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The Use, Nonuse, and Misuse of Low Value Speech

Arnold H. Loewy*

This Article is a paean to the potential, and to some degree actual, contributions of the doctrine of low value speech. Although he praises the abstract concept, Professor Loewy laments the inconsistent use and even misuse of the doctrine. He then suggests a methodology for capturing the virtues of low value speech, while eliminating its vices.

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I. Introduction

Prior to the last quarter of the twentieth century, there was no such thing as low value speech. Speech was either protected speech (which we might call high value speech) or unprotected speech (which we might call no value speech). The concept of something in between (low value speech) was foreign to our jurisprudence. The following three example cases from the 1940s and 1950s illustrate the point.

The first case, *Valentine v. Chrestensen*,¹ involved a statute forbidding the distribution of only commercial handbills.² A submarine exhibitor who sought to distribute leaflets advertising the exhibition challenged the statute.³ In an incredibly cavalier opinion, a unanimous Supreme Court dismissed the plaintiff's claims:⁴

This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. . . .* If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct.⁵

So, by a simple *ipse dixit*, commercial speech became nonspeech or, at least, no value speech.

1. 316 U.S. 52 (1942).

2. See *Valentine v. Chrestensen*, 316 U.S. 52, 53 n.1 (1942) (specifically exempting noncommercial handbills). The distribution of noncommercial handbills is, of course, constitutionally protected. *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 160 (1939); see *infra* notes 62-63 and accompanying text (discussing *Schneider*).

3. *Valentine*, 316 U.S. at 54. The case was slightly more complex than that because the exhibitor, after being warned not to distribute the commercial advertising, distributed a two-faced leaflet (one side with advertising and the other side with a political protest). *Id.* at 53. The police commissioner informed the exhibitor that the political protest, if exhibited alone, would not subject him to prosecution, but that if he exhibited the two-faced handbill, he would be prosecuted. *Id.* The Court quite reasonably concluded that if the distribution of commercial handbills could be punished, so could the distribution of this two-sided handbill. *Id.* at 55.

4. For a considerably more sophisticated analysis of the problem, see the opinion of the District Court, 34 F. Supp. 596, 600 (S.D.N.Y. 1940) (finding that ordinance prohibiting distribution of handbills was unconstitutional), and see generally the majority and dissenting opinions of the Court of Appeals, 122 F. 2d 511 (2d Cir. 1941).

5. *Valentine*, 316 U.S. at 54-55 (emphasis added).

Just six years later, in *Winters v. New York*,⁶ the Court faced another New York claim that the government should not protect less valued speech.⁷ This time, New York argued that the First Amendment should not protect entertainment.⁸ Or, the state argued, at least the Court should deny such protection to magazines that are "collections of criminal deeds of bloodshed or lust . . . 'so massed as to become vehicles for inciting violent and depraved crimes against the person . . .'"⁹ The Court answered that argument with the following:

We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine. *Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.*¹⁰

In contrast to the *Valentine* Court's treatment of commercial speech as no value speech, the *Winters* Court held violent magazines (in which it could see no possible value) to the same high value that it holds political speech or the best of literature.¹¹ Yet, in the very next sentence, it suggested that the magazines "are equally subject to control if they are lewd, indecent, obscene, or profane."¹² That suggestion became the rule nine years later in *Roth v. United States*.¹³

In *Roth*, the Court refused to protect obscenity because the material was "utterly without redeeming social importance."¹⁴ This was a strange rationale for a Court that had held, in *Winters*, that the absence of any possible value in a bloody violent magazine was no reason to deny it constitutional protection.¹⁵

6. 333 U.S. 507 (1948).

7. *Winters v. New York*, 333 U.S. 507, 518-20 (1948).

8. *Id.* at 510.

9. *Id.* at 513.

10. *Id.* at 510 (emphasis added).

11. This holding caused Justice Frankfurter to protest that the decision "gives publications which have 'nothing of any possible value to society' constitutional protection but denies to the States the power to prevent the great evils to which, in their rational judgment, such publications give rise." *Id.* at 528 (Frankfurter, J., dissenting).

12. *Id.* at 510.

13. 354 U.S. 476 (1957).

14. *See Roth v. United States*, 354 U.S. 476, 484-85 (1957) (holding that obscenity is not constitutionally protected speech).

15. *See supra* notes 6-12 and accompanying text (describing First Amendment protection of violent magazines that supposedly add no value to society).

There may be good reason to cabin material depicting excesses in both violence or sex, but it is not intuitively nor empirically obvious that cabining material depicting sexual excesses is more important than cabining material depicting excess violence.¹⁶ Yet, under *Winters* and *Roth*, a state could do nothing to cabin excessively violent material, but it could outright forbid excessively sexual material.¹⁷

Because no "low value" speech category existed, neither excessively violent nor excessively sexual material could be placed in it. Consequently, the Court had to choose between "high value" or "no value." In sum, the Court deemed excessively violent material speech (high value), yet deemed excessively sexual material obscenity (no value).

In 1976, the concept of low value speech was born in two cases decided only a month apart. In the first case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁸ the Court rejected *Valentine*, holding that pure commercial speech is entitled to at least a modicum of First Amendment protection.¹⁹ At the same time, in a footnote of all places, the Court adumbrated the concept of low value speech:

In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does no more than propose a commercial transaction, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nevertheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.²⁰

Thus, the concept of low value speech was born of compromise. Rather than treat commercial speech as no value speech, as the *Valentine* Court had done, or treat it as full value speech as the *Winters* Court had done with violent magazines, the Court instead reasoned that commercial speech is entitled to some, but not necessarily all, of the protections afforded full value speech.²¹

16. See generally Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994) (comparing legal censorship history of sexually explicit obscenity and violent materials, and investigating policy reasons behind distinction).

17. Of course, excessively sexual material is not an exact synonym for obscenity, but for the current point it will suffice.

18. 425 U.S. 748 (1976).

19. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-73 (1976).

20. *Id.* at 771-72 n.24 (citation omitted).

21. *Id.* at 770.

The Court continued the low value speech concept a month later in *Young v. American Mini Theatres, Inc.*²² In *Young*, the Court held that a zoning regulation applicable to certain sexually explicit movies theaters, and not applicable to other movie theaters, did not violate the First Amendment rights of the affected theater owners.²³ Four of the Justices (Stevens, Burger, Rehnquist, and White) went to great lengths to hold that sexually explicit speech was lower value speech and, as such, could be treated less favorably than higher value speech.²⁴ Although Justice Powell, who cast the fifth vote upholding the statute, purported to question the concept of low value speech,²⁵ he joined in the plurality's observation that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."²⁶ Whatever ambiguity may inhere in *Young*, it is clear from its progeny that the Court currently views sexually explicit non-obscene speech as low value.²⁷

II. The Value of Low Value Speech

Value, of course, is in the eye of the beholder. Neither a state seeking to regulate ideas, nor a speaker seeking to disseminate ideas, can be completely happy with the concept of low value speech. From a state's perspective, treating the utterance as low value speech is not as helpful as treating it as nonspeech (or no value) as in *Valentine* or *Roth*. Under those decisions, states can regulate nonspeech using merely rationality or conjecture.²⁸ From a

22. 427 U.S. 50 (1976).

23. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 68-69 (1976).

24. *See id.* at 63-73 (Stevens, J., plurality opinion).

25. *Id.* at 73 n.1 (Powell, J., concurring).

26. *Id.* at 61. (Stevens, J., plurality opinion).

27. *See, e.g., Erie v. Pap's A.M.*, 529 U.S. 277, 288-89 (2000) (upholding statute prohibiting nude live entertainment because statute provided "content-neutral restrictions on symbolic speech"). The four Justice plurality opinion (Breyer, Rehnquist, O'Connor, and Kennedy) concluded that "nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection." *Id.* at 289 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991) (Rehnquist, C.J., plurality opinion)). Justice Souter, concurring in part, suggested that statutes regulating nude dancing should be subject to intermediate scrutiny. *Id.* at 313 (Souter, J., concurring in part, dissenting in part) (citing *Edenfield v. Fane*, 507 U.S. 761 (1993) (commercial speech case)).

28. *See supra* notes 1-5 and accompanying text (explaining constitutionality of prohibition on commercial communications in *Valentine*); *supra* notes 13-17 and accompanying text (examining denial of First Amendment protection for obscenity in *Roth*). For an illustration of how little of a showing satisfies substantive due process scrutiny, see *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (stating that courts do not substitute own judgment for that of legislature).

speaker's perspective, low value speech is less acceptable than high value speech (such as that in *Winters*) because low value speech can be regulated in ways that high value speech cannot.

Whether government legislation or speech is the winner in a low value speech regime depends on the default position. If in the absence of a low value speech category the questioned speech would be treated as high value speech, low value speech aids the government. But, if in the absence of such a category the speech would be treated as having no value, low value speech actually advances the free speech claim. In fact, the default position varies. Before commercial speech was granted low value status, it was treated as valueless.²⁹ However, sexually explicit non-obscene speech enjoyed full First Amendment protection before the Court recognized it as low value.³⁰

Intuitively, one thinks of low value speech as a mid or neutral point with each side getting half of what it wants. But that need not be the case. Law is not a zero sum game. If the speaker is allowed to convey her message, and the listener allowed to hear it, the bulk of the free speech claim has been satisfied. Conversely, if the government operates under a different set of rules for low value speech without significantly impacting that speech, the government's interest may have been substantially satisfied. Thus, low value speech at least has the potential to give both government and speakers far more than half of what each seeks. Such a prospect should not be dismissed lightly.

This Article will explore ways in which the concept of low value speech has been and can be employed to achieve the twin goals of protecting the conveyance of ideas while simultaneously allowing regulation that would be inappropriate for high value speech. It will also examine missed opportunities for invoking low value speech, as well as misuses of low value speech resulting in actual suppression of the speech. Finally, this Article will conclude with suggestions for expanded use of the low value speech concept.

Before turning to the specific values of low value commercial speech and low value sexually explicit speech, I will evaluate two arguments suggesting that the entire process of distinguishing between low and high value speech is flawed. First, some argue that it is inherently wrong to treat some speech

29. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that First Amendment protection does not apply to commercial handbills); *supra* notes 1-5 and accompanying text (discussing *Valentine*).

30. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) (invalidating ordinance prohibiting films with nudity visible outside of drive-in theater); *Southeastern Promotions v. Conrad, Ltd.*, 420 U.S. 546, 557-58 (1975) (finding that denial of use of municipal facility for production of musical *Hair* violated First Amendment). *Cf. Winters v. New York*, 333 U.S. 507, 510 (1948) (protecting violence in magazines under First Amendment despite fact that Court found no redeeming value in material); *supra* notes 6-12 and accompanying text (discussing *Winters*).

less favorably than other speech purely on the basis of content.³¹ The second argument is that the line between low value and high value speech is too difficult to draw.³²

The first argument is the spiritual descendent of *Police Department of Chicago v. Mosley*,³³ in which the Court held that one cannot be denied the opportunity to protest because of the content of his message.³⁴ Mosley carried a picket sign within 150 feet of a high school, in protest of that high school's segregation.³⁵ The Court assumed *arguendo* (and arguably incorrectly)³⁶ that a general prohibition on picketing in front of the school would have been permissible, but upheld Mosley's claim on the ground that labor picketing was permissible.³⁷ In the most absolute terms possible, the Court declared that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."³⁸

Of course, the *Mosley* Court was referring to high value speech. Nobody doubted that government could distinguish between classes of high value speech (school segregation protest or labor protest) and no value speech (obscenity) based on content. What government could not do was discriminate based on content *within* classes of high value speech.³⁹ The question of whether there could be a category of low value speech distinguishable from both high value speech and no value speech simply was not before the Court. Nor is there any logical reason why a Court that denies any protection to some forms of speech could not deny partial protection to others. Put differently, it is not obvious that if the courts eliminate low value speech, the default position would be high value speech.

31. See generally Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (arguing that distinction between commercial and noncommercial speech is illogical).

32. See generally Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989) (detailing problems associated with categorizing speech).

33. 408 U.S. 92 (1972).

34. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 (1972).

35. *Id.* at 92-93.

36. In a companion case, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court strongly suggested that streets could not be off-limits for protest unless the protest was inconsistent with the use of the area. *Id.* at 20-23. It is highly unlikely that one solitary, silent picketer within 150 feet of a school would have disrupted the school. Cf. *United States v. Grace*, 461 U.S. 171, 184 (1983) (upholding right to protest in front of Supreme Court).

37. *Mosley*, 408 U.S. at 99-100.

38. *Id.* at 95.

39. *Id.* at 100-01.

The argument that it is too difficult to distinguish between high and low value speech is similarly flawed. Anybody who has ever tried an obscenity case knows that the line between protected and unprotected speech is ephemeral at best.⁴⁰ Adding a middle category does not make the line-drawing more difficult. Rather, it simply reduces the consequences of a mistake. For example, under the *Valentine* regime, if a Court found a particular leaflet to be commercial speech, it would grant that leaflet no protection at all.⁴¹ The line would still have to be drawn. Under the low value regime, the same line has to be drawn, but the consequences of a mistake are less. If the low value line is drawn incorrectly, the speech gets less protection. However, less protection is better than no protection at all.

III. The Proper Use of Low Value Speech

A. Commercial Speech

1. Truthful and Not Misleading

Because commercial speech is low value speech, the government can demand that the speech be "truthful and not misleading."⁴² Although, this limitation does not trouble the Court or most commentators,⁴³ it is flatly contrary to the rule for high value speech in several ways.

First, as the Court in the landmark case of *New York Times Co. v. Sullivan*⁴⁴ instructs us, the First Amendment must protect speech that is factually false in order to provide breathing room for truthful speech.⁴⁵ However, courts

40. See *infra* notes 201-04 and accompanying text (discussing hypothetical scenario).

41. Indeed, because the handbill in *Valentine* was two-sided (one side commercial, the other side political), the plaintiff argued that his speech should be treated as political. *Valentine v. Chrestensen*, 316 U.S. 52, 53 (1942). The Court of Appeals found this point persuasive. *Chrestensen v. Valentine*, 122 F.2d 511, 515-16 (2d Cir. 1941).

42. See *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (reasoning that commercial speech must first relate to lawful business and also not mislead in order to deserve First Amendment protection); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372-73 (1977) (providing First Amendment protection for legal advertisement in part because it was not misleading); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-73 (1976) (discussed *supra* notes 18-21 and accompanying text).

43. See Vincent Blasi & Henry Paul Monaghan, *The First Amendment and Cigarette Advertising*, 256 JAMA 502, 504-06 (1986) (arguing constitutionality of ban on tobacco advertising); see also Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 386-98 (1979) (exploring commercial speech as separate class warranting separate analysis). But see Kozinski & Banner, *supra* note 31, at 635-37 (questioning distinction between commercial and noncommercial speech).

44. 376 U.S. 254 (1964).

45. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (highlighting potential chilling effect of stricter rule). *Sullivan* is not predicated on any affirmative value of false factual speech. Rather, it is predicated on the belief that if all falsehoods are punishable, newspapers may be reluctant to print what they believe to be a true story out of fear that, in some

do not afford commercial speech that same breathing room because courts consider commercial speech to have a lower value. In this respect, the rule for commercial speech is a compromise. Requiring commercial speech to be truthful, while simultaneously not forbidding it, is a classic example of giving each side most of what it wants. The government can forbid false advertising, surely an important interest. At the same time, advertisers still can present their products to the public as long as they do so in a truthful way.⁴⁶

The "no misleading advertising" rule permits the Federal Trade Commission to require certain products to disclose their limitations as well as their scope — their negatives as well as their positives. In fact, one can hardly watch an evening of commercial television without hearing some wonder drug extol its virtues while whispering its potential pitfalls.⁴⁷ If commercial speech were instead high value, this kind of compelled speech would run afoul of at least two clearly settled rules. First, the Court in *Miami Herald Publishing Co. v. Tornillo*⁴⁸ clearly held that the government cannot constitutionally compel a

particular, it will later be determined to be false. *Id.* at 266. Justice Brennan, the author of the *Sullivan* majority, emphasized this concern in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which he wrote:

We recognized in *New York Times Co. v. Sullivan* that a rule requiring a critic of official conduct to guarantee the truth of all of his factual contentions would inevitably lead to self-censorship when publishers, fearful of being unable to prove truth or unable to bear the expense of attempting to do so, simply eschewed printing controversial articles.

Id. at 365-66 (Brennan, J., dissenting). In that regard, *Sullivan* acts as a prophylactic rule, not all that unlike *Miranda v. Arizona*, 384 U.S. 436, 492 (1966) (enumerating constitutionally required warning that must be given to suspect prior to interrogation), recently reaffirmed in *Dickerson v. United States*, 120 S. Ct. 2326, 2333-34 (2000) (confirming that *Miranda* rule is constitutionally based and that legislature cannot supercede it).

46. *Bates*, 433 U.S. at 383-84 (stating that restrictions on truthfulness of legal advertisements do not discourage free speech); *Va. State Bd. of Pharmacy*, 425 U.S. at 771-73 (concluding that although state may regulate certain commercial speech, state may not prohibit distribution of truthful communication based on potential effects on recipients).

47. For example, a Prilosec commercial contained the following warning: "Prilosec is generally well tolerated, but it is not for everybody. The most common side effects are headache, diarrhea, and abdominal pain." *Prilosec Commercial* (NBC television broadcast, June 20, 2000). A Propecia commercial warned, "A small number of men experienced some sexual side effects. Women who are or may potentially be pregnant must not use Propecia or handle broken tablets." *Propecia Commercial* (TBS television broadcast, June 21, 2000). A Claritin commercial advised, "Claritin Reditabs are well tolerated, with a low occurrence of side effects. Side effects include headache, drowsiness, fatigue, and dry mouth. See your doctor for more information." *Claritin Commercial* (ABC television broadcast, June 20, 2000). Finally, a Valtrex commercial cautioned, "Valtrex is intended for treatment of initial and recurrent genital herpes in adults with normal immune systems. The most common side effects are generally mild and include headache, nausea, diarrhea, and dizziness. See your doctor for more information about prescribing Valtrex." *Valtrex Commercial* (ABC television broadcast, June 21, 2000).

48. 418 U.S. 241 (1974).

newspaper to give a discredited candidate newspaper space to respond to the paper's critique.⁴⁹ Second, and more pointedly, the Court in *Wooley v. Maynard*⁵⁰ ruled that the government cannot compel a person to support a proposition that he preferred not to support.⁵¹ *Wooley* involved an extraordinarily passive form of support, that is, the display of a license plate with the insignia "Live Free or Die."⁵² If such innocuous compelled support of a proposition offends the First Amendment, surely a requirement that Prilosec spell out the risk of its product causing diarrhea also should offend the First Amendment.⁵³

Of course, that is not the case because Prilosec's commercials are low value speech, whereas *Wooley*'s discomfort with New Hampshire's license plate message implicates higher value political speech. Although both deserve protection, it seems ludicrous to equate the two. Thus, through proper use of the device of low value speech, the Court can ensure protection of consumers without having to reduce political speech to the rules appropriate for commercial hucksters.

2. Solicitation

The concept of low value speech has been especially prominent in the lawyer solicitation cases. The first two, *In re Primus*⁵⁴ and *Ohralik v. Ohio State Bar Ass'n*,⁵⁵ form a wonderfully paired paradigm of the difference between high value political speech and low value commercial speech.⁵⁶ *Primus* solicited an unlawfully sterilized woman for free representation by the ACLU.⁵⁷ In contrast, *Ohralik* solicited a woman injured in an automobile accident whom he hoped to represent for profit.⁵⁸

Unsurprisingly, the Court upheld *Primus*'s First Amendment claim yet rejected that of *Ohralik*.⁵⁹ Pointedly rejecting the argument that there is one

49. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (emphasizing editor's full discretion over material he publishes).

50. 430 U.S. 705 (1977).

51. See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (concluding that state cannot force individual to display state motto inconsistent with individual's beliefs).

52. *Id.* at 707.

53. See *supra* note 47 (listing television commercials' forced and explicit recitations of products' side effects).

54. 436 U.S. 412 (1978).

55. 436 U.S. 447 (1978).

56. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (finding that First Amendment does not protect attorney's solicitation for purpose of pecuniary gain); *In re Primus*, 436 U.S. 412, 438-39 (1978) (determining that First Amendment protects non-profit organization's communication of free legal assistance).

57. *Primus*, 436 U.S. at 422.

58. *Ohralik*, 436 U.S. at 450.

59. *Ohralik*, 436 U.S. at 468; *Primus*, 436 U.S. at 439.

rule for all speech, the *Ohralik* Court noted: "In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment . . . , it lowers the level of appropriate judicial scrutiny."⁶⁰ Had the Court not adopted the high value/low value dichotomy, it would have had to choose between denying First Amendment protection to Primus' civil rights solicitation, or granting such protection to *Ohralik*'s ambulance chasing. Recognizing low value speech allowed the Court to do neither.⁶¹

3. Time, Place, and Manner

Time, place, and manner (or when, where, and how) cases typically address whether a court can sustain a speech-restrictive statute designed to protect some nonspeech interest (for example, visual blight). Even when high value speech is implicated, these cases necessarily require balancing, sometimes favoring speech and sometimes favoring aesthetics. For example, in *Schneider v. State (Town of Irvington)*,⁶² the Court held that a state's interest in preventing litter did not justify the prohibition of all leafleting.⁶³ Some years later, however, in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,⁶⁴ the Court upheld the City's aesthetic concerns in forbidding posters on lampposts, notwithstanding the First Amendment costs.⁶⁵

Because cases like these involve balancing, and because, by definition, low value speech is not equal to high value speech, one would expect, at least in some instances, that a court would sustain a time, place, and manner limitation on commercial speech that it would not sustain if the speech was political speech. Had *Valentine v. Chrestensen*⁶⁶ arisen after *Virginia State Board of Pharmacy*,⁶⁷ it could have been such an example. The *Valentine* Court might

60. *Ohralik*, 436 U.S. at 457.

61. See also *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485-86, 474-75 (1989) (upholding limits on solicitation for selling Tupperware that would not have been appropriate for charitable solicitations, and contrasting case with *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) (finding that Constitution protects commercial speech "inextricably intertwined" with noncommercial speech)).

62. 308 U.S. 147 (1939).

63. See *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162-64 (1939) (reasoning that stated purpose of keeping streets clean does not justify restriction on speech).

64. 466 U.S. 789 (1984).

65. See *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803-05 (1984) (finding that city's prohibition on posting signs on public property does not violate First Amendment).

66. See *supra* notes 1-5 and accompanying text. In *Chrestensen*, the Court dismissed the commercial handbills as no value speech. *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942) (discussed *supra* notes 1-5 and accompanying text).

67. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748

have held that although commercial speech is important, its lesser value allows the City's interest in clean streets to trump Chrestensen's free speech claim. Of course, the Court also might have held that even with its lower value, commercial speech is more important than the City's marginal gain in street cleanliness achieved through its anti-leafleting ordinance. The point is not the result of the balance. Rather, the point is that the balance between low value speech and a time, place or manner regulation is not (or should not be) the same as the balance between high value speech and the same time, place, and manner regulation.⁶⁸

One good illustration of this rule in operation was *Metromedia, Inc. v. City of San Diego*,⁶⁹ in which the Court confronted an anti-billboard ordinance.⁷⁰ In *Metromedia*, a plurality of four Justices concluded that a city may limit billboards to on-site commercial advertising, but it may not so limit non-commercial signs.⁷¹ Relying on the lower value of commercial speech, the plurality reasoned that the City's interest in traffic safety and aesthetics outweighed the commercial free speech interest in off-site advertising.⁷² However, it also held that the higher value of noncommercial speech trumped the City's interest.⁷³

Two Justices in *Metromedia* maintained that both commercial and non-commercial speech should prevail.⁷⁴ The other three would have allowed neither to prevail.⁷⁵ Because one of the Justices, Rehnquist, (who voted to sustain the statute for both types of speech) has consistently argued that commercial speech is less valuable than other speech,⁷⁶ it seems fair to conclude that at least five of the Justices on the *Metromedia* Court would have held that

(1976); see *supra* text accompanying notes 18-21. In *Virginia State Bd. of Pharmacy*, the Court recognized the value of commercial speech and thus granted it more protection than the Court in *Chrestensen* granted it. *Va. State Bd. of Pharmacy*, 425 U.S. at 770-73.

68. But see generally *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (discussed and critiqued *infra* text accompanying notes 102-08).

69. 453 U.S. 490 (1981).

70. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-21 (1981) (White, J., plurality opinion).

71. *Id.* at 512-13.

72. *Id.* at 512.

73. *Id.* at 514-15.

74. *Id.* at 521-40 (Brennan, J., concurring in judgment). Justice Blackmun joined the concurrence.

75. *Id.* at 540-55 (Stevens, J., dissenting in part); *id.* at 555-69 (Burger, C.J., dissenting); *id.* at 569-70 (Rehnquist, J., dissenting).

76. See, e.g., *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 439 (1993) (Rehnquist, C.J., dissenting) ("Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression'" (quoting *Bd. of Trustees v. Fox*, 492 U.S. 469, 477 (1989))).

the rights of commercial speakers should be balanced differently from, and less favorably than, high value speakers when weighing their rights in regard to a time, place or manner regulation.

B. Sexually Explicit Speech

1. Community Environment

At least since 1973, the Supreme Court has recognized the potential connection between sexually explicit speech and neighborhood deterioration. In *Paris Adult Theatre I v. Slaton*,⁷⁷ the Court explained the rationale behind anti-obscenity laws as the protection of "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."⁷⁸ Three years later, in *Young v. American Mini Theatres, Inc.*⁷⁹ a sharply divided Court found that the concentration of sexually explicit bookstores and movie theaters in the same area could compromise the quality of life in that neighborhood, regardless of whether the material was obscene.⁸⁰

Although only four of the Justices explicitly grounded their decision on the "low value speech" theory, it seems hard to believe that the value of the speech did not at least influence Justice Powell, the fifth vote.⁸¹ Justice Powell believed that because only sexually explicit speech caused the problem of neighborhood deterioration, there was no need to decentralize *all* movie theaters and book stores. I have argued elsewhere that Justice Powell's opinion would not permit a predominantly Republican town to forbid Democrats to set up headquarters out of a concern that the riffraff attracted thereto would spoil the town's genteel image.⁸² If I am correct in my analysis of the "Republican town" case, a piece of Justice Powell's opinion must be predicated on the lower value of sexually explicit speech.

Young is a marvelous compromise. While allowing sexually explicit speech to be discriminated against in a manner that would ordinarily be intolerable under the First Amendment,⁸³ the Court insisted that access to the material

77. 413 U.S. 49 (1973).

78. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973).

79. 427 U.S. 50 (1976).

80. *Young v. Am. Mini Theatres, Inc.* 427 U.S. 50, 72 (1976).

81. *See id.* at 73-84 (Powell, J., concurring) (applying four-part test from *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

82. *See* Arnold H. Loewy, *Obscenity, Pornography, and First Amendment Theory*, 2 WM. & MARY BILL RTS. J. 471, 489 (1993) (arguing that Republican and Democrat hypothetical was more viewpoint-specific than ordinance in *Young*).

83. *See* *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

should not be significantly limited.⁸⁴ The Court noted the ample availability of sexually explicit movies in Detroit.⁸⁵ Thus, it was able to preserve both the quality of Detroit's neighborhoods, and the availability of sexually explicit material to those who desired it. By protecting the heart of both the city's and the First Amendment's primary interest, *Young* stands as a paradigm for the proper use of low value speech.

2. Children

The government frequently has invoked, but rarely succeeded with, arguments designed to curb sexually explicit speech for the sake of the children. Typically, the government has argued that unless certain sexually explicit messages are forbidden, children may gain access to them. The vice of these arguments is that they would severely limit adult access to material in order to protect children. Thus, efforts to keep patent indecency off of telephones⁸⁶ and the Internet⁸⁷ have failed. As Justice Frankfurter once put it, we cannot "reduce the adult population to reading only what is fit for children."⁸⁸

On the other hand, statutes that channel sexually explicit speech away from children without significantly impairing adult access have fared better, as they should. The best example is *Ginsberg v. New York*,⁸⁹ a case decided before the rhetoric of low value speech entered the Supreme Court's lexicon.⁹⁰ *Ginsberg* upheld the conviction of a merchant who sold sexually explicit magazines, deemed obscene for children, to a sixteen year old boy.⁹¹ The Court emphasized that the statute did not impair adult access.⁹² Indeed, it did not even significantly impair a teenager's access if his parents approved.⁹³

84. See *Young*, 427 U.S. at 70 (stating that "First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value").

85. See *id.* at 55 n.3 (citing police memo stating that number of adult theaters in Detroit increased from two to twenty-five); *id.* at 71 n.35 (stating ordinance did not apply to existing theaters).

86. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 131 (1989) (invalidating statute that banned adult access to indecent messages).

87. See *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (invalidating Communications Decency Act of 1996).

88. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

89. 390 U.S. 629 (1968).

90. See *Ginsberg v. New York*, 390 U.S. 629, 643 (1968) (concluding that legislature could punish sale of sexually-explicit material to minors even though material was not obscene for adults).

91. *Id.* at 631-33.

92. *Id.* at 634-35.

93. "Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Id.* at 639.

*FCC v. Pacifica Foundation*⁹⁴ was the one case in which a portion of the Court specifically relied on the low value of sexually explicit speech to protect juveniles. In *Pacifica*, the Court upheld, as constitutionally appropriate, the time channeling of a monologue that repeatedly invoked what the speaker, George Carlin, called the "seven dirty words" that cannot be broadcast on the airwaves.⁹⁵ The three Justices that relied on low value speech,⁹⁶ and the two in the majority that did not,⁹⁷ all focused on the exposure to children of a broadcast at two o'clock on an October Tuesday afternoon. The Court suggested that a late evening broadcast when fewer children were likely to be in the audience might yield a different result.⁹⁸

Pacifica was, as it should have been, a close case. Unlike *Ginsberg*, adults were inconvenienced in their access to the monologue. Nonetheless, if the Court were right in its premise about the accessibility to children, its conclusion to channel the material probably would have been correct. However, its premise may not have been correct. Most children are in school at two o'clock on Tuesday afternoon. Only one person complained about the broadcast, and though he was traveling with his young son, he was not sufficiently upset to turn it off.⁹⁹ Consequently, one has to wonder whether any significant number of children even heard the monologue. If they did not, *Pacifica* was probably wrongly decided. If in fact there were a significant number of potentially unsupervised children in the audience, then the argument for the low value speech doctrine channeling the monologue to a different time would have been more powerful.

3. Privacy

Certain sexually explicit images are sufficiently shocking that an indiscriminate foisting of them on the public would likely not be sustained. For example, it is highly unlikely that a sexually explicit billboard on an interstate highway would receive First Amendment protection.¹⁰⁰ The only Supreme Court case dealing with the issue was *Pacifica*, in which the Court relied on

94. 438 U.S. 726 (1978).

95. *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

96. Justices Stevens and Rehnquist, and Chief Justice Burger relied on low value speech. *Id.* at 744-48.

97. Justices Powell and Blackmun did not rely on low value speech. *Id.* at 761-62 (Powell, J., concurring).

98. *Id.* at 750-51.

99. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 938 (2d ed. 1988) (examining probability of offending any significant number of listeners).

100. *But cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) (invalidating ordinance that forbade projection of nude images from drive-in theater).

the intrusion of radio into the private home.¹⁰¹ Frankly, to distinguish the case on the radio's intrusiveness seems tenuous at best. First, a simple turn of the tuning knob or push of the off button can adequately protect privacy. Second, if that were not sufficient, how could we justify the portion of *Pacifica* that suggested the appropriateness of a late night airing? Presumably, people are even more likely to be at home late at night. Thus, if privacy were truly the basis of *Pacifica*, it is unlikely that the Court would have incorporated the late night suggestion into the opinion.

IV. The Nonuse of Low Value Speech

A. Commercial Speech

In *City of Cincinnati v. Discovery Network, Inc.*,¹⁰² the Court clearly rejected the time, place, and manner analysis proposed in Part III.A.3 of this Article and suggested by the *Metromedia* plurality.¹⁰³ *Discovery* involved a Cincinnati ordinance designed to improve safety and aesthetics by eliminating commercial newspaper boxes from public right of ways.¹⁰⁴ Because only sixty-two of the 1500-2000 newspaper boxes were commercial, most newspaper boxes were unaffected by the ordinance.¹⁰⁵

In invalidating the ordinance, the Court rejected the argument that commercial speech could be treated as less valuable than other speech.¹⁰⁶ Noting that the hazardous nature or ugliness of a newspaper box did not depend on the commercial *vis-à-vis* noncommercial character, the Court held that reliance on commercial content was a forbidden content-based discrimination.¹⁰⁷ The low value character of commercial speech was simply not relevant to the manner of its distribution.¹⁰⁸ The Court may have reached the correct result because the paltry number of newspaper boxes eliminated was such a small percentage of the total that it may not have been worth even the low value speech candle. Unfortunately, by denigrating the low value characterization in reaching its arguably correct result, the Court may have unnecessarily blurred the line between low value and high value speech.

101. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (noting that offensive radio material confronts citizen in privacy of own home).

102. 507 U.S. 410 (1993).

103. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516-17 (1981) (analyzing restrictions in time, place, and manner context); see also *supra* text accompanying notes 69-76 (discussing *Metromedia*).

104. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 413 (1993).

105. *Id.* at 418.

106. *Id.* at 418-19.

107. *Id.* at 427-28.

108. *Id.* at 426.

B. Sexually Explicit Speech

Not unlike in its *Discovery* opinion, the Court in *United States v. Playboy Entertainment Group, Inc.*¹⁰⁹ disparaged the difference between a burden and a complete prohibition as applied to low value speech.¹¹⁰ *Playboy* involved a federal statute exclusively applicable to sexually explicit channels.¹¹¹ It required such channels either to block *completely* the signal for nonsubscribers or to limit broadcast to the hours between 10 p.m. and 6 a.m.¹¹² Incomplete blocking that resulted in "signal bleed," whereby some of the audio or video still could be seen or heard, was not sufficient.¹¹³ *Playboy* argued, and the Court agreed, that providing complete blocking for only those cable subscribers that requested it would be a less intrusive alternative.¹¹⁴

Playboy was not an altogether problematic opinion. The entire Court agreed that purveyors of sexually explicit material could be required to pay for extra blocking that was not required for other channels.¹¹⁵ Furthermore, because any homeowner who desired complete blocking could have it, no parent desiring protection, nor cable subscriber desiring privacy, need be subject to invasion. On the other hand, the record did identify substantial evidence that obtaining blocking was neither as efficient or expeditious as might be desired, and that children were sometimes exposed to *Playboy's* partially scrambled signal outside of their parents' home.¹¹⁶

Significantly, the court never analyzed, presumably because it thought it irrelevant, how little the willing listener would be inconvenienced by the 10 p.m. to 6 a.m. alternative. One can assume that most people who have cable, and who would choose to add the cost of *Playboy*, have a VCR. Consequently,

109. 120 S. Ct. 1878 (2000).

110. See *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1893 (2000).

111. *Id.* at 1883-84.

112. *Id.* at 1882-83.

113. *Id.* at 1883.

114. *Id.* at 1888-93.

115. *Id.* at 1888. The dispute was over whether such blocking should be required in the *absence* of a request from a customer.

116. There were instances, noted in the record, of customers having blocking difficulties. In fact, it was conceded by *Playboy* that the basic scrambling package did not scramble the audio portion of the program. *Playboy Entm't Group, Inc. v. United States*, 30 F. Supp. 2d 702, 707 (D. Del. 1998). Also, the Government presented at least three witnesses that complained of the ineffectiveness of the partial scrambling. Louisa Lindell of Wilmington, Delaware testified that her son viewed signal bleed at friend's house; Phil Vonder Haar of Webster Groves, Missouri testified that he viewed signal bleed at his daughter's home in St. Louis; and Cecilia Flake of Battle Creek, Michigan, was informed that she would be charged \$6.00 to have her signal blocked. *Id.* at 709 n.10; see also 141 CONG. REC. 15586 (1995) (providing further testimony about signal bleed).

the viewer desiring to watch Playboy during early evening hours could record the program the night before and watch it the next evening. Surely there is little, if anything, that is so time sensitive in Playboy's offerings that a day's delay would be problematic.¹¹⁷ In this regard, the *Playboy* statute actually interfered less with the listener than the FCC order upheld in *Pacifica*. The driver of a car likely would not be prepared to record George Carlin's monologue from the radio because he would not know when it might appear.

Of course, Playboy would not earn as much money if it were limited to eight non-primetime hours. However, while profit to the speaker does not deprive speech of First Amendment value,¹¹⁸ neither does it drive the law. Our primary First amendment concern is ensuring the speaker's access to the audience, and the audience's access to the speech.¹¹⁹

V. *The Misuse of Low Value Speech*

Using the low value speech concept to totally suppress unpopular speech should be immediately rethought. In this Part, I identify two instances in which the low value speech concept has been used as an improper excuse for total suppression.

A. *Commercial Speech*

The chief culprit is *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹²⁰ in which the Court claimed, quite wrongly,¹²¹ that prior commercial speech cases had developed the following four part test:

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

117. I suppose it is theoretically possible that some individual would wish to watch more than eight hours of Playboy per day, but in the absence of proof that there are very many such individuals, we should not be terribly concerned about it.

118. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (concluding that economic interest does not disqualify speech from First Amendment protection); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (stating that paid nature of advertisement was irrelevant); see also *Smith v. California*, 361 U.S. 147, 150 (1959) (sale of books for profit); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (distribution of movies for profit).

119. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 76-79 (1976) (Powell, J., concurring) (stating that First Amendment requires full opportunity for expression and full opportunity for everyone to receive message).

120. 447 U.S. 557 (1980).

121. See generally *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (discussed *infra* notes 130-34).

*the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.*¹²²

The deceptive simplicity of the test masks its anti-First Amendment character. In form, it looks like *O'Brien* warmed over.¹²³ In substance, it allows government to suppress a message to avoid the harm of its being conveyed, which is in direct contravention of one of the Court's most crucial First Amendment rules: "There is no such thing as a false idea."¹²⁴

Central Hudson involved a Commission ban on all promotional advertising by electric utility companies including advertisements advocating products to conserve electrical energy.¹²⁵ The Court reasoned that this conservation rationale was a legitimate purpose, and that if the promotional ban simply applied to products that used more energy, the ban would have been constitutional.¹²⁶ However, because the ban also applied to products such as heat pumps, that would use energy *more* efficiently, the ban was more extensive than necessary, thus failing the fourth part of the test.¹²⁷

Central Hudson is a watershed case because it marks the first time in nearly half a century that the Court suggested that mere advocacy of an anti-government policy could be grounds for suppression.¹²⁸ Railing against the Court's test, Justice Blackmun observed:

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment.¹²⁹

122. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (emphasis added).

123. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court announced a four part test to determine when conduct designed to express an idea was constitutionally protected:

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

Id. at 377.

124. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

125. *Cent. Hudson*, 447 U.S. at 559.

126. *Id.* at 568-69.

127. *Id.* at 570.

128. Even the Court in *Dennis v. United States*, 341 U.S. 494 (1951), at least required that "the gravity of the 'evil' [be] discounted by its improbability" before speech could be suppressed. *Id.* at 510. The last case to uphold a conviction predicated on mere advocacy was *Whitney v. California*, 274 U.S. 357 (1927).

129. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 574 (1980) (Blackmun, J., concurring).

Ironically, just three years earlier in *Linmark Associates, Inc. v. Township of Willingboro*,¹³⁰ a unanimous Supreme Court¹³¹ had resoundingly rejected any such theory for commercial speech.¹³² At issue was a town ordinance precluding the display of "for sale" signs on front lawns, predicated on the perceived fear that such signs would accelerate the already serious problem of white flight.¹³³ Speaking for the Court, Justice Marshall (who inexplicably joined the *Central Hudson* majority) correctly observed:

The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the council views as the homeowners' self interest and the corporate interest of the township: they will choose to leave town. . . . If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally."¹³⁴

That the Court could ignore such obvious constitutional wisdom, only three years after pronouncing it, is part of the shame of *Central Hudson*. More disappointing are two of *Central Hudson*'s more pernicious progeny, *Posadas Puerto Rico Associates v. Tourism Co. of Puerto Rico*¹³⁵ and *United States v. Edge Broadcasting Co.*,¹³⁶ in which the Court actually upheld statutes designed to limit commercial speech in order to maximize public ignorance.¹³⁷

The *Posadas* Court upheld a Puerto Rican statute designed to forbid local casino gambling advertising in order to reduce local demand.¹³⁸ Relying on Puerto Rico's undoubted power to forbid gambling casinos entirely, the Court held that Puerto Rico necessarily possessed the "lesser" power to preclude advertising of casinos.¹³⁹ Relying on *Central Hudson*, the Court found that preventing advertising directly advanced the government's interest and was no more extensive than necessary.¹⁴⁰ Fortunately, more recent cases have indicated that "the greater includes the lesser" rationale is no longer to be followed and that *Posadas* likely is no longer good law.¹⁴¹

130. 431 U.S. 85 (1977).

131. Justice Rehnquist did not participate.

132. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).

133. *Id.* at 87-91.

134. *Id.* at 96.

135. 478 U.S. 328 (1986).

136. 509 U.S. 418 (1993).

137. *United States v. Edge Broad. Co.*, 509 U.S. 418, 428-35 (1993); *Posadas P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341-46 (1986).

138. *Posadas*, 478 U.S. at 332-33.

139. *Id.* at 346.

140. *Id.* at 341-44.

141. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509-510 (1996) (majority opinion written by Justice Stevens and joined by Scalia, Kennedy, Souter, Thomas, and Gins-

The demise of *Edge*, however, is not so clear. *Edge* involved a federal statute forbidding gambling advertising by radio stations licensed by states in which lotteries were unlawful.¹⁴² *Edge* owned a radio station in a non-lottery state, North Carolina, but broadcast into a lottery state, Virginia, where over ninety percent of its audience resided.¹⁴³ A federal statute precluded radio stations in non-lottery states from accepting lottery advertising.¹⁴⁴ The theoretical federal interest was a desire to balance the competing rights of the states with lotteries against the rights of the states without them.¹⁴⁵ The Court concluded that the advertising ban on North Carolina stations, including this one whose audience was primarily Virginian, directly advanced that governmental interest.¹⁴⁶

The Court never analyzed why, or even whether, North Carolina had an interest in precluding its citizens from playing the Virginia lottery. It is not a violation of North Carolina law for a North Carolinian to buy a Virginia lottery ticket and to transport it to North Carolina.¹⁴⁷ Indeed, it is doubtful whether North Carolina *could* criminalize the transportation of a lottery ticket lawfully purchased in Virginia.¹⁴⁸ Under similar circumstances, the Court, even before it had held commercial speech to be entitled to some First Amendment protec-

burg, J.J.) ("[O]n reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. . . . The *Posadas* majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available."); see also *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 182 (1999) (noting that "the opinions in [44 *Liquormart*] concluded that our precedent both preceding and following *Posadas* had applied the *Central Hudson* test more strictly . . . – and . . . we had rejected the argument that the power to restrict speech about certain socially harmful activities was as broad as the power to prohibit such conduct") (citations omitted).

142. *United States v. Edge Broad. Co.*, 509 U.S. 418, 422-23 (1993).

143. *Id.* at 423.

144. *Id.* at 424.

145. *Id.* at 426.

146. *Id.* at 428. The result in *Edge* probably would be different today because the Court seems to demand a closer fit between the means and the end. See *Greater New Orleans*, 527 U.S. at 188-95 (requiring narrow tailoring of restrictions). Unfortunately, the Court still asks the same questions.

147. Indeed, it has not been illegal since 1876, when the North Carolina Supreme Court held that its anti-lottery statute did not apply to purchasers of out-of-state lottery tickets. See *State v. Bryant*, 74 N.C. 207, 209 (1876).

148. See *Edge*, 509 U.S. at 437 n.1 (Stevens, J., dissenting) ("North Carolina law does not, and presumably couldn't, bar its citizens from travelling across the state line and participating in the Virginia lottery."); see also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (holding that New Jersey statute prohibiting importation of most solid or liquid waste was unconstitutional); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935) (invalidating New York Milk Control Act that set minimum prices to be paid by dealers to producers for milk, and prohibited sale of milk brought from outside state of New York unless price would be same as price paid for milk produced in state).

tion, in *Bigelow v. Virginia*,¹⁴⁹ invalidated a Virginia law forbidding advertising the availability of abortions, as applied to a newspaper that advertised lawful abortions in New York.¹⁵⁰

The similarities of the cases are striking. *Bigelow* advertised lawful abortions in New York at a time when abortions were not constitutionally protected, and when they were deemed both unlawful and immoral in Virginia.¹⁵¹ The federal government sought to do for North Carolinians in *Edge*¹⁵² what Virginia's legislature sought to do for Virginians in *Bigelow*. The Court in *Edge* would have done well to share the *Bigelow* Court's understanding of the constitutional insubstantiality of that interest:

Here, Virginia is really asserting an interest in regulating what Virginians may *hear or read* about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. The asserted interest, even if understandable, was entitled to *little, if any, weight* under the circumstances.¹⁵³

Ironically, *Edge* was decided only three months after *Discovery*,¹⁵⁴ which, as we have seen, refused to allow low value commercial speech to be treated less favorably than political speech in regard to a time, place, and manner regulation. So, within three months, the Court went from insisting on treating all speech equally for a time, place, and manner regulation to upholding a clearly viewpoint based statute, intentionally designed to keep ideas from the populace. The Court can, and frankly should, do better.

Before closing this section, I would be remiss if I did not commend one Justice who is trying to fix the *Central Hudson* mess. Justice Thomas recently condemned that portion of *Central Hudson* that allows the state's interest in shielding its citizens from hearing what the state does not want them to hear to count as a constitutionally cognizable interest.¹⁵⁵ Although he contributed

149. 421 U.S. 809 (1975).

150. See *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (stating that statute would impose severe burdens on interstate publications).

151. See *id.* at 811-15 (discussing nature of advertisement). The *Bigelow* advertisement that violated Virginia law ran in 1972, before *Roe v. Wade*, 410 U.S. 113 (1973).

152. See *supra* notes 142-48 and accompanying text (examining congressional limitations on lottery advertisement).

153. *Bigelow*, 421 U.S. at 827-28 (second emphasis added).

154. See *supra* Part IV.A and accompanying text (discussing treatment of low value commercial speech).

155. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1984) (Thomas, J., concurring in part and concurring in judgment). Justice Thomas remarked:

[When] the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balance-

to the problem by joining the majority in *Edge*, he does seem to be trying to atone for his indiscretion.¹⁵⁶ If he can persuade four of his colleagues to join him, the mess will be fixed.

B. Sexually Explicit Speech

*City of Renton v. Playtime Theatres, Inc.*¹⁵⁷ is the *Central Hudson* of sexually explicit speech.¹⁵⁸ Relying on the wonderfully nuanced *Young v. American Mini Theatres, Inc.*¹⁵⁹ a case that allowed zoning of sexually explicit theaters as long as the availability of such material was not significantly impaired,¹⁶⁰ *Renton* transmogrified the *Young* doctrine into one in which availability of the material was irrelevant. On the surface, the *Renton* ordinance resembled that upheld in *Young* – both were zoning laws. In form, the *Young* ordinance called for dispersal of sexually explicit theaters (no more than two within 1000 feet of each other)¹⁶¹ while the *Renton* ordinance suggested concentration (none within 1000 feet of a residential neighborhood, church, park, or school).¹⁶² However, there was one huge difference. The *Young* ordinance did not significantly reduce adult access to the material, whereas the *Renton* ordinance did reduce adult access.

ing test adopted in *Central Hudson* should not be applied, in my view. Rather, such an "interest" is per se illegitimate and can no more justify regulation of "commercial" speech than it can justify regulation of "noncommercial" speech.

Id.

156. Somewhat inexplicably, in his concurring opinion in *Liquormart*, Justice Thomas stopped short of disowning *Edge*, although he clearly indicated that it needed to be rethought. However, his opinions in both *44 Liquormart* and *Greater New Orleans* are flatly inconsistent with not only *Central Hudson*, but also with *Edge*. Justice Thomas wrote:

The outcome in *Edge* may well be in conflict with the principles espoused in *Virginia Bd. of Pharmacy* and ratified by me today. . . . Because the issue of restrictions on advertising of products or services to be purchased legally outside a State that has itself banned or regulated the same purchases within the State is not squarely presented in this case, I will not address here whether the decision in *Edge* can be reconciled with the position I take today.

44 Liquormart, 517 U.S. at 526 n.7 (Thomas, J., concurring in part and concurring in judgment).

157. 475 U.S. 41 (1986).

158. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54-55 (1986) (upholding constitutionality of zoning ordinance prohibiting adult theaters).

159. 427 U.S. 50 (1976).

160. See *supra* notes 79-85 and accompanying text (discussing permissibility of zoning ordinances).

161. *Young v. Am. Mini Theatres, Inc.* 427 U.S. 50, 50 (1976).

162. *Renton*, 475 U.S. at 926.

Although the *Renton* ordinance formally allowed sexually explicit entertainment in areas that were not within 1000 feet of a residence, church, park, or school, that restriction left available only 520 acres, or just over five percent of the City.¹⁶³ Furthermore, as the Ninth Circuit had observed in invalidating this ordinance, most of this land was unfit or unavailable for use as an adult movie theater.¹⁶⁴ One may assume that Renton was not bothered by the total absence of adult movie theaters within its borders. Neither was the Supreme Court, which rather cavalierly concluded:

That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.¹⁶⁵

Unfortunately, the Court was neither legally nor factually correct. The law did not allow respondents to compete on an equal footing, but rather subjected them to a law unto themselves. Consequently, they did not have a *reasonable* opportunity to open a theater unless the word "reasonable" is used in some kind of Alice in Wonderland sense.¹⁶⁶

At least the *Renton* Court formally required that the sexually explicit entertainment have a chance to compete. The Court dropped even that fig leaf¹⁶⁷ in the nude dancing cases, *Barnes v. Glen Theatre, Inc.*¹⁶⁸ and *City of*

163. Justice Rehnquist described the area as "more than 5%." *Id.* at 53. I presume that if it were significantly more than 5% (say, 10%), he would have said so.

164. The Ninth Circuit appropriately noted:

The district court found that 520 acres in Renton were available for adult theater sites. Although we do not quarrel with the conclusion that 520 acres are outside the restricted zone, we do not agree that the land is available. A substantial part of the 520 acres is occupied by:

- (1) a sewage disposal site and treatment plant;
- (2) a horseracing track and environs;
- (3) a business park containing buildings suitable only for industrial use;
- (4) a warehouse and manufacturing facilities;
- (5) a Mobil Oil tank farm; and,
- (6) a fully-developed shopping center.

Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 534 (9th Cir. 1984); *see also* Loewy, *supra* note 82, at 491-93 (comparing *Renton* and *Young*).

165. *Renton*, 475 U.S. at 54.

166. Humpty Dumpty told Alice, "When I use a word . . . it means what I choose it to mean — neither more nor less." LEWIS CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS* 216 (1957).

167. Or perhaps I should say, "g-string."

168. 501 U.S. 560 (1991).

*Erie v. Pap's A.M.*¹⁶⁹ *Barnes*, to put it mildly, was a strange case. Three of the Justices, Rehnquist, O'Connor and Kennedy, conceded that nude dancing was speech, albeit low value speech.¹⁷⁰ However, they still concluded that the immorality of public nudity was sufficient to warrant its total prohibition.¹⁷¹ Obviously, something is wrong here. If speech is protected, even low value speech, it cannot be precluded simply because it is immoral. That would reduce it to "no value" speech, which the Court claimed not to be doing. Probably because of the obvious silliness of that rationale, the Court dropped it nine years later in *Pap's*.¹⁷²

Justice Scalia's rationale in *Barnes* was simpler. In his view, all public nudity was forbidden. Therefore public nude dancing could also be forbidden.¹⁷³ If his major premise, which is that all public nudity *could* be forbidden, were correct, his conclusion would make perfect sense. Unfortunately (or perhaps fortunately) that is not correct. Several decisions have held that nudity is not a justification for suppressing movies¹⁷⁴ or plays,¹⁷⁵ and Indiana never claimed that its statute forbade them.¹⁷⁶ Consequently, it is simply not true that Indiana had forbidden all public nudity.

Justice Souter (the fifth vote) relied on the negative secondary effects caused by nude dancing,¹⁷⁷ a rationale that later commanded a plurality of the Court in *Pap's*.¹⁷⁸ At least two problems inhere in that analysis. First, no evidence was presented as to any problems occasioned by nude dancing, nor

169. 529 U.S. 277 (2000).

170. They found nude dancing to be "expressive conduct within the outer perimeters of the first Amendment, though we view it as only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

171. *Id.* at 571-72.

172. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290-92 (2000) (discussing analysis in *Barnes*).

173. See *Barnes*, 501 U.S. at 572-81 (Scalia, J., concurring) (opining that it is our nation's tradition that people should not expose themselves).

174. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (striking ordinance prohibiting films with nudity at drive-in theater); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (concluding that nudity does not render movie obscene).

175. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (finding that municipality's refusal to rent auditorium for allegedly vulgar production was unconstitutional prior restraint).

176. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 590 (1991) (White, J., dissenting) (noting state's argument that it did not seek to prohibit nudity if it were part of form of expression "meriting protection").

177. *Id.* at 585 (Souter, J., concurring) (stating that pernicious secondary effects may be associated with nude dancing).

178. *Erie v. Pap's A.M.*, 529 U.S. 277, 296-99 (2000) (finding secondary effects sufficient in determining public health and safety interest).

is it intuitively obvious that totally nude dancers are more likely to cause social problems for the city than erotic dancers with a modicum of clothing (pasties and g-string) would cause.¹⁷⁹ Indeed, in *Pap's*, Justice Souter rethought his *Barnes* opinion and voted to remand for a determination of adverse secondary effects.¹⁸⁰

The second, and more serious, objection to the secondary effects rationale is that the ordinance applies to *all* nude dancing. Consequently, whether *Pap's* or any other establishment *in fact* created adverse secondary effects was immaterial.¹⁸¹ No other case, including *Renton*, had ever held that the government can bar *all* sexually explicit entertainment because of a potential negative secondary effect. Such a holding, subtly but completely, transmogrifies low value speech into no value speech or nonspeech.

I am not arguing that the harmful secondary effects from nude dancing cannot or should not be regulated. A state or municipality is free to enact legislation forbidding alcohol at establishments that permit nude dancing. The "sex and liquor do not mix" rationale has been the law at least since 1972.¹⁸² Reasonable distance requirements between dancers and audience is another possibility.¹⁸³ Finally, such establishments could be zoned to such areas where they are less likely to cause adverse secondary effects.¹⁸⁴

Ironically, *Pap's* was decided less than two months before *Playboy*, in which the Court had refused to allow channeling or blocking of movies consisting of a lot more than nude dancing.¹⁸⁵ This is not a consistent or proper use of low value speech. If the speech is low value, it should be subject to reasonable channeling; it should not be subject to total prohibition.

179. Indeed, it is not uncommon for sex shops to sell pasties and g-strings to individuals who wish to be more sexually provocative. See ADAM & EVE, WORLD'S LUCKIEST PATIENT 2, 4, 12 (2000); FREDERICK'S OF HOLLYWOOD, BEST OF THE BEST 23, 29 (2000).

180. See *Pap's*, 529 U.S. at 312-13 (Souter, J., concurring in part and dissenting in part) (discussing need for evidentiary record). In an opinion concurring in the *Pap's* judgment, Justice Scalia (this time joined by Justice Thomas) repeated his *Barnes* analysis, concluding that a general law against public nudity does not violate the First Amendment, even as applied to nude dancing. *Id.* at 307-08.

181. This probably explains why the record was silent on the subject.

182. See *California v. LaRue*, 409 U.S. 109, 118-19 (1972) (upholding regulation banning nude entertainment in places that sold liquor).

183. Justice Scalia's opinion notwithstanding, this case was not about lap dancing. See *Pap's*, 529 U.S. at 308 (Scalia, J., concurring) (asserting that city's concern was with lap dancers, as opposed to streakers, sunbathers, or hot dog vendors); see also *id.* at 1406 n.1 (Stevens, J., dissenting) (emphasizing that case was not about lap dancing).

184. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976) (upholding such zoning); *supra* notes 79-85 and accompanying text (discussing zoning ordinances).

185. See *supra* notes 109-19 and accompanying text (discussing *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878 (2000)).

VI. Rethinking Obscenity as Low Value Speech

More than thirty years ago, before the Court even verbalized the "low value" speech doctrine, the Court in *Stanley v. Georgia*¹⁸⁶ held that while the dissemination of obscenity was subject to regulation, the private consumption of it could not be so regulated.¹⁸⁷ In ringing tones, the Court eloquently pronounced:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government power to control men's minds. . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot *constitutionally* premise legislation on the desirability of controlling a person's private thoughts.¹⁸⁸

The Court then noted that public distribution of obscenity presented different problems such as the danger of children obtaining the material and the intrusion of the material on the general public.¹⁸⁹ Justice Marshall, writing for the Court, also could have noted the community environment issue, later developed in *Paris Adult Theatre*.¹⁹⁰

Although subsequent cases have reduced *Stanley* to such a minute blip on the Court's obscenity radar screen¹⁹¹ that Justice Black lamented, "[I]n the future that case will be recognized as good law only when a man writes sala-

186. 394 U.S. 557 (1969).

187. *Stanley v. Georgia*, 349 U.S. 557, 568 (1969).

188. *Id.* at 565-66 (emphasis added).

189. *Id.* at 567 (distinguishing public distribution of obscene materials).

190. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973). Chief Justice Burger, writing for the Court, articulated that:

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.

Id. at 58; see also *supra* text accompanying notes 77-78 (discussing *Slaton*).

191. See *United States v. Orito*, 413 U.S. 139, 144 (1973) (holding that First Amendment right to possess obscene material in privacy of one's home does not create right to transport such material, as applied to person transporting film in briefcase or on interstate flight); *United States v. 12,200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 128-29 (1973) (finding that government can constitutionally prohibit importation of obscene material even though importer claimed that such material was for private, personal use); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (holding that Tariff Act of 1930 could be constitutionally applied to seizure of allegedly obscene photographs if certain procedural safeguards were read into statute); *United States v. Reidel*, 402 U.S. 351, 356 (1971) (upholding section of United States Code prohibiting knowing use of mails for delivery of obscene materials).

cious books in his attic, prints them in his basement, and reads them in his living room,"¹⁹² the case should be revived as a serious first step towards treating obscenity as low value speech. The current treatment of obscenity is both overinclusive and underinclusive. Sexually explicit materials which are not obscene can do the same type of harm as obscenity when marketed to children, thrust in the face of unwilling viewers, and displayed in such a concentrated manner as to destroy a neighborhood. On the other hand, obscene sexually explicit material that is discreetly marketed to consenting adults can do nothing that can constitutionally count as harm.¹⁹³

Justice Thomas's concurring opinion in the *Playboy* case¹⁹⁴ illustrates the ill fit between the law and both governmental and First Amendment needs. After noting that the government failed to argue that *Playboy's* programming was obscene, and further noting that much of the programming may well have been obscene, Justice Thomas concluded that the government's argument for channeling the time, or effectively blocking the signal, of *Playboy's* concededly indecent programming was unconstitutional:

I am unwilling to corrupt the First Amendment to [uphold the statute as a proper regulation of protected (rather than unprotected) speech]. The "starch" in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government.¹⁹⁵

Under this all or nothing approach, indecent sexually explicit movies are available for everybody, whether they like it or not, but obscene sexually explicit movies are available to nobody. Surely, the government should not be forced to prohibit speech when it merely desires to regulate it.

Let us assess why the government did not try to establish the obscenity of *Playboy's* movies. One possible reason is that, unlike the Burger¹⁹⁶ and Rehnquist¹⁹⁷ Courts, the government took seriously the *Stanley* admonition that "it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."¹⁹⁸ A more practical reason is the difficulty and uncertainty of obtaining an obscenity verdict.

192. *Thirty-Seven Photographs*, 402 U.S. at 382.

193. The Court in *Stanley* was quite correct in holding that the content of one's mind cannot constitutionally count as harm. See *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969) (stating that mind is not subject to state control).

194. *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1894-95 (2000); see also *supra* notes 109-19 and accompanying text (discussing *Playboy* case).

195. *Playboy*, 120 S. Ct. at 1895 (Thomas, J., concurring).

196. See, e.g., *Miller v. California*, 413 U.S. 15, 23-24 (1973) (upholding concept of obscenity).

197. See, e.g., *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (upholding obscenity conviction of two bookstore clerks).

198. *Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

Justice Scalia described the promotion for one of Playboy's movies as follows: "Little miss country girls are aching for a quick roll in the hay! Watch southern hospitality pull out all the stops as those ravin' nymphos tear down the barn and light up the big country sky."¹⁹⁹ Let us assume that the government chose to prosecute Playboy for showing that movie. Playboy, undoubtedly equipped with the best obscenity lawyers available, would argue that the movie was of high artistic value because of the camera angles. It would probably also argue that there was a moral to the story.²⁰⁰ Playboy might further contend that the focus on country girls was a political satire, debunking the idea that rural America is inferior to its urban compatriots. Finally, it would argue that the movie is no more offensive than dozens of other movies shown on cable channels such as HBO, Cinemax, or Showtime.

To make its case, the government would undoubtedly show the movie to ordinary citizens, who might be horrified by its content, in order to obtain them as witnesses.²⁰¹ The prosecutor would then challenge all of Playboy's arguments for artistic or political merit with its own witnesses. Several days later, the case would go to a jury which, if all twelve jurors found the movie obscene beyond a reasonable doubt, could convict. Then the appellate process would begin and several years later, if the Supreme Court affirmed or denied certiorari, the conviction would be upheld. The conviction, of course, would do nothing to keep Playboy from disseminating the rest of its movies, or, for that matter, even the same movie, albeit in another community.²⁰²

Taking the concept of low value speech seriously, and including obscenity within it, would avoid these problems.²⁰³ Instead of lengthy trials designed

199. *Playboy*, 120 S. Ct. at 1897.

200. Cf. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Massachusetts, 383 U.S. 413, 433-41 (1966) (Douglas, J., concurring) (appendix) (recounting minister's sermon that characterized *Fanny Hill* as piece of moral literature).

201. See, e.g., Brief for Appellee at 8-9, *Stanley v. Georgia*, 394 U.S. 557 (1969) (No. 293) (calling the following individuals as government witnesses to testify as to obscenity: pastor who was also Chairman of State Literature Commission; service station attendant; attorney; retired locomotive engineer; optometrist; real estate salesman; assistant solicitor general; and investigator). These witnesses were all required to watch Stanley's film in order to determine whether the film that he had in a drawer in his bedroom was obscene.

202. Community standards do vary.

203. Justice Scalia would avoid these problems by prosecuting Playboy on the basis of its purveying predominantly sexually explicit material.

We are more permissive of government regulation in these circumstances because it is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer is interested in the work's literary, artistic, political, or scientific value. "The deliberate representation of petitioner's publications as erotically arousing . . . stimulates the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." Thus, a business that "(1) offers . . . hardcore sexual material, (2) as a constant and

to determine whether a particular indecent movie is obscene, the government could take steps to avoid the harms that it can legitimately prevent while insuring that consenting adults have access to whatever reading and viewing material they desire.²⁰⁴

VII. *Explicit Violence as Low Value Speech*

Just as my proposal would raise obscenity from no value to low value speech, I would also suggest reducing explicit violence from high value to low value speech. Recognizing that low value speech, properly conceived, will not significantly interfere with a producer's opportunity to market the material, or with a consumer's opportunity to obtain the material, it makes sense to shield children and nonconsenting adults from this material. Violent material foisted upon a nonconsenting adult may be as offensive as sexually explicit material. And, it is at least doubtful that children are better served by watching *The Texas Chainsaw Massacre* than *Debbie Does Dallas*.²⁰⁵

Pop culture has already recognized the similarity of inappropriateness between violence and sex. Movies are frequently rated "R" for violence, and occasionally even "NC-17."²⁰⁶ As long as low value speech is defined as I have suggested, I see no harm, and some good, in creating a congruence between explicitly sexual material and explicitly violent material.

intentional objective of [its] business, [and] (3) seeks to promote it as such' finds no sanctuary in the First Amendment."

United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1896 (2000) (Scalia, J., dissenting) (quoting *Ginzburg v. United States*, 383 U.S. 463, 470 (1966)). Justice Scalia would apply this same rationale to book stores. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 260-61 (1990) (stating that emphasis should be on nature of business). In his view, a sexually explicit book sold by Barnes and Noble is non-problematic, but many sexually explicit books sold by the XXX Bookstore are a problem, and thus the XXX Bookstore should be subject to prosecution. If this view were to prevail, constitutionally protected sexually explicit material would either move to legitimate book stores where it would be much more likely to be perused by children and nonconsenting adults, or it would disappear for want of a purveyor, thereby artificially depriving some constitutionally protected material of a distributional outlet.

204. This is not true when the case involves actual photographs of child pornography because protection of the photographed child trumps any right to possess the material. See *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990) (finding that state's interest limits First Amendment protection of child pornography); *Loewy*, *supra* note 82, at 480-82 (discussing First Amendment protection of child pornography).

205. See generally KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION* 10-11 (1996) (discussing public debate over media violence).

206. Among those movies rated NC-17 for violence were: *Man Bites Dog* (Roxie Releasing 1992) (Belgian film released in United States that was originally entitled *C'est Arrivé Près de Chez Vous*) and *Santa Sangre* (Expanded Entm't 1991) (horror film with many scenes of graphic violence).

VIII. Conclusion

Low value speech, properly conceived, provides an important detente for utterances that are worthy of some constitutional protection, but are not the functional equivalent of full value political speech. To be sure, the concept's primary value is as a heuristic device designed to ensure that some types of speech will get the protection they need without disabling the government from enacting regulations that it needs to implement. But heuristic devices are frequently necessary to ensure desired results,²⁰⁷ and low value speech ensures results in accord with core constitutional principles. Stripped of its misuses, low value speech should be celebrated as a means to protect both free speech and society.

207. Obscenity is a heuristic device that yields an undesirable result. Arguably, so are "fighting words." Compare *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (concluding that words that inflict injury or tend to incite immediate breach of peace are outside scope of First Amendment) with *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (limiting fighting words doctrine to those words that have direct tendency to cause act of violence by person to whom words are addressed). See also Arnold H. Loewy, *Distinguishing Speech From Conduct*, 45 *MERCER L. REV.* 621, 627-29 (1994) (discussing evolution of fighting words doctrine).

