. 1992).

[61]Cf. Carpenter v. United States, 484 U.S. 19 (1987), as discussed on this point in VIII Louis Loss and Joel Seligman, Securities Regulation 3648 (1991).

[62]See, e.g., Wall Street Publishing Institute, Inc., 851 F.2d 365 (D.C. Cir. 1988). Indeed, even Lowe has been interpreted relatively narrowly. See R & W Technical Services Ltd. v. CFTC, 205 F.3d 165 (5th Cir. 2000).

entirely accurate information about Ford's proposed prices for the forthcoming model year the consequences would more likely be treble damages and time in the penitentiary than praise for having contributed to the marketplace of ideas. Organizing a boycott is also an effective way of attracting the attention of the Justice Department and class action lawyers, but another way of describing a boycott is as advocacy of the virtues of collective action. Indeed, the very language of the Sherman Act – "contract[s], combination[s], or conspirac[ies] in restraint of trade" – appears to anticipate that many anti-competitive practices will occur as a result of the verbal exchange of information.

As with securities regulation, antitrust law has occasionally been checked by the First Amendment when it invades traditional First Amendment domains, as with concerted action to urge legislation (the so-called Noerr-Pennington doctr ine[63]) or with otherwise unlawful boycotts that are more political than economic in motivation.[64] Apart from such rare exceptions, however, antitrust law, even when it restricts the exchange of accurate market, pricing, and production information, and even when it restricts advocacy of concerted actions in most

[63]Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). See generally Daniel Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 1 (1977). For the current state of the doctrine, see City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991). For a discussion of the frequently litigated "sham" exception, see Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993).

[64]Most famously, N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982). See also Missouri v. National Organization for Women, Inc., 620 F.2d 1301 (8th Cir. 1980).

contexts,[65] remains almost wholly untouched by the First Amendment. As early as 1921, Oliver Wendell Holmes found the constitutional acceptability of these antitrust restrictions "surprising in a country of free speech,"[66] but Holmes was in dissent then and would be in dissent today. Despite the occasional urgings of commentators,[67] despite dire warnings that antitrust law, like securities regulation, was on a "collision course" with the First Amendment,[68] and despite the potential implications of the constitutionalization of commercial speech, antitrust law has proceeded apace, with its constraints on speech, on advocacy, and on the exchange of accurate information remaining totally uncovered by the First Amendment.

[65]See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

[66]American Column & Lumber Co. v. United States, 257 U.S. 377, 413 (1921) (Holmes, J., dissenting).

[67]See Stanley D. Robinson, Reconciling Antitrust and the First Amendment, 48 Antitrust L.J. 1335 (1980).

[68]Gordon F. Hampton, The Bill of Rights as a Limitation Upon Antitrust, 48 Antitrust L.J. 1417, 1417 (1980).

Labor law is more complex, but the basic story is the same. Though the First Amendment has occasionally been involved in protecting some forms of public labor picketing,[69] and though free speech ideas have been incorporated into some dimensions of statutory labor law, most of labor law proceeds unhindered by the First Amendment.[70] Perhaps because of labor's crucial role in the formative years of modern First Amendment thinking[71] and perhaps because of the ideological preferences of the academics who do most of the writing about labor law and most of the writing about the First Amendment, the relative invisibility of labor law in First Amendment doctrine has been the subject of considerable commentary,[72] but to little effect. Although much of labor law is about managing the speech that takes place in elections, the existing law permits official and content-based management of elections and election campaigns, including restrictions on accurate representations about the future consequences of unionization, to an extent that would never be countenanced in domains covered by the First Amendment.[73]

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[69]See Thornhill v. Alabama, 310 U.S. 88 (1940).

[70]See International Brotherhood of Teamsters v. Vogt, Inc., 354 U.. 284 (1957); Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949).

[71]See David M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205 (1983); David M. Rabban, The First Amendment in Its Forgotten Years, 90 Yale L.J. 514 (1981).

[72]See, e.g., Julius Getman, supra note 8; James Gray Pope, supra note 8; James Gray Pope, The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole, 11 Hastings Const. L.Q. 189 (1984).

[73]See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Farris Fashions v. NLRB, 32 F.3d 373 (8th Cir. 1994); Eldorado Tool Div. of Quamco, 325 N.L.R.B. No. 16, 156 L.R.R.M. 1241 (1997); Reeves Bros., 320 N.L.R.B. 1082 (1996). See generally Alan Story, Employer Speech, Union Representation Elections, and the First Amendment, 16 Berkeley J. Emp. & Lab. L. 356 (1995).

Moreover, much of the balance of modern labor law involves unashamedly viewpoint-based restrictions on boycotts, strikes, and picketing. In some contexts unions may do things that employers may not, and the reverse applies to employers in other contexts.

Agitation against the exclusion of labor law again seems to have peaked. Frequent in the 1980s, concern about the absence of First Amendment analysis in the development of labor law has largely disappeared, perhaps because of a recognition that the Supreme Court would not be sympathetic, or perhaps because of a fear that the Supreme Court would be too sympathetic.[74] Whatever the reasons, labor law continues to be an outsider to the First Amendment, a situation that is increasingly even if grudgingly (by some) accepted.

[74]Cf. Mark Tushnet, An Essay on Rights, 62 Texas L. Rev. 1363, 1387-92 (1984).

The history of securities regulation, antitrust, and labor law has been replicated in numerous other domains. Copyright, especially recently, has been the subject of some agitation, but its pervasive regime of content regulation and prior restraint remains largely unimpeded by the First Amendment.[75] So too with the law of sexual harassment, which in both its quid-pro-quo and hostile environment versions regulates speech, but which, with Supreme Court approval[76] and occasional anguish by commentators,[77] remains unencumbered by the First Amendment's constraints. Even less visibly yet, much the same degree of First Amendment unencumbrance holds true of the content-based regulation of trademarks,[78] the pervasive and constitutionally untouched law of fraud, almost all of the regulation of professionals,[79] virtually the entirety of the law of evidence, large segments of tort law,[80] and that vast domain of ordinary

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[75]See supra note 2.

[76]R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). See also Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), in which the Supreme Court's failure even to mention the First Amendment transpired against a background of active discussion of the First Amendment issues in both the briefs and oral argument. On the meaning of this silence, compare Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the Dog That Didn't Bark, 1994 Sup. Ct. Rev. 1, with Frederick Schauer, The Speech-ing of Sexual Harassment, in Catherine MacKinnon and Reva Siegel, eds., New Directions in Sexual Harassment Law (forthcoming 2003).

[77]See supra note10.

[78]See Friedman v. Rogers, 440 U.S. 1 (1979).

[79]See Lowe v. SEC, 472 U.S. 181 (1985) (White, J., concurring); Accountant's Society of Virginia v. Bowman, 860 F.2d 602 (4th Cir. 1988); Alfred Aman, Jr., SEC v. Lowe, Professional Regulation and the First Amendment, 1985 Sup. Ct. Rev. 93; Frederick Schauer, The Speech of Law and the Law of Speech, 28 Ark. L. Rev. 687 (1997).

[80]See David A. Anderson, Incitement and Tort Law, 37 Wake Forest L. Rev. 957 (2002); Frederick Schauer, Mrs. Palsgraf and the First Amendment, 47 Wash. & Lee L. Rev. 161 (1990).

criminal law that deals with conspiracy and criminal solicitation.[81] Indeed, the examples I have noted in this section are ones in which the speech is propositional rather than performative, to use the distinction common among philosophers.[82] If we do not restrict ourselves to the propositional, and include the speech by which we make wills, enter into contracts, render verdicts, create conspiracies, consecrate marriages, admit to our crimes, post warnings, and much else, it becomes even clearer that the speech with which the First Amendment is even slightly concerned is but a small subset of the speech whose control is a pervasive but invisible part of our lives.

V. Outcomes in Search of a Theory

Now that we have glimpsed part of that vast expanse of human communication that lies beyond the boundaries of the First Amendment, it is tempting to suppose that the line between what is inside and what is outside, even if not explainable in terms of constitutional text or the intentions of those who wrote it, is nonetheless susceptible of theoretical explanation. Perhaps

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[81]See especially R. Kent Greenawalt, Speech, Crime, and the Uses of Language (1989); R. Kent Greenawalt, Speech and Crime, 1980 Am. B. Found. Res. J. 645.

[82]See J.L. Austin, How to Do Things With Words (J.O. Urmson & M. Sbisa, eds., 2d ed., 1975); John Searle, Speech Acts: An Essay in the Philosophy of Language (1969). The classic examples of performatives include saying "I do" at a wedding, "I bequeath" in a will, or "Guilty" at a trial.

there is an organizing principle explaining coherently which speech winds up within the First Amendment and which speech winds up without. Maybe there are no words, and maybe the history is unhelpful, but perhaps there is a theory.

Yet however hard we try to theorize about the First Amendment's boundaries, our efforts at anything close to an explanation of the existing terrain of coverage and non-coverage are unavailing. Although an account of what the First Amendment "is all about" will include some things and exclude others, and so too with an account that recognizes that the First Amendment is about multiple things and not just one, none of these accounts appear to explain much of, let alone most of, the First Amendment's existing inclusions and exclusions. Theories based on democratic deliberation[83] have problems with pornography, commercial advertising, campaign finance, and art, among others. Marketplace of ideas accounts[84] struggle with art, literature, communication that may be expressive but non-ideational, and much of factually falsifiable speech. Autonomy and self-expression seem poorly to explain commercial speech, non-

[83]See, e.g., Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Cass R. Sunstein, Democracy and the Problem of Free Speech (1993); Harry Kalven, Jr., The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191; Robert Post, Managing Deliberation: The Quandary of Democratic Dialogue, 103 Ethics 654 (1993); Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. Colo. L. Rev. 1109 (1993).

[84]See, e.g., International Brotherhood of Elec. Workers v. NLRB, 181 F.2d 34 (2d Cir. 1950) (L. Hand, J.); William P. Marshall, In Defense of the Search for Truth as a First Amendment Justification, 30 Ga. L. Rev. 1 (1995).

commercial corporate speech[85] and also harmful speech. Distrust of government theories have a hard time explaining why that distrust does not extend to the SEC, the FTC, the FDA, the Justice Department, and a trial judge managing the speech taking place during a trial. If only one theory explains the First Amendment's coverage, then no extant theory appears to come even close to serving the function of explaining a significant amount of the existing doctrine. And if all of the historically available and judicially mentioned theories are available – self-expression,[86] individual autonomy,[87] dissent,[88] democratic deliberation,[89] the search for truth,[90] tolerance,[91] distrust of government,[92] and many others – then their collective coverage is so great that again they fail as explanations of the existing state of the First Amendment terrain. If every underlying theory of the First Amendment can be conscripted into service to justify either an inclusion or an exclusion from the coverage of the First Amendment, and if the array of such theories is as large

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[85]See C. Edwin Baker, Human Liberty and Freedom of Speech (1989); C. Edwin Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L. Rev. 1 (1976).

[86]See, e.g., Martin H. Redish, Freedom of Expression: A Critical Analysis (1984); Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591 (1982); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974).

[87]See, e.g., Thomas M. Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204 (1972); Harry Wellington, On Freedom of Expression, 88 Yale L.J. 1105 (1979).

[88]See Steven H. Shiffrin, The First Amendment, Democracy, and Romance (1990).

[89]See supra note ___.

[90]See supra note ___.

[91]See Lee C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America (1986); David A.J. Richards, Toleration and the Constitution (1986).

[92]See Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521.

and diverse as it actually is, then all of the work is being done not by the theories but by the unarticulated factors that determine coverage or non-coverage in the first instance. Like Karl Llewellyn's claims about the consequences of the profusion of frequently inconsistent canons of statutory construction,[93] the profusion of available First Amendment theories produces a universe in which the actual grounds for inclusion and exclusion from the domain of the First Amendment remain successfully camouflaged.

[93]Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 Vand. L. Rev. 395 (1951).

That the existing justifications for a free speech principle cannot individually or collectively explain much of the development of the First Amendment does not necessarily mean that the theories are inadequate as normative accounts of the idea of free speech. Although theories of the First Amendment's domain have proliferated, and although the full proliferation of theories has been utilized by the courts, it does not follow that one or a small number of those theories might produce a more coherent set of First Amendment boundaries. But the fact that even the best of the normative accounts diverges so substantially from existing doctrine, and thus from the shape of the First Amendment as we know it, means that if we are looking to explain this existing terrain, rather than prescribe what it ideally should look like, then we need to go elsewhere. To put it differently, a descriptive and explanatory understanding of how the First Amendment came to look the way it does,[94] and how it came to include what it includes and exclude what it excludes, is not an understanding as to which existing theories of the First Amendment – and they are legion – provide much assistance. In light of that failure of normative free speech theory to explain the existing shape of the First Amendment, therefore, it may be more fruitful to look elsewhere, and to consider the possibility that the best explanation of the boundaries of the First Amendment may come from the political, sociological, cultural,

[94]It is almost certainly true that understanding the shape of the First Amendment requires recognizing that the First Amendment has developed in common law fashion. See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996); Frederick Schauer, Is the Common Law Law?, 77 Cal. L. Rev. 455, 470 (1989). But that observation itself has limited explanatory power without an account of how the common law develops, an account, as Holmes first recognized, that understands that the development of the common law is not strictly a logical process. Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457 (1897). Yet although Holmes was correct to stress the role of experience rather than logic, he seemed not to consider the role that the array of cases disputed and presented played in shaping the path of common law development.

historical, psychological, and economic milieu in which the First Amendment exists and out of which it has developed.

VI. The Magnetism of the First Amendment

If we abandon – at least here – the pursuit of a normative theory of inclusion and exclusion, and seek explanation rather than justification, our search may be more revealing. So instead of supposing that the domain of the actual First Amendment is inscribed by its purposes, functions, or philosophical explanations, we will examine the political, social, cultural, historical, psychological, and economic dynamics of the way in which the First Amendment functions in society. When we define our task in this way, when we explore the political psychology of the First Amendment, we wind up getting a better picture of why the First Amendment notices what it notices, and, perhaps more importantly, why it ignores what it ignores. In an important way, as I will suggest, the coverage of the First Amendment is best understood as the outcome of a competitive struggle among numerous interests for constitutional attention,[95] and the factors that

[95]See Herbert Blumer, Social Problems as Collective Behavior, 18 Soc. Prob. 298 (1971). Much of the existing literature on agendas has started with the accurate premise that the public agenda is a scarce resource. See, e.g., Frank R. Baumgartner and Bryan D. Jones, Agendas and

determine who prevails and who does not in this competition for constitutional salience are worth not only closer inspection, but the kind of systematic research that I can only hint at here.

Instability in American Politics (1993); Roger W. Cobb and Marc Howard Ross, Cultural Strategies of Agenda Denial: Avoidance, Attack and Definition (1997); Anthony Downs, Up and Down with Ecology – The "Issue-Attention Cycle," 28 Pub. Int. 38 (1972). The constitutional agenda is potentially different insofar as an issue will not appear to a judge of a court with mandatory jurisdiction as one involving a scarce resource, but rather as one requiring a decision. Nevertheless, the scarce resource model of an agenda will still be applicable in terms of attracting public attention to sponsor and support litigation, of attracting the interest of advocacy organizations, of influencing which cases courts take seriously and which not, and, of course, in determining which cases are hard and which not by courts having discretionary jurisdiction.

Any account of the politics of the First Amendment would have to start with what we can call the First Amendment's magnetism.[96] In any culture there is a group of quasi-authoritative symbols and ideas, and part of understanding the rhetorical terrain of a society entails understanding how public and private actors seek to appropriate those symbols and ideas to their own causes.[97] Indeed, the non-disciplined nature of American politics may make the political contest for symbols even more important than it is under different political structures and systems.[98] Occasionally these symbols are negative – Communism; Prohibition; Munich – and political actors seek to distance themselves from them. More often, however, the competition is over the claim to various positive symbols. These symbols might be a particular period in history, as with the revolutionary and founding period in the United States, the creation of the State of Israel in 1948, the transformation from apartheid in South Africa from1990 to 1994, the beginnings of independence in much of the post-colonial world, and the civil rights movement for some Americans and the Sixties for others. The symbols might be particular individuals, such as Abraham Lincoln the United States, Chairman Mao in the People's Republic of China, Nelson Mandela in South Africa., Simon Bolivar in parts of Latin America, or Thomas Jefferson

[96]The magnetism of the First Amendment generates the phenomenon on the part of advocates, legal and public, that I have previously referred to as opportunism, see Frederick Schauer, First Amendment Opportunism, in Lee C. Bollinger and Geoffrey R. Stone, eds., Eternally Vigilant: Free Speech in the Modern Era 175 (2002). The present Article can be understood as the further development of themes I first explored there in a much more preliminary way.

[97]For the systematic development of the basic ideas, see especially Harold D. Lasswell, Daniel Lerner, and Ithiel de Sola Pool, The Comparative Study of Symbols (1952); Ithiel de Sola Pool, Harold D. Lasswell, and Daniel Lerner, Symbols of Democracy (1952).

[98]See Anthony King, The Vulnerable American Politician, 27 Brit. J. Pol. Sci. 1 (1997).

at the University of Virginia. They might be physical artifacts, such as the flag or the cross. They might be abstract ideas like rights, freedom, liberty, equality, or capitalism. (Why did the country formerly known as East Germany officially refer to itself as the German Democratic Republic?) Or they might be books, such as the Koran in the Islamic world and the Bible in much of the West. When Antonio in The Merchant of Venice observes that "even the Devil can cite scripture to his purpose," he was commenting not only on the linguistic indeterminacy of the Bible, but also on the way in which the Bible has sufficient rhetorical authority to cause participants in social and political discussions to strive constantly to enlist it in their cause.

In important respects the First Amendment serves a similar function in American society. To an extent unmatched elsewhere in the world, a world that often views America's obsession with the First Amendment as embodying an insensitive neglect of the other important values with which the First Amendment often conflicts,[99] the First Amendment, freedom of speech, and freedom of the press provide considerable rhetorical power and argumentative authority. The individual or group gaining the support of the First Amendment often believes, and often correctly, that it has secured the upper hand in public debate. The First Amendment not only attracts attention, but also appears to strike fear in the hearts of many who do not want to be seen as being against it.

[99] See, e.g., Stephen Sedley, The First Amendment: A Case for Import Controls?, and Eric Barendt, The First Amendment and the Media, both in Ian Loveland, ed., Importing the Firt Amendment: Freedom of Expression in Britain, Europe, and the USA (1998), at 23, 29.

The reasons why the First Amendment has this effect, an effect greater than free speech and free press ideas have in other countries, are complex. One might be that events of dissent and protest, and thus of freedom of speech and press – the Boston Tea Party, John Peter Zenger, Thomas Paine, John Brown, the origins of the labor movement, the civil rights movement – have pride of place in the popular conception of American history. Another might be that some people think that the First Amendment was first because it was most important, rather than because, as is actually the case, that it moved from third to first after the first two amendments failed to secure ratification. Still another might be the way in which the First Amendment is essentially negative. Various constitutional values like federalism, equality, and separation of powers have both their positive and negative, forward- and backward- looking, policy and principle[100] dimensions. Freedom of speech, however, which in theory can be understood both positively and negatively, has in reality developed more negatively, understood to be at its core about protecting against danger and guarding against disaster rather than about making conditions better. And given that negatives tend to outweigh positives in terms of likelihood of re-transmission – a person who has a good experience on a cruise will, on average, tell eight people about it, but a person who has a bad experience will tell fifteen[101] – competition to claim the mantle of the First Amendment,

[100]See Ronald Dworkin, Law's Empire (1987).

[101][Get cite from Tom Patterson]

especially in a country with more distrust of government than virtually any other in the world,[102] is predictably fierce.

[102][Inglehart studies]

Such explanations for the First Amendment's magnetism likely have some force, yet in the complex array of reasons why the First Amendment has become one of the symbols that opposing political forces fight to claim, one of the principal reasons is surely that relying on the First Amendment is, not surprisingly, a good way of attracting the attention and sympathy of the institutional press.[103] If, as the literature on agenda-setting tells us, attracting press attention is a major factor in moving issues from the back burner to the front,[104] from converting claims of special interest into matters of public concern, then the shrewd public advocate will attempt to devise a strategy to attract press attention, and claiming the support of (or, even better, the presence of a threat to) the First Amendment is often a wise strategy.[105] Because the press is not nearly as disinterested an observer of First Amendment controversies as it is of constitutional

[103]There is a debate in the literature about the extent to which interest groups can directly (rather than through mobilizing the public) attract the attention of the press, compare Jeffrey M. Berry, The New Liberalism: The Rising Power of Citizen Groups (1999), with Timothy E. Cook, Governing with the News: The News Media as a Political Institution (1998), but it would be a plausible hypothesis that press interest is more likely to be directly piqued by press-related issues than by issues in which the press is not itself an interested participant.

[104]See especially John Kingdon, Agendas, Alternatives, and Public Policies (2d ed., 2002), the locus classicus for research on agenda-setting and the way in which issues wind up on the policy agenda.

[105]A LEXIS search (February 17, 2003) encompassing the last two years is instructive. "New York Times and first amendment" revealed 2997 instances, and coupling "New York Times" with "freedom of speech or free speech" exceeded 3000. By contrast, coupling "New York Times" with "fourth amendment" produced 284 references, "fifth amendment" 657, "equal protection" 404, "fourteenth amendment" 208, and "due process" 1208. The results substituting "Boston Globe" for "New York Times" were similar, with 603 "First Amendment" references, 317 for "due process" 123 for "fifth amendment," 64 for "equal protection," 51 for "fourth amendment," and 23 for "fourteenth amendment." And substituting "Washington Post" produced 2273 for "free speech or freedom of speech," 2164 for "first amendment," 853 for "due process," 490 for "fifth amendment," 278 for "equal protection," 195 for "fourth amendment," and 113 for "fourteenth amendment."

issues involving due process, equal protection, federalism, or the rights of criminal defendants, for example, a First Amendment argument has a special kind of resonance with the very people who substantially determine which topics will become public and which will not.

Somewhat more debatably, a disproportionate interest in the First Amendment may exist within the larger intellectual milieu that includes, in addition to the press, the world of education, academic research, the professions, and, perhaps most importantly, the world of the law, including judges.[106] In part because of their own beliefs, and in part because they are unlikely to be totally unconcerned with what is said about them in the press,[107] judges are also likely to be, and even if not are likely to be perceived as being, disproportionately sympathetic to First Amendment arguments.

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[106]See Martin Shapiro, Freedom of Speech (1966); Cf. Aaron Director, The Parity of the Economic Market Place, 7 J. L. & Econ. 1 (1964); Ronald H. Coase, Advertising and Free Speech, 6 J. Leg. Stud. 1 (1977).

[107]I explore this delicate topic at somewhat greater length in Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. Cinc. L. Rev. 615 (2000).

These empirical assertions are testable and possibly false, but they do seem to explain a substantial part of the magnetic effect of the First Amendment – the way in which legal and constitutional argument migrates to claims of freedom of speech and press. Time and again, legal arguments that appear initially to have little to do with free speech turn up in First Amendment clothing far more than free speech arguments turn up in, say, equal protection clothing.[108] Objections to the military's "Don't Ask, Don't Tell" policy are framed not, as one might expect, as arguments about equality, about sexual orientation as a potentially suspect or suspicious class, or even as arguments about personal liberty. Rather, the "telling" dimension of the "Don't Ask, Don't Tell" policy is used to focus on the policy as a free speech problem more than, or at least in addition to, being an equality problem and a liberty problem.[109] Similarly, economic liberty objections to government regulation of business become objections to the regulation of commercial advertising,[110] objections to the alleged intrusiveness of hostile

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[108]For the intellectual underpinnings of this idea, an idea that has gone essentially nowhere in litigation or public perception, see Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975).

[109]See Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), vacated by Steffan v. Aspin, 1994 U.S. App. LEXIS 9977 (D.C. Cir. Jan. 7, 1994); Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994). For discussion of the strategy, see Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551 (1993). For defenses of the free speech argument, see Nan D. Hunter, Expressive Identity: Recuperating Dissent for Equality, 35 Harv. C.R.-C.L. L. Rev. 1 (2000); Taylor Flynn, Of Communism, Treason, and Addiction: An Evaluation of New Challenges to the Military's Anti-Gay Policy, 80 Iowa L. Rev. 979 (1995); Tobias Barrington Wolff, Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy, 63 Brooklyn L. Rev. 1141 (1997); Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Dont't Ask, Don't Tell," 108 Yale L.J. 485 (1998).

[110]See Thomas H. Jackson and John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1 (1979). For an explicit acknowledgment of the role of the First Amendment in providing a rhetorically and doctrinally powerful "hook"

environment sexual harassment law become objections to regulating speech in the workplace,[111] the anti-Microsoft and anti-Hollywood claims of the open source movement focus on the way in which computer source codes can be conceived as a language and therefore as speech,[112] equality and dignity objections to the (mis)treatment of the homeless become First Amendment arguments for the right to beg,[113] and the sexual liberty and anti-paternalism claims of those who object to laws restricting sexual conduct typically focus on those aspects of the sex industry – nude dancing, most obviously – that can be conceptualized as involving free speech issues.[114] Most recently, universities now attempting to defend affirmative action in admissions before the Supreme Court have resuscitated barely breathing[115] academic freedom arguments as a way of supplementing what many worry will be losing equal protection arguments.[116]

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for what is essentially an argument for economic laissez faire, see Peter M. Gerhart, Constitutional Limits on State Regulatory and Protectionist Policies, 48 Antitrust L.J. 1351 (1980). For a strong critique of the strategy, see Allen D. Boyer, Free Speech, Free Markets, and Foolish Consistency, 92 Colum. L. Rev. 474 (1992).

[111]I document this phenomenon at some length in Schauer, The Speech-ing of Sexual Harassment, supra note ___.

[112]See supra note ___.

[113]See supra note ___.

[114]See Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986); Vincent Blasi, Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing, 33 Wm. & Mary L. Rev. 611 (1992).

[115]See University of Pennsylvania v. EEOC, 493 U.S. 182 (1990). See generally Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 Yale L.J. 251(1989).

[116]See Grutter v. Bollinger, 137 F. Supp. 2d 874 (E.D. Mich. 2001), rev'd in part and vacated in part, 288 F.3d 732 (6th Cir. 2002), cert. granted, 123 S. Ct. 617 (2002). [Harvard brief] The fact that academic freedom was mentioned by Justice Powell in his determinative

In these and numerous other instances, the First Amendment's magnetism leads strategic actors to gravitate to it as easily as politicians gravitate to the flag, motherhood, and apple pie. When, for example, the strategic actors who populate the White House were discussing the controversy about sampling versus so-called "actual" enumeration with respect to the 2000 Census, President Clinton suggested, by all accounts with a straight face, that the administration position on sampling be characterized in First Amendment terms, and Clinton expressly added that doing so was likely to generate press sympathy for the position. This turned out to be too much of a reach, but even the suggestion reinforces the view that using the First Amendment for non-First-Amendment-y claims is a subject of not-infrequent speculation by those who would wish to affect public opinion, and especially elite public opinion.

The magnetic force of the First Amendment generates two distinct phenomena. First, actors in the public arena (defined here to exclude the courts) are likely to rely on the First Amendment in pressing their causes, in the often-justified expectation that doing so will disproportionately, compared to relying on other dimensions of the law, attract allies, generate favorable attention by the press, and arouse the sympathies of other public actors. Second, lawyers representing clients with claims and causes not necessarily lying within the First Amendment's core or traditional concerns will add First Amendment arguments and claims to

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concurrence in Bakke makes the issue more complex, because the universities' strategy would of course rely on this opinion.

their core claims, or will modify their core claims to connect them with First Amendment arguments, all in the hope that doing so will increase the probability of their success.

The two phenomena are distinct but connected. From the perspective of an interest group using the First Amendment to launch or reinforce its public arguments, the public attention that the First Amendment fosters will likely make a First Amendment claim more obvious to a lawyer and more appealing, or at least less frivolous, to a judge. In this respect using the First Amendment as public rhetorical strategy may both fuel litigation and increase the likelihood of its success. And litigation itself is likely to attract press and public attention just because litigation, for numerous well-documented reasons relating to the ability of conflict to attract media and public attention,[117] attracts more press and public attention than would a non-litigated or non-conflictual controversy raising the same issues and involving the same parties.[118] When taken together, therefore, the two phenomena reinforce each other to produce a milieu in which the magnetic force of the First Amendment attracts to First Amendment litigation topics and claims that would otherwise be beyond the First Amendment's boundaries, and in which that litigation then, simply because it is litigation, attracts a degree of press, public, and interest group attention that further contributes to the First Amendment's magnetic force. Thus the magnetic force of the First Amendment brings into the First Amendment issues that had previously been

[117]See W. Russell Neuman, Marion R. Just, and Ann R. Crigler, Common Knowledge: News and the Construction of Political Meaning (1992); Matthew A. Baum, Sex, Lies, and War: How Soft News Brings Foreign Policy to the Inattentive Public, 96 Am. Pol. Sci. Rev. 91 (2002).

[118]See Roy B. Flemming, John Bohte, and B. Dan Wood, One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-92, 41 Am. J. Pol. Sci. 1224 (1997).

outside, and exerts considerable outward pressure on the boundaries of the First Amendment.

This outward pressure is increased when the courts themselves engage in the same form of First Amendment opportunism as do the advocates and interest groups who rely on it. When courts, having reached their decisions, need to choose among various plausible justifications for those decisions, they not surprisingly reach for those justifications with greater rather than lesser persuasive appeal, even controlling for the degree of actual precedential support for their decision. A Supreme Court concerned about the fairness of elections, for example, is likely to be able to rely frequently on the Equal Protection Clause, often on the Elections Clause of Article I, and sometimes on the First Amendment, but the way in which election opinions gravitate to the First Amendment rather than other not implausible routes to the same result.[119] Often, of course, the attraction of the First Amendment will arise simply because the most logical doctrinal support would need to surmount substantial procedural or precedential obstacles, as in the Court's preference for the First Amendment rather than economic liberty arguments in Virginia Pharmacy, but just as often the preference seems more strategic than doctrinal, with courts no less than other strategic political actors recognizing that relying on the First Amendment is more often than not wise strategy even when it is not the most direct source of doctrinal support.

[119]Compare Anderson v. Martin, 375 U.S. 399 (1964), with Chief Justice Rehnquist's concurring opinion in Cook v. Gralike, 121 S. Ct. 1029, 1042 (2001) (Rehnquist, C.J., concurring in the judgment), as analyzed on this point in Vicki C. Jackson, Cook v. Gralike: Easy Cases and Structural Reasoning, 2001 Sup. Ct. Rev. 299.

VII. Taking the First Amendment Seriously

Yet there seems to be more than just strategic sensitivity behind the courts' own sympathies for First Amendment arguments. For courts disinclined to think strategically, or for claims not initially presenting at least plausible First Amendment arguments, why is it not the case that when presented with a claim awkwardly shoe-horned into First Amendment language a court will simply dismiss the case on the pleadings, make noises about Rule 11, and that would be that? Whatever the strategies might be for attracting the attention of the public and the sympathy of various interest groups, it does not follow from the attractions of using the First Amendment as part of a public relations and media strategy that, except for the qualification noted at the conclusion of the previous section, it is likely to be a successful or even plausible strategy in litigation.

Yet although there are important differences between media strategy and litigation strategy, the frequency with which courts find stretched First Amendment claims frivolous is rare. One reason, and one to which we have earlier alluded, is that the capacious language of the First Amendment, the indeterminacy of the First Amendment's purposes, and the omnipresence of speech (in the ordinary language meaning of the word) combine to produce a world in which it would be extremely difficult to dismiss almost any First Amendment claim as wildly implausible. So even if we believe that there are "off the wall" or frivolous claims with respect to many statutes, some common law doctrines, and some constitutional provisions,[120] and even if

[120]See Sanford Levinson, Frivolous Cases: Do Lawyers Know Anything At All?, 24

we believe that a claim being deemed frivolous is at least partly a function of the effect of traditional legal materials such as texts and precedents and documented original intentions, it is quite likely that the First Amendment does not fit this mold, and that judges, even assuming no greater intrinsic sympathy with First Amendment claims than with the universe of legal or constitutional claims generally, and even assuming no attempt to make decisions that would be publicly, politically, or journalistically well-received, would be especially reluctant to dismiss First Amendment claims as frivolous even when they border on frivolity in light of existing doctrine and existing First Amendment traditions.

Osgoode Hall L.J. 353 (1986).

In addition to First Amendment claims being less likely to be seen as legally frivolous, the First Amendment's magnetism makes it likely that those claims will not arise in isolation. As with the multiple challenges to the "Don't Ask, Don't Tell"policy, as with the proliferation of First Amendment rhetoric surrounding computer source code, and as with the panoply of parallel claims about First Amendment limitations on copyright, there will often be multiple lawyers and multiple litigants and multiple public actors who perceive the virtues of the same opportunistic strategy regarding the First Amendment at roughly the same time, or who may be in active coordination with each other. When this is the case, the very multiplicity of individually tenuous claims may produce a cascade effect[121] such that the claims no longer appear tenuous. The combination of, say, four scarcely plausible but simultaneous court challenges concurrent with twenty scarcely plausible public claims of a First Amendment problem will make the individually scarcely plausible claims seem more plausible than they actually are. From the standpoint of an interest group seeking to achieve change, and seeking to create the opportunities to mobilize immanent public support or the support of other interest groups,[122] winning is better

[121]See Lisa R. Anderson, Payoff Effects in Information Cascade Experiments, 39 Econ. Inq. 609 (2001); Lisa R. Anderson and Charles A. Holt, Classroom Games: Information Cascades, 10 J. Econ. Persp. 187 (1996); A.V. Banerjee, A Simple Model of Herd Behavior, 107 Quart. J. Econ. 797 (1992); Sushil Bikhchandani, David Hirshleifer, and Ivo Welch, Learning from the Behavior of Others: Conformity, Fads, and Information Cascades, 12 J. Econ. Persp. 151 (1998); Sushil Bikhchandani, David Hirshleifer, and Ivo Welch, A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades, 100 J. Pol. Econ. 992 (1992); David Hirshleifer, The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades, in Kathryn Ieurulli and Mariano Tommasi, The New Economics of Human Behavior 188 (1995). For application to law and regulation, see Timur Kuran and Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 Stan. L. Rev. 683 (1999).

[122]See Lee Ann Banaszak, Why Movements Succeed or Fail (1996); Doug McAdam, John D. McCarthy, and Mayer Zald, eds., Comparative Perspectives on Social Movements (1996); Sidney Tarrow, Power in Movement (1998).

than losing explicitly, but losing explicitly may still be preferable to being ignored.

Once the claim or argument seems plausible, the game may be over. Even if individual courts reject the claim, the multiplicity of now-plausible claims will frequently give the issue what is referred to in inside-the-Beltway political jargon as "traction" and in inside-the-newsroom journalistic jargon as "legs." Interestingly, this phenomenon appears to survive even authoritative rejection of the claim. With respect to the arguments that hostile environment sexual harassment enforcement has serious First Amendment implications, for example, neither the Supreme Court's rejection of those arguments in dicta in R.A.V. v. City of St. Paul[123] nor the Court's silent dismissal of the same claims in Harris v. Forklift Co.[124] has slowed the momentum of those who would wage serious First Amendment battle against hostile environment sexual harassment law.[125] Similarly, decades of judicial rejection of the argument that copyright law must be substantially restricted by the commands of the First Amendment have scarcely discouraged those who have urged otherwise, and in important respects the Supreme Court's recent decision in Eldred v. Ashcroft[126] can be considered less as a defeat than as one further step

[123]505 U.S. 377 (1992).

[124]510 U.S. 17 (1993).

[125]See supra note 10.

[126]123 S. Ct. 769 (2003).

(the Supreme Court did grant certiorari, and the seven Justice majority as well as the two Justice dissent acknowledged that the First Amendment was not irrelevant) towards the entry of copyright into the domain of the First Amendment.

In order to understand the curious persistence of First Amendment arguments even after authoritative rejection, we must take seriously the possibility that those who continue to press those claims are hardly being irrational. We and they certainly know that courts change position, and we and they know as well that the pressures on the boundaries of the First Amendment are almost always outward and almost never inward. As a result, a judicial defeat may accurately be perceived as but a temporary impediment, and may even be a way of attracting additional attention, an attention that may itself have litigation advantages. Consider, for example, the existing research on decisions by the Supreme Court to grant certiorari. If it is the case, as several studies have shown, that the very existence of amici increases the probability that certiorari will be granted,[127] then the ability to mobilize the kinds of interest groups, many with small staffs and smaller resources, that would file amicus briefs is of crucial importance in determining which cases will be heard and which not, and thus with determining the path of constitutional law. Generalizing from just the certiorari process to judicial agendas generally, it could well be that the existence of persistent interests in limitations on copyright and persistent interests in limitations on the use of hostile environment sexual harassment law may turn out to explain more of their role in shaping the First Amendment than does the (current) judicial

[127]See Gregory A. Caldeira and John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109 (1988); Keith T. McGuire and Gregory A. Caldeira, Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court, 87 Am. Pol. Sci. Rev. 17 (1993).

rejections of those claims.

VIII. The Indicia of Coverage

This is not to say that decisions by courts are irrelevant in shaping the First Amendment. Far from it. It is to say, however, that the factors determining what will and what will not be taken as representing an important First Amendment issue are not limited to the doctrinal. And it is to say as well that the explanation for what winds up being covered and what winds up remaining uncovered appears to be the result of a highly complex array of factors, some of which are doctrinal and many of which are not. And although these factors may not be susceptible of systematic ranking, a look at the wider domain of inclusions and exclusions from the coverage of the First Amendment suggests a list of the factors that appear to make a difference in one way or another. More importantly, examination of these factors may explain why, even if not inevitably and even if not permanently, so much speech remains outside the First Amendment. The First Amendment's magnetism and the consequent opportunism of legal and political actors may explain much of the First Amendment's invasiveness, but we need to look elsewhere to see why that invasiveness is not infinite.

A useful place to begin would be the criminal law. In his important analysis of the non-coverage by the First Amendment of numerous verbal aspects of criminal law – most notably criminal conspiracy and criminal solicitation – Kent Greenawalt identified three principal factors that bore on the question of First Amendment coverage of verbal crimes.[128] When the

[128]R. Kent Greenawalt, Spcch, Crime, and the Uses of Language (1989); R. Kent

defendant's speech was public rather than face-to-face, when it was inspired by the speaker's desire for social change rather than private gain, and when it was normative rather than informational in content, the First Amendment was plainly implicated. Conversely, when the speech was face-to-face, informational, and for private gain, the First Amendment was (and should be, insisted Greenawalt) irrelevant. So when Susan whispers to Max that the combination to the office safe is 22 left – 14 right – 37 left, the ability to prosecute Susan for being an accessory based solely on her verbal behavior is unconstrained by the First Amendment because Susan's words were private, informational, and devoted solely to private gain. But when Fred makes a speech to an audience in Central Park urging his listeners to rob banks in order to finance the revolution, the public, non-informational, and ideological nature of this speech brings the First Amendment – and Brandenburg – into play.

Greenawalt, Speech and Crime, 1980 Am. B. Found. Res. J. 645.

Although Greenawalt was addressing only the criminal law, the factors he identified also appear to apply in the civil realm, especially with respect to tort liability on the basis for written or printed materials.[129] As with criminal conspiracy and criminal solicitation, here again the universe of First-Amendment-free liability is huge. Liability for misleading instructions, maps, and formulas, for example, is in general understood, silently, not to raise First Amendment issues. Yet at the same time the pressures to hold publications liable for damages harm they have caused (in the traditional tort sense of that word) is increasing. If we look at a series of cases starting from the California decision with respect to the television movie Born Innocent,[130] and continue to the recent and ultimately settled litigation regarding the book Hit Man,[131] it turns out that the issues become especially complex. And if we try to unravel the complexity, it turns out that in order to explain the full scope of First Amendment coverage and decisions with respect to tort liability for written and printed materials, and indeed with respect to wide range of other coverage and non-coverage issues, we would have to add a number of factors to Greenawalt's list, some of which appear to be highly explanatory even though they may not be susceptible as

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[129]See David A. Anderson, Incitement and Tort Law, 37 Wake Forest L. Rev. 957 (2002).

[130]Olivia N. V. Nat'l Broadcasting Co., 178 Cal. Rptr. 888, (Cal. Ct. App. 1981).

[131]Rice v. Paladin Enterprises, Inc., 940 F. Supp. 836 (D. Md. 1996), rev'd, 128 F.3d 233 (4th Cir. 1997). Although there are lower court cases on the forseeable misuse of a book, see, e.g., Herceg v. Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Cal. Ct. App. 1988), there remains no Supreme Court case directly on point on the question of media tort liability for forseeable misuse of a book, magazine, or broadcast. Because the quantity of such litigation is increasing, those who would wish a strong statement from the Supreme Court of the impermissibility under the First Amendment of such liability, see Bruce W. Sanford and Bruce D. Brown, Hit Man's Miss Hit, 27 N. Ky. L. Rev. 69 (2000), would want to ensure that the case presenting that issue would be one with more sympathetic facts than the Hit Man case, a factor possibly explaining the settlement prior to petitioning for certiorari or going to trial.

his are to a legally articulable justification.

Chief among these factors may be the existence of a sympathetic litigant or class of litigants. Although the history of First Amendment doctrine has been, as is well-documented, forged by some "not very nice people"[132] – Clarence Brandenburg, Frank Collin, Jay Near, Robert Welch, and Larry Flynt, for example – the standard account that First Amendment doctrine and coverage has been built on the foundations of such undesirables is a misleading oversimplification. Indeed, it may simply be false. If we look at the cases in which the First Amendment has been taken in a genuinely new direction, or been brought into a new arena, the chief protagonist has rarely been as unappealing as those on the foregoing list. More often, the litigants at the forefront of genuine First Amendment breakthroughs have either been individually sympathetic or at least parties the courts (and some of the public) are likely to be perceive as having been unduly or unfairly persecuted. Not only was libel brought into the First Amendment on the shoulders of the very sympathetic litigants in New York Times Co. v. Sullivan, but the same phenomenon also exists in other area of First Amendment expansion. The early commercial speech cases did not involve tobacco and liquor advertisers seeking to employ the best of Madison Avenue techniques in order to increase the market for their products, but generally involved upstarts frozen out by entrenched professional oligopolies such as the "independent" pharmacists in Virginia Pharmacy and the established lawyers and law firms in

[132]United States v. Rabinowitz, 339 U.S. 56, 69 (1950)(Frankfurther, J., dissenting).

Bates v. State Bar of Arizona.[133] The litigants in the breakthrough fighting words cases were people whose primary crime was backtalk to bullying police officers, and indeed the significant breakthroughs even in obscenity law came largely as a consequence of the prosecution of works of plausibly serious literature in the 1960s such as Lady Chatterley's Lover or Memoirs of a Woman of Pleasure. Although it is true that people you might not want to invite into your home have been the major forces in crystallizing and reinforcing First Amendment doctrine, the doctrines these individuals have crystallized and reinforced first arose in the context of substantially more sympathetic litigants.[134] By contrast, when arguments for expanding the boundaries of the First Amendment have arisen in the context of unsympathetic litigants or classes of litigants - offerors of securities, telemarketers, price fixers, workplace gropers, con artists, terrorists, racist murderers, and indeed even music pirates, for example – the results have been different, and the borders of the First Amendment have not shifted.

[133]433 U.S. 350 (1977).

[134]Implicit in the statement in the text is the assumption that a doctrine or approach created in the context of a sympathetic litigant will be subsequently available in the case of a less sympathetic one. At least in the context of the First Amendment, this assumption appears sound. See Mark J. Richards and Herbert M. Kritzer, Jurisprudential Regimes in Supreme Court Decision Making, 96 Am. Pol. Sci. Rev. 305 (2002).

The existence of a link with existing First Amendment items or domains appears also to make a difference. Tort liability for written or printed materials has set off First Amendment alarms when the materials have resembled the traditional mass media, but much less so otherwise. Although hostile environment sexual harassment prohibitions have yet to be overturned in the name of the First Amendment, the shift from First Amendment arguments being essentially unspeakable to those arguments being taken seriously occurred in the context of routine sexual harassment scenarios arising either in the context of familiar First Amendment domains – colleges and universities, most notably[135] – or with familiar First Amendment items – posting a Playboy centerfold on a woman worker's locker may be no different conceptually to making a crude sexual suggestion to her, but Playboy calls forth First Amendment images in a way that the verbal suggestion does not.[136] Even the pathway to commercial speech protection was paved, in part, by the efforts of newspapers in cases like Pittsburgh Press v. Human Relations Commission.[137] And though the First Amendment is rarely invoked when a criminal defendant's motives are inferred from his presence at a meeting at which others have spoken, inferring a motive from the words in a book that the defendant owns rather than from words that are spoken in a defendant's presence raises makes plausible First Amendment claims that might

[135]See Mary Gray, Academic Freedom and Nondiscrimination: Enemies or Allies?, 66 Texas L. Rev. 1591 (1988).

[136]Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). See also Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Rabidue v. Osceola Refining Co., 584 F. Supp. 419 (E.D. Mich. 1984), aff'd, 805 F.2d 611 (6th Cir. 1986); Arnold v. City of Seminole, 614 F. Supp. 853 (E.D. Okla. 1985).

[137]413 U.S. 376 (1973).

otherwise seem silly.[138]

Perhaps most significant, however, is the existence or absence of an existing and well-entrenched regulatory scheme. With defamation as a possible counterexample, most of the domains in which significant forms of content-based regulation of propositional speech have persisted unimpeded by the First Amendment have been ones in which an elaborate regulatory scheme is already in place. Thus, the role of the Securities and Exchange Commission, the National Labor Relations Board, the Federal Trade Commission, the Antitrust Division of the Justice Department, the Office of the Register of Copyrights, and quite a few others is likely important not only in regulating speech, but in raising the stakes for its protection (and thus its non-regulation). It is one thing to make it harder to regulate a certain type of utterance, but something else entirely to dismantle a large and longstanding regulatory structure. Once we understand that the decision to extend coverage will rarely or never be compelled by existing doctrine or even accepted theories, then that decision will always be, in some sense, discretionary. And if it is discretionary, the discretion is less likely to be exercised when the stakes of doing so are larger.

[138]See United States v. Giese, 597 F.2d 1170 (9th Cir. 1979).

Moreover, the existence of an existing regulatory scheme may also produce an environment in which the likely challengers to that scheme have become comfortable with it, and have learned how to use it to their advantage.[139] When as a result of the Lowe case thousands of publishers were freed from the legal obligation to register with the SEC, only twenty took advantage of the privilege,[140] speaking volumes about the extent to which the nominal victims of pervasive content regulation, especially in highly regulated business environments, desire to create significant change. In many regulatory environments, the more respectable regulated parties – for example, those who offer FDA approved diet supplements rather than those who sell diet slippers or soap that washes off the fat[141] – have a stronger interest in regulation that differentiates them from some of their competitors than they do in being freed from regulation entirely. And if changes to the existing terrain of coverage and non-coverage require not just one litigant but something approaching a genuine movement or a genuine interest group, failing to understand the dynamics of when those groups exist and when they are mobilized to seek change will result in a deficient understanding of the dynamic forces that determine the shape of the First

[139]See Neuborne, supra note 4, predicting, correctly, the limited success of the "securities regulation and the First Amendment" movement.

[140]See "Despite Lowe, Few Advisers Deregulate, SEC Official Says," 17 Sec. Reg. & L. Rep. (BNA) 2087 (1985). See also VII Louis Loss and Joel Seligman, Securities Regulation 3400 n. 166 (3d ed. 1991).

Amendment.

Although these seem preliminarily to be among the most important factors determining both the willingness to challenge non-coverage decisions and the receptiveness of courts to those challenges, there are likely to be others as well. Still, if we look at the universe of examples of coverage and non-coverage, we may discover that the magnetism of the First Amendment plays a large role in determining which non-coverage decisions are challenged, and that the existence of attractive litigants, of a hook to traditional First Amendment items or topics, and of the non-existence of an established regulatory scheme may powerfully explain which of those challenges succeed and which do not. Success, however, cannot be measured, at least in the short term, solely in terms of litigation success, and ultimately the most significant factor in determining the shape of the First Amendment may be the ability of advocates to place their First-Amendment-sounding claims on the public agenda. When they are successful in doing so, for reasons discussed above, the boundaries of the First Amendment, even as a matter of formal legal doctrine, are likely eventually to expand, but when First Amendment issues of novel coverage fail to have the attributes that will put them on the larger agenda, the pressures on the boundaries of the First Amendment are likely to be much less.

IX. Conclusion: In Search of Constitutional Salience

[141] I am not making this up. [See FTC Hearings, November 18, 2002].

Superficial appearances to the contrary, this Article is not only about the First Amendment. It is also about the phenomenon of constitutional salience, the mysterious phenomenon by which issues become constitutionalized.[142] The phenomenon applies importantly to the First Amendment, but appears to apply as well to other dimensions of American constitutional law. How equality issues get on the agenda of equal protection scrutiny, for example, is likely a process analogous to that involving freedom of speech and the press, although the particular factors involved are almost certainly different.

What makes the topic of constitutional salience important is precisely the way in which the incentives and dynamics of constitutional litigation seem substantially different from the incentives in purely private litigation. Led by George Priest and William Klein,[143] scholars have made important progress in identifying the factors, largely economic, that determine which disputes will be contested in court, which court contests will proceed to verdict, and which verdicts will wind up as appellate opinions. Undergirding the standard model of the selection of disputes for litigation, as Priest and Klein put it, however, is the belief that parties will not wage

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[142]On political salience, see Keith Kollman, Outside Lobbying: Public Opinion and Interest Group Strategies (1998); Elizabeth M. Armstrong, Daniel P. Carpenter, and Marie Hojnacki, "Organized Interests and Agenda Setting," American Politics Workshop paper, University of Chicago, February 21, 2001. On the importance and mysteries of salience as a matter of game theory, see J. Mehta, C. Starner, & R. Sugden, The Nature of Salience: An Experimental Investigation of Pure Coordination Games, 84 Am. Econ. Rev. 658 (1994). See also Donald H. Regan, Authority and Value: Reflections on Raz's morality of Freedom, 62 S. Cal. L. Rev. 995, 1028 n.74 (1988).

[143]George L. Priest and William Klein, The Selection of Disputes for Litigation, 13 J. Leg. Stud. 1 (1984). See also Frederick Schauer, Judging in a Corner of the Law, 61 S. Cal. L. Rev. 1717 (1988).

a court contest unless they have a justified belief in the possibility that they might prevail.

When we depart private litigation for public law, however, and especially to constitutional law, the factors are likely to be quite different. When litigating is less a cost and more of a consumption item, as it may be for many incarcerated prisoners, the shape of criminal procedure litigation can no longer be assessed by the standard economic selection model. When visible losses may generate more sympathy than less visible victories, as with the Indianapolis anti-pornography ordinance,[144] using likelihood of success as a marker for predicting inclination to litigate seems misguided. And when the conflict reflected in litigation is itself a good way of attracting a press that finds conflict newsworthy and slow progress tedious, bringing a lawsuit may be a valuable public relations strategy independent of the likelihood of success on the merits. Moreover, the complex institutional, bureaucratic, and ideological incentives of ideologically driven claimants and ideologically driven organizations make understanding the initiation and pressing of constitutional litigation a complex affair scarcely explained by the economic selection model.

Political scientists, historians, and, on occasion, academic lawyers have contributed significantly to our understanding the role of social movements in the initiation of litigation, and on the role of litigation in fueling social movements. Undoubtedly some of that learning can be transferred to understanding the growth of the First Amendment's boundaries. But the special

[144]American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

magnetic effect of the First Amendment in this society at this period in the nation's history, and the opportunism that that magnetic effect has spawned, makes the First Amendment not only, in part, an example of what we know about social movements and constitutional litigation, but, in part, a special case. President Clinton did not suggest that the Democratic position on the Census be couched in due process or even in equal protection terms, the opponents of "Don't Ask, Don't Tell" did not rely as much on the Fifth Amendment self-incrimination claim nearly as much as on the First Amendment free speech claim, and economic libertarians now, unlike in the 1930s, gravitate to the First Amendment and not to the Due Process or Contract clauses. When we can fully explain both the causes and the consequences of this phenomenon, when we full understand the political psychology as well as the doctrine of the First Amendment, we will have made a large step towards understanding the unique role that the First Amendment has come to play in American constitutional politics, and the way in which that role as much as the doctrine has determined the contours of the First Amendment itself.