First Amendment Imperialism and the Constitutionalization of Tort Liability

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To what extent does the First Amendment impose limits on the permissible scope of tort liability? Until recently, the clear answer would have been, "only under very limited circumstances." During the last few decades, however, the First Amendment has been so greatly expanding its empire that giving this answer is no longer possible. "All bets are off" would be a more accurate answer because the forms of speech to which the Supreme Court has extended First Amendment protection have become impressively broad. Although existing First Amendment restrictions on the permissible scope of tort liability currently are limited, the very existence of those restrictions confirms that many torts involving speech potentially are subject to First Amendment protection. And many torts do involve speech—the duty to warn about the dangers of prescription drugs, fraud, and even some forms of simple negligence are just a few examples.

If the First Amendment of the future limited all or even many of these different constitutionally unprotected forms of tort liability, then its scope would be pervasive. We contend, however, that neither existing First Amendment doctrine nor sensible constitutional policy supports extending free speech protection to torts that are accomplished through speech, except in extremely narrow circumstances. Extending First Amendment protection to such torts would aggravate what we argue are two of the principal risks posed by First Amendment imperialism: the erosion of the cultural distinction between truth and falsity, and devaluation of the status of speech about matters of public concern. Our contention is that most of; the forms of speech involved in torts that are accomplished through speech currently are, and should remain, excluded from First Amendment protection. To support this contention, we examine the First Amendment's extension to previously unprotected forms of speech over the last three-quarters of a century, compare the new First Amendment protections to the doctrinal elements of a series of torts that always or often are accomplished through speech, and argue that it would make little sense, as a matter of tort or constitutional law, to restrict liability for those torts on First Amendment grounds.

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Introduction

To what extent does the First Amendment impose limits on the permissible scope of tort liability? Until recently, the clear answer would have been "only under very limited circumstances."[1] During the last few decades, however, the First Amendment has been so greatly expanding its empire that giving this answer is no longer possible. "All bets are off" is now about as confident an answer as the contemporary First Amendment's "imperialism" permits.[2]

The forms of speech to which the Supreme Court has extended First Amendment protection are impressively broad: symbolic conduct;[3] political-campaign expenditures;[4] commercial advertising;[5] beer labels;[6] animal-abuse videos;[7] video games with violent imagery;[8] the description of additional fees imposed on consumers paying merchants with credit cards;[9] and lying about receiving the Congressional Medal of Honor.[10] Partly as a consequence of those Supreme Court decisions, other forms of regulated speech that were

1. To oversimplify only slightly, the principal First Amendment limits apply only to the torts of defamation, intentional infliction of emotional distress, and the form of invasion of privacy known as public disclosure, and even then only when the plaintiff is a public official or public figure, or the suit involves a matter of public concern. For more detailed discussion, see *infra* subpart I(E).

2. Commentators noting this tendency in the U.S. Supreme Court's First Amendment jurisprudence have focused on different points of emphasis and, given that tendency, different labels. As early as 2002, Frederick Schauer identified a growing interest by litigators in advancing novel First Amendment challenges to government regulations and associated that interest with a perception that the courts were increasingly receptive to First Amendment arguments. He labeled the surfacing of that perception "First Amendment opportunism." Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). Recently Leslie Kendrick, emphasizing the growing "level of success" of First Amendment challenges in the courts, has described that trend as "First Amendment expansionism." Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015). As early as 1979, Thomas Jackson and John Jeffries spotted and criticized the tendency without giving it a label. Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 4–6 (1979). We have chosen the term "First Amendment imperialism" to highlight our focus in this Article, which is on one feature of the same tendency: the prospective introduction of constitutional privileges based on the First Amendment's protection of "freedom of speech" into the realm of thus-far constitutionally unprotected common law tort liability.

3. Cohen v. California, 403 U.S. 15, 16–18 (1971).

4. Buckley v. Valeo, 424 U.S. 1, 39, 44–45 (1976).

5. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. (*Virginia Pharmacy*), 425 U.S. 748, 762 (1976).

6. Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995).

7. United States v. Stevens, 559 U.S. 460, 464, 482 (2010).

8. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 804–05 (2011).

9. *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (concluding that the challenged statute regulated speech and remanding to the Court of Appeals to conduct First Amendment analysis), *remanded to* 877 F.3d 99 (2d Cir. 2017).

10. United States v. Alvarez, 567 U.S. 709, 713, 715 (2012).

once thought to have "nothing to do with the First Amendment"[11] have now been provided First Amendment protection by lower courts or are subject to calls for protection by commentators. These include such varied regulations of speech as Title VII restrictions on language constituting sexual harassment;[12] securities-law prohibitions on misleading financial information;[13] National Labor Relations Board requirements for posting notices of employees' rights;[14] requirements for cancer warnings on food and drink;[15] and liability in public nuisance for advertising paint.[16] But these are just examples. Speech—and therefore potential First Amendment protection—figures in virtually all endeavors, many of which are currently subject to legal regulation of one sort or another.[17] As Justice Elena Kagan recently put it, these and similar possible developments pose the risk of "weaponizing the First Amendment."[18]

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11. *See* Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346, 347 (2015) (asserting "for example . . . it is laughable to suppose that all, most, or even much of contract law in any way implicates the First Amendment").

12. *See* Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEXAS L. REV. 687, 695 (1997) (proposing a compromise approach that includes some level of protection for workplace speech respecting the underlying purpose of Title VII).

13. *See* Susan B. Heyman, *The Quiet Period in a Noisy World: Rethinking Securities Regulation and Corporate Free Speech*, 74 OHIO ST. L.J. 189, 211–17 (2013) (retelling how First Amendment challenges succeeded in the formerly impregnable area of securities law).

14. Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 956–59 (D.C. Cir. 2013).

15. *See* Floyd Abrams, *Op-Ed: Forcing Starbucks to Put a Cancer Warning on Your Coffee Cup Would Violate the 1st Amendment*, L.A. TIMES (Oct. 11, 2018, 4:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-abrams-coffee-cancer-warning-20181011-story.html [https://perma.cc/57L6-B5HL] (detailing a California lawsuit aimed at requiring coffee vendors to include cancer warnings).

16. *See* Deborah J. La Fetra, *Retroactive Tort Liability and the First Amendment*, DAILY J. (Aug. 17, 2018), https://www.dailyjournal.com/articles/348822-retroactive-tort-liability-and-the-first-amendment [https://perma.cc/34XC-7GJC] (recounting that three companies were held liable for millions of dollars based on their promotion—not sale—of lead paint).

17. A number of commentators have noted the potential reach of the First Amendment into hitherto constitutionally unprotected areas, and some have deplored it. For illustrations, see the following articles in a 2018 symposium: Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057 (2018); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953 (2018); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018); Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161 (2018).

18. In her dissent in *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018), Justice Kagan, in objecting to the majority's conclusion that the First Amendment prevented an Illinois public-sector union from collecting agency fees from employees who did not consent to being represented in a collective-bargaining process, referred to the majority decision as "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy" and suggested that "[t]oday is not the first time the Court has wielded the First Amendment in such an aggressive way . . . [a]nd it threatens not to be the last." *Id.* at 2501–02 (Kagan, J., dissenting). She added that "almost all economic and regulatory policy affects or touches speech. So the majority's road runs long." *Id.* at 2502.

And that brings us to tort liability. Although the established First Amendment restrictions on the permissible scope of tort liability are limited,[19] the very existence of those restrictions confirms that torts involving speech potentially are subject to First Amendment protection. Many torts involve speech. Even the most familiar and most common tort, simple negligence, sometimes causes harm through speech. For example, if a ladder owner tells someone that it is safe to use a ladder when the owner should know that the ladder has a weak rung, the owner can be held liable for negligence if the user is injured after stepping on the rung.[20] In this situation, the imposition of negligence liability (and the threat to impose it in the future) may inhibit speech and therefore might be thought to implicate First Amendment concerns.

In addition to negligence, which only sometimes involves speech, there are a number of torts that always or typically involve speech that is actionable and those therefore might also be in jeopardy from First Amendment imperialism. Perhaps the most prominent is the duty to warn in products liability. Sellers of a product are liable in tort for the failure to provide an adequate warning of the dangers posed by the product.[21] The manufacturers of prescription drugs, for example, are frequently held liable for the failure to adequately warn the consumer of the drug of its potential side effects.[22] Less prominent but analogous duties to warn include the duty of the owner of real property to warn invitees and licensees of hidden, dangerous conditions on the premises,[23] and the duty of a physician to obtain a patient's informed consent to a particular medical treatment by disclosing the risks posed by the treatment.[24] Imposition of liability for breach of each of these duties constitutes the regulation (and consequently the possible inhibition) of speech that is potentially subject to First Amendment protection.

Beyond negligence and the duty to warn lie still other torts that involve other forms of speech. Most of those are what are often termed "business torts"[25] because they usually occur in the course of business or in commercial settings. Thus, there is tort liability for intentionally interfering with another party's contract, usually by encouraging one of the contracting parties to

19. *See supra* note 1.

20. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 18 cmt. g (AM. LAW INST. 2010).

21. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(c) (AM. LAW INST. 1998).

22. *Id.* at § 6 cmt. e.

23. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. i (AM. LAW INST. 2012).

24. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 94–96 (5th ed. 2017) (noting that most medical treatments involve risk, so physicians must receive the patient's informed consent after informing the patient of the risks of the treatment).

25. *See generally* BUSINESS TORTS (Joseph D. Zamore ed., 2019) (explaining that "business torts" cover torts that impose liability in the commercial setting).

breach.[26] And there is tort liability (though under more limited circumstances) for intentionally interfering with another party's prospective economic advantage, usually by discouraging a party from entering into a contract with another party.[27] Naturally, the actionable encouragement and discouragement in those torts commonly occurs through speech.

In addition, there is liability for committing fraud[28] and (under more limited circumstances) for negligent misrepresentation.[29] The essence of each of these torts is that something has been misrepresented, and misrepresentation is always accomplished through some form of speech or communication. Like the duty to warn, imposing liability for committing any of these business torts involves regulating the speech that causes the harms that the torts redress.

Finally, there is liability for disparaging another party's product,[30] and there is tort liability for misappropriation of an individual's name or likeness.[31] Product disparagement is by definition a business tort, and misappropriation usually is too because the plaintiff profits financially from her name or likeness and the defendant, without permission, appropriates that name or likeness for his own business purposes—for example, by using an actor's photograph to promote his business. In other settings, the plaintiff is a private individual whose privacy is invaded by the misappropriation, whether for business or other purposes. Regardless of the setting, however, the means through which a name or likeness is misappropriated is speech, such as an advertisement or some other form of publicly available communication, and the imposition of liability for misappropriation in effect regulates or inhibits speech.

If the First Amendment turns out to limit all or even many of these different, traditionally unprotected forms of tort liability, then its scope would be pervasive. We contend, however, that neither existing First Amendment doctrine nor sensible constitutional policy supports extending free speech protection to torts with communicative dimensions, except in extremely narrow circumstances. Extending First Amendment protection to torts with communicative dimensions would aggravate what we consider the principal risks posed by First Amendment imperialism: the erosion of the cultural distinction between truth and falsity, and the devaluation of the status of speech about matters of public concern. Up to this point in our history, those

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26. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 16 (AM. LAW INST., Tentative Draft No. 3, 2018).

27. *Id.* at § 17.

28. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. LAW INST., Tentative Draft No. 2, 2014).

29. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 5 (AM. LAW INST., Tentative Draft No. 1, 2012).

30. RESTATEMENT (SECOND) OF TORTS § 623A (AM. LAW INST. 1977).

31. *Id.* at § 652C.

two threatened values have buttressed the exclusion of most torts with communicative dimensions from the First Amendment's coverage. Our contention, simply stated, is that most of the forms of speech involved in torts with communicative dimensions currently are, and should remain, excluded from the First Amendment's coverage.

To explain and explore our contentions, Part I surveys the expansion of forms of speech deemed to be covered by the First Amendment. This Part shows how the extension of the First Amendment's ambit of coverage over the last three-quarters of a century to include forms of previously uncovered speech has been primarily concerned with what forms of speech are included within the ambit of First Amendment protection at all and what speech remains totally outside of the ambit of First Amendment protection.[32] Because the torts with which we are concerned are not currently regarded as falling within the "coverage" of the First Amendment at all, this distinction is important for our analysis.

Part II then compares the doctrinal bases for the extension of First Amendment coverage to new forms of speech with the doctrinal elements of torts that have communicative dimensions. We show why the principles underlying these extensions of coverage, substantial as they are, nonetheless do not apply to most of those torts. Finally, in Part III we argue that it would make little sense, as a matter of tort law or constitutional law, to restrict existing tort liability for those torts on First Amendment grounds. We ultimately link our conclusions to a concern for maintaining both the cultural distinctiveness and value of true, as distinguished from false, statements of fact and the importance of speech about matters of public, as distinguished from private, significance.

I. The Rise and Evolution of First Amendment Imperialism

The following narrative of developments in late twentieth- and twenty-first-century First Amendment jurisprudence treats those developments as efforts to bring within the ambit of the First Amendment forms of speech previously regarded as *uncovered* by the First Amendment. This treatment is to be distinguished from accounts of those developments as efforts to increase the *level of protection* accorded to forms of speech deemed already

32. On the distinction between coverage and protection in First Amendment jurisprudence, see the contributions of Frederick Schauer over more than thirty years, extending from Frederick Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225, 227 (1981) [hereinafter Schauer, *Can Rights Be Abused?*], to Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1617–20 (2015) [hereinafter Schauer, *Politics and Incentives*]. In the latter of those works, Schauer maintains that "[i]n the past, many of the most important issues surrounding the First Amendment were issues about the nature and degree of its protection within its widely acknowledged coverage. But now the pressure appears to be on coverage itself." Schauer, *Politics and Incentives*, *supra*, at 1616–17 (footnote omitted).

to be within the scope of First Amendment coverage.[33] For torts with speech dimensions that have never been included within the First Amendment's coverage at all, the former issue is obviously of principal significance. We therefore direct our attention to that issue.

In speaking of First Amendment imperialism, we mean to emphasize the tendency during the last three-quarters of a century to see as candidates for constitutionalization certain forms of speech that once had been characterized as having no constitutional value because they were "no essential part of any exposition of ideas."[34] In our opinion, this tendency has been due to an increasing perception that a variety of common law rules, statutory provisions, and administrative regulations unduly restrict freedom of speech.

The account we provide in this Part prefigures and serves as the predicate for our analysis of the implications of First Amendment imperialism for the torts involving speech that have not yet been constitutionalized. There is arguably some basis in the decisions we will recount for the perception that the imposition of liability for those torts impacts speech and therefore has First Amendment implications. This raises the possibility that more and more forms of tortious speech may be drawn into the ambit of the First Amendment's coverage. We think that this possibility is a real one, but we believe that it would be jurisprudentially inaccurate and culturally imprudent to include those torts within coverage for reasons we will set forth in detail in Part III.

The modern application of the First Amendment began with decisions expanding the scope of constitutional protection for overtly political speech that was regulated on the ground that it frustrated legitimate governmental objectives.[35] But in the second half of the twentieth century, this expansion spread to symbolic conduct, campaign finance, commercial speech, defamation, invasion of privacy, and intentional infliction of emotional distress (IIED). The Supreme Court has shifted among doctrinal formulations that may or may not be entirely consistent, sometimes conceiving of certain

33. In nearly all current constitutional casebooks, the narrative of twentieth- and twenty-first-century changes in First Amendment jurisprudence emphasizes distinctions between high- and low-value speech, assuming that Court decisions have primarily been concerned with the level of protection accorded a particular form of speech rather than whether that form is covered by the First Amendment at all. To take just one of numerous examples, see GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 88, 133–34 (5th ed. 2016).

34. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

35. *See* Abrams v. United States, 250 U.S. 616, 621–24 (1919) (finding sufficient evidence of the defendants' intent to bring down the U.S. government in their circulated leaflets to warrant conviction under the Espionage Act); Schenck v. United States, 249 U.S. 47, 52–53 (1919) (upholding the constitutionality of the Espionage Act's prohibition on interfering with military recruitment during wartime).

forms of speech as being wholly uncovered by the First Amendment,[36] occasionally distinguishing high-value from low-value speech,[37] and most recently, treating forms of speech that do not fall into historically uncovered categories as presumptively within the First Amendment's coverage without assigning them high or low value.[38]

Although this Part explicates those different formulations, in the end, the choice among them does not affect our underlying point about the very limited First Amendment protection that should be accorded to the speech entailed in torts involving speech. Taken together, however, the expansion of covered speech brought about by the various formulations reflecting First Amendment imperialism amounts to a formidable structure of protection for speech that would otherwise result in a criminal conviction, be subject to regulation, or risk the imposition of civil liability for the harm it causes. It is, therefore, incumbent on us to identify the scope of First Amendment imperialism before we argue that the First Amendment has limited application to the areas of tort liability that have thus far remained outside of its protection.

A. The Initial Twentieth-Century Decisions

The earliest twentieth-century First Amendment decisions permitted the suppression of any speech that had a tendency to produce "substantive evils that [the state] has a right to prevent."[39] That standard left much speech outside of First Amendment protection. As to categories of speech that were wholly unprotected, the baseline against which to assess the scope of First Amendment expansion is the Supreme Court's 1942 decision in *Chaplinsky*

36. *See* Miller v. California, 413 U.S. 15, 23 (1973) (finding obscenity an unprotected category of expression).

37. The most common example has been commercial speech. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (describing commercial speech as having a "limited measure of [First Amendment] protection, commensurate with its subordinate position in the scale of First Amendment values").

38. *See* United States v. Alvarez, 567 U.S. 709, 722 (2012) (stating that "[b]efore exempting a category of speech from the normal prohibition on content-based restrictions, . . . the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription'" (quoting Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011))).

39. That language was from Justice Oliver Wendell Holmes's opinion for a unanimous Court in *Schenck v. United States*, even though it was accompanied by the statement that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger" that they would bring about substantive evils. *Schenck*, 249 U.S. at 52. In two cases decided along with *Schenck—Frohwerk v. United States*, 249 U.S. 204 (1919), and *Debs v. United States*, 249 U.S. 211 (1919)—Holmes, in the course of upholding convictions under the Espionage Act of 1917, referred to the tendency of expressions to obstruct the war effort without using the clear-and-present-danger language. *Frohwerk*, 249 U.S. at 209; *Debs*, 249 U.S. at 216. In *Gitlow v. New York*, 268 U.S. 652 (1925), the Court restated the test as "natural tendency and probable effect . . . to bring about the substantive evil which the legislative body might prevent." *Id.* at 671.

v. New Hampshire.[40] *Chaplinsky* contained extensive discussion and enumeration of "certain . . . classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[41] These included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[42] The Court observed that the classes of speech excluded from coverage were "no essential part of any exposition of ideas" and that "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[43]

In contrast, within little more than a decade, the Supreme Court began an expansion of First Amendment protection for speech that the government sought to regulate because it contained ideas or information that allegedly posed a threat to the security of the state. In a series of cases from 1957 through 1969,[44] the Court made it progressively more difficult for Congress, the states, and municipalities to suppress such expressions, culminating in a standard that in subversive-advocacy cases "a State [could not] 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."[45] This doctrinal evolution garnered considerable attention.[46]

As the Court adopted this more speech-protective posture in subversive-advocacy cases, its actions served to throw another set of issues into sharper relief. Those were cases in which the Court had previously concluded, as it did in *Chaplinsky*, that other forms of speech were entirely outside the coverage of the First Amendment. Against the backdrop of its subversive-advocacy decisions, the Court reconsidered those earlier decisions in which it had treated certain categories of expression, such as true threats,[47] "fighting

40. 315 U.S. 568 (1942).

41. *Id.* at 571–72.

42. *Id.* at 572.

43. *Id.*

44. Brandenburg v. Ohio, 395 U.S. 444 (1969); Bond v. Floyd, 385 U.S. 116 (1966); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957).

45. *Brandenburg*, 395 U.S. at 447.

46. For illustrations, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 114–15 (1980) (describing the transformative evolution of First Amendment doctrine); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754–55 (1975) (discussing the different speech-protective formulas advanced by Learned Hand and Justice Holmes and how they coalesced to form the core of First Amendment doctrine).

47. In *Bridges v. California*, 314 U.S. 252 (1941), Justice Felix Frankfurter, joined by Chief Justice Harlan Fiske Stone and Justice Owen Roberts, would have found a true threat in a telegram sent by labor leader Harry Bridges to the Secretary of Labor, which suggested that if a judge's decision in litigation between two rival unions was enforced, his union would call a strike affecting the Port of Los Angeles. *Id.* 303–04 (Frankfurter, J., dissenting).

words,"[48] words that "stirred people to anger,"[49] "lewd and obscene" speech, "profane" speech, and "libelous" speech,[50] as well as commercial advertising,[51] as wholly unprotected. The addition of new categories of speech within First Amendment coverage had begun.

B. Symbolic Conduct

In this same period, the Court also struggled to identify the distinction, for First Amendment purposes, between speech and conduct. That struggle was arguably unnecessary, but here it occurred in a new context.[52] Beginning in the 1960s, participants in the civil rights movement began organizing protests against racial segregation that took the form of protests of various businesses, sit-ins in segregated restaurants, and marches in public places in which the marchers held up signs, chanted messages, and congregated in particular spaces.[53] The Court was faced with the question whether, in those situations, expression that took the form of symbolic communicative conduct, rather than actual speech, could be excluded from the First Amendment's coverage.[54]

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48. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

49. Terminiello v. Chicago, 337 U.S. 1, 5 (1949).

50. *Chaplinsky*, 315 U.S. at 572.

51. Breard v. Alexandria, 341 U.S. 622, 642 (1951); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

52. The classes of expressions the Court had initially excluded from First Amendment coverage were not placed outside its ambit because they did not literally consist of speech. In fact, all of the cases in which Court majorities had excluded certain forms of speech from coverage, or intimated that the speech in question would have been excluded had it fallen into one of several enumerated categories, involved spoken or written words. There was no suggestion in those decisions that the exclusion of a category of expression turned on its being something other than actual speech. Moreover, in some of its early twentieth-century free speech cases, the Court had seemed to take for granted that a form of symbolic conduct amounted to protected speech. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (saluting the American flag as a gesture of patriotism); Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940) (picketing a business in connection with a labor dispute); Stromberg v. California, 283 U.S. 359, 368–69 (1931) (displaying a red flag as a symbol of opposition to organized government); Whitney v. California, 274 U.S. 357, 371–72 (1927) (participating as a member of a political party deemed to advocate criminal syndicalism).

53. *See* SIMON HALL, PEACE AND FREEDOM: THE CIVIL RIGHTS AND ANTIWAR MOVEMENTS IN THE 1960S 148–49 (Michael Kazin et al. eds., 2005) (recounting examples of such protests at Duke University in 1967–1968, in which students and staff participated in vigils, picket lines, and sit-ins to advocate for racial equality and demand an end to segregationist policies).

54. In *Cox v. Louisiana*, 379 U.S. 536 (1965), a group of students challenged their conviction for a breach of the peace based on their having picketed a courthouse as a protest against some civil rights arrests. *Id.* at 538. In a later combined opinion concurring in 379 U.S. 536 and dissenting in 379 U.S. 559, Justice Hugo Black's concurrence asserted that "[s]tanding, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited." 379 U.S. 559, 575 (Black, J., concurring). And in three cases decided between 1964 and 1966 involving sit-ins and a demonstration outside a jail, Black concluded that the First Amendment did not apply to any of those cases because the actions of the protesters consisted of expressive conduct rather than speech. Adderly v. Florida, 385 U.S. 39, 47–48 (1966); Brown v. Louisiana, 383 U.S. 131, 166

The distinction between speech and expressive or symbolic conduct was prominently attacked in 1968[55] and was inconsistent with the Court's earlier recognition that some forms of expressive conduct amounted to speech. Subsequently, the Court treated the public burning of a draft card,[56] the wearing of black armbands in a public school,[57] and the unauthorized wearing of a military uniform in a public skit demonstrating opposition to the war in Vietnam[58] as activities engendering some measure of First Amendment protection. And in a 1969 case in which the appellant was convicted for burning the American flag on a public street as a political protest, the Court overruled the conviction because the flag burning was accompanied by contemptuous comments about the flag.[59]

The culmination of this tendency on the part of the Court to sweep forms of expression that arguably combined speech and conduct into the ambit of the First Amendment came in the 1971 decision in *Cohen v. California*.[60] Cohen had worn a jacket displaying the words "Fuck the Draft" in the corridor of the Los Angeles County courthouse.[61] Cohen's message was self-evidently "lewd" and "profane," in the language of *Chaplinsky*, although under the Court's existing definition of obscenity it lacked sufficient erotic content to be "obscene."[62] It was also arguably fighting words and words inciting a hostile audience reaction because it communicated a message of

(1966) (Black, J., dissenting); Bell v. Maryland, 378 U.S. 226, 325 (1964). Court majorities did not accept Black's distinction in two of the cases. In a 1967 article, Harry Kalven concluded that Black's "strategy of protecting all speech just because it was something other than conduct traps him when he is confronted by conduct which is symbolic." Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 449–50 (1967).

55. Louis Henkin called the distinction "specious," asserting that "[s]peech *is* conduct, and actions speak" and arguing that "[t]he meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct." Louis Henkin, *The Supreme Court, 1967 Term—Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 79–80 (1968).

56. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (reinstating O'Brien's conviction because the government's interest in regulating the nonspeech element was sufficient to justify "incidental limitations on First Amendment freedoms").

57. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

58. Schacht v. United States, 398 U.S. 58 (1970).

59. *See* Street v. New York, 394 U.S. 576, 581 (1969) (holding that the statute used to convict the appellant was "unconstitutionally applied in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag"). Subsequently, after Black left the Court in the fall of 1971, two persons had their convictions for "contemptuous treatment" of the flag and "flag misuse" overturned by Court majorities. The first case, *Smith v. Goguen*, 415 U.S. 566 (1974), involved wearing a replica of the flag sewn to the seat of trousers, and the second, *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam), involved the public display of a privately owned flag with a peace symbol affixed to it with removable tape.

60. 403 U.S. 15 (1971).

61. *Id.* at 16.

62. *Id.* at 20; Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The Court's then-current definition of obscenity had been set forth in *Roth v. United States*, 354 U.S. 476, 487–89 (1957).

opposition and potential resistance to the United States government's process for conscripting eligible men into military service. Therefore, applying the language of *Chaplinsky* to Cohen's communication, which the state sought to criminalize as "offensive conduct,"[63] there seemed to be no First Amendment issues implicated in Cohen's conviction.

But there were. The majority opinion in *Cohen* took pains to show that, under the First Amendment, a state could not make nonobscene, offensive speech the basis of a criminal conviction. Since Cohen could not have been convicted merely for displaying a message of opposition to the draft, he was being convicted for the words that he used in communicating that message. The argument for state censorship of offensive words seemed "inherently boundless": how could one distinguish the word that was sought to be criminalized in *Cohen* "from any other offensive word"?[64]

After *Cohen*, it was plain that one category of speech that *Chaplinsky* had excluded from First Amendment coverage—"lewd" and "profane" expressions—was no longer outside the ambit of the First Amendment. And the scope of another category—fighting words and words provoking a hostile audience reaction—had been narrowed in scope. But the most significant feature of *Cohen*, for our purposes, is that its inroads into the Court's traditional exclusions of categories of speech from the First Amendment's ambit came in a case in which the expression sought to be criminalized was not a traditional form of speech. It was a message neither spoken in public nor written for publication but worn on an article of clothing.[65] This not only continued the process of sweeping a variety of expressive activities into the First Amendment's ambit but also laid the conceptual groundwork for the contention that tortious conduct that is accomplished through speech should be included in that group of protected activities.

C. Money as Speech: Campaign Finance

The Court next turned to a category that its recent decisions had made more salient. As we have seen, when speech and conduct were combined in an activity, regulation of the speech elements posed issues that came potentially within the First Amendment's coverage. Consequently, it turned out that even spending money could be the subject of First Amendment protection.

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63. The petitioner, Paul Robert Cohen, was given thirty days in jail for violating a California statute prohibiting individuals from "maliciously and willfully disturb[ing] the peace" of any "person . . . by . . . offensive conduct." *Cohen*, 403 U.S. at 16 (alteration in original).

64. *Id.* at 25.

65. Justice Blackmun, joined by Chief Justice Burger and Justice Black, dissented in *Cohen* on the ground that the defendant's expression was "mainly conduct and little speech" and thus "well within the sphere of *Chaplinsky v. New Hampshire*." *Id.* at 27 (Blackmun, J., dissenting).

The Federal Elections Act of 1971 established dollar limits on campaign contributions and expenditures in federal elections.[66] *Buckley v. Valeo*[67] was a challenge to the constitutionality of major provisions of the Act.[68] The opinion in *Buckley* treated giving to or spending money on political campaigns as more like pure speech than symbolic communicative conduct. Although the Court acknowledged that "[s]ome forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two," it added that "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."[69] It maintained that giving money to and spending money on political campaigns directly implicated the freedoms of political speech and association since they signaled which candidates, and which ideas, contributors wanted to associate themselves with and how those candidates wanted to get their messages across to the electorate.[70]

The *Buckley* Court upheld restrictions on campaign contributions but invalidated limitations on campaign expenditures.[71] Not a single Justice in *Buckley* suggested that because sometimes giving money to political candidates and spending money on political campaigns involved activities that were not pure speech, they were outside the coverage of the First Amendment. At one point in the opinion, in response to the argument that a "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" served to justify the Act's limitations on expenditures, the Court declared that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others" was "wholly foreign to the First Amendment," whose "protection against governmental abridgement of free expression cannot properly be made to depend upon a person's financial ability to engage in public discussion."[72] That was a signal that future efforts to regulate the financing of campaigns would bear a heavy constitutional burden.

The statement was to constitute the principal theoretical basis for the Court's eventual overruling in 2010 of its 1990 decision in *Austin v.*

66. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 104, 86 Stat. 3, 5 (1972); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263 (expanding the scope of spending limitations in federal elections).

67. 424 U.S. 1 (1976).

68. *Id.* at 6.

69. *Id.* at 16.

70. *Id.* at 19, 22.

71. *Id.* at 58.

72. *Id.* at 48–49.

Michigan State Chamber of Commerce,[73] that a state could ban a corporation's expenditures for political speech solely on the basis of its corporate identity.[74] In overruling *Austin* in *Citizens United v. FEC*,[75] the Court majority asserted that the "antidistortion" rationale for suppressing corporate political speech was inconsistent with the *Buckley* proposition that restricting the speech of some elements in society to enhance the relative value of others was wholly foreign to the First Amendment.[76]

The doctrinal aspects of *Buckley* and *Citizens United* have no direct implications for torts that involve communicative conduct because none of those torts imposes liability for or indirectly limits spending money on speech. Rather, the significance of *Buckley* and *Citizens United* for those torts is that they represent the inclusion in First Amendment coverage of yet another category of speech that previously had been thought to fall completely outside of First Amendment protection. If even monetary expenditures on certain forms of speech fall within coverage, then the prospect that tortious speech might be protected becomes all the more conceivable.

D. Commercial Speech

In a number of cases decided in the period of the Court's early coverage decisions, commercial speech was treated as wholly outside the First Amendment's ambit of protection.[77] Those decisions, when compared with another decision invalidating the application of a city ordinance prohibiting door-to-door distribution of leaflets announcing a religious meeting because the leaflets contained no commercial advertising,[78] suggested that the Court at that point was employing a somewhat-opaque definition of "commercial speech," possibly including any instance in which ideas were communicated primarily for profit.

This intuition also appeared in commentary in the same time period. In Alexander Meiklejohn's *Free Speech and Its Relation to Self-Government*, which appeared in 1948, Meiklejohn distinguished sharply between public speech, which he thought the First Amendment completely protected, and private speech, which lay outside its coverage.[79] "The constitutional status of

73. 494 U.S. 652 (1990).

74. *Id.* at 660.

75. 558 U.S. 310 (2010).

76. *Id.* at 349–50.

77. Breard v. Alexandria, 341 U.S. 622, 642–45 (1951); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

78. *See* Martin v. City of Struthers, 319 U.S. 141, 141–43, 142 n.1 (1943) (relying in part on the absence of commercial advertising in the leaflets that were distributed door-to-door to reach a determination that the ordinance in question was invalid under the First Amendment).

79. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT

a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client," Meiklejohn declared, "is utterly different from that of a citizen who is planning for the general welfare."[80] This passage suggested that whether speech was inside or outside the ambit of the First Amendment might turn on whether the information it communicated was part of selling something. Nonetheless, the notion that prohibitions or regulations on commercial speech, which the Court eventually defined as "speech proposing a commercial transaction,"[81] might raise First Amendment issues had begun to creep into the Court's cases in the same time period.[82]

For example, in *Thomas v. Collins*,[83] a Texas statute required labor organizers to register with a state official and procure an organizer's card before soliciting memberships in labor unions.[84] The statute was defended on the ground that it was simply directed at "business practices, like selling insurance, dealing in securities, acting as commission merchant, pawnbroking, etc."[85] But the Court declared that "[t]he idea is not sound . . . that the First Amendment's safeguards are wholly inapplicable to business or economic activity" or when an individual exercising "the rights of free speech and free assembly . . . receives compensation for doing so."[86]

In several decisions after *Thomas*, the Court held that a movie,[87] a book,[88] and a paid advertisement in a newspaper[89] did not lose First Amendment protection merely because their dissemination took place under commercial auspices.[90] Those cases suggested that whatever the definition of "commercial speech," all speech made under commercial auspices was not necessarily outside the First Amendment's coverage. Similarly, in *Bigelow v. Virginia*,[91] the Court invalidated the conviction of a newspaper editor for publishing an advertisement about abortion, declaring that "speech is not stripped of First Amendment protection merely because it appears in [the]

1–2 (1948) (arguing that "two different freedoms of speech" exist, namely speech "open to restriction by the government" and speech "not open to such restriction").

80. *Id.* at 39.

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

82. *E.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963); Smith v. California, 361 U.S. 147, 150 (1959).

83. 323 U.S. 516 (1945).

84. *Id.* at 519 n.1.

85. *Id.* at 526.

86. *Id.* at 531.

87. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952).

88. Smith v. California, 361 U.S. 147, 150 (1959).

89. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964) (quoting Valentine v. Chrestensen, 316 U.S. 52 (1942)) (holding that newspaper advertisements, provided they are not "purely commercial," are entitled to First Amendment protection).

90. In *Ginzburg v. United States*, 383 U.S. 463 (1966), the Court referred to the "frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Id.* at 474.

91. 421 U.S. 809 (1975).

form [of paid commercial advertisements]."[92] The Court indicated that there might be a distinction between "classic . . . commercial speech," such as a proposal for a commercial transaction, and other sorts of speech made under commercial auspices.[93] The Court was persuaded that the advertisement in *Bigelow* "did more than simply propose a commercial transaction" but also "conveyed information of potential interest and value to a diverse audience."[94]

It appeared, after that series of cases, that a majority of the Court believed that, to the extent that commercial speech was not covered by the First Amendment at all, this conclusion applied only to classic commercial speech, speech that simply proposed a commercial transaction. But only one Term later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (*Virginia Pharmacy*),[95] the Court found a way to jettison this notion altogether. That case involved regulation of a merely commercial advertisement.[96] But the Court held that the First Amendment applied to the regulation.[97]

The majority in *Virginia Pharmacy* identified an additional First Amendment interest present in commercial-speech cases other than the interest of the advertiser. It was that of prospective consumers and users of commercial products in receiving ideas and information about the state of such products. As Justice Blackmun's opinion put it, "Freedom of speech presupposes a willing speaker," and where "a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."[98] It went on to say that "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[99] In the case of information about the prices of prescription drugs, the subject matter of the prohibition challenged in *Virginia Pharmacy*, the Court noted that "[w]hen drug prices vary as strikingly as they do, information as to who is charging what . . . could mean the alleviation of physical pain or the enjoyment of basic necessities" for some consumers.[100] It followed that "speech which does 'no more than propose a commercial transaction'" was not "so removed from any 'exposition of ideas'" as to

92. *Id.* at 818.
93. *Id.* at 821–22.
94. *Id.* at 822.
95. 425 U.S. 748 (1976).
96. *Id.* at 749–50.
97. *Id.* at 771.
98. *Id.* at 756–57.
99. *Id.* at 763.
100. *Id.* at 763–64.

"lack[] all protection" under the First Amendment.[101] Given the strength of the interest of consumers in receiving information about commercial products and that of advertisers in communicating that information, "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."[102]

At this point, even classic commercial speech had been brought within the First Amendment's coverage—but, it turned out, not all such classic commercial speech. Five years after *Virginia Pharmacy*, the Court noted that the classic commercial speech that was protected was *factually accurate* speech. First Amendment protection was afforded to commercial speech, the Court said, only if it is "not . . . misleading," and further indicated that it had not approved a ban on commercial speech in recent years "unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."[103]

Although the exact scope of the First Amendment protection afforded commercial speech may not be entirely clear, the overall implication for our particular inquiry is. The torts with which we are concerned almost always involve commercial speech of one sort or another: product warnings, fraud, and interference with contract, among others. If commercial speech fell wholly outside First Amendment coverage, then there would be no argument at all that those torts are, or should be, afforded constitutional protection. Once commercial speech is within coverage, however, those torts are not automatically excluded from potential protection.

E. Tort Liability

There was one additional category of speech to which First Amendment protection was extended during the period when the series of expansions we have described was occurring. And this extension was at least as unprecedented as the others. In less than twenty-five years, a series of Supreme Court decisions transformed the law governing tort actions involving communication about matters that were newsworthy or of public concern. Those were the torts of defamation, invasion of privacy through the publication of true but private facts or the portrayal of the plaintiff in a false light, and IIED.

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101. *Id.* at 762 (citations omitted).

102. *Id.* at 765.

103. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 & n.9 (1980). The majority opinion in *Virginia Pharmacy* had anticipated that "false" and "misleading" commercial speech might constitutionally be regulated, stating that "the greater objectivity and hardiness of commercial speech may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker," and "may also make it appropriate to require that a commercial message . . . include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Virginia Pharmacy*, 425 U.S. at 771, 772 n.24.

As we noted in Part I, *Chaplinsky* had characterized libel and slander as outside the scope of any First Amendment protection. In addition, as far as we can determine, until the late 1960s there had never even been a reference in a Supreme Court opinion to the constitutional status of the torts of invasion of privacy and IIED, which were creatures of the twentieth-century expansion of tort liability.[104] The strong implication was that the speech associated with those torts also fell wholly outside of First Amendment protection. Before the end of the century, all that had changed.

1. Defamation.—Defamation is a tort with ancient roots in English common law, but by the middle of the twentieth century, it was still virtually unchanged.[105] It was governed by a strict liability standard, allowing even typographical errors to be a basis for recovery.[106] It allowed recovery for punitive (as well as compensatory) damages and made certain categories of false statements actionable even without proof of any out-of-pocket losses by plaintiffs.[107] It treated statements regarded as damaging to a plaintiff's reputation as presumptively false, shifting the burden onto defendants to prove that they were true.[108] And it recognized only a limited number of defenses or privileges for making false and damaging statements about others, even, in some jurisdictions, qualifying the defense that a statement was true on its being made with good motives and justifiable ends.[109]All that was to change in *New York Times Co. v. Sullivan*[110] and the cases that soon followed.

a. Public Officials and Public Figures.—The *New York Times* case can be paired with the Court's early symbolic-speech decisions in that it arose out of the same series of political controversies which prompted those decisions: protests against the alleged deprivation of the civil rights of African-Americans by segregationist laws and policies in southern states. *New York Times* involved an advertisement taken out in that newspaper by

104. *See generally* Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27 (2013) (describing how Prosser effectively discovered the torts of IIED and invasion of privacy).

105. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 572 (2d ed. 1955) (indicating that the state of defamation law is a product of "historical accident and survival").

106. *Id.* at 601–02.

107. *Id.* at 587–89; *see, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 262 (1964) (quoting the jury instructions given at trial, "[P]unitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown").

108. *See* PROSSER, *supra* note 105, at 630 (noting the "defense that the defamatory statement is true").

109. *See* Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VALPARAISO U. L. REV. 39, 45–47 (1992) (describing the defenses and privileges applicable to defamation, some of which were considered conditional and could be deemed inapplicable if abused).

110. 376 U.S. 254 (1964).

the "Committee to Defend Dr. Martin Luther King and the Struggle for Freedom in the South."[111]

L.B. Sullivan, Commissioner of Public Affairs in Montgomery, brought a libel action in the Alabama courts against the New York Times Company and some of the individuals whose names were listed as endorsing the ad.[112] Sullivan, whose responsibilities as Commissioner for Public Affairs included supervision of the police, maintained that some inaccurate references in the ad to "the police," "Southern violators," and "[t]hey" could have been understood to refer to him.[113] Sullivan demanded damages in the amount of $500,000, and a jury awarded him the full amount.[114]

The Alabama courts applied the common law rules governing defamation, including the strict liability standard and the presumption of damages that still applied in that tort. Those courts therefore ruled in favor of Sullivan on a whole series of issues that favored plaintiffs such as Sullivan at the expense of the speech rights of defendants such as the *Times*.[115] The case then was appealed to the Supreme Court.

New York Times v. Sullivan came to the Court in 1964, in the midst of the same sorts of civil rights demonstrations in the South that had fostered the Court's symbolic-speech cases, contributing to the early stirrings of First Amendment imperialism. It was not difficult for the Justices to grasp the

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111. *Id.* at 257.

112. *Id.* at 256, 260.

113. *Id.* at 258–59. Sullivan made no effort to prove that he suffered actual pecuniary loss as a result of the ad, but he did make a demand for a retraction from each of the named defendants in his suit, a necessary step to recovery in punitive damages under Alabama law. None of the defendants issued a retraction, and the *Times* wrote Sullivan that it failed to see how the ad referred to him. *Id.* at 260–61.

114. *Id.* at 256.

115. Alabama defamation law adopted the conclusion in *Post Pub. Co. v. Hallam*, 59 F. 530 (6th Cir. 1893), that in order for criticism of public officials to be privileged, it must be based on true underlying facts. *Id.* at 539. As the case progressed through the Alabama courts, those courts ruled that false written statements of fact made about a person with respect to his business or profession were libelous per se, not requiring proof of actual damages. *N.Y. Times*, 376 U.S. at 262–63. They followed then-existing Alabama law in ruling that a statement had to be factually accurate to trigger the common law privilege of fair comment on matters of public concern and that any claim that statements were true had to demonstrate that "they were true in all their particulars." *Id.* at 267. They ruled that the mere fact of publication of a libel per se created a presumption that it was false and malicious, allowing punitive as well as presumed damages. *Id.* at 262. They did not require the jury to separate compensatory from punitive damages in its award of $500,000. *Id.* They ruled that the jury could have found that the statements about "police," "Southern violators," and "They" were "of and concerning" Sullivan because it was "common knowledge" to the average citizen that the police were "under the direction and control of a single commissioner." *Id.* at 258, 263. And they did not find the damages "excessive," stating that the *Times* had been "irresponsib[le]" in publishing the ad because it had articles in its own files that would have demonstrated the falsity of some of the ad's allegations. *Id.* Finally, the Alabama Supreme Court declared that no privilege of free speech or of the press could be attached to the ad because "[t]he First Amendment . . . does not protect libelous publications," and the "Fourteenth Amendment is directed at State action and not private action." *Id.* at 264.

potential of libel suits to "chill" speech: the *New York Times* case was an ideal vehicle for bringing that feature of defamation law to the forefront.[116]

In an opinion written by Justice William Brennan, the Court set aside the strict liability standard and ruled the award of punitive damages impermissible in Sullivan's suit on First Amendment grounds.[117] The Court held that, at least when public officials were plaintiffs in defamation suits, they were required to demonstrate not only that statements about them were false and damaging to their reputations but also that the defendant had made the statements with knowledge of their falsity or with reckless disregard of whether the statements were true or false.[118] It called this scienter standard "actual malice."[119] Punitive damages remained available to public-official plaintiffs, but only when actual malice had been shown.[120] And actual malice had to be shown by clear and convincing evidence, not merely a preponderance of evidence.[121]

Brennan's opinion advanced two rationales for conditioning defamation actions against public officials on a showing of actual malice. One was that there was "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[122] Belief in that principle was linked to the proposition that the First Amendment was designed to further criticism of the government and those representing it. Commentators recognized that *New York Times* represented the Court's adoption of Meiklejohn's self-governance theory of the First Amendment.[123]

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116. In Alabama the chilling effect was very real. Douglas Laycock observes:

> Many of these suits also named as defendants individual leaders of the civil rights movement. Seizure of the property of individual defendants so discouraged or intimidated some leaders of the Southern Christian Leadership Conference that they left Alabama and accepted jobs in the North. The devastating threat of the defamation judgments is a running theme in the history of the SCLC . . . .

Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1722 (1990) (reviewing ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY OF CONSEQUENCES OF JUDICIAL REVIEW (1989)) (footnote omitted).

117. *N.Y. Times*, 376 U.S. at 279.

118. *Id.* at 279–80.

119. *Id.* at 280.

120. *Id.* at 283.

121. *Id.* at 285–86 ("Applying these standards, we consider the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands . . . .").

122. *Id.* at 270.

123. *See, e.g.*, Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 ("If the Court accepts the invitation, it will slowly work out for itself the theory of free speech that Alexander Meiklejohn has been offering us for some fifteen years now."). Kalven gives Meiklejohn's thesis as being "that in a democracy the citizen as ruler is our most important public official." *Id.* at 209.

The other rationale involved the treatment of factual error. Brennan maintained, citing two previous Court decisions, that constitutional protection for statements did not necessarily turn on whether they were factually accurate. "[E]rroneous statement is inevitable in free debate," he declared, and "it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[124] Even false statements of fact that adversely affected the reputations of others were not actionable, where public officials were concerned, absent a showing of malice. A "breathing space" for inaccuracies was sometimes necessary in order to ensure that the freedom to comment on public affairs or on the conduct of public officials was "uninhibited, robust, and wide-open."[125] And *New York Times* implied, without expressly saying, that imposing the burden of proving the truth of a statement on defendants, instead of requiring plaintiffs to prove falsity in public-official defamation cases, was incompatible with the First Amendment.[126]

The implications of the decision for defamation law were momentous. A large portion of a category once wholly excluded from First Amendment protection—false statements of fact lowering the reputations of individuals—had been brought within the Amendment's coverage, at least where public officials were concerned.[127] Only false statements made with malice were excluded.[128] *New York Times* thus suggested that many additional defamation suits might raise free speech issues.

That suggestion proved accurate. Between 1964 and 1985 the Court extended First Amendment protection to defamation actions in which defendants belonged to various classes of "public figures,"[129] ranging from persons who had achieved "such pervasive fame or notoriety that they [became] public figures for all purposes and in all contexts," to persons who "voluntarily inject[ed] themselves" or were "drawn into" particular "public controvers[ies]," to "involuntary public figures who become public figures through no purposeful action of their own."[130] In all such "public figure"

124. *N.Y. Times*, 376 U.S. at 271–72 (second alteration in original).

125. *Id.* at 270.

126. The Court was later to make that conclusion explicit in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775 (1986).

127. The *New York Times* Court stopped short of defining public officials. *See supra* notes 117–21 and accompanying text.

128. "Malice," under the Court's constitutionalized defamation cases, meant "constitutional malice" rather than "common law malice." It did not represent an attitude of animus toward the subject of a defamation action but rather an attitude toward the truth or falsity of a statement that was the basis of the action. "Malice" meant knowledge that the statement was made in false or reckless disregard as to whether it was true or false. St. Amant v. Thompson, 390 U.S. 727, 730–33 (1968).

129. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (consolidated case involving a prominent college football coach and a former United States general).

130. The language describing those categories of "public figures" comes from *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551–52, 1552 n.9 (4th Cir. 1994).

cases, *New York Times* "malice" had to be shown in order to negate a defendant's First Amendment protection.[131]

b. Matters of Public Concern and the Status of Opinions.—At the same time that it was elaborating the scope of First Amendment protection afforded to speech about public officials and public figures, the Court turned to actions by private figures about matters of public concern. In *Gertz v. Robert Welch, Inc.*,[132] it held that in such cases the First Amendment also constrained the scope of constitutionally permissible liability but only by precluding strict liability.[133] The First Amendment required that in such cases the plaintiff prove at least that the defendant had been negligent with respect to the falsity of a defamatory statement.[134] Further, damages could not be presumed (as they often were in common law defamation) without proof of actual malice, as defined in *New York Times*.[135]

Justice Lewis Powell began his opinion for the Court in *Gertz* by saying:

> We begin with the common ground. Under the First Amendment *there is no such thing as a false idea*. . . . But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide open" debate on public issues.
>
> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters.[136]

Powell's statement invited confusion. He very likely intended to mean that the First Amendment required some protection even for factual falsehoods that were "inevitable in free debate."[137] That suggestion seemed consistent with Brennan's *New York Times* opinion which, before announcing the principle that debate on public matters needed to be "uninhibited, robust, and wide-open," had cited previous decisions

131. The Court even temporarily extended the *New York Times* privilege to defamatory statements made about private citizens on "matters of public concern," Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971), but then reconsidered, concluding that in such cases a plaintiff could at least recover compensable damages on a showing that a defendant had been negligent in making a false statement that lowered the plaintiff's reputation. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

132. 418 U.S. 323 (1974).

133. *Id.* at 347.

134. *See id.* (allowing states to define the standard of liability for themselves, provided they do not impose "liability without fault").

135. *Id.* at 349–50.

136. *Id.* at 339–41 (emphasis added).

137. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

suggesting that some inaccuracies in debates on public issues were inevitable and should not be made a basis for constraining debate on such issues.[138]

But Powell's statement, on its face, appeared to fashion a bright-line distinction between false ideas, which were completely protected by the First Amendment, and false statements of fact, which received no protection whatsoever. Some lower courts after *Gertz* took Powell's comments to be saying that.[139] After announcing that "[u]nder the First Amendment there is no such thing as a false idea," Powell had added that "[h]owever pernicious an opinion may seem, we depend for its correction . . . on the competition of other ideas."[140] The courts therefore concluded that opinions, which included statements described as "rhetorical hyperbole" such as calling a "scab" dissident from a union "a traitor to his God, his family and his class,"[141] enjoyed full constitutional protection. In one case, a statement that a candidate for a faculty position had "no status within the profession but [was] a pure and simple activist" was held to be protected "opinion."[142]

Then, in 1990, the Court decided *Milkovich v. Lorain Journal Co.*,[143] a case in which a high school wrestling coach brought a defamation action against an Ohio newspaper.[144] The newspaper had published a column about a hearing that was investigating allegations that the coach had incited a brawl at a wrestling match.[145] A headline to the column read, "[The high school in question] beat the law with the 'big lie,'" and the columnist stated that "[a]nyone who attended the [match] . . . knows in his heart that [the coach] lied at the hearing after . . . having given his solemn oath to tell the truth."[146] The Court used the occasion to review the question whether the First Amendment should be understood as granting protection for opinion, even where a statement arguably phrased as an opinion ("anyone who attended the [match] knows in his heart that [the coach] lied") contained a suggestion that the speaker was possessed of underlying defamatory facts. A majority concluded no,[147] and although two dissenters disagreed that the statement

138. *Id.* at 270–73.

139. *See, e.g.*, Price v. Viking Penguin, Inc., 881 F.2d 1426, 1431 (8th Cir. 1989) (describing the fact–opinion analysis as a threshold inquiry and referring to statements of opinion as "absolutely protected"); Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1130 (7th Cir. 1987); Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984) ("In *Gertz*, the Supreme Court in *dicta* seemed to provide absolute immunity from defamation actions for all opinions and to discern the basis for this immunity in the First Amendment.").

140. *Gertz*, 418 U.S. at 339–40.

141. Letter Carriers v. Austin, 418 U.S. 264, 268, 285–87 (1974) (emphasis omitted) (approving this treatment of "rhetorical hyperbole").

142. *Ollman*, 750 F.2d at 989–90.

143. 497 U.S. 1 (1990).

144. *Id.* at 5 n.2.

145. *Id.*

146. *Id.* at 4–5.

147. *Id.* at 18–20.

about the coach could reasonably be understood as stating or implying underlying defamatory facts, they agreed that there was no independent First Amendment privilege for "opinion."[148] The *Milkovich* case has thus come to stand for the proposition that a defendant cannot deflect a claim that he or she made a false statement of fact about another merely by declaring that the statement was couched as an opinion.

Finally, in a 1985 case, the Court apparently established a limit to its constitutionalization of defamation law, concluding that in a case where the subject matter of the defamation involved a private citizen on a matter not "of public concern," no First Amendment protection applied.[149] It was therefore possible for plaintiffs in private–private suits to recover presumed and even punitive damages without a showing that the defendant had been negligent in issuing a false and defamatory statement.[150] In cases involving public plaintiffs or matters of public concern, however, defamation law had been fully constitutionalized. And as a practical matter, this meant that the First Amendment limited the liability of virtually all traditional media defendants because most of what they published was a matter of public concern.

In short, there was First Amendment protection, subject to the standards we have identified, against liability for defamation, except when a statement constituted an opinion premised on false facts and in defamation suits between private parties regarding statements not involving matters of public concern.

2. Invasion of Privacy.—Once defamation actions were largely brought within the First Amendment's coverage, other torts with communicative dimensions appeared to be candidates for comparable treatment. The tort of invasion of privacy had come to encompass a series of disparate actions—ranging from portraying individuals in a "false light,"[151] to publicly disclosing true but arguably "private" facts about them,[152] to intrusions on the private spaces or private activities,[153] to misappropriation of a person's name

148. *Id.* at 24 (Brennan, J., dissenting).

149. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759, 763 (1985).

150. Six members of the Court also concluded in *Dun & Bradstreet* that there was no distinction between media and nonmedia defendants with respect to the constitutional privileges accorded in defamation cases. *See id.* at 783–84 (noting that in the context of defamation law, the rights of the institutional media are "no greater and no less than" the rights of any other individual or organization engaged in the same activities). That issue had been open since *Gertz*, in which Justice Powell's opinion referred to the constitutional requirement of establishing at least negligence in cases where a private citizen claimed defamation on a matter of public concern by defendant "publishers or broadcasters." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–48 (1974).

151. RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

152. *Id.* § 652D.

153. *Id.* § 652B.

or likeness.[154] The first two seemed to present a ready analogy to defamation, and the fourth was a possible candidate in some instances.

In a number of cases involving the public disclosure form of the tort, the Supreme Court or lower courts found that the defendants had First Amendment protection. The cases emanated from a newspaper account of the impact of a bridge's collapse on the wife of one of the victims of that accident;[155] the publication of a book describing the salacious conduct of a person who had sought to disassociate himself from his former behavior;[156] the inclusion in a newspaper story of the name of a rape victim;[157] the disclosure, on a radio broadcast, of an incriminating telephone conversation illegally wiretapped;[158] and the filming by a television crew of the condition of the victim of a serious accident.[159] Public disclosure in such situations was not subject to liability at all when the facts disclosed were in public records.[160] When this was not the case, the California Supreme Court, for example, balanced the interests in seclusion, dignity, and autonomy against the public's right to know, holding that the test was whether the private information revealed was "newsworthy."[161]

Two of the three other privacy torts also were made subject to the First Amendment, leaving only "intrusion on seclusion" outside its coverage.[162] In a case involving a magazine article on a family being held hostage by escaped convicts,[163] the Court held that the false light form of the tort, which closely resembled defamation, was subject to the same standards.[164] Mis-appropriation of the plaintiff's name or likeness also turned out sometimes to implicate First Amendment concerns. For example, the filming and broadcast on a local television station of the "entire act" of a man shot from a cannon

154. *Id.* § 652C.

155. Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 246–47 (1974).

156. *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1226, 1233 (7th Cir. 1993) (describing plaintiff's past conduct that he would rather forget).

157. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471 (1975).

158. Bartnicki v. Vopper, 532 U.S. 514, 518–19 (2001).

159. Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 474–75 (Cal. 1998).

160. *E.g.*, Fla. Star v. B. J. F., 491 U.S. 524, 562, 533 (1989); *Cox Broadcasting*, 420 U.S. at 496.

161. *See Shulman*, 955 P.2d at 478 (describing the newsworthiness analysis as involving a balancing act between the plaintiff's privacy interest and the public's right to know).

162. *Id.* at 490.

163. Time, Inc. v. Hill, 385 U.S. 374, 377 (1967).

164. *Id.* at 390–91. In *Cantrell*, the Court majority noted that the jury had been instructed that liability could be imposed for false statements made about the plaintiff only if they concluded that the statements were deliberately and recklessly false (the definition of "actual malice" given by the Court previously in *New York Times v. Sullivan*) and that "[c]onsequently, [the] case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability" when a private individual claimed injury under a false-light theory of liability. Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 249–51 (1974). The Court then cited *Gertz*, suggesting that that case may have had implications for false-light privacy as well. *Id.* at 250–51.

at a county fair[165] and the "creative" use of characters resembling real people in comic book science fiction[166] were both treated as raising First Amendment issues, although no privilege was accorded in the former case, apparently because the plaintiff's "entire act," which lasted less than two minutes, was filmed and broadcast without his permission.[167] In cases involving the commercial use of one's name or likeness, the issue of the First Amendment's protection for artistic "appropriation[s]" was resolved through a rule that protected "transformative" uses.[168]

3. IIED.—One additional tort was constitutionalized in a similar fashion in the decades following *New York Times*. In 1988, the Court ruled that a parody of the prominent evangelist minister Jerry Falwell in *Hustler* magazine, although it qualified as sufficiently extreme and "outrageous" to meet the Virginia standard for IIED, was protected under the *New York Times* line of cases because it amounted to satiric comments about a public figure.[169] And in 2011, the Court extended that ruling to statements that might have been expected to cause severe distress but were nonetheless constitutionally protected speech about matters of public concern.[170] The latter case involved signs displayed in the vicinity of a funeral for a soldier killed in Iraq which condemned "Fag Troops," asserted that "Priests Rape Boys," and contained the message "Thank God for Dead Soldiers."[171] In both cases, the Court found the expressive conduct to be protected under the First Amendment because it was directed at a public figure or associated with a matter of public concern.[172]

F. The Current Status of First Amendment Imperialism

Our analysis demonstrates that over the past half-century, there has been a sea change in First Amendment jurisprudence. First, the dominant approach of the Supreme Court increasingly has been to address whether a category of speech is or is not "covered," to use our term, rather than to distinguish among the levels of protection different categories of speech receive. Second, a series of categories of speech that previously were not covered by the First Amendment at all, or were treated ambiguously, have been brought clearly within coverage: conduct mixed with speech, political campaign expenditures, commercial speech, defamation, invasion of privacy, and IIED,

165. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 563–64 (1977).
166. Winter v. DC Comics, 69 P.3d 473, 476 (Cal. 2003).
167. *Zacchini*, 433 U.S. at 563, 575.
168. *Winter*, 69 P.3d at 477–78, 480.
169. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 & n.3, 53 (1988).
170. Snyder v. Phelps, 562 U.S. 443, 454, 460–61 (2011).
171. *Id.* at 454.
172. *Id.* at 458; *Falwell*, 485 U.S. at 57.

among others. The reach of the First Amendment is now broad and has the potential to become even broader.

Three decisions during the last decade and a half, in which the Supreme Court applied and reflected on its First Amendment jurisprudence, confirm both of our observations: the principal issue normally is whether a particular form of speech is within or outside coverage altogether, and the forms of speech in the former category are growing. Thus, in *United States v. Stevens*,[173] the Court struck down a statute criminalizing depictions of animal cruelty as applied to certain videos showing graphic illustrations of animals being crushed to death.[174] In *Brown v. Entertainment Merchants Ass'n*,[175] the Court held that a California statute prohibiting the sale or rental to persons under eighteen of "violent video games" violated the First Amendment.[176] And in *United States v. Alvarez*,[177] the Court held that the federal Stolen Valor Act, which made it a crime to falsely claim receipts of military decorations or honors and added a penalty if the Congressional Medal of Honor was involved, did not pass constitutional muster.[178]

In each case the principal opinion for the Court gave illustrations of categories of speech that are not covered by the First Amendment. The most exhaustive of those lists came in *Alvarez*: "advocacy intended, and likely, to incite imminent lawless action"; defamation not subject to *New York Times* or *Gertz*; "speech integral to criminal conduct"; "so-called 'fighting words'"; child pornography; fraud; true threats; and "speech presenting some grave and imminent threat the government has power to prevent."[179] The Court described the categories as "limited areas" where the First Amendment "has permitted restrictions upon the content of speech,"[180] and "categories of expression where content-based regulation is permissible."[181] In *Stevens* the Court added that, although it was not concluding that the list of uncovered categories of speech had been exhausted, any creation of further categories of speech that were not covered by the First Amendment would need to rest

173. 559 U.S. 460 (2010).

174. *Id.* at 482.

175. 564 U.S. 786 (2011).

176. *Id.* at 805. "Violent video game[s]" were defined as those in which options for players included depictions of "killing, maiming, dismembering, or sexually assaulting" images of human beings that were presented in a fashion that a "reasonable person . . . would find . . . patently offensive to prevailing standards in the community as to what is suitable for minors." CAL. CIV. CODE § 1746(d)(1)(A) (West 2009).

177. 567 U.S. 709 (2012).

178. *Id.* at 715–16.

179. *Id.* at 717 (citation omitted).

180. *Entm't Merchs.*, 564 U.S. at 791 (quoting United States v. Stevens, 559 U.S. 460, 468 (2010)).

181. *Alvarez*, 567 U.S. at 716.

on a showing that a category had "been historically unprotected."[182] The plurality opinion in *Alvarez* followed that formulation.[183]

Setting aside the descriptive awkwardness of those efforts to identify cases outside the coverage of the First Amendment, the substantive message is clear: there are only limited categories of speech that *do not* fall within the coverage of the First Amendment. That is the sea change that we recounted in this Part. It would not have been imaginable in the 1940s, when *Chaplinsky* was handed down, that *Stevens*, *Entertainment Merchants*, or *Alvarez* even would have been litigated—let alone decided in favor of the speech claims. In a cultural and jurisprudential universe in which calling someone a "God damned racketeer" and "Fascist" was deemed to be a communication forming "no essential part of any exposition of ideas" and "lewd" and "profane" expressions were treated as outside the First Amendment's coverage,[184] no court would have lingered over the criminalization of depictions of the crushing of animals; restrictions on the access of minors to games encouraging participants to imagine killing, maiming, or assaulting other players; or the constitutionality of a statute making it a criminal offense to lie about receiving the Congressional Medal of Honor.

In short, the Court's posture toward First Amendment challenges to restrictions on speech has changed significantly since the first stirrings of speech-protective interpretations of the First Amendment appeared. When principal opinions of the Court, within a two-year span, imply that only in a limited category of instances can regulations on the content of speech be tolerated *at all*, First Amendment imperialism seems solidly in place. The

182. United States v. Stevens, 559 U.S. 460, 472 (2010). Query whether this statement was intended to require a showing of actual cases illustrating that the form of speech was unprotected or simply the production of evidence that no First Amendment challenges to restrictions on the form had ever been brought to the Court's attention. Although an "ad hoc balancing" approach was also rejected in *Entertainment Merchants*, the majority opinion in that case did not emphasize the "unprotected" status of certain categories of speech. *Id.* at 470; *Entm't Merchs.*, 564 U.S. at 791–92. Rather, it indicated that such categories constituted an exception to the general principle that content-based regulations on speech were presumptively invalid. *See Entm't Merchs.*, 564 U.S. at 792–93 ("Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking . . . .").

183. *Alvarez*, 567 U.S. at 722. We are not sure that this conceptualization is accurate. Unprotected categories of speech are just that: they receive *no* constitutional protection because they are altogether outside the First Amendment's coverage. Judicial scrutiny of the constitutionality of a content-based regulation of speech presupposes that the speech being regulated is within that coverage. And the regulation may be valid: it may overcome strict scrutiny by furthering a compelling governmental interest. *Entertainment Merchants*'s and *Alvarez*'s lists of "categories of expression where content-based regulation is permissible" refer to forms of speech whose regulation, on the basis of their content, does not raise constitutional issues at all when the regulation conforms to constitutional requirements. *Id.* at 716. They do not refer to forms of speech where content-based regulations are permissible because the government has demonstrated that a regulation furthered a compelling interest. And, of course, the categories listed in *Alvarez* are ones the Court has ruled upon.

184. Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 572 (1942) (internal quotation marks omitted).

next question, for our purposes, is what First Amendment imperialism holds in store for the forms of tort liability that it has not yet affected.

II. Tort Liability and the Limits of First Amendment Imperialism

We have now explained how the expanding scope of the First Amendment led to the addition of categories of covered speech and led to (among other things) the consequent placement of constitutional limits on liability for torts that sometimes or always involve speech or expression: defamation, invasion of privacy, and IIED. Those are not the only torts, however, that may involve speech or expression. In this Part, we consider why, given the constitutionalization of those areas of tort law and the growing momentum of First Amendment imperialism, a number of torts in which the tortious activity emanates from speech or communicative conduct nonetheless are, and should remain, outside the ambit of the First Amendment's coverage.

A. The Potential Significance of First Amendment Imperialism for Tort Law

A number of the developments associated with the growth of First Amendment imperialism in the late twentieth and twenty-first centuries might be understood as creating a logic that could result in additional tort actions now understood as falling outside the coverage of the First Amendment being swept within the Amendment's purview.

The first development is the recognition, beginning with defamation cases, that many torts emanate from activities with speech dimensions. The recognition of constitutional protection applying to defamation, privacy, and IIED cases showed that the communicative dimension of an activity creating a harm for which redress is sought in tort law was an important basis for sweeping the activity within the First Amendment.

A second development was the emergence of the notion, as First Amendment imperialism progressed, that the Amendment's protection was not confined to pure speech. The distinction between speech and conduct—once tentatively proposed as a way of excluding picketing, marching, or demanding service in a restaurant from the Amendment's coverage—was abandoned in the Court's symbolic-conduct cases beginning in the 1960s. This suggests that tortious business practices involving some sort of communication in order to accomplish their goal might be treated in the same way as the conduct involved in the symbolic-speech cases.

A third development consisted of holdings, in cases such as *Virginia Pharmacy*, that First Amendment interests not only resided in speakers but

also in audiences because of the public's right to know.[185] *Virginia Pharmacy* made it clear that the "public" in question was not limited to audiences seeking information on political subjects but to those seeking commercial information as well.[186] Related to this recognition of the constitutional dimensions of the public's right to know is the understanding that many of the cases in which constitutional protections applied in privacy suits seemed to turn on the fact that the information publicly disclosed was arguably of interest and value to the public.

A fourth development, closely related to the third, was the extension of First Amendment protection to commercial speech. The torts involving communication that we identified at the outset—the failure to warn, product disparagement, misrepresentation, interference with contract and prospective advantage, and misappropriation—typically involve commercial matters. Those torts are no longer automatically excluded from First Amendment coverage on that ground.

Finally, as to the potential for the First Amendment to apply to those torts, the Court's statements in *Stevens*, *Entertainment Merchants*, and *Alvarez* are ambiguous. The Court indicated that creation of further categories of speech that are not covered by the First Amendment would need to rest on a showing that a category had historically been treated as unprotected. The torts listed above, with the exception of fraud,[187] however, have rarely been mentioned as either protected or unprotected. Whether those torts have historically been treated as unprotected, or simply ignored, is unclear. Further, the Court's stance seemed almost to indulge in a presumption that speech categories that have not expressly been treated as unprotected fall into the protected category.

In light of these themes, it would not be implausible to predict that any time speech, in the extended sense in which that term is now employed, is associated with an activity, the First Amendment is implicated. On this view, when an activity involving speech is suppressed or regulated by government, a presumption that the regulation is constitutionally suspect would arise. There would be some exceptions for historically unprotected categories of speech, but they would be limited, though their scope has been narrowed. In short, the pressure of First Amendment imperialism could conceivably be thought to restrict permissible liability under any tort involving speech or expression. For the reasons we will now explain, we think that this view,

185. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976) (recognizing that the First Amendment protects the "right to 'receive information and ideas'" (quoting Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972))).

186. *Id.* at 761–62.

187. *See Alvarez*, 567 U.S. at 717 (identifying speech related to fraud as subject to content-based restrictions).

though understandable in light of First Amendment imperialism, is wholly incorrect.

B. Why First Amendment Imperialism Does Not Mandate Coverage of Other Torts Involving Speech

In this subpart, we discuss the six torts with speech dimensions that we identified in the introduction and consider whether any of them, given their defining elements, are legitimate candidates for First Amendment protection. We explain why those torts should be understood to fall largely, though in rare instances not completely, outside the ambit of the First Amendment. The differences between the torts that remain unprotected by the First Amendment and those rare examples that might merit a degree of First Amendment protection, we conclude, go to the heart of what First Amendment imperialism is and is not about and why its application to tort law would be doctrinally unsupported.

There are a variety of bases for this conclusion, and in the case of some torts, multiple bases. First, none of the torts involve the expression of a pure idea wholly divorced from underlying factual assumptions within the meaning of the First Amendment. Second, the elements of two of the torts themselves (fraud and product disparagement) expressly render them outside protection under the Court's current First Amendment jurisprudence. Third, some of the torts (breach of the duty to warn and product disparagement) involve false commercial speech and are therefore unprotected. Fourth, some of the torts (intentional interference with contract and prospective economic advantage and nonproduct-related breach of the duty to warn) involve matters of private rather than public concern, which takes them outside the scope of protection. Finally, the torts that involve false statements (product and nonproduct warnings, product disparagement, fraud, and negligent misrepresentation) do not require the protection for falsity that is afforded under limited circumstances by the breathing-space rationale for First Amendment protection. Taken together, those reasons for the absence of First Amendment protection leave almost no liability for currently uncovered torts with speech dimensions potentially susceptible to constitutional limitations.

1. None of the Torts Involve the Expression of an Idea.—In the context in which it was made, Justice Powell's statement in *Gertz* that, under the Constitution, there is no such thing as a false idea[188] can only mean this: there can be no liability for the expression of an idea in a tort in which falsity is an element.[189] None of the torts that currently are uncovered by the First

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

189. We think that it would be a mistake to interpret this statement even more broadly to mean that, under the First Amendment, there can be no tort liability for the expression of an idea. There

Amendment involve the expression of an idea in this constitutional sense of the term.

There is no canonical definition of what counts as an idea for First Amendment purposes, but the kinds of statements that have been treated as a basis for imposing liability under the torts we are discussing do not fall into any reasonable definition of an idea. Thus, warnings can be understood as pure expressions of fact—in each instance, a warning states facts about risks posed to the intended recipient of the warning. It is true that warnings are not only communications about empirical facts. Rather, they reflect opinions about which risks do and do not exist, which risks are not already known by intended recipients, which risks are significant, and which risks are insignificant enough to be omitted from a warning. These are not ideas, however, but opinions that, in the *Milkovich* sense,[190] implicitly rely on a factual premise. False factual premises do not receive the automatic First Amendment protection that ideas receive.

It might be thought that liability for breaching a duty to warn can be analogized to compelled commercial speech, which is sometimes subject to First Amendment limits.[191] We don't think the analogy holds up. Although in compelled-speech situations a statute or regulation compels a particular warning or statement, and in warnings law, liability is imposed for not warning about something—which could be understood as compelling a warning—the message of virtually all the case law[192] in compelled-commercial-speech cases is that compelling purely factual, noncontroversial warnings in the commercial context is permissible under the First Amendment.[193] One case, *National Ass'n of Manufacturers v. SEC* (*NAM I*),[194] which protected an employer's First Amendment right not to post a Department of Labor announcement,[195] might be regarded as an exception.

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is no decision of the Supreme Court that goes this far. A moment's reflection reveals why: speech resulting in such liability is not always protected. For example, if there can be criminal liability for expressing ideas that incite immediate violence, as there can be, then imposing tort liability for such expression must also be permissible. For more detail, see KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 132–34 (1989).

190. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 21–22 (1990) (finding opinions by their nature to be based on some factual premise sufficient to prove whether the opinion is true or false).

191. Most recently in *National Institute of Family Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

192. *See, e.g.*, UAW–Labor Emp't & Training Corp. v. Chao, 325 F.3d 360, 362 (D.C. Cir. 2003) (upholding employee-labor-rights notice requirement); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114–15 (2d Cir. 2001) (upholding requirement for labeling hazards); Stockwell Mfg. Co. v. Usery, 536 F.2d 1306, 1309–10 (10th Cir. 1976) (upholding OSHA safety notice requirements); Lake Butler Apparel Co. v. Sec'y of Labor, 519 F.2d 84, 89 (5th Cir. 1975) (same); NLRB v. M.E. Blatt Co., 143 F.2d 268, 275 (3d Cir. 1944) (upholding employee-labor-rights notice requirement); Fogel v. H & G Rest., Inc., 654 A.2d 449, 463 (Md. 1995) (upholding smoking notice requirement).

193. The case most frequently cited for that proposition is *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

194. 748 F.3d 359 (D.C. Cir. 2014).

195. *Id.* at 373; Nat'l Ass'n of Mfrs. v. SEC (*NAM II*), 800 F.3d 518, 530 (D.C. Cir. 2015).

And if *NAM I* were treated as broadly applicable, our analysis on this point would be suspect. But the case comes from a single U.S. Circuit Court of Appeals and has been limited by that same court,[196] and has been subjected to a fair amount of criticism.[197] Unless and until the Supreme Court confirms the principle that the case adopts, we think it will remain an outlier.

Subjecting negligent warnings on products to tort liability amounts to regulating false or misleading commercial speech. When a warning fails to disclose risks associated with a product that are serious enough that they reasonably should have been communicated, the nondisclosure is either a false or misleading statement of fact or a false or misleading statement of an opinion (users need not concern themselves with any risks of the product that are not disclosed based on a false factual premise). So there seems to be no reason to equate compelled speech about product warnings, where the product manufacturer disputes the factual accuracy of the warning and thus seeks to avoid complying with it,[198] with ordinary products liability for intentional or negligent failure to warn.[199] In failure-to-warn cases, the burden is on those asserting that the warning was defective to show that it was

196. In *American Meat Institute v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, upheld a rule that meat products must carry labels identifying the country where each step of the production process took place. The court stated that to the extent that *NAM I* was inconsistent with that holding, it was overruled. *Id.* at 22–23. The *American Meat Institute* court treated the case as being governed by *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and applied an intermediate standard of review of the labeling rule, under which the court found it to be "purely factual and uncontroversial." *Id.* at 22 (quoting *Zauderer*, 471 U.S. at 651). Since the rule challenged in *NAM I* had required certain firms to report their links to the Congo, which was in a state of civil unrest, the reporting rule might not have simply governed "purely factual and uncontroversial" information. *See NAM II*, 800 F.3d at 523, 530 (internal quotation marks omitted) (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995)) (arguing that the label "not conflict free . . . conveys moral responsibility for the Congo war" (internal quotation marks omitted) (quoting *NAM I*, 748 F.3d at 371)). The extent to which *NAM I* survives *American Meat Institute* is thus not entirely clear.

197. *See, e.g.*, Kendrick, *supra* note 2, at 1202–09 (criticizing the *NAM I* court's failure to distinguish between a Notice Posting Rule and the Pledge of Allegiance); Recent Cases, American Meat Institute v. USDA, *760 F.3d 18 (D.C. Cir. 2014) (en banc)*, 128 HARV. L. REV. 1526, 1527, 1530–33 (2015) (noting that the D.C. Circuit's approach to commercial speech in *American Meat Institute* is a "welcome" departure from *NAM I*).

198. In addition to the labeling requirements challenged in *NAM I* and *American Meat Institute*, there have been a series of First Amendment challenges, some of them successful, to federal and state statutes and regulations requiring manufacturers to post warnings about risks purportedly associated with the use of their products. *See, e.g.*, R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1208 (D.C. Cir. 2012) (striking down a law requiring graphic warnings on cigarette labels); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69–70 (2d Cir. 1996) (granting a preliminary injunction against a Vermont law requiring labeling of milk from cows treated with synthetic growth hormone); United States v. Philip Morris USA, Inc., 907 F. Supp. 2d 1, 10 (D.D.C. 2012) (rejecting the claim that requiring tobacco companies to issue corrective statements about the risks of smoking violated the First Amendment), *aff'd in part, rev'd in part*, 801 F.3d 250, 252 (D.C. Cir. 2015).

199. In *In re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation*, 687 F. Supp. 2d 897 (W.D. Mo. 2009), a Missouri court rejected the claim that a tort failure-to-warn action violated the First Amendment rights of the defendants. *Id.* at 907–08.

negligent.[200] In compelled-warnings cases, where the obligation to warn is challenged, the government has simply asserted the factual accuracy of the product's risks.[201]

Second, for essentially the same reasons as for product warnings, fraud, negligent misrepresentation, defamation, product disparagement, and invasion of privacy based on public disclosure do not involve an actionable assertion of ideas. Both fraud and negligent misrepresentation are actionable only on the basis of a (false) statement of fact.[202] Even advice negligently given through misrepresentations by lawyers and accountants, and the assessments given by soil testers and title searchers, presupposes facts. A lawyer advising a client is typically giving advice that is premised on underlying facts, in which instance the advice is tainted if the facts are false, and the advice actionable if "unreasonable."[203]

Similarly, to the extent that a statement disparaging a product is superficially something other than a pure statement of fact, it is an opinion that presupposes a fact about the product in question, or it does not constitute a disparagement at all.[204] And public disclosure involves the publication of

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200. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i (AM. LAW INST. 1998).

201. Most of the current First Amendment challenges to warnings involve efforts by the government to compel particular disclosures or warnings on products. In addition to the cases cited *supra* note 192, see *American Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (en banc), in which the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, reversed a district court's denial of a preliminary injunction in a case challenging, on First Amendment grounds, a San Francisco ordinance requiring advertisements for sugar-sweetened beverages to devote 20% of their space to a warning that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." *Id.* at 753.

The judges voting to reverse the denial of a preliminary injunction in *American Beverage Ass'n* did not agree on whether intermediate scrutiny should always be applied in reviewing governmental efforts to regulate commercial speech that was not false or misleading or whether a heightened standard should be applied when the speech in question was not "purely factual and uncontroversial" under the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). *Am. Beverage Ass'n*, 916 F.3d at 757–58, 761, 767–68. But it is clear that the judges voting to reverse were affected by the fact that the government was requiring soft drink manufacturers to give warnings with content that they disagreed with.

One could attempt to analogize warnings in compelled-speech cases to cases imposing tort liability for inadequate warnings on products, arguing that a negligence standard for such warnings inadequately protects speech because product manufacturers' speech is chilled. We find the analogy specious. Manufacturers of products are not compelled by tort law to issue particular warnings and have incentives not to disclose some of the risks of their products. A negligence standard in warnings cases, administered by juries, signals to manufacturers that they need to choose the risks of their products that they should reasonably disclose.

202. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. LAW INST., Tentative Draft No. 2, 2014); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 5 (AM. LAW INST., Tentative Draft No. 1, 2012).

203. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 5 (AM. LAW INST., Tentative Draft No. 1, 2012).

204. One can see this feature of disparagement law in the allowance of puffing about products as a complete defense to disparagement claims, including puffed statements making implicit

true (though allegedly private) facts.[205] Conceivably IIED could be accomplished through the expression of ideas, but we have not identified any cases in which this has occurred. In such a case, conceivably there could be some First Amendment protection.

Third, although in theory, statements constituting intentional interference with contract or prospective economic advantage could be ideas; in practice, that is extraordinarily unlikely. Statements that accomplish actionable interferences are designed to persuade a particular recipient to engage or not to engage in a business transaction. As efforts at persuasion, such statements offer reasons for breaching contracts or taking other actions. The reasons typically constitute opinions premised on asserted facts, such as the reason that the listener or hearer would be economically better off breaching or taking other action.[206]

It is true that, in principle, anything might be offered as a reason in such cases for doing what the defendant suggests, including reasons based on a genuine idea rather than an opinion premised on a fact. Breaching your contract with Exxon because Exxon's promotion of fossil fuels is destroying the planet might or might not be a genuine idea. But, as a practical matter, it will rarely have a persuasive effect and therefore will rarely be the basis for one of the interference actions.

Finally, misappropriation of another's name or likeness is never actionable when it occurs through what amounts to the expression of an idea: transformation that is significant enough to constitute an artistic expression.[207] The result is that this tort is not actionable at all when what is asserted is an idea rather than a fact.

In short, the distinction between facts and ideas, whatever its role in determining the constitutional protections that are available in defamation, privacy, and IIED, plays only a minimal role in connection with other torts with speech dimensions because those torts virtually never involve the imposition of liability for the expression of ideas.

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comparisons between a manufacturer's product and those of competitors. If a statement puffing a product is deemed to be incapable of being proven true or false, it cannot be treated as grounds for a disparagement suit. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109, at 757 (5th ed. 1984), where the authors stated that "[t]he 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or . . . would be influenced by such talk."

205. *See* cases cited *supra* notes 155–59.

206. *See, e.g.*, Della Penna v. Toyota Motor Sales, U.S.A., Inc. 902 P.2d 740, 742 (Cal. 1995) (indicating in a suit for interference with prospective economic advantage that defendant warned its dealers not to do business with certain third parties).

207. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808–09 (Cal. 2001) (noting that the First Amendment protects the use of another's likeness when it is "so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness").

2. The Elements of Fraud and Product Disparagement Automatically Preclude Protection.—A second reason that the First Amendment extends no protection to two of the torts we have identified is that their very elements preclude protection. Fraud consists of a statement of fact made with knowledge that the statement is false or in reckless disregard of the truth or falsity of the statement.[208] Product disparagement is also not actionable unless the defendant satisfied this same scienter standard—a false statement about another's product must be made with knowledge that the statement is false or in reckless disregard of its truth or falsity.[209]

No decision of the Supreme Court has held that the First Amendment places limits on the scope of tort liability for statements made with this sort of constitutional malice.[210] Indeed, the holding of *New York Times* is that the breathing-space rationale for protecting false statements about public officials from defamation liability runs out when a statement is made with this form of malice. There is no reason to think that fraud or product-disparagement actions are subject to even greater constitutional protection than defamation. Consequently, although they involve communication, the torts of fraud and product disparagement should always be understood to fall outside the scope of First Amendment protection because liability is never imposed for those wrongs under conditions that could trigger this protection. The torts are unprotected per se.

3. Liability for Product Warnings, Fraud and Negligent Mis-representation, and Product Disparagement Involves Unprotected False Commercial Speech.—Virginia Pharmacy made it clear that there is no automatic exemption of commercial speech from First Amendment coverage.[211] But that decision applied to the regulation of commercial advertising. It has been understood in subsequent cases, and especially in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[212] not to mandate First Amendment protection of false or misleading

208. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM §§ 9–10 (AM. LAW INST., Tentative Draft No. 2, 2014).

209. *See* RESTATEMENT (SECOND) OF TORTS § 623A (AM. LAW INST. 1977) (listing the elements for liability for publication of injurious falsehood, including that one know or act in reckless disregard to the falsity of the injurious statement).

210. *Alvarez*, which suggests that false statements not connected to activity that can be sanctioned by the state are presumptively protected, is not to the contrary. False statements giving rise to actions in defamation, disparagement, or fraud are only actionable if made with deliberate or reckless knowledge of their falsity. When that showing is made, they become false statements that the state can subject to criminal or civil liability. *Alvarez* did not involve such a statement.

211. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (asserting that commercial speech is not so far removed from traditional notions of protected speech that it lacks protection).

212. 447 U.S. 557 (1980).

commercial speech.[213] For this reason, product warnings would clearly fall outside the reach of First Amendment protection. Warnings result in liability only if they are not adequate, which logically means that they are false or incomplete statements of fact or support misleading inferences about a product's risks. And of course, most fraud, negligent-misrepresentation, and product-disparagement cases also involve false commercial speech and therefore would fall outside of constitutional protection for that reason as well.

4. Intentional Interference and Nonproduct Warnings Involve Matters of Private Concern.—The decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[214] made it clear that First Amendment coverage does not extend to defamation suits between private parties when the alleged defamatory statement does not involve a matter of public concern.[215] Similarly, in *Snyder v. Phelps*,[216] the Supreme Court appeared to limit the First Amendment protection provided to statements alleged to constitute IIED to matters of public concern.[217] And First Amendment protection is afforded against liability for public disclosure of true private facts only when they are "newsworthy."[218]

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213. *See id.* at 575–76 (noting that *Virginia Pharmacy* indicated that the government may apply reasonable restrictions to deal with false, deceptive, and misleading commercial speech).

214. 472 U.S. 749 (1985).

215. *See id.* at 763 (holding that presumed and punitive damages in defamation cases do not violate the First Amendment when the defamatory statements do not involve matters of public concern).

216. 562 U.S. 443 (2011).

217. *See id.* at 451–52 (explaining that whether statements in an IIED claim are protected by the First Amendment depends on whether the statements are of public or private concern).

218. *See, e.g.*, Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993) (discussing how a private individual has no legal right "to obtain damages for the publication of newsworthy facts about him"). The Supreme Court has not expressly adopted a requirement that for true information to be disclosed with impunity it must be newsworthy, principally because in all of the Court's true-disclosure-privacy cases the information disclosed was either available in public records, legally obtained, or plainly newsworthy. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 535 (2001) (finding a telephone conversation about a school-labor dispute illegally intercepted but then lawfully obtained by a radio commentator who broadcast it, the Court emphasized that the subject of the conversation was a matter of public importance); Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989) (discussing the publication of the name of a victim of sexual assault identified in a police report to which the newspaper reporter had access); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (finding the state was precluded from imposing sanctions for the publication of the identity of a rape victim obtained when a television reporter was permitted to inspect indictment).

In *Shulman*, a victim of a motor-vehicle accident was filmed in a weakened condition at the site of the accident and being transported to a hospital in a helicopter. Shulman v. Grp. W. Prods., Inc., 955 P.2d 469, 474–75 (Cal. 1998). The film was subsequently broadcast on a local television station. *Id.* at 475. The victim sued for intrusion and true-disclosure privacy, and the station asserted First Amendment privileges in both actions. *Id.* at 476. The California Supreme Court concluded that there was no First Amendment "newsgathering" privilege in intrusion actions where the intrusion was "offensive to a reasonable person." *Id.* at 494–96. But it also assumed that any true-disclosure

The Court has not made a blanket statement that First Amendment protections are inapplicable to *any* tort suit involving a matter of private concern only, but that is certainly a reasonable inference to draw from the case law. The Court's statement in *Virginia Pharmacy* that it would not distinguish between publicly interesting or important advertising and the "opposite kind,"[219] should be read, we think, as limited to publicly disseminated and widely available statements. In effect, the Court was holding that such communications are necessarily matters of public concern or subject to the same constitutional treatment as such matters for much the same reasons.

It follows that virtually all of the torts of interference with contract and with prospective economic advantage would fall outside of First Amendment protection. The statements at issue in actions alleging these forms of tortious conduct almost always are private communications between private parties about matters involving their businesses or professions. Only rarely do such actions involve matters of public concern.[220]

The same is true of most cases involving nonproduct warnings as well. Disclosure of material medical information in order to obtain informed consent from a patient involves a matter of private concern, as do virtually all warnings provided, or that should have been provided, to licensees—a category consisting mainly of the social guests of the owners or renters of private property. Finally, although they fall outside of protection for reasons we have already identified, the limitation of most actions for fraud and negligent misrepresentation to matters of private concern also would eliminate them from protection.

5. The Truth–Falsity Distinction and the Absence of a Breathing-Space Rationale Lead to Very Limited Remaining Protection.—The protection provided by *New York Times*, *Gertz*, *Hustler Magazine v. Falwell*,[221] and other cases imposing First Amendment limitations on tort liability extends to false statements of fact. That protection is provided not because false statements merit protection in their own right, however, but for prophylactic and instrumental reasons. In light of those decisions, Justice Powell's statement in *Gertz* that there is no constitutional protection for false statements of fact must be understood to mean there is no constitutional "value" to such statements.[222] The decisions nonetheless provide protection (in varying degrees) against tort liability for certain false statements of fact

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suit would not succeed because the disclosure of the plaintiff's condition was obviously newsworthy. *See id.* at 477 ("[T]he material broadcast was newsworthy as a matter of law.").

219. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976).

220. For the rare exceptions, see *infra* notes 225–31 and accompanying text.

221. 485 U.S. 46, 52–55 (1988).

222. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]he erroneous statement of fact is not worthy of constitutional protection . . . .").

in order to provide breathing space for speech that does have constitutional value. This is speech pertaining to matters of public concern or speech that is newsworthy.

a. Where and Why the Rationale Does Not Apply.—As we have just shown, most of the liabilities that might arise out of torts with speech dimensions, however, do not involve matters of public concern. In the instances in which those torts involve false statements, there is little risk that imposing liability for false statements of fact would deter potential speakers from making true statements of fact. That is, there is no need for breathing space because true statements of fact made in connection with the conduct the torts address are usually of no special constitutional value beyond the value associated with the conduct itself.

Thus, product and other warnings are simply ways of addressing a risky world. They reduce risk, just as do headlights and turn signals on cars. It may be that, in extreme cases, regulation of such warnings has some First Amendment significance under *Virginia Pharmacy*. But that case addressed the regulation of true statements of fact in advertising. It said nothing about protecting false advertising in order to provide breathing space for true advertising. Providing First Amendment protection to false or misleading warnings in order to provide breathing space that would encourage making accurate warnings is similarly unnecessary.

The same is true of fraud and negligent misrepresentation and product disparagement, in both of which falsity is an element. Most misrepresentations and disparagements that are the subject of lawsuits are made in the course of business and professional activities. These are often conducted with speech, but true statements made in business have no more value than any other business-related speech or conduct. They are not special in any way that requires breathing space for false statements made in the course of business. The same is true, perhaps even more clearly, of fraud.

b. Limited Exceptions.—What is left for potential First Amendment protection, then, are slivers of liability under some torts with communicative dimensions that do not automatically fall outside of protection for the reasons we have already discussed or that also implicate breathing-space concerns.

First, misappropriation of a party's name or likeness for commercial reasons is analogous to theft. The fact that the wrongful use is communicative should have no implications for First Amendment protection.[223] On the other hand, some such uses involve significant transformative expression that merely uses the plaintiff's name or likeness for artistic purposes. Some lower

223. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 565–66 (1977) (rejecting a First Amendment challenge to the imposition of liability on a local television station for misappropriation through broadcast of plaintiff's entire county-fair performance).

courts have held that there is no liability in such instances. The basis for those decisions varies. Some seem to invoke a common law privilege in such circumstances, while others seem to afford First Amendment protections.[224] We are comfortable with the notion that existing First Amendment doctrine requires constitutional protection under those limited circumstances.

A second area in which First Amendment protection may legitimately be afforded involves interferences with prospective advantage (and perhaps contract as well) that occur because of matters of public concern. Those rare cases merit First Amendment protection under current doctrine. In *Missouri v. National Organization for Women, Inc.*,[225] for example, the state of Missouri sued an organization that discouraged groups from holding conventions in that state because it had not ratified the Equal Rights Amendment.[226] The court held, on common law grounds, that this "interference" was not an improper interference.[227] And in *NAACP v. Claiborne Hardware Co.*,[228] a civil rights organization encouraged a boycott of white merchants,[229] but the Supreme Court held that the boycott constituted constitutionally protected activity.[230] The communications in both settings deserve First Amendment protection because they involve statements—apparently true statements—that pertained to matters of public concern.[231]

Finally, even if one assumes that the *Stevens–Entertainment Merchants–Alvarez* trilogy of recent decisions suggests that the Court now views any regulation of expressive activity as presumptively raising First

224. For the latter, see *Winter v. DC Comics*, 69 P.3d 473, 476 (Cal. 2003).

225. 620 F.2d 1301 (8th Cir. 1980).

226. *Id.* at 1302.

227. *Id.* at 1316–17.

228. 458 U.S. 886 (1982).

229. *Id.* at 900.

230. *Id.* at 911.

231. The Boycott, Divestment, and Sanctions movement (BDS) is a global campaign promoting various forms of boycott against Israel until that nation meets what the campaign's organizers believe are its "obligations under international law." CHARLES TRIPP, THE POWER AND THE PEOPLE: PATHS OF RESISTANCE IN THE MIDDLE EAST 125–26 (2013). Numerous states have passed legislation or executive orders either deploring the activities of BDS or proposing that states divest themselves from companies engaging in BDS activities. An illustration is a June 5, 2016 Executive Order of New York Governor Andrew Cuomo calling for the divestment of state assets in any company listed as participating in the BDS movement. N.Y. Exec. Order No. 157, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016); *see also* Lara Friedman, *The Pitfalls of the New York Executive Order on BDS*, AM. FOR PEACE NOW (June 7, 2016), https://peacenow.org/entry.php?id=18551#.XIkbbBlJYaig [https://perma.cc/A5AY-HDBK] (explaining the New York executive order and arguing "such initiatives are the wrong way to combat BDS"). That order has raised constitutional objections on the grounds that economic boycotts are protected forms of speech under *NAACP v. Claiborne Hardware* and that states placing companies participating in BDS on lists and ceasing to do business with them chills that speech. *Id.* We are inclined to agree that *NAACP v. Claiborne Hardware* governs governmental efforts to regulate BDS's objectives because the boycotts constitute speech about a matter of public concern.

Amendment issues, there remain the categories of unprotected speech outlined in *Alvarez*. As noted, it seems unclear whether the *Alvarez* formulation of historically unprotected categories refers to categories explicitly excluded from First Amendment coverage by prior Court decisions, such as obscenity or false and misleading commercial speech, or whether it also includes categories of speech whose restriction has not previously been thought of as raising any First Amendment issues. Given the momentum of First Amendment imperialism we have previously charted, we are inclined to think it may mean just the former: the Court may be reserving judgment about the potential First Amendment implications of regulation of expressive activities not previously thought of as being within the ambit of that Amendment's coverage. But even if that interpretation of the *Stevens–Entertainment Merchants–Alvarez* trilogy seems more likely, we believe that the doctrinal barriers to bringing the torts analyzed in this Part within the Amendment's coverage are too formidable for that to occur.

III. The First Amendment, the Cultural Value of Truth, and Breathing Space for Matters of Public Concern

Our analysis has implications for a broader theme we now address: the relation between First Amendment protections, the cultural significance of speech, and the breathing-space rationale for protecting the communication of ideas and information that could otherwise be made the basis of tort suits. For all the complexity of First Amendment doctrine, much of the constitutional protection provided for speech hinges on whether a factual statement is true or false. But some false speech receives protection when the special breathing-space rationale of *New York Times* applies, some true speech is denied protection because it does not address a matter of public concern, and some ideas cannot be separated from the factual assertions on which they are predicated. Those doctrinal principles explain why virtually no liability under torts with communicative dimensions has recently received new First Amendment protection, as well as underscore the cultural value that is accorded to truth and the diminished value accorded to falsity. This Part elaborates upon the constitutional and cultural significance of those principles.

A. The Truth–Falsity Distinction in Torts

Our analysis in the preceding Part demonstrated that liability for torts with communicative dimensions often turns on the falsity of a statement made by the defendant. This is true of defamation, product warnings and disparagement, fraud, and negligent misrepresentation. And whether a statement receives First Amendment protection often depends at least in part on its truth or falsity. The distinction between unprotected false statements of fact and other forms of speech highlights a fundamental dynamic that implicitly is reflected in free speech jurisprudence. Protecting some speech

presupposes that other forms of speech, which remain outside protection, may be regulated, inhibited, or suppressed without raising First Amendment concerns. The consequence is a signal about what forms of speech are culturally valued and what forms of speech are not. Identifying speech that we value enough to accord First Amendment protection simultaneously identifies speech that we value less, very little, or not at all. Decisions placing forms of speech within or outside the coverage of the First Amendment reinforce this valuation and devaluation.[232] Not including most false statements of fact within the coverage of the First Amendment can thus be understood as an implicit recognition that such statements have a lower cultural value than some other forms of speech within the Amendment's coverage.

It follows that the more additional forms of speech and speech-related conduct that are brought within the coverage of the First Amendment, the more difficult it may be to determine what forms of speech are truly valued in American culture. If First Amendment protections were extended to nearly all forms of speech—including the torts involving speech that are not now covered by the First Amendment—speech arguably would cease to become culturally special; it might even tend to become the equivalent of noise. The more categories of speech are swept within the coverage of the First Amendment, the less those categories may be seen as vitally important. This dilution effect thus can influence perceptions regarding not only protected but also unprotected forms of speech.

Although the truth–falsity distinction often fixes the boundary between protected and unprotected speech, it does not always do so. Providing breathing space for certain false statements has been a core feature of protections against liability for defamation cases since *New York Times*, and inaccurate comments portraying individuals in a false light or intentionally subjecting public figures to emotional harm receive the same First Amendment protection as false defamatory statements about public figures. Lesser protection, but protection nevertheless, is provided by the application of a negligence standard of liability when a private party is defamed regarding a matter of public concern. A comparable treatment seems appropriate for noncommercial disparagement actions.[233] And, as we have

232. For a recent discussion of the relationship between Court decisions and changing cultural attitudes, see RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 15–17 (2018) (outlining ways in which changing norms influence both the jurisprudence and legitimacy of the Court).

233. Rawn Reinhard argues that although most disparaging speech is commercial and consequently unprotected, some lacks a "commercial motive" or "commercial form" and should be treated analogously to defamatory speech, being afforded constitutional protection based on whether it involves public figures or matters of public concern. Rawn Howard Reinhard, Note, *The Tort of Disparagement and the Developing First Amendment*, 1987 DUKE L.J. 727, 737–39, 742–44. An example of noncommercial disparaging speech would be the publication in a newspaper of an

seen, some cases have treated the "transformative" appropriation of names or likenesses as giving rise to First Amendment privileges. So the distinction between truth and falsity marks out some, but not all, of the protection the First Amendment provides against tort liability.

B. Disentangling Protected Ideas from Unprotected Statements of Fact

A second feature of First Amendment doctrine reflects a distinction between ideas and false statements of fact. But the difficulty of fully separating ideas from facts in certain contexts means that the doctrinal message is sometimes ambiguous.

The fact–idea distinction is clearly not as sharp as Powell's language in *Gertz* suggested. Sometimes there is no bright line between false ideas, which are invariably protected, and false statements of fact, which are unprotected or (under *New York Times* or *Gertz*, for example) only partially protected. Instead, ideas cannot always fully be disentangled from underlying facts associated with them, and when those facts are false, ideas associated with them become tainted with that falsity, and the reasons for treating them as protected First Amendment speech drop out of the picture. In tort law, when the assertion of what seems to be an idea is made a basis for tort liability, as with defamation, false light privacy, disparagement, and misrepresentation, it is because the ideas are predicated on false statements of fact. The truth–falsity decision does considerable work in that process—for example, the factual truth of a statement prevents it from being actionable in defamation or misrepresentation—but not because a categorical distinction between false ideas and false statements of fact can be drawn.

C. Speech Value and Breathing Space

Part I demonstrated that as the Supreme Court's First Amendment jurisprudence has become progressively imperialistic, it has drastically reduced the forms of speech that are regarded as falling outside of First Amendment protection. Although the list of those unprotected forms of speech is not fixed, the *Stevens–Entertainment Merchants–Alvarez* trilogy of decisions suggests that the forms are limited to categories of speech historically given no constitutional protection and thus implicitly treated as "no essential part of any exposition of ideas."[234] The Court's location of a particular form of speech as at the core or on the periphery of the First Amendment's protective ambit has no analytical significance once the form is included within the Amendment's coverage. Nude dancing and speech about politics or public affairs are treated comparably by the Court's current

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advertisement by a product manufacturer claiming that the products of a competitor were defective. If the manufacturer were sued for disparagement by the competitor, the ad would be "commercial" speech, but if the newspaper were sued, it would arguably be noncommercial speech. *Id.* at 739.

234. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

posture, despite language in some nude dancing cases describing it as only "marginally" within the ambit of protected expression.[235]

Other than in cases involving false or misleading commercial speech, the Court has not recently described unprotected forms of tortious speech in terms of the value accorded them. But the absence of such a description does not mean that the unprotected status of forms of tortious speech has no implications for the cultural value assigned to those forms. Defamation, invasion of privacy, IIED, and a few very narrow categories of other torts with speech dimensions are subject to First Amendment protection and therefore clearly are not outside the Amendment's coverage, though they once were. But the protection applied to those torts has limits—it does not apply, depending on the circumstances, when a statement at issue is false and made with malice or negligence, or when a false statement is commercial speech, or when a false statement involves a matter of purely private concern.

Consequently, when an allegedly defamatory statement is completely unprotected, as where a false and damaging statement is made about a private-citizen plaintiff on a subject deemed not a matter of public concern, it receives no First Amendment breathing-space protection: if the common law of a jurisdiction permits liability for defamation without a showing of fault, the statement is actionable. Otherwise, however, defamatory statements, despite their falsity, are afforded some breathing space, and the degree of that breathing space not only affects the scope of the constitutional privilege but also implicitly signals the cultural value accorded to the form of speech in question, even if not to the particular false statement.

Our previous review of the torts we have identified as possible targets of First Amendment imperialism suggests that they mainly involve commercial speech.[236] And false or misleading commercial speech ostensibly receives no constitutional protection. Fraud or negligent misrepresentation are nearly always commercial speech, and in order to be actionable must constitute a false representation of a material existing fact. Product disparagement is likewise usually commercial speech and needs to be factually false as well as damaging to be actionable.

Similarly, product warnings, when deemed inadequate, are treated as factually false commercial speech. Warnings about the risks of products, or

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235. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (discussing how the kind of nude dancing at issue qualified as protected expressive conduct within the First Amendment but "only marginally so").

236. In this vein, we take the Court's recent decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), as suggestive. In that case, a Vermont statute—which prevented information about doctors' drug-prescribing practices from being sold to pharmaceutical companies without the doctors' consent—was challenged by "data min[ing]" companies who collected the information, arguing the statute violated their First Amendment rights. *Id.* at 561. The dissemination of information was treated by the Court majority as a form of commercial speech, but strict scrutiny was nonetheless applied to the statute. *Id.* at 571.

the omission of information about such risks, are part and parcel of proposals for commercial transactions: the manufacturer of the product is saying, or failing to say, "Be aware of the following risks on using or consuming this product." Finally, interference with contract and interference with prospective economic advantage typically appear in commercial settings. It is possible to imagine reasons of "public concern" for such interferences, but such cases are rare. Moreover, the actions do not require falsity; indeed, in most of the settings in which they appear the plaintiff is not complaining about the misleading character of the defendant's action, only that it existed. The gravamen of interference actions, in most cases, is not founded in speech but in purportedly wrongful action.

These treatments buttress the conclusion that the falsity of speech, its commercial character, and its implicit cultural salience—its speech value—all continue to matter in First Amendment jurisprudence, despite its imperialist tendencies. So does the issue of whether speech sought to be restricted is directed at a matter of public or private concern. In cases such as *Missouri v. National Organization for Women, Inc.* and *Winter v. DC Comics*,[237] where speech that would otherwise be treated as tortious because it involved interference with prospective advantage or a commercial misappropriation of a likeness was given constitutional protection, those cases: (1) did not involve false speech; (2) did not involve purely commercial speech; and (3) arguably involved speech—supporting adoption of the Equal Rights Amendment or disseminating a creative artistic expression—of high cultural salience.

In sum, there is a connection between the cultural value of a form of speech, its public or private dimensions, and the breathing space accorded to it that runs through imperialist First Amendment jurisprudence. The higher the value associated with a form of allegedly false and damaging speech, whether about public figures or private citizens on matters of public concern, the larger the breathing space. The breathing space can be said to signal the perceived cultural importance of the speech in question. And breathing space for false and allegedly tortious speech has typically been associated with its being newsworthy or otherwise directed to matters of public concern. Thus, nearly all defamatory speech is treated as noncommercial speech, so its social value is thought to turn not only on its falsity but also on its connection to issues of public interest; but some defamatory speech, such as that in *Dun & Bradstreet*, is treated as commercial speech or speech directed only at matters of private concern and thus is outside the First Amendment's coverage.

Applying those analytical criteria—falsity, the commercial or noncommercial character of an expression, and the cultural salience of speech value—to the torts we have previously reviewed, a few forms of speech that these torts address can be seen as raising First Amendment issues

237. 69 P.3d 473 (Cal. 2003).

despite the falsity of the speech involved, because of their noncommercial character, their attention to matters of public concern, and their corresponding cultural salience. But most of the forms of speech the torts address, involving false commercial statements or false speech about private matters, have low cultural importance and therefore remain outside of First Amendment protection. And, in our view, that is where they should remain despite the pressures generated by First Amendment imperialism, in part because of the potential dilution effect on speech value that would be created were they brought within the First Amendment's coverage.

Conclusion

The narrative of late twentieth- and twenty-first-century free speech jurisprudence we have sketched in this Article yields the following conclusions. First Amendment jurisprudence has never valued factually false speech for its own sake and continues not to value it even in the era of First Amendment imperialism. The relative value of protected speech is connected to the public dimensions of that speech. Such valuations have implicitly influenced the differing treatment of various categories of false speech, mainly by affording breathing space to various forms of public or newsworthy speech.

In the final analysis, both the truth–falsity distinction and the distinction between public and private forms of speech are the principal barriers to imperialist forays that threaten to constitutionalize large segments of tort law. Thus, two arguably separable propositions run together to produce our conclusion that factually false speech and speech directed wholly at matters of private concern are culturally and thus constitutionally devalued.

One is that factually false information is worth less than factually true information. We repeatedly operate under this premise as a society. We assume that when information is factually inaccurate, incorrect inferences and faulty premises may be drawn from it. We regularly use demonstrations that decisions and policies were based on false information to undermine those policies. We also regularly use revelations that individuals conveyed false information about their backgrounds or accomplishments to impeach the credentials of those individuals and sometimes to disqualify them from positions they hold or aspire to. In short, we trust information shown to be false far less than information shown to be true, and we draw numerous conclusions from the showing.

That dimension of falsity may appear intuitively obvious. But a second, related dimension may not be as apparent. Consider the claim that statements made about an individual or an event are "fake news." A straightforward way to understand that claim is that the statements are factually inaccurate, being invented by someone with an interest in falsely reporting the matter. But the claim may be more commonly understood, in contemporary American culture, as operating at a deeper level. It may be understood as suggesting

that all facts are capable of being constructed by those who report them; they have little objective reality in the face of the spin that accompanies them. The idea of "fake news" suggests that manufacturing such news is comparatively easy because "true news" is elusive. Factually objective reality is so easily capable of being transformed and distorted in its reporting, the argument goes, that it is sometimes impossible to know what the truth is. If that is the case, a person distressed at the reporting of information about him or her can simply label the information fake and—because of the perceived great capacity of individuals reporting factual information to distort it for their own purposes—thereby undermine its authenticity.

If American culture has reached an epistemological state in which truth is widely perceived to be the equivalent of constructed truth, the idea of objective factual reality might well be deemed elusive, and the truth–falsity distinction might have far less salience, both culturally and constitutionally. We think that the very persistence of the truth–falsity distinction in First Amendment jurisprudence, however, suggests we have not reached that point. Were we to do so, First Amendment jurisprudence might become incoherent.

But that is not the end of the matter. A similar risk of incoherence would be associated with the breakdown of a meaningful distinction between commercial and noncommercial, or between private and public speech. A guiding assumption of the Court's commercial speech decisions has been that where a proposal for a commercial transaction contains false or misleading information or ideas, it contains no speech value and can routinely be regulated, including through tort law. But it is, of course, possible to reframe the focus of commercial expressions traditionally thought of as being tortious, such as falsely inaccurate warnings on product labels, by giving them a public dimension, as by stressing the need for breathing space for businesses to make their products attractive to the general public. A similar analysis could be applied to the sort of noncommercial, private speech currently not afforded any First Amendment protection, such as false and damaging information about one private individual communicated to another. There might be several individuals who would find the information a matter of interest. But we believe that that fact alone does not now, and should not in the future, render false and damaging statements about private individuals within the coverage of the Amendment.

Doctrinal incoherence in a legal field is reached when the field's core distinctions have become unintelligible. If the First and Fourteenth Amendments to the Constitution are designed to protect government from abridging freedom of speech, we need to know what speech is protected. If protected speech extends to any sort of utterance, true or false, public or private, benign or malign, meaningful or nonsensical, the term "protected speech" would cease to have any meaning. This is why, we believe, the truth–

falsity and public–private distinctions in First Amendment jurisprudence matter and will continue to matter. Those distinctions help us understand what speech we value and devalue. As such, they can serve as useful bases for excluding, or partially excluding, torts with speech dimensions from the pressures of First Amendment imperialism.