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Content and Context: The Contributions of William Van Alstyne to First Amendment Interpretation

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CONTENT AND CONTEXT: THE CONTRIBUTIONS OF WILLIAM VAN ALSTYNE TO FIRST AMENDMENT INTERPRETATION

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INTRODUCTION

William Van Alstyne's contributions to First Amendment interpretation, like his contributions to all of American constitutional law, are characterized by a piercing intellectual honesty and an impish play of intelligence. One feels relentlessly pulled by the elegant currents of Professor Van Alsytne's arguments, yet, at the same time, restlessly resistant, a resistance borne of the vague but certain wariness that one is but an apprentice forever consigned to a level of awareness several moves behind the master, who almost certainly will produce surprises at the end.

In this essay I explore two defining themes of Professor Van Alsytne's First Amendment thought, themes that occupy cornerstone placements in the modern architecture of First Amendment law. The first theme deals with the core content of the First Amendment's Speech Clause.[1] The second theme deals with the vexing problem of how to interpret the Speech Clause in the context of the government's putative participation in the expressive enterprise.

In the parlance of Professor Van Alsytne's scholarship, Part I of this essay searches for the meaning of the First Amendment's phrase "*the* freedom of speech," with an emphasis on "the."[2] This exploration includes an examination of the shortcomings of "absolutism" as a plausible understanding of the meaning of "the

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1. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

2. WILLIAM VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 25 (1984).

freedom of speech,"[3] an examination of why the history surrounding the enactment of the First Amendment, including the elusive search for the "original understanding" of the First Amendment, is only of limited utility in supplying doctrinal content to the Free Speech Clause.[4] Part I concludes with a critique of the various attempts that have been made to reduce the meaning of the Free Speech Clause to some formulaic calculation. These calculations include the "bad tendency" test;[5] the "clear and present danger" test;[6] Judge Learned Hand's risk calculation test, embraced for a time by the Supreme Court in *Dennis v. United States*;[7] and the currently prevailing orthodoxy, the "incitement test" articulated in *Brandenburg v. Ohio*,[8] as well as various "categorical" approaches to free speech law, such as that suggested by the Court in *Chaplinsky v. New Hampshire*.[9]

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3. *See infra* Part I.A.

4. *See infra* Part I.B.

5. *See infra* notes 68–72 and accompanying text. The "bad tendency" test is most famously associated with the early free speech opinions of Justice Oliver Wendell Holmes, before Holmes shifted to positions more protective of freedom of speech. *See* Debs v. United States, 249 U.S. 211, 216 (1919) ("[T]he jury were [*sic*] most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency . . . to obstruct the recruiting service . . . ."); Frohwerk v. United States, 249 U.S. 204, 209 (1919) (concluding that a speaker may be punished for knowingly making statements that tend to "kindle a flame" of dissent in the audience); Schenck v. United States, 249 U.S. 47, 52 (1919) ("If the act, . . . its tendency[,] and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."). Under this test, the mere "tendency" of speech to cause harm was enough to justify its regulation. Ernst Freund, *The* Debs *Case and Freedom of Speech*, 40 U. CHI. L. REV. 239, 239 (1973); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 533 (1981).

6. *See infra* notes 73–79 and accompanying text.

7. 341 U.S. 494 (1951). "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510 (alteration in original) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)); *see infra* notes 80–83 and accompanying text. Professor Van Alstyne critiques the Hand / Dennis formula in *Interpretations of the First Amendment*. VAN ALSTYNE, *supra* note 2, at 30–37.

8. 395 U.S. 444 (1969).

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

Id. at 447; *see infra* notes 84–85 and accompanying text. Professor Van Alstyne discusses the *Brandenburg* formula in *Interpretations of the First Amendment*. VAN ALSTYNE, *supra* note 2, at 35.

9. 315 U.S. 568 (1942); *id.* at 571–72 (discussing forms of speech that do not receive First Amendment protection); *see infra* notes 86–112 and accompanying text.

Modern free speech doctrine takes in a vast landscape. The table of contents of Professor Van Alstyne's law school casebook on the First Amendment illustrates the point.[10] The topics covered by the casebook include taxation of the press, regulation of the political process, campaign finance laws, libel law, privacy law, symbolic dissent, prior restraints, regulation of speech in relation to the judicial process, the speech of government employees, public forum law, regulation of broadcasting, coerced expression, anonymity and freedom of expression, commercial speech, press access to judicial proceedings, and obscenity[11]—and these topics, numerous as they are, do not include all that exist (lest the casebook become so thick as to lose its pedagogical utility and market viability).

Tests such as "clear and present danger" or the *Brandenburg* incitement standard may be perfectly serviceable when dealing with a prosecution for incitement to riot, but they tend to lose their coherence when applied to such issues as libel, public forum law, or campaign finance restrictions. In modern First Amendment doctrine, one size does not fit all, at least not stylishly. As Professor Van Alstyne's scholarly efforts have so well demonstrated, the intelligent design of free speech doctrine must be a constant work-in-progress, continually refined to remain robustly protective of free speech.

Part I of this essay examines Professor Van Alsytne's wonderful insights into the intricacies of any conscientious attempt to define the appropriate core content of "*the* freedom of speech," with particular emphasis on the strengths and weaknesses of such approaches as absolutism, historicism, and formulaic standards. Part I examines Professor Van Alsytne's important contributions to the ongoing constitutional conversation on the meaning of the First Amendment, and offers in turn a few modest ruminations on that conversation.

In Part II, I explore a second theme of Professor Van Alstyne's scholarship, one that centers less on *content* and more on *context* in First Amendment analysis. This Part focuses specifically on one of the great perplexing questions of modern First Amendment law: To what extent are First Amendment protections appropriately diminished or diluted when the government *itself* is in some way a putative participant in the expressive activity? I use the term "putative participant" here purposefully—for whether the government is a

10. WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS xi–xvi (2d ed. 1995).

11. *Id.*

genuine participant is often a critical issue in contest, as is the degree and nature of that participation.[12] Indeed, a careful dissection of the claimed participation is often warranted, with the degree of protection derived through analysis of the precise nature of the government's participation.[13] This problem of the "government as participant" arises in modern First Amendment law in many different iterations, ranging from issues posed by the regulation of speech on government property or in a government facility (an issue usually treated as part of "public forum" law[14]), to situations in which the speech takes place in the context of some governmental enterprise (such as public education, public employment, or the management of a prison system[15]), to speech by government licensees in regulated industries (such as the regulation of broadcasting by the Federal Communications Commission[16]), to speech that is subsidized in whole or in part by government funding (such as student publications at a state university[17] or funding of the arts[18]), to the direct expressive activity of the government itself, such as an antismoking campaign (so-called "government speech"[19]). In Part II, I explore how attempts

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12. *See generally id.* at 330–33; *see infra* note 166 and accompanying text.

13. *See generally* VAN ALSTYNE, *supra* note 10, at 330–33; *see infra* Parts II.B & C.

14. *See generally* VAN ALSTYNE, *supra* note 10, at 480–552; *see infra* Part II.B.

15. *See generally* VAN ALSTYNE, *supra* note 10, at 336–420; *see infra* Part II.C.

16. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369, 375 (1969) (rejecting broadcasters' First Amendment challenge to the FCC's "fairness doctrine" requiring broadcasters to cover both sides of public issues); VAN ALSTYNE, *supra* note 10, at 536–47 (discussing *Red Lion* and regulation of the airwaves).

17. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 825, 837 (1995) (holding that a university policy of denying funding to any student group that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality" infringes the right to free speech (alteration in original) (quoting Appendix to Petition for Certiorari at 66a)).

18. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 573 (1998) (rejecting a First Amendment challenge to the statutory requirement that the National Endowment for the Arts, in assessing the artistic merit of grant applications, "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" (alteration in original) (quoting 20 U.S.C. § 954(d)(1))).

19. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker."); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens."); Planned Parenthood of S.C. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) (Michael, J., writing separately and announcing the judgment) (concluding that a license plate bearing the slogan "Choose Life" constitutes a mixture of government and private speech), *cert. denied*, 125 S. Ct. 1036 (2005); *id.* at 800 (Luttig, J., concurring) (same); Sons of Confederate

to grapple with the problems posed by the government-as-putative-participant in speech usually trigger forays into one of the larger quandaries of American constitutional law, the "right-privilege" distinction, and its doctrinal antidote, the "doctrine of unconstitutional conditions."[20] The direction of American constitutional law on this right-privilege issue has been heavily influenced by William Van Alstyne's writings.[21]

I. THE CORE CONTENT OF THE SPEECH CLAUSE: *THE* FREEDOM OF SPEECH

One of my favorite episodes in modern American libel litigation arose from a breezy interview of the writer Mary McCarthy on the old Dick Cavett show, in which McCarthy was slinging literary slams against other writers, including Lillian Hellman. Among her zings was the insult that "every word she writes is a lie, including 'and' and 'the.'"[22] Hellman sued McCarthy for libel and appropriately lost.[23] The essential relevancy of this seemingly inessential irrelevancy, however, is the nice illustration of the degree to which little words, even the lowly "the," may at times pack big importance.

A. Why the First Amendment Cannot be an Absolute

William Van Alstyne uses a combination of the "the" in the Speech Clause and a series of what he calls "irresistible counterexamples" to illustrate why, as a matter of both constitutional

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Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002) (concluding that a Sons of Confederate Veterans license plate featuring a Confederate flag constitutes private speech); *see infra* note 166 and accompanying text.

20. *See* VAN ALSTYNE, *supra* note 10, at 330–78 (discussing the right-privilege distinction and the doctrine of unconstitutional conditions); *see infra* Part II.A.

21. Van Alstyne's works on this topic include VAN ALSTYNE, *supra* note 10, at 330–34; William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 485–87 (1977) [hereinafter Van Alstyne, *New Property*]; William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1461–62 (1968) [hereinafter Van Alstyne, *Right-Privilege Distinction*]; *see infra* Part II.A.

22. Hellman v. McCarthy, 10 Media L. Rep. (BNA) 1789, 1790 (N.Y. Sup. Ct. 1984), *discussed in* RODNEY A. SMOLLA, SUING THE PRESS 62–66 (1986).

23. SMOLLA, *supra* note 22, at 62–66.

text and common logic, the First Amendment cannot be sensibly interpreted as providing *absolute* protection for freedom of speech.[24]

The actual constitutional text, of which we ought never tire, bears repeating: "Congress shall make no law . . . abridging the freedom of speech . . . ."[25] We may properly thank Professor Van Alstyne for reminding us, at the threshold, that this command is relatively unique among constitutional guarantees in its lack of condition or equivocation.[26] Unlike the Fourth Amendment, it is not limited to "unreasonable" actions by government, as in the case of the prohibition against "unreasonable searches and seizures."[27] Similarly, unlike the Fifth Amendment, it is not trimmed by requiring that government provide only that "process" which is "due."[28] And unlike the Eighth Amendment, it is not confined to punishments that are "excessive," "cruel," or "unusual."[29]

The command of the First Amendment is, by comparison to other guarantees, ostensibly absolute. And there have been jurists who have insisted on absolute fidelity to its language. Justice Black would thus sternly invoke the First Amendment's clarion command that "Congress shall make no law" abridging freedom of speech as a literal translation of a sacred text, employing a kind of First Amendment version of scriptural fundamentalism, in which the words "no law" were understood quite literally as *no* law, "without any ifs, buts, or whereases."[30] Echoing his Brother's theme, Justice Douglas often concurred in similarly soaring invocations, such as his statement in *Columbia Broadcasting System, Inc. v. Democratic National*

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24. *See* VAN ALSTYNE, *supra* note 2, at 22–26 (suggesting that speech such as soliciting murder and threatening the president would not fall within the "the" in "the freedom of speech").

25. U.S. CONST. amend. I.

26. *See* VAN ALSTYNE, *supra* note 2, at 22 ("In comparison with nearly every other provision in the Bill of Rights, the first amendment is of exceptional crispness and clarity.").

27. U.S. CONST. amend. IV.

28. U.S. CONST. amend. V; *see, e.g.*, Matthews v. Eldridge, 424 U.S. 319, 332–49 (1976) (employing a cost-benefit analysis to determine levels of procedural protection that apply to deprivations of interests in "'liberty' or 'property'" in context of administrative action (quoting U.S. CONST. amend. V, XIV)).

29. U.S. CONST. amend. VIII.

30. Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting); Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 559 (1952) ("My view is . . . without any ifs, buts or whereases, that freedom of speech means that you shall not do something to people either for the views they have or the views they express or the words they speak or write." (remarks of Justice Black)).

Committee[31] that "[t]he ban of 'no' law that abridges freedom of the press is in my view total and complete."[32]

Through a parade of "irresistible counterexamples," Professor Van Alstyne demonstrates an intuitive recognition that many instances of communication that fall literally within the meaning of the word "speech" in the First Amendment cannot plausibly be understood to dwell within the shelter of the constitutional command protecting "*the* freedom of speech."[33]

Professor Van Alstyne begins with the best-known of all such counterexamples, the argument of Justice Oliver Wendell Holmes that no credible conception of the meaning of the Free Speech Clause will include within its protection the case of a person shouting "Fire!" in a crowded theater—knowing there is no fire—for the perverse purpose of precipitating a stampede.[34] Holmes' example is so often quoted that it now verges on cultural cliché.[35]

Yet, to illustrate the convolution of modern First Amendment law, even the irresistible counterexamples may be subjected to irresistible counter-counterexamples. Pushing the problem in his inimitably puckish way, for example, Van Alstyne devilishly posits the problem of a diabolical villain who shouts "Fire!" in a crowded theater populated entirely by persons who are deaf, watching a movie with subtitles![36]

Taking a cue from Van Alstyne's clever play on the Holmes counterexample, I offer some plays of my own. In the midst of debate over the meaning of "the freedom of speech," someone will inevitably declare that it does not encompass any right to shout "Fire!" in a crowded theater. But of course, it *does*, if there *is* a fire. And of course, the observation by Holmes does not solve many subsidiary difficulties, such as what society's response ought to be when the person who shouts "Fire!" *thinks* there is one but turns out to be

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31. 412 U.S. 94 (1973).

32. *Id.* at 156 (Douglas, J., concurring).

33. VAN ALSTYNE, *supra* note 2, at 22–26.

34. *Id.* at 24; *see* Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.").

35. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 98–108 (1992) (explaining the development of free speech jurisprudence, including Holmes' "fire" quote); *see* Gerald Caplan, *Searching for Holmes Among the Biographers*, 70 GEO. WASH. L. REV. 769, 770–71 n.4 (2002) (commenting on the pervasiveness of Holmes's images in federal court opinions).

36. VAN ALSTYNE, *supra* note 2, at 38.

mistaken. May strict liability attach to render the shouter responsible for ensuing harm?[37] Should negligence be the operative principle?[38] Or is a standard more protective of such speech warranted, something similar to "reckless disregard" for the risks of harm?[39] And recalling that when Holmes made this observation he was putting it to the service of a discussion of liability for antiwar protest and draft obstruction, the metaphor of "fire" and "crowded theater" also invites judgment as to whether expression of opinion may be penalized.[40] If the shout of "fire" is an argument that launching a war

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37. One might, for example, treat the shouting of "Fire!" in a crowded theater as a kind of intramural exercise of speech not part of the arena of public discourse implicating any issue of public concern, and thus essentially beneath the radar of the First Amendment. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759–60 (1985) (raising the possibility that common-law strict liability standards for defamation may be constitutionally permissible when the attempt to impose liability does not involve any issue of "public concern"). There is authority for the proposition that the First Amendment might permit strict liability standards to apply in defamation actions not involving public figure plaintiffs or issues of public concern. Sleem v. Yale Univ., 843 F. Supp. 57, 62 (M.D.N.C. 1993); Ross v. Bricker, 770 F. Supp. 1038, 1043 (D.V.I. 1991); Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1505 n.21 (D.D.C. 1987); RODNEY A. SMOLLA, THE LAW OF DEFAMATION § 3:17 (2d ed. 2004); *see also* Snead v. Redland Aggregates, Ltd., 998 F.2d 1325, 1333 (5th Cir. 1993) (stating that *Dun & Bradstreet* exempts states from First Amendment strictures in defamation actions when speech does not relate to matters of public concern); Mutafis v. Erie Ins. Exch., 775 F.2d 593, 594–95 (4th Cir. 1985) (holding that under *Dun & Bradstreet* no First Amendment principles attached to speech arising from an interoffice memorandum not related to issues of public concern).

38. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that ordinary negligence is the minimum First Amendment standard required of states for the imposition of liability in defamation cases in which the plaintiff is a private figure).

39. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (establishing standard of "knowledge that [a statement] was false or with reckless disregard of whether [a statement] was false or not" in public official defamation cases).

40. Separating "fact" from "opinion," and determining the extent to which the First Amendment ought to be understood as speaking to this issue, has been a vexing issue. The question has had a rollercoaster history, for example, in First Amendment cases dealing with defamation standards. The starting point for analysis is the holding of the United States Supreme Court in its landmark decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Prior to *Milkovich*, there was a spreading consensus among lower courts that the First Amendment contained a freestanding constitutional protection for statements of opinion in defamation actions. This constitutional protection of opinion was seen as superseding and augmenting the protections embodied in the "fair comment" privilege recognized at common law. The basis of this belief was traced most famously to language in *Gertz*, in which the Supreme Court stated with seemingly emphatic certitude that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. at 339–40. Building on this pronouncement in *Gertz*, as well as other statements from the Supreme Court protecting "rhetorical hyperbole," Greenbelt Coop. Publ. Assoc. v. Bresler, 398 U.S. 6, 14 (1970), "lusty and imaginative expression of contempt," Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974), or vicious parody,

against Iraq in the absence of transparent and public documentation of weapons of mass destruction, and the "crowded theater" is something akin to the "theater of war against terrorism," then whether there is a "fire" and a "war" in the constitutional sense may both be matters of contingent characterization on which reasonable and loyal citizens are permitted to disagree.[41]

Professor Van Alstyne poses many other irresistible counterexamples, all of which reinforce his general premise—that each counterexample is "an instance of speech plainly within the literal protection of the first amendment but an instance nonetheless sufficient to give one pause."[42] For each such irresistible counterexample posited by Professor Van Alstyne, one might cite examples recognized by the courts confirming the common sense "pause" indicating that the First Amendment simply cannot be understood as absolute. This overlap of Professor Van Alstyne's counterexamples and judicial decisions limiting free speech include solicitation of murder,[43] bribery of a public official,[44] false and

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Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988), lower courts not only treated opinion as independently protected by the First Amendment, but constructed various multi-part doctrinal tests to define "opinion" generously. These judicial decisions tended to emphasize such factors as (1) the author's choice of words, (2) whether the challenged statement is capable of being objectively characterized as true or false, (3) the context of the challenged statement within the writing or speech as a whole, and (4) the broader social context into which the statement fits. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984) (en banc) (emphasizing these four factors). The Supreme Court's decision in *Milkovich*, however, complicated this picture. In *Milkovich* the Court held that there is no freestanding First Amendment privilege protecting "opinion" in defamation suits. 497 U.S. at 19–20. Yet at the same time, the Supreme Court in *Milkovich* held that in defamation suits against media defendants involving stories on issues on "matters of public concern," the First Amendment requires that the defamatory statement, whether express or implied, be provable as false before there can be liability. *See id.* at 20 ("The question is not whether a statement is an opinion, but whether a reasonable factfinder could conclude that the statement implies an assertion of fact that is provable as false.").

41. *See* Rodney A. Smolla, *Not So Free Speech*, LEGAL AFF., Jan.-Feb. 2005, at 62–66 (reviewing GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2005)).

42. VAN ALSTYNE, *supra* note 2, at 24.

43. *Id.* at 24; *see also* Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting):

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.

For another case discussing free speech and solicitation of murder, see Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 243 (4th Cir. 1997) (holding that the First Amendment does not

misleading commercial advertising,[45] perjury,[46] disruption of public meetings by interrupting the speech of someone else who has already been granted the floor,[47] and a threat against the life of the president.[48]

Absolutism has thus failed to carry the day, largely because it is simply too brittle to account for the many "irresistible counterexamples" for which some accounting must be made. A simplistic and entirely unsatisfying accommodation, advanced by Justice Black, was to label with the conclusory epithet "conduct" any form of expression that Justice Black deemed unworthy. This

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bar imposition of liability against publisher of a murder instruction manual when the manual was used by a professional hit man to perform contract murder for hire).

44. VAN ALSTYNE, *supra* note 2, at 24; *see also* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 446 (2001) (assuming the constitutionality of antibribery laws); Buckley v. Valeo, 424 U.S. 1, 27 (1976) (recognizing the government's interest in preventing "quid pro quo" donations).

45. VAN ALSTYNE, *supra* note 2, at 24–25. Contemporary commercial speech doctrine is governed by the four-part test first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563–64 (1980):

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

A large and contentious body of law has arisen regarding the nature of the proof required to satisfy the threshold *Central Hudson* requirement that the speech not be "misleading." The issue was presented by *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), in which the Supreme Court ultimately refused to consider what First Amendment standards ought to apply to allegedly misleading statements by the corporate giant Nike regarding its employment practices in third-world nations, *see id. at* 656 (Stevens, J., concurring). The California Supreme Court had sustained liability against Nike. Kasky v. Nike, Inc., 45 P.3d 243, 262 (Cal. 2002). The Supreme Court granted review, to great fanfare, only to dismiss the writ of certiorari as "improvidently granted." *Nike*, 539 U.S. at 655.

46. VAN ALSTYNE, *supra* note 2, at 25; *see also* Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961) (explicitly rejecting the absolutist view of the meaning of the First Amendment and observing that such a view "of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like.").

47. VAN ALSTYNE, *supra* note 2, at 25; *see also* State v. Hardin, 498 N.W.2d 677, 681 (Iowa 1993) (holding that the First Amendment did not give a person a right to disrupt President Bush at a political fundraiser).

48. VAN ALSTYNE, *supra* note 2, at 25; *see* Virginia v. Black, 538 U.S. 343, 358–59 (2003) (exploring the meaning of the "true threat" doctrine under the First Amendment in the context of a challenge to Virginia's anti-cross-burning statute); Watts v. United States, 394 U.S. 705, 708 (1969) (exploring the meaning of the "true threat" doctrine in the context of prosecution under federal law criminalizing threats against the president, in a case in which the ostensible threat was deemed mere political hyperbole).

expression could include activity that is undeniably expressive and also undeniably political, and thus (one might expect) at least presumptively protected. Justice Black thus dissented, voting against providing First Amendment protection for the expression, in the famous "Fuck the Draft" case, *Cohen v. California*,[49] explaining that in wearing his offending jacket as a protest against the War in Vietnam, Paul Cohen was engaged, not in speech, but in conduct.[50] Yet Mr. Cohen's message was manifestly metaphorical, as one cannot literally perform a sexual act with a federal agency. Similarly, in *Adderley v. Florida*,[51] Justice Black voted against First Amendment protection for civil rights protestors picketing outside a courthouse, again reasoning that the law was restricting conduct, not speech.[52] In both cases Justice Black was dealing with protest that heavily relied upon the symbolic use of expression. Although it may well be that when expressive activity is brigaded with action or intertwined with physical conduct the government may have especially cogent claims for regulating certain aspects of the activity for reasons *unrelated* to the suppression of ideas or the content of the communication,[53] the mere surface labeling of speech that has been deemed undesirable as conduct cannot be enough to take the government off the hook.

B. Why History is not a Reliable Guide

When absolutes fail, history is a tempting substitute. Interpreting a clause in the Constitution's text in light of the original understanding of the clause may indeed supply a tempting certitude and legitimacy. Professor Van Alstyne, however, has not attempted to ground his approach to First Amendment interpretation in the original understanding of the Framers, and for good reason. The restricting reality of the First Amendment (and of numerous other grandly phrased clauses in the Constitution) is that history does not easily yield its secrets.

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49. 403 U.S. 15 (1971).

50. *Id.* at 27 (Blackmun, J., dissenting) (relying on the speech/conduct distinction in a dissenting opinion joined by Justice Black).

51. 385 U.S. 39 (1966).

52. *Id.* at 42.

53. *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding an anti-noise regulation); United States v. O'Brien, 391 U.S. 367, 372 (1968) (upholding a ban on burning draft cards because of the government's interest in preserving an administrative system).

As a matter of surface impression, what history seems to make of the First Amendment is that the Amendment did not mean much. The text of the Constitution refers only to "Congress," and commands merely that "Congress shall make no law . . . abridging the freedom of speech." Grammar would thus both permit and arguably invite the understanding that the First Amendment, by targeting only Congress, was applicable only to abridgements of a uniquely federal character, or, at the very most, limited to the common-law prohibition against prior restraints.[54] In one of his earliest iterations of the meaning of the First Amendment, for example, Justice Holmes held in *Patterson v. Colorado*[55] that a newspaper publisher could be jailed for contempt for daring to criticize the Colorado Supreme Court.[56] Throughout Holmes' ruling in *Patterson*, Holmes casts doubt on the notion that the First Amendment applied to acts of state government at all.[57] Even if the First Amendment did apply to Colorado, on the supposition that some notion of "freedom of speech" was implicit in the conceptions of liberty recited in the Due Process Clause of the Fourteenth Amendment, Holmes suggested that the meaning of the First Amendment was limited to the prevention of prior restraint.[58]

Holmes would come to abandon this narrow view, and indeed, to abandon any effort to ground his First Amendment thought in history.[59] Following Holmes, the development of modern First Amendment law has been largely ahistorical. The principal difficulty

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54. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52 ("The liberty of the press . . . consists in laying no *previous* restraints upon publication . . . .").

55. 205 U.S. 454 (1907) (Holmes, J.).

56. *See id.* at 462 (holding that the First Amendment's main purpose is to shield against prior restraints).

57. *See id.* at 460 (suggesting that the "Fourteenth Amendment would not forbid" certain intrusions by states into federal constitutional rights).

58. *See id.* at 462:

> But even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is "to prevent all such previous *restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all.

(footnotes omitted).

59. *See* Rabban, *supra* note 5, at 591 (stating that Holmes, along with Brandeis, departed from historical interpretations of the First Amendment and developed a theory of the Amendment based on the writings of Zechariah Chafee, Jr.).

with any effort to liquidate the meaning of the First Amendment through reference to the original understanding of the Framers is that, among those select Framers who thought about the matter at all, different Framers thought different things.[60] James Wilson articulated the meaning of the Amendment in Blackstonian terms, observing that "what is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government or the safety, character and property of the individual."[61] James Madison, however, explained the First Amendment by contrasting its protection with the British tradition,[62] and would come to refer to freedom of the press as among the "essential" "rights of Conscience in the fullest latitude."[63]

Crabbed historicism also suffers from any lack of sensitivity to the larger arc of history that defined the American Revolution. The single most important historical datum regarding the Revolution is that it was a *revolution*, in which conceptions of government were in the process of radical and wholesale modification.[64] The rebellious assumptions of the new nation were that ultimate sovereignty rested with the people, that legitimacy was dependent on the consent of the governed, and that expansive conceptions of liberty were fundamental to the nature of men. The Framers lived and breathed freedom of speech, and, in choosing such ringing and unqualified phrasing, it is doubtful that they intended future generations to be bound by any narrow English conceptions of what "*the* freedom of speech" should come to mean.

C. The Formulas and Graphics of First Amendment Protection

Professor Van Alstyne, like Holmes before him, thus wisely eschews absolutes, as well as any strong reliance on history as a guide

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60. *See* David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 816–20 (1985) (reviewing LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985)) (discussing the divergent views of the Framers regarding free speech).

61. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 97 n.6 (1981).

62. *See* James Madison, *Report on the Virginia Resolutions, 1798*, *in* 4 ELLIOT'S DEBATES 528 (2d ed. 1941) (decrying the Alien and Sedition Acts as akin to monarchy).

63. 5 THE WRITINGS OF JAMES MADISON 320 (G. Hunt ed. 1904).

64. *See* Rabban, *supra* note 60, at 855 ("[A] new conception of popular sovereignty, derived from the Radical Whig tradition in England, arose during the American Revolution . . . .").

to interpreting the First Amendment. But if absolutes won't do, and history cannot help, what principles ought to guide First Amendment jurisprudence? Rather than manufacture an elegant theory of First Amendment interpretation out of philosophical whole cloth, Professor Van Alstyne, following the method characteristic of all his constitutional scholarship, instead takes up the classic tools of the trade, and from them constructs his model.[65] Professor Van Alstyne closely examines the cases, and the various doctrinal formulas and animating principles that emerge from them, relentlessly critiquing, contrasting, and comparing. Among my favorite examples of Professor Van Alstyne's labors in this regard is his essay "A Graphic Review of the Free Speech Clause."[66] Using diagrams and charts to illustrate graphically how various doctrinal approaches to First Amendment law operate, Professor Van Alstyne steadily and inexorably builds toward the extraction of guiding maxims for hardy and robust constitutional protection for speech. Professor Van Alstyne's graphic tour of the First Amendment invites a survey of such nominees as the "bad tendency" test; "clear and present danger"; the Hand / *Dennis* test; and the modern variation of "clear and present danger," the *Brandenburg* incitement test, as well as "categorical" approaches to First Amendment interpretation.[67]

1. *Bad Tendency*. Modern free speech law started with a false start. In *Schenck v. United States*,[68] Holmes announced his famous "clear and present danger" test,[69] language that appeared to contemplate strong protection for freedom of speech. But the "clear and present danger" test in *Schenck* proved to be less than met the

65. *See generally* Garrett Epps, *"You Have Been in Afghanistan": A Discourse on the Van Alstyne Method*, 54 Duke L.J. 1553 (2005).

66. William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982), *reprinted in* VAN ALSTYNE, *supra* note 2.

67. *Id.*

68. 249 U.S. 47 (1919) (Holmes, J.).

69. When a nation is at war many things that might be said in time of peace are such a hindrance that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute . . . punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.

Id. at 52.

eye. Despite the seeming toughness of a standard that required that the "danger" be both "clear" and "present," Holmes in the same opinion talked of how things that could be said during times of peace could not be said during war, and he applied his test quite casually in sending Schenck to the clink.[70] The bad tendency test, under which the mere tendency of speech to cause harm justified its regulation, got worse in *Debs v. United States*[71] and *Frohwerk v. United States*.[72] As applied by the early Holmes, "clear and present danger" meant neither "clear" nor "present"; all that was required to support a conviction for seditious speech was proof of the speaker's bad intent and evidence of the speech's bad tendency.

2. *Clear and Present Danger.* Holmes had a conversion experience in *Abrams v. United States*,[73] in which he wrote one of the most eloquent dissents in the history of the Court, setting forth his elegant defense of the marketplace of ideas.[74] The rhetoric in Holmes' *Abrams* dissent soared like roaring opera, thundering that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful

70. *Id.* at 52–53.

71. *See* 249 U.S. 211, 214–15 (1919) (Holmes, J.) (upholding a conviction against a speaker who engaged in core political speech in opposition to a war).

72. 249 U.S. 204 (1919) (Holmes, J.). In *Frohwerk*, perhaps the least well-known of these Holmes cases, the Supreme Court dealt with prosecutions arising from a series of articles critical of the war effort in a German language newspaper in Missouri with a minuscule circulation, *Staats Zeitung*. The articles declared it a monumental and inexcusable mistake to send American soldiers to France, and touted the undiminished strength and unconquerable spirit of the German people. After describing the plight of the draftee, one article asked rhetorically, who would pronounce the draftee guilty for following "the first impulse of nature: self-preservation." *Id.* at 208. Frohwerk was convicted under the Espionage Act of 1917 and sentenced to a fine and ten years' imprisonment. Justice Holmes, writing for a unanimous Court, affirmed the conviction. Holmes noted that Frohwerk's articles actually had condemned violence, deploring draft riots in Oklahoma and elsewhere. But the language Frohwerk used, Holmes insisted, "might be taken to convey an innuendo of a different sort." *Id.* at 207. The First Amendment, Holmes noted, could not have been "intended to give immunity for every possible use of language." *Id.* at 206. He then reiterated the holding in *Schenck* that a person may be convicted for conspiracy to obstruct the draft "by words of persuasion." *Id.* Holmes conceded that "[w]e do not lose our right to condemn either measures or men because the Country is at war." *Id.* at 208. Holmes then went on, however, to affirm Frohwerk's conviction by claiming that "on [the] record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out." *Id.* at 209.

73. 250 U.S. 616 (1919).

74. *Id.* at 630 (Holmes, J, dissenting).

and pressing purposes of the law that an immediate check is required to save the country."[75] Brandeis would later elaborate, in his wonderful opinion in *Whitney v. California*,[76] admonishing that the "fitting remedy for evil counsels is good ones."[77] As Professor Van Alstyne so cogently explained, the bad tendency test was far less protective of freedom of speech than a conscientiously applied "clear and present danger" test.[78] Under "clear and present danger," the harm must be real, not speculative, and it must be immediate. "Bad tendency," however, does not speak to the gravity or clarity of the harm, and requires no immediacy at all, merely the *potential* that the speech would *tend* to cause harm, at some vaguely defined future time.[79]

3. *The Hand / Dennis Test.* The First Amendment test suggested by Judge Learned Hand and adopted by the Supreme Court in *Dennis v. United States*[80] directs courts "in each case" to engage in an algebraic measure, computing whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[81] On the plus side of the ledger, the Hand test calls for the calculation to be made by the judiciary, and to be made in *each case*. The ostensible objectivity of the exercise, its reducibility to a chalkboard equation, and the fact that it can be universally applied to virtually any free speech problem also contribute to its threshold seductiveness.

If the Hand / *Dennis* test has the aesthetic appeal of well-defined math, however, it is not well-calculated to protect "the freedom of speech." When the harm the government seeks to redress is deemed relatively trivial—a simple fleeting trespass, for example—the Hand test calls for a high degree of probable harm before speech may be abridged. The difficulty, however, is that when the articulated harm is catastrophic, speech may be abridged on virtually no showing of

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75. *Id.*

76. 274 U.S. 357 (1927).

77. *Id.* at 375 (Brandeis, J., concurring).

78. *See* VAN ALSTYNE, *supra* note 2, at 35 (describing Holmes' test to be just as protective as the modern test).

79. *See* Debs v. United States, 249 U.S. 211, 215 (1919) (holding that speech likely to cause harm is unprotected when the speaker intends the harm).

80. 341 U.S. 494 (1951)

81. *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand, J.)).

probability at all.[82] If one articulates the harm as the violent overthrow of the United States government (the claimed harm in *Dennis* itself, which involved Communist Party prosecutions) or nuclear holocaust (such as in the infamous *Progressive* H-Bomb case[83]), even speech with no realistic chance of ripening into actual disaster may be punished. In the dark light of the terrorist attacks of September 11 and the ongoing ripples of violence that have emanated throughout the world in its aftermath, society might be tempted to treat any inflammatory rhetoric (such as describing America as the "great Satan" and urging the propriety of *Jihad*) as triggering calamitous possibilities, and by that measure punish it.

4. *The Brandenburg Incitement Test.* The "clear and present danger" test was reconstituted in *Brandenburg v. Ohio*,[84] in which the Court announced the currently-governing standard:

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[85]

5. *Categorical Approaches and Thoughts on the Limits of Formulas.* Casting a long shadow over all of these tests is an approach to First Amendment law that is not geared to probabilities or harms at all, but rather employs a very different methodology. Speech might be subdivided into various categories which might then be ranked according to their value or importance, perhaps arranged in concentric circles with the most important speech at the core and the less important speech at the periphery. First Amendment protection would be strongest at the center and weakest at the perimeter.[86]

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82. *See* VAN ALSTYNE, *supra* note 2, at 30 ("The greater the evil, the less probable need be its occurrence to forbid speech . . . .").

83. *See* United States v. Progressive, Inc., 467 F. Supp. 990, 997 (W.D. Wis. 1974) (upholding prior restraint against the publication of a magazine article explaining how a spy or terrorist could use information in the public domain to gather the scientific information (but not the fissionable material) needed to manufacture a nuclear bomb).

84. 395 U.S. 444 (1969).

85. *Id.* at 447.

86. Professor Van Alstyne presents such a model (as food for discussion) in his graphic review of free speech jurisprudence. VAN ALSTYNE, *supra* note 2, at 42.

At times the Supreme Court has embraced this methodology, and it is worthy of deep critique. Let me take as my text the pivotal passage in the Supreme Court's 1942 decision in *Chaplinsky v. New Hampshire*,[87] a case that Professor Van Alstyne has also used as a foil.[88] *Chaplinsky* is a case that predates the elevation of the Holmes / Brandeis / *Brandenburg* formulation. I believe, however, that it continues to exert a powerful gravitational pull on First Amendment jurisprudence, a pull in opposition to the instincts of Professor Van Alstyne and at least one of his pupils (me). *Chaplinsky* had echoes of common-law Blackstone but actually went far beyond Blackstone in suggesting a comprehensive approach to freedom of speech, namely, that the law ought not protect speech inimical to the social interests in order and morality:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[89]

The passage opens with remarkable boldness: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[90] For those who would later wish to make *Chaplinsky* out to be a case that *advances* the cause of freedom of speech, only the first eleven words of this sentence matter. First Amendment civil liberties lawyers and lawyers representing large mass media companies still cite *Chaplinsky* with approval in briefs, and Supreme Court Justices who are generally sympathetic to expansive protection for freedom of speech also still cite *Chaplinsky*

87. 315 U.S. 568 (1942).

88. VAN ALSTYNE, *supra* note 2, at 26 & n.21.

89. *Chaplinsky*, 315 U.S. at 571–72.

90. *Id.* at 571.

in their opinions.[91] When they cite the case, however, they mean to invoke only these first eleven words, pressing them for the proposition that the regulation of expression in America is limited to the proscription of "certain well-defined and narrowly limited classes of speech."[92] With this limiting spin, *Chaplinsky* can be made out to be a pro-free speech opinion, drawing the constitutional line in the sand around speech falling within the "well-defined and narrowly limited classes."[93]

But this accounting is not a credible one. The remainder of the first sentence itself gives the game away, expanding the thought with the intrepid declaration that these classes of speech have "*never* been thought to raise *any* Constitutional problem."[94] *Never* been thought to raise *any* problem! *Never* would seem to lay straight what historians have found crooked, seemingly returning to Blackstone and the original understandings of the Framers. *Any* means "any"—so that the proscription of these classes does not trigger *any* need to balance competing interests, or satisfy some doctrinal standard requiring harm or intent or causal proximity. If the first sentence of the *Chaplinsky* passage is to be taken seriously, it seems to mean that speech falling within these categories—"the lewd and obscene, the profane, the libelous"[95]—will receive no constitutional protection at all.

Consider next the second fascinating passage in *Chaplinsky*—the second half of the second sentence. Also among the proscribable categories are the "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[96] This sentence fragment is often referred to as enunciating the "fighting words" doctrine, and that is fair enough.[97] But note that the Court speaks of "insulting" words as well as

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91. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) (O'Connor, J.) (citing, with approval, *Chaplinksy*); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 740 (1996) (Breyer, J.) (citing, with approval, *Chaplinsky*).

92. *Chaplinsky*, 315 U.S. at 571.

93. *Id.*

94. *Id.* (emphasis added).

95. *Id.*

96. *Id.*

97. *See Black*, 538 U.S. at 359 (describing with approval *Chaplinsky*'s "fighting words" doctrine); Avis Rent A Car System, Inc., v. Aguilar, 529 U.S. 1138, 1141 (2000) (Thomas, J., dissenting from the denial of certiorari) (describing, with approval, *Chaplinsky*'s "fighting words" doctrine).

"fighting" words. They are not the same. An insult is an affront to human dignity. An insult works its harm through non-physical offense. The insult is complete and the affront accrues when the words themselves are uttered. No fisticuffs or palpable violence need follow. "Fighting words" are a bit different. Fighting words are a kind of super-insult, words that tend to provoke physical consequences—a punch in the nose or a riot. The passage confirms this dichotomy. As the Court elaborates, "insulting" words and "fighting" words are "those which by their very utterance inflict injury," (the insulting words) "or" (the "or" being quite critical here), those which "tend to incite an immediate breach of the peace" (the fighting words). Thus the Court in this sentence means to describe two quite different kinds of speech that may cause harms—speech that harms because it offends or insults, and speech that harms because it incites or provokes. The Court refers to these in the disjunctive, using "or" and not "and," thus clearly demarking these two harms as alternative and equally viable bases for preventing or punishing speech.

In the third sentence the *Chaplinsky* Court waxes philosophical. In an extraordinarily efficient single sentence, the doctrinal exposition in the first two sentences is infused with its animating theory: "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[98] This is the most perfect articulation ever of the balancing test that lies at the heart of all those who believe that, in the end, freedom of speech must always be measured against other vital societal interests in order and morality, and, additionally, that this balance is value laden, with high value speech getting the better of the balance than low value speech. As with the sentences preceding it, this sentence is meaning-packed. "[S]uch utterances are no *essential* part of any exposition of ideas . . . ."[99] The Court does not say they play *no* part, but no *essential part*. Thus one need not say "Fuck the draft" in order to express the idea "oppose the draft." One need not burn a flag to express the idea of dissent from the war effort. Reinforcing this theme, the passage speaks of *exposition*, connoting the use of language, reason, argument—an *intellectual* enterprise,

98. *Chaplinsky*, 315 U.S. at 572.
99. *Id.* (emphasis added).

something more than burning a piece of cloth. Most profoundly, the passage articulates with pristine clarity the theory driving the balance struck: such speech is "of slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[100] This is decidedly not the stuff of the marketplace of ideas, for *Chaplinsky* does not leave the test of truth to the power of the idea to command the market. *Chaplinsky* itself contemplates that the test of truth has already been administered, and these forms of speech have flunked the test, have been certified already as truth retarded, as of only "slight social value as a step to truth," and, perhaps most importantly, have already been deemed unfit for decent society, as "outweighed by the social interest in order and morality." And, once again, note that *Chaplinksy* is not just about keeping order—it is about keeping morality as well. *Chaplinsky* is not limited to the speech that might breach the peace; it extends to speech that offends society's moral sensibilities.

Read generously, this authentic *Chaplinsky* might be best understood as not intended to be entirely category-bound at all. It might be read as articulating a sweeping theory, a balancing test in which government has the freedom to pass on the social value and truth-utility of speech and weigh those variables against morality and good order. The various categories listed at the beginning of the passage might be understood as merely evocative, not exhaustive. Thus the examples on the list would automatically qualify as categories of speech that might be punished without any constitutional problem, but new categories of constitutionally proscribable speech could also emerge. Alternatively, even if *Chaplinksy* is read as inviting a mechanical approach to all First Amendment problems, creating a "list" of taboo categories that come certified as not worth the candle, and *freezing* First Amendment law to the particular classes contained in the list, at least one of the categories, describing those words which "by their very utterance inflict injury," is dangerously amorphous. The phrase does not define what is meant by "injury" and might open the door to punishment of any speech that has the capacity to offend or cause listeners mental or emotional distress.

Strictly as a descriptive matter, much of modern First Amendment law has passed by *Chaplinsky*. On the surface, its

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100. *Id.*

seemingly simplistic "categorical" approach to addressing First Amendment problems would seem washed away, an observation that Professor Van Alstyne has also made.[101] Sexually explicit material that might fairly be described as "lewd and obscene" now receives substantial First Amendment protection, with the degree of protection depending on the circumstances and method of regulation;[102] speech that is merely "profane" in the sense of being vulgar or blasphemous is now recognized as entirely protected;[103] speech that is "libelous" now benefits from vast First Amendment protection, particularly when it involves public officials or public figure plaintiffs on issues of public concern;[104] and the "fighting words" doctrine, although still alive, has been significantly honed and narrowed by being honed and harmonized with the highly protective intent and immediacy standards emanating from cases such as *Brandenburg v. Ohio*.[105]

But I do not believe *Chaplinsky* is dead, much as I might come to bury it. Fast-forward to a recent Supreme Court decision that again confronted the social interests in order and morality, and the antagonistic gravitational pulls of *Chaplinsky* and the Holmes / Brandeis / *Brandenburg* approach to defining "the freedom of speech" are again apparent. The case, *Virginia v. Black*,[106] involved a challenge to a Virginia statute that first made it a crime to burn a cross with the intent of intimidating any person, and then treated the burning of a cross itself as prima facie evidence of such intent.[107] If, in

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101. VAN ALSTYNE, *supra* note 2, at 26 & n.21.

102. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 874 (1997) ("[T]he CDA['s] . . . burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (protecting the private possession of obscene material in the home).

103. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988) (holding that vulgar speech about a public figure that causes emotional distress may not be restricted); Cohen v. California, 403 U.S. 15, 24–25 (1971) (declaring that "verbal tumult, discord, and even offensive utterance" are necessary consequences of open debate, and suggesting that, often, "one man's vulgarity is another's lyric"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952) (rejecting a state's attempt to ban films that a censor has determined to be "sacrilegious").

104. *Cf. Hustler Magazine*, 485 U.S. at 57 (holding that the publisher of an ad parody depicting Jerry Falwell in an "outrageous" manner is not liable for damages resulting from emotional distress).

105. 395 U.S. 444 (1969); *see also Cohen*, 403 U.S. at 20 (rejecting the application of the "fighting words" doctrine because neither intent nor actual provocation were shown).

106. 538 U.S. 343 (2003). In the interest of full disclosure, the author was Counsel for the Respondents in this case.

107. VA. CODE ANN. § 18.2–423 (Michie 1996).

light of the horrific legacy of violence of the Ku Klux Klan, one treats a burning cross as *always* being a "code" for a terrorist threat, which was the argument advanced by the Commonwealth of Virginia,[108] then one might treat it as easily embraced by even the narrower understandings of *Chaplinksy*. Indeed, a "threat" is arguably an *easier* First Amendment case than "fighting words," in that the harm that flows from a threat flows immediately—the "evil" need never be discounted by any probability (as Learned Hand might require) or measured by any yardstick of "clear and present danger" (as Holmes and Brandeis might require) because the evil is fully consummated and complete once the threat itself is made. One need only determine if the "threat" is genuine or merely hyperbolic—in the styled parlance of First Amendment art, whether it is a "true threat." This *Chaplinsky*-style definitional exercise (not unlike the exercise used to determine whether speech is or is not "obscene," as Professor Van Alstyne might observe[109]) hearkens to cases such as *Watts v. United States*[110] and *NAACP v. Claiborne Hardware Co.*[111]

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

108. *See Black*, 538 U.S. at 391 (Thomas, J., dissenting) ("I wholeheartedly agree with the observation made by the Commonwealth of Virginia that: 'A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him.'" (quoting Brief of Petitioner)).

109. *See* VAN ALSTYNE, *supra* note 2, at 26 & n.18 (noting the categorical treatment of obscenity by the Supreme Court).

110. 394 U.S. 705 (1969) (per curiam). The defendant Watts was convicted of willfully making a threat to take the life of the president during a public rally at the Washington Monument. *Id.* at 705–06. In the course of expressing his opposition to the draft, Watts stated that "I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." *Id.* at 706. The Court summarily reversed Watts' conviction, holding that the statement, taken in context, was "a kind of very crude offensive method of stating a political opposition to the President" and was protected by the First Amendment. *Id.* at 708 (internal quotation marks omitted).

111. 458 U.S. 886 (1982). In *Claiborne Hardware*, the Supreme Court applied *Brandenburg* principles to overturn a conviction arising from a civil rights boycott of merchants in Mississippi. *Id.* at 928–29. The tactics of the boycott organizers were found by the Mississippi Supreme Court to include threats, intimidation, and coercion. *Id.* at 894. The Supreme Court, however, held that the actions of the boycott organizers were protected by the First Amendment. *Id.* at 911–12:

> In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not

The Supreme Court, in a splintered decision, struck down the Virginia law as applied to a Ku Klux Klan rally conducted on a private farm, emphasizing the unconstitutionality of the provision in the law that treated the mere burning of a cross as "prima facie" evidence of an intent to intimidate, but held that a law with this prima facie evidence provision severed would be constitutional.[112] Having written much about the case elsewhere, my purpose here is not to deconstruct the result or rationale, but merely to point out how the ghosts of *Chaplinsky* continue to haunt the woods.

D. Summing up Van Alstyne's Insights Regarding "The Freedom of Speech"

As Professor Van Alstyne has persuasively argued, even a standard as promising as the *Brandenburg* incitement test is still "dramatically incomplete."[113] The difficulty posed is that even under the Holmes / Brandeis / *Brandenburg* approach, the legislature remains free to accomplish through two steps what it was forbidden to do in one.[114] The test fails to impose any freestanding First Amendment threshold of seriousness to the "lawless action." No one, for example, would doubt that the legislature could make it a crime to engage in terrorism, outlawing violent attacks on people and property. The First Amendment, however, would normally act as a bar to any attempt to impose liability for the mere abstract advocacy of the propriety of making war on the United States. What Professor Van Alstyne points out, however, is that the legislature, if it has a free hand in defining what constitutes "lawless action," could define the brandishing of a defined symbol with a defined intent (such as a burning cross with intent to intimidate) as *presumptively* "lawless

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> identical, are inseparable." Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.

(internal citation omitted). More importantly, the Supreme Court rejected an attempt to impose liability on civil rights leader Charles Evers for highly charged statements made by Evers in the course of a speech exhorting others to participate in the boycott, stating that "[t]o the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his 'threats' of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award." *Id.* at 926.

112. *Black*, 538 U.S. at 362–68.

113. VAN ALSTYNE, *supra* note 2, at 36.

114. *Id.*

action."[115] This would obviate the necessity of establishing a connection in time or probability between the expressive action and future lawless action, because the burning of the cross itself becomes lawless action.[116] Although the ultimate disaster (the destruction of the nation by terrorists) might be remote, small incremental steps working toward that end might be quite immediate, and the legislature might, through passage of sweeping measures (as some might label the Patriot Act, for example), make dramatic incursions on First Amendment rights by using two steps to make a jump it could not make in one.

This analysis suggests, just as Professor Van Alstyne's insights suggest, that even formulations as elegant as "clear and present danger" require doctrinal refinements and case-by-case attention, if they are to be worthy of the strain of "near-absolutism" suggested by the unequivocal command of the text to "make no law . . . abridging the freedom of speech . . . ."[117]

This is a constitutional work-in-progress. It is an experiment, as Holmes would say, "as all life is an experiment."[118] We may all be thankful that William Van Alstyne has been a robust player in that experiment. The clarity of his thought and persuasiveness of his arguments have helped keep the enterprise on track. The core content of the First Amendment, the meaning of "*the* freedom of speech," would be far weaker without his efforts.

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115. *See* VAN ALSTYNE, *supra* note 2, at 36 (recognizing that a legislature might simply make additions to the categories of evils properly proscribed, and thereby restrict formerly permissible speech).

116. The notion that such a two-step process might at times be constitutionally permissible is essentially the view expressed by Justice Thomas in his dissent in *Virginia v. Black*. *See* 538 U.S. at 388 (Thomas, J., dissenting):

> In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

117. U.S. CONST. amend. I.

118. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.").

II. FREE SPEECH IN THE CONTEXT OF THE GOVERNMENT AS A PUTATIVE PARTICIPANT

A. Rights v. Privileges

Among the things that "the freedom of speech" would come to mean in modern times is that government must not only avoid outright regulatory "abridgments" of speech but must also justify limitations on speech accomplished through the attachment of conditions on government largess. Justice Oliver Wendell Holmes is once again an early foil, and Professor William Van Alstyne is the theorist largely responsible for foiling him.

Holmes was an early architect of the "right-privilege" distinction, a glib constitutional doctrine that posited that government could place whatever conditions it wished on the receipt of public benefits, even if it otherwise would have lacked the power to impose the same prohibition as a naked restraint. In *Commonwealth v. Davis*,[119] for example, Holmes sustained an ordinance that prohibited public speaking in a municipal park without a permit from the mayor. Holmes treated the city as a landlord with the power to exclude anyone from the park altogether. The greater power to exclude necessarily included the lesser power to admit with conditions attached.[120] Justice Holmes, then on the Supreme Judicial Court of Massachusetts, held that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[121] Similarly, when a police officer was fired for talking politics while on duty, Holmes dismissed the officer's First Amendment challenge with the blunt quip: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[122]

There is no American legal thinker who deserves more credit for discrediting the Holmes right-privilege distinction than Professor Van Alstyne, who set the course in his powerful and influential piece, *The*

119. 39 N.E. 113 (Mass. 1895), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43 (1897).

120. *Id.* at 113.

121. *Id.*

122. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.).

Demise of the Right-Privilege Distinction in Constitutional Law.[123] The article, which traversed territory far broader than speech issues, supplied a much-needed theoretical justification for limitations on the conditions that government may properly place on the receipt of public goods,[124] and First Amendment law has benefited ever since. The Supreme Court has on many occasions rejected the right-privilege distinction.[125] Many Supreme Court Justices, writing in concurrence[126] or dissent,[127] have drawn on Professor Van Alstyne's

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123. *See* Van Alstyne, *Right-Privilege Distinction*, *supra* note 21; *see also* Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Charles A. Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295 (1990); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Rodney A. Smolla, *Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321 (1990); Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982) [hereinafter Smolla, *Reemergence of the Right-Privilege Distinction*]; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Van Alstyne, *New Property*, *supra* note 21.

124. *See* Van Alstyne, *Right-Privilege Distinction*, *supra* note 21, at 1459–62 (attacking Holmes's reasoning and the assumptions on which the right-privilege distinction is based).

125. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547–49 (2001) (conditions placed on practices of lawyers funded through legal aid funds violated First Amendment); Elrod v. Burns, 427 U.S. 347, 372–73 (1976) (holding political patronage system unconstitutional); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (stating that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

126. *See* O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 795–96 (1980) (Blackmun, J., concurring):

> To state a general rule, however, is not to decide a specific case. The Court never has held that *any* substantive restriction upon removal of *any* governmental benefit gives rise to a generalized property interest in its continued enjoyment. Indeed, a majority of the Justices of this Court are already on record as concluding that the term 'property' sometimes incorporates limiting characterizations of statutorily bestowed interests. Common sense and sound policy support this recognition of some measure of flexibility in defining 'new property' expectancies. Public benefits are not held in fee simple.

(citations omitted) (citing Van Alstyne, *New Property*, *supra* note 21, at 460–66); McDaniel v. Paty, 435 U.S. 618, 633 & n.6 (1978) (Brennan, J., concurring) (describing *Sherbert v. Verner* as resting on the fact that the state had forced the claimant "'to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand,'" and stating that "*Sherbert* did not state a new principle in this regard" (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963) (citing Van Alstyne, *Right-Privilege Distinction*, *supra* note 21)); Cruz v. Hauck, 404 U.S. 59, 65 & n.14 (1971) (per curiam) (Douglas, J., concurring):

> It is apparent that this disparate treatment has the effect of classifying appellants according to wealth, which, like race, is a suspect classification. Accordingly, this classification could withstand challenge only upon a showing of compelling circumstances. Respondent offers none but simply repeats the discredited maxim that paupers' appeals are privileges, not rights.

scholarship to reinforce the demise of the right-privilege distinction, or either to extol or lament its seeming reappearance.

The approach that has emerged forces the government, when confronted with the claim that it has placed impermissible restrictions on the receipt of largess, to justify the restrictions in neutral terms related to the mission of the program. The justification is analyzed under various balancing tests that, although not as speech-protective as those tests that apply when government seeks to regulate speech in the general marketplace, nonetheless provide the speaker with sufficiently hardy legal doctrine to make the contest a fair fight.[128] When the restriction instead is exposed as an effort to skew the marketplace of ideas by using government funding to engage in viewpoint discrimination, the restriction is unconstitutional.[129]

This is our working constitutional divide, and we have the work of William Van Alstyne to thank for helping us to intelligently chart it. Yet constitutional divides, like continental divides, are at times jagged and uneven, and it is easy to fall off or lose sight of the path. It is worth sampling a few of the critical doctrinal battlegrounds, such as public forum law and the law governing the speech of government employees, to get a sense of the struggle.

B. Public Forum Law

Public forum law is a highly stylized and easy-to-parody body of law through which the Supreme Court seeks to divide those government programs and spaces into two forms. Some programs and spaces are truly "public" in a free speech sense and presumptively open to indiscriminate exercise of freedom of expression and thus heavily protected from regulation based on content or viewpoint. Other programs and spaces are those that exist primarily to advance some governmental business, and thus subject to balancing tests supplying more the more moderated quantum of protection attendant to "intermediate scrutiny" levels of judicial review. Despite its stylistic density and concomitant vulnerability to ridicule, as a rough functional divide public forum law is both a potent antidote to the right-privilege distinction of Justice Holmes and a reasonably serviceable workhorse First Amendment doctrine.

Public forum law begins with a robust rejection of the Holmes view in *Commonwealth v. Davis*,[130] the view that the government may exclude speakers from public spaces with the same cavalier whimsy with which a curmudgeonly landlord might exclude a visitor from private property. Certain public spaces—streets, sidewalks, parks[131]—are deemed "traditional public fora," places that have a kind of "free speech easement" that runs with them and are subject only to those restrictions on the content or viewpoint of expression that are banned virtually *per se*.[132] Yet these spaces can also be subject to restrictions on the mere "time, place, or manner" of the speech that are subject to an intermediate-scrutiny balancing test that tests the significance of the government's rationale for regulation, the tailoring of the regulatory effort, and the availability of alternative channels of

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130. *See supra* notes 119–22 and accompanying text.

131. *See* United States v. Grace, 461 U.S. 171, 177 (1983) ("'[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' In such places, the government's ability to permissibly restrict expressive conduct is very limited. . . ." (citations omitted)).

132. *See* Boos v. Barry, 485 U.S. 312, 321, 329 (1988) (applying "exacting scrutiny" to a District of Columbia law prohibiting the display of signs critical of a foreign government within 500 yards of that government's embassy, and ruling that law facially violative of the First Amendment); Hudgens v. NLRB, 424 U.S. 507, 515 (1976) (noting that access to "streets, sidewalks, parks, and other similar public places" for the purpose of exercising First Amendment rights "cannot constitutionally be denied broadly and absolutely") (quoting Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 315 (1976)).

communication.[133] The strength of the doctrine here is that the traditional public forum is open to speech whether the government desires this result or not. The Supreme Court has thus held that "traditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers."[134]

Once outside "traditional public fora," modern public forum law gets more complicated, and correspondingly less theoretically and doctrinally pure, but it is defensible nonetheless. Through a kind of "adverse possession," government property and programs that are not traditionally open to expression may become so-called "designated public fora" when the government treats the space (a municipal theater, for example[135]) as a space open to a wide range of expression.[136] Then there are nonpublic fora, spaces that are deemed functional but not dedicated to expression,[137] and the curious hybrid known as the "limited public forum," open to expressive activity but limited to certain subject matter or patrons.[138] At the margins the application of this body of law may be difficult, with courts reaching

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133. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989):

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

(quoting Clark v. Comm. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

134. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

135. *See* Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546, 555 (1975) (holding the denial of an application to perform at a municipal theater to be a prior restraint on the use of a public forum).

136. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) ("[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.").

137. *See* United States v. Kokinda, 497 U.S. 720, 730, 737 (1990) (holding that a sidewalk in front of a post office was not a public forum).

138. A university, for example, might open classrooms or funding programs to student groups and be forbidden from discriminating on the basis of content or viewpoint among those groups. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 837 (1995) (holding that a university policy of denying funding to any student group that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality" infringes the right to free speech (alteration in original) (quoting Appendix to Petition for Certiorari at 66a)); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (striking down content-based discrimination by a university in its classroom use policies).

conflicting results on essentially equivalent facts.[139] But on the whole, the use of context to divide government property into public and private spaces, with a generally generous willingness to classify spaces public and provide a healthy measure of protection when they are so classified, represents a laudable advance in First Amendment doctrine.

C. The Speech of Public Employees

A similar analytic divide has emerged in public employee speech cases. Once again, the harsh regime of the Holmes right-privilege distinction has been mitigated by doctrines that now supply public employees with a healthy measure of First Amendment protection.

Thus the aphorism of the political spoils system that "to the victor belong the spoils" has been repudiated by a line of cases generally forbidding the wholesale firing of government employees because they are affiliated with the wrong political party.[140] The doctrine is mitigated in part by an exception that permits patronage in certain positions. The positions that qualify for the exception are usually high in the hierarchy of government and involve substantial policymaking authority or special solicitude for confidences. For such positions, party affiliation is deemed appropriate, and requiring such affiliation does not offend the First Amendment.[141] "To the victor belong the spoils" has thus been supplanted by "To the victor belong only those spoils that may be constitutionally obtained."[142] Again, the doctrinal contours here are imperfect; one might well hope for brighter lines and greater definitional rigor in the articulation of the exception to the rule, but in its broad sweep the rule itself is beneficent, working to eliminate the application of the right-privilege

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139. *Compare* Hotel Employees & Rest. Employees Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation, 311 F.3d 534, 552 (2d Cir. 2002) (holding that the plaza space at the Lincoln Center performing arts complex between West 62nd and West 65th Streets in Manhattan was not a traditional public forum), *with* First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114, 1131 (10th Cir. 2002) (holding that a portion of a street in the downtown Salt Lake City mall area, sold by the city to the Church of Jesus Christ of Latter-Day Saints, but over which the city retained an easement, was a traditional public forum).

140. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 373 (1976) (holding that "the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments").

141. *See* Branti v. Finkel, 445 U.S. 507, 518 (1980) ("[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.").

142. Rutan v. Republican Party, 497 U.S. 62, 64 (1990).

distinction in gross as applied to the vast majority of government employees.

So too, a public employee fired or disciplined for speaking may now challenge the adverse action on First Amendment grounds. The court will first ask whether the employee's speech was on a "matter of public concern."[143] If this question is answered affirmatively, the employee has a foot in the door; the court will then proceed to apply a balancing test, in which the interest of the employee to speak is balanced against the interest of the government as employer in promoting the efficiency of the public services it performs as an employer.[144] In *Connick v. Myers*, the link to the repudiated right-privilege distinction was made explicit; the Court openly acknowledged that "[f]or most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."[145] After recognizing the persistence of the right-privilege distinction, the Court openly rejected it as a legitimate basis for analysis.[146] The Court instead installed its balancing test, now applied routinely by lower courts,[147] which focuses on such factors as whether the contested speech was disruptive,[148] insubordinate,[149] or corrosive of *esprit de corps*[150].

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143. Waters v. Churchill, 511 U.S. 661, 668 (1994) ("To be protected, the [employee's] speech must be on a matter of public concern . . . ."); Connick v. Myers, 461 U.S. 138, 147–48 (1983) (declaring that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement"); Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968) ("[T]he question whether a school system requires additional funds is a matter of legitimate public concern . . . .").

144. *Waters*, 511 U.S. at 668; *Connick*, 461 U.S. at 142, 146; *Pickering*, 391 U.S. at 568.

145. *Connick*, 461 U.S. at 143.

146. *Id.* at 144.

147. *See, e.g.*, Gustafason v. Jones, 290 F.3d 895, 906 (7th Cir. 2002) (setting forth a detailed, multi-step balancing test for application to the *Connick* line of cases).

148. *See* Greer v. Amesqua, 212 F.3d 358, 372 (7th Cir. 2000) (determining that a sensational news release by a firefighter, accusing his chief of preferential treatment toward homosexuals, would disrupt the department's operations).

149. *See* Havekost v. United States Dep't of Navy, 925 F.2d 316, 318 (9th Cir. 1991) (asserting that circulation of a petition calling for the discharge of a person higher in the chain of duties was not speech on matters of public concern but merely an expression of a private workplace preference); Withiam v. Baptist Health Care, 98 F.3d 581, 583 (10th Cir. 1996) (expression of personal grievance not protected speech on matters of public concern).

150. *See* INS v. FLRA, 855 F.2d 1454, 1464, 1466 (9th Cir. 1988) (government as employer may punish employee speech that is corrosive of *esprit de corps*).

This framework was reinforced by the holding in *Rankin v. McPherson*,[151] in which the Supreme Court held that an administrative employee in a Texas constable's office could not be fired when she blurted out, upon hearing the breaking news that John Hinckley had shot President Ronald Reagan, that "if they go for him again, I hope they get him."[152] The statement, made to a co-employee who was also her boyfriend, arose in the context of an intense conversation ranging over issues relating to poverty, race, and President Reagan's social policies.[153] The government's view that it had the right to fire McPherson was not entirely makeweight; certainly one might demand of law enforcement employees a sufficient respect for law and order that they refrain from openly advocating the desirability of presidential assassination as an instrument of social change. The Supreme Court, however, felt it incumbent to be sensitive both to the plainly hyperbolic character of McPherson's remarks—she was merely blowing off steam to her boyfriend in response to emotionally charged news about a leader she apparently despised—and to her role within the hierarchy of the public agency involved.[154] The Court thus noted that it could not "believe that every employee in Constable Rankin's office, whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency."[155]

The *Connick / Pickering / Waters* framework, like public forum analysis, can be picked at if one is so inclined.[156] The "matters of public concern" test is highly vulnerable at times, for reasons that may parallel certain vulnerabilities in public forum law. There is an inherent tension in the notion of "matters of public concern" as applied to government employees. Because, in the largest sense, all of what goes on inside a government agency may be of concern to the public, when an employee criticizes agency policy or the actions of a

151. 483 U.S. 378 (1987).

152. *Id.* at 381.

153. *Id.*

154. *Id.* at 389–91.

155. *Id.* at 391.

156. *See* Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 75 (1988) (citing courts' "unbridled discretion" in determining "matters of public concern" as the cause of inconsistencies among lower court interpretations of *Connick*).

superior, the employee is arguably speaking on matters of public concern. Yet not all complaining employees are righteous whistleblowers; the government acting as employer is carrying on the work of a sovereign yet in many senses is using employees in much the same manner as any employer. This conundrum is difficult and, as with any legal test that attempts to reconcile such competing tensions, naturally generates a fair number of reported case decisions.[157] Yet as with public forum law, there is logic to taking a middle ground, and with any middle ground there will be litigation as parties—who view the precise placement of the line in any given case through their own prisms of experience—contest which side of the middle they fall. The logic of the middle ground is that solicitude for free speech values ought to be at its apex when society seeks to facilitate the free exchange of information and ideas as part of discourse in the public arena. This animating value applies with diminished force, however, when speech is merely the vehicle through which the routine intramural frictions of the workplace are resolved.[158] An all-or-nothing solution in either direction would be untenable. To return to the regime of Holmes and the right-privilege distinction, as Professor Van Alstyne so cogently explained, would permit government to engage in action inimical to constitutional values through the mere artifice of labeling.[159] At the same time, however, the government has interests that it may invoke in certain functional contexts—as when the government is trying to manage property used to deliver the mail or run an agency with hundreds or thousands of employees organized in a complex hierarchy—that it does not have when it is merely acting as the pandemic sovereign responsible for the rule of law in the open marketplace. Both the public forum and public employment cases require vigilance, for there is the constant worry that the government

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157. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 18:5–18:22 (2004) (collecting and critiquing cases applying the test).

158. *See* Smolla, *Reemergence of the Right-Privilege Distinction*, *supra* note 123, at 74–75:

> [An] underlying element, one that is a close corollary of the freedom of contract notion, is the idea that government should have greater latitude in its dealings with individuals when it acts as the proprietor of the public business rather than as the pandemic regulator. The proprietary-regulatory distinction, by assuming that restrictions are less necessary when government acts essentially as a private entity administering its internal business, frees government in that context from certain restrictions that would apply to it when it acts as a governing entity.

(footnote omitted).

159. *See* Van Alstyne, *Right-Privilege Distinction*, *supra* note 21, at 1459 (stating that the government automatically denies constitutional protection by merely labeling expression a privilege rather than a right).

will cheat and attempt an illegitimate gerrymander, seeking to commandeer more of the public arena than that to which it is entitled. This illicit gerrymander might be spatial—as when the government seeks to exclude speech from a public plaza on the theory that it ought to be dedicated to quiet musings over the meanings of sculpture; it might be spectral—as when the government seeks to commandeer the spectrum of public debate over agency policy; or it might involve some other spectrum—as when it exerts unique regulatory control over the airwaves. That we must constantly watch how government draws its lines between public and private space, however, does not mean that the act of line-drawing is wrong in itself.

D. Academic Freedom, Government Speech, and Other Conundrums

I have set out here in some detail the manner in which the right-privilege problem has evolved in constitutional doctrine in the specific contexts of public forum law and the speech of public employees. I have no doubt that the relatively sensible doctrinal evolution in these two areas, although not without tensions and difficulties, owes a great deal to the seminal efforts of William Van Alstyne.

A large part of First Amendment law today is really the demise of the right-privilege distinction working itself pure. We have William Van Alstyne to thank for the kick-start his thinking gave to this healthy but always contentious process. With enough space and time, one could trace the same right-privilege problem through any number of other problems, such as the free speech issues surrounding public schools,[160] the government funding of speech,[161] academic freedom,[162] or government speech.[163] Professor Van Alstyne has written and spoken extensively on all these issues. One could fill a book, for example, commenting and reflecting on his remarkable contributions

160. *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (sustaining the power of school authorities to discipline a student for material in a high school newspaper); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (sustaining the power of school authorities to discipline a student for sexually suggestive remarks made at a school assembly); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (protecting a student's wearing of a black arm band as a passive symbol of war protest); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 17:1–17:20 (2004) (collecting and critiquing cases on free speech issues in public schools).

161. *See infra* note 166 and accompanying text.

162. *See infra* note 164–165 and accompanying text.

163. *See infra* note 166 and accompanying text.

to academic freedom in America,[164] contributions reflected in his scholarship, his efforts as a litigator, his towering national leadership in the American Association of University Professors, and in his day-to-day commitment to academic freedom at Duke and at the many other campuses around the nation at which he has graced faculties.[165]

Professor Van Alstyne's newest challenge is to take on the fast-developing issue of "government speech."[166] This effort, a work in

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164. *See generally* William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (Summer 1990); William W. Van Alstyne, *Foreword* to *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles*, 53 LAW & CONTEMP. PROBS. 1 (Summer 1990); William W. Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963) [hereinafter Van Alstyne, *Political Speakers*]; William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, 404 ANNALS AM. ACAD. POL. & SOC. SCI. 140 (1972), *reprinted in* THE CONCEPT OF ACADEMIC FREEDOM 59 (Edmund L. Pincoffs ed., 1975) [hereinafter Van Alstyne, *Specific Theory*].

165. Professor Van Alstyne's work in the arena of academic freedom and the role of the Constitution on campus has influenced the thinking of Justices of the Supreme Court. *See* Widmar v. Vincent, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring) ("Although these comments were not directed at a public university's concern with extracurricular activities, it is clear that the 'atmosphere' of a university includes such a critical aspect of campus life." (citing Van Alstyne, *Specific Theory*, *supra* note 164, at 77–81)); Police Dep't v. Mosley, 408 U.S. 92, 95 & n.3 (1972) (noting the intersection of equal protection and First Amendment antidiscrimination principles (citing Van Alstyne, *Political Speakers*, *supra* note 164)); Jones v. State Bd. of Educ., 397 U.S. 31, 34 (1970) (per curiam) (Douglas, J., dissenting):

> But the campus, where this leaflet was distributed, is a fitting place for the dissemination of a wide spectrum of ideas.
>
> Moreover, it is far too late to suggest that since attendance at a state university is a 'privilege,' not a 'right,' there are no constitutional barriers to summary withdrawal of the 'privilege.'

(citing Van Alstyne, *Right-Privilege Distinction*, *supra* note 21, at 1445–54); Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

166. Cases in which the government is the funder of the speech, or is *itself* the speaker, present one of the most rapidly developing arenas in which this process continues to unfold. *See, e.g.*, Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000) (upholding a university's use of student fees to support extracurricular speech activities by students, provided the fees are administered with viewpoint neutrality); Meese v. Keene, 481 U.S. 465, 481, 484 (1987) (allowing Congress to place the term "political propaganda" upon expressive materials from foreign countries intended to influence U.S. foreign policy); Planned Parenthood of S.C. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004) (striking down South Carolina's "Choose Life" specialty license plate because it only opened a limited forum to one viewpoint, thereby favoring that viewpoint, without the State having identified itself as the speaker); Sons of Confederate Veterans, Inc. *ex rel.* Griffin v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 618–21, 626 (4th Cir. 2002) (applying a four-factor test to determine that logos incorporating the Confederate flag on specialty license plates concern private speech, not government speech, and striking down a restriction on such logos as unconstitutional viewpoint discrimination). Government may put its resources behind one policy (pro-life) but not another (the provision of

progress in the Spring of 2005, is being undertaken by Professor Van Alstyne as this essay and this symposium tribute to his scholarship were being completed. I have been lucky enough to have been given a sneak preview of the problems that he is tackling, and, along with the others who so admire his scholarship, I cannot wait to see what he does with it. And so retrospective here gives way to prospective. Perhaps there is no more apt tribute to William Van Alstyne the teacher and scholar than the observation that we all continue to anticipate his work.

CONCLUSION

William Van Alstyne, the greatest intellectual provocateur in my life in the law, has through his extraordinary insights into these conundrums cajoled and confounded my own thinking on freedom of speech for over two decades. His ruminations and variations on the constitutional text and history, his ringing chord changes on approaches to constitutional interpretation, his pioneering exploration of the distinction between "rights" and "privileges," and his graphic elaborations on the wide variety of approaches that courts and commentators have invoked to try to organize and render coherent free speech law, have been at once a wonderful guide and a vexing challenge to anyone who has ventured into this arena.

I could go on and on exploring the pervasive influence of William Van Alstyne's thought on the evolution of First Amendment

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information concerning abortion services), provided it does not engage in viewpoint discrimination; government may not place restrictions on the dispensing of largess by private speakers in a manner that discriminates on the basis of viewpoint. Government may, however, when it is *itself* engaged in speech, express its own viewpoint (to the disparagement of others) without triggering any significant First Amendment judicial review whatsoever. *Compare* Rust v. Sullivan, 500 U.S. 173, 193–94 (1991) (asserting that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest," and that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program"), *with* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833–34 (1995) (recognizing that the Court has "permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message," but refusing to extend that authority when the government "discriminate[s] based on the viewpoint of private persons whose speech it facilitates"), *and* Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. at 235 (stating that "[w]hen the government speaks . . . it is . . . accountable to the electorate and the political process for its advocacy," but noting that the university was not speaking here). A critical question, now being addressed by Professor Van Alstyne in his forthcoming efforts, is whether there are limits imposed by the First Amendment on even the government's own expression.

doctrine and theory, as one might for virtually any arena of constitutional law. The reflections here only scratch the surface. As lawyers, scholars, and citizens, we owe Professor Van Alstyne a great deal for his courage and honesty as a teacher, scholar, leader, and advocate.

For me, it is also more personal. The intellectual excitement and passionate commitment with which he approached the world of constitutional law caught fire in me on the first day of class with him. That excitement, commitment, and passion have fired my professional life ever since.

I will always be indebted to William Van Alstyne for that inspiration. It is the kind of debt that the student never really repays to the teacher, except to the extent that the student may also learn to teach, and, in so doing, seek to inspire others. My life as a lawyer and scholar was forever influenced by Professor Van Alstyne, and I know of no other way to thank him than to continue to labor to pass on to new generations of students some measure of the passion and zeal for our wonderful Constitution that he so indelibly instilled in me.